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on the other hand, he may acquire independent rights, deserving of protection.

Again, assuming for the moment that the proprietor of the film is entitled to copyright therein, his rights are liable to be infringed either by the taking of a single picture from his film, or by the copying of the entire series of pictures, or by the series being "performed" by being thrown upon the screen in public.

The foregoing will sufficiently indicate that this new invention raises some complicated questions in the law of copyright which, unfortunately, the new Act does not very clearly solve.

**Old law**

It seems fairly clear that under the old law the proprietor of the copyright in a cinematograph film had a right to prevent a single picture being copied from his film; in other words, his film was entitled to protection like any other photograph (*a*). On the other hand, under the old law it was not an infringement of copyright to dramatize a novel, provided the expressions employed by the novelist were not copied (*b*), and the making of a cinematograph film was, presumably, no infringement of copyright; but whether the exhibition of a film in public could be fairly said to be a public "performance" of a dramatic work was, it is believed, never actually decided (*c*).

**Copyright under new Act includes right to make cinematograph film.**

In the Copyright Act, 1911, the only express references to cinematography are to be found in sects. 1 and 35. By sub-sect. (2) of the former section, it is provided that "copyright" shall include the sole right, in the case of a literary, dramatic or musical work, to make any . . . cinematograph film or other contrivance by means of which the work may be mechanically performed; and by sect. 35 (1) "cinematograph" is defined as including any work produced by any process analogous to cinematography. This right is confined to literary, dramatic and musical works, and is not extended to artistic works. It is, perhaps, not very clear whether an artistic work could be "performed" by means of a cinematograph film (*d*), but it is to be regretted that the British Code should have here departed from

(*a*) *Barker Motion Co.* v. *Hulton* (1912), 28 T. L. R. 496.

(*b*) *Ante*, p. 163.

(*c*) The point was raised in *Glenville* v. *Selig Polyscope* (1911), 27 T. L. R. 554; see also *Karno* v. *Pathé Frères* (1909), 100 L. T. 260; *Newark* v. *National Phonograph* (1907), 23 T. L. R. 439. In the case of *London Theatre of Varieties* v. *Evans* ((1914), 30 T. L. R. 258), the Court held that a music-hall artiste who performed a sketch with the object of enabling a cinematograph film to be made, thereby broke a covenant "not to permit any colourable imitation, representation or version of his performance to be given."

(*d*) A magic lantern slide being unaccompanied by the illusion of motion could hardly be regarded as a "performance," but it might perhaps be an exhibition by way of trade (sect. 2 (2)).

the provisions of Article 14 of the Revised Berne Convention (*e*), which requires that authors of "literary, scientific *or artistic works*" shall be given "the exclusive right of authorising the reproduction and public representation of their works by cinematography."

**Films taken from novels.**

Incidentally, we may here recall that under the new Act authors of novels or other non-dramatic works have the right to prevent their works from being converted into dramatic works by way of public performance "or otherwise" (*f*). It is therefore clear that if the cinematographer adopts expedient number (4) referred to above, he must obtain the licence of the proprietor of the copyright in the novel; and, similarly, if he adopts expedient number (5), he must obtain a licence from the proprietor of the copyright in the dramatic piece. It is also submitted that if he does not obtain such licence, he, by *making* the film, infringes literary rights, and not performing rights. On the other hand, there is no one who can prevent him adopting any of the other expedients referred to, provided he does the necessary photography and arrangement independently, and does not copy another's film or adopt another's method of arrangement. As already pointed out, there appears to be nothing in English law that ordinarily gives anyone a right to object to his being "snapshotted" in a public place, although any "faking" of the photograph might perhaps bring the photographer under the law of libel (*g*), and sometimes the taking of a photograph might be restrained by injunction, upon the ground that it was done in breach of confidence.

**Public exhibition of films.**

Besides the making of the film, the public exhibition of the film may be an infringement of copyright. Copyright includes the sole right to perform a work or any substantial part thereof in public (*h*), and "performance" means "any visual representation of any dramatic action in a work, including such a representation made by means of any mechanical instrument." Thus, any doubt as to whether a cinematograph show is a "performance" of a literary or dramatic work is removed, but it was held in the case of *Glenville* v. *Selig Polyscope* (*i*) that a person who sells films knowing that they are to be publicly exhibited, and who advertises them for public performance, does not himself either perform

(*e*) Appendix B., *post*.
(*f*) Sect. 1 (2) (c), *ante*, p. 164, n.
(*g*) *Ante*, p. 117, n. (*g*); *Corelli* v. *Wall* (1906), 22 T. L. R. 532.
(*h*) Sect. 1 (2); see *ante*, p. 163, where the meaning of performance "in public" is more fully considered.
(*i*) (1911), 27 T. L. R. 554; see also *Karno* v. *Pathé Frères* (1909), 100 L. T. 260. In America the contrary has been held: *Kilmer* v. *Harper Bros.* (1911), 222 U. S. R. 55.

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the work or cause it to be performed. In the same case it was further held that an exhibition by the makers of a film upon their business premises for the purpose of inducing their customers to purchase the film was not a public performance. This case was decided under the old law, and in a more recent case where the defendants, by means of posters and handbills, announced their intention of exhibiting a certain film at a theatre, Mr. Justice Horridge held that they had thereby "authorised" a performance of the work within the meaning of sect. 1, sub-sect. (2) of the Act of 1911, and so infringed the plaintiffs' copyright (*k*). The public exhibition of a film is an infringement of performing rights, and the right to restrain the same will belong to the author or the assignee of the performing rights, unless the cinematograph rights have been excepted from the assignment.

**Problems arising as to copyright in the film.**

Turning now to the protection which is accorded to the film itself, we do not find the Act to be very clear upon the point. The difficulty arises from the fact that the film may be regarded from two points of view: it consists of a series of photographs, and from this point of view it is an "artistic work"; but it is also a means by which dramatic incidents may be represented. and from this point of view it is a "dramatic work." That the film may be regarded as a dramatic work is made clear from the definition section (*l*), which states that a "dramatic work" is to include "any cinematograph production where the arrangement or acting form, or the combination of incidents represented give the work an original character." Again, the rights of the proprietor of the film may be invaded by the copying of a single picture, or by the copying of the entire series of pictures, or by the unauthorised use for public exhibition of a film lawfully or unlawfully manufactured.

**Dramatic and non-dramatic films.**

The Act seems to recognise the distinction between a dramatic and a non-dramatic film (*m*) in providing that a film is only to be regarded as a dramatic work "where the arrangement or acting form, or the combination of incidents represented give the work an original character." Referring back to the various methods which have been suggested as open to the person setting out to make a film for a cinematograph show (*n*), it is submitted that

(*k*) *Fenning Film Service* v. *Wolverhampton, &c. Cinemas*, (1914) W. N. 338.

(*l*) Sect. 35 (1).

(*m*) In the American Copyright Act, 1909, as amended by the Act of 1912 (Appendix D.), the same distinction is to be found, the expressions used being "motion-picture photo-plays," and "motion pictures other than photo-plays."

(*n*) *Ante*, p. 247.

all, except number (1), and, possibly, number (5) (*o*), answer the definition of a dramatic work, and it is submitted that a film made in any of those ways is entitled to full protection as a dramatic work. If the film consists of a series of photographs depicting an event, and the cinematographer has not in any way arranged or combined the incidents in such manner as to give the work an original character, then it does not appear to be a dramatic work. This does not, however, it is submitted, imply that it is entitled to no protection whatsoever; but all non-dramatic films are entitled to protection simply as a series of photographs, which, as we shall see, means a lesser period of protection than in the case of a dramatic film.

Reasons for distinction.

No doubt there is a logical principle underlying the distinction between a dramatic and a non-dramatic film—the former is the result of an intellectual effort combined with technical skill; to produce the latter only the technical skill is needed. The former is therefore given by the Act a higher degree of protection as a dramatic work, the latter a lower degree of protection as a photographic work. At the same time it is thought that logic might in this case have been sacrificed to convenience, and the distinction certainly seems likely to give rise to difficulties in some cases, particularly as the dividing line between a dramatic and a non-dramatic film may not always be easy to draw.

Consequences of distinction.

The main differences between the rights of the owner of the copyright in a dramatic and a non-dramatic film appear to be as follows:—First, the dramatic film receives protection for the longer period, namely, the life of the author and fifty years after his death (*p*), or if unpublished at the author's death, until the date of publication and for fifty years afterwards (*q*), whereas the non-dramatic film is only protected for the shorter period of fifty years from the date of the making of the film (*r*). Secondly, the dramatic film may be reproduced by anyone, subject to payment of a royalty, twenty-five years after the author's death (*s*), whereas probably the royalty system does not apply at all to a non-dramatic film (*t*). Thirdly, the first owner of the copyright in a dramatic film will be the "author" of the work, unless he was under a contract of service with another, and the film was made

(*o*) In case No. 5 there is certainly a dramatic work, but there appears to be no "original character" given to it by the maker of the film.
(*p*) Sect. 3.
(*q*) Sect. 17.
(*r*) Sect. 21.
(*s*) Sect. 3. But this does not give a right of public performance, see p. 106, *ante*.
(*t*) This system does not, it is thought, apply to photographs, see *ante*, p. 108.

by him in the course of his employment, in which case the employer would be the first owner of the copyright (*u*), whereas the first owner of the copyright in a non-dramatic film will be the owner of the negative at the time the film was made (*x*), unless the film was ordered by some other person and was made for valuable consideration in pursuance of that order, in which case the person who ordered the film will, in the absence of contrary agreement, be the first owner of the copyright (*y*).

The "author" of a film.

The "author" of a dramatic film is, of course, not the photographer who takes the pictures, nor the actors, if any, who play in front of the camera, but the person who invents the plot or arranges the incidents.

Whether a dramatic film can be regarded as a photographic work.

The question may arise as to whether a dramatic film can for any purposes be regarded as a photographic work, inasmuch as it certainly consists of a series of photographs. It is submitted that, if the owner of the copyright in a film were to detach a single picture and publish it separately, the picture so published would only be entitled to the lesser period of protection enjoyed by a photograph. But if a pirate were to copy a single picture which had never been published separately by the owner of the film, would he infringe dramatic rights or photographic rights? A person who took a photograph of a single incident in a play which was being acted upon the stage, would not, it is thought, infringe either the literary or performing rights in the play (*z*), and it might be thought that the same would apply to a person taking a single picture from a dramatic film, but it is submitted it is not so. The object of a dramatic work is to produce something which can be performed in the view of an audience. The means by which this result is to be obtained, whether by writing and actors performing before the audience, or by a series of photographs to be thrown consecutively upon a screen, are subordinate to the desired result. Regarded as a series of pictures making up a total dramatic work, a dramatic film is no more a photographic work than a photograph of a manuscript would be a photographic work, and, just as the author who prints his dramatic work can sue anyone who takes a substantial portion of his letterpress, so it is submitted the person who has made a film of his dramatic work can sue anyone who copies a substantial portion of his film, and this at any time during which the film, regarded as a whole, is entitled to protection.

(*u*) Sect. 5 (1), *ante*, p. 117.
(*x*) Sect. 21, *ante*, p. 113.
(*y*) Sect. 5 (1) (a).
(*z*) To "make" a cinematograph film is, however, an infringement of copyright: sect. 1 (2) (d), and sect. 2 (1).

Effect of assignment of copyright prior to the commencement of the Act.

A curious point arises in connection with cinematograph exhibitions of works, the copyright in which has been assigned prior to the date of the commencement of the new Act (*a*). The short effect of sect. 24 (1) of the Act is that the person who at the date of the commencement of the Act, was entitled to any such right in a work, as is specified in the first column of the Schedule to the Act, is to be entitled to the substituted right specified in the second column of the Schedule, subject, where there has been an assignment of the right, to the author becoming entitled to the benefit of the extra period of protection allowed by the new Act (*b*). By virtue of the Schedule, the person entitled at the commencement of the Act to copyright in a work "other than a dramatic or musical work" becomes entitled to "copyright as defined by this Act." If, therefore, the author of a literary work has, prior to the commencement of the Act, assigned his copyright to a publisher, it is reasonably clear that it is the publisher, and not the author, who has the right to dramatise the work and make and exhibit cinematograph films. Similarly, in the case of a musical or dramatic work, if both copyright and performing right have been assigned, the assignee has all cinematograph rights, for he, too, is given by the Schedule "copyright as defined by this Act." But what if the author of a dramatic or musical work has assigned his performing rights, but retained his copyright, or *vice versâ?* Here, the effect of the Act is not so clear. The Schedule provides that in such case the owner of the copyright is to be entitled to "copyright as defined by this Act, except the sole right to perform the work or any substantial part thereof in public," and that the owner of the performing rights is to be entitled to "the sole right to perform the work in public, but *none of the other rights* comprised in copyright as defined by this Act." "Performance," as we have seen, under the Act includes any visual representation of the dramatic action in a work "by means of any mechanical instrument" (*c*). It therefore appears that the right of *public exhibition* of the work by means of a cinematograph belongs to the proprietor of the performing rights and not to the proprietor of the copyright; but has the former the right to *make*, as distinct from the right to *exhibit*, a cinematograph film? It is submitted that he has not, inasmuch as sect. 1, sub-sect. (2) (d) treats the right to "make" a cinematograph film as a totally distinct right from the right of public

(*a*) *I.e.*, the 1st July, 1912.
(*b*) The section is more fully considered in Chapter VII., *post*.
(*c*) Sect. 35 (1).

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performance. If this be so, then the result is to produce a kind of stalemate: the owner of the copyright has the right to "make" the film, but not to "exhibit" it; the owner of the performing rights has the right to "exhibit" the film, but not to "make" it. Practically, therefore, a cinematograph exhibition can only be given by mutual arrangement between the respective owners of the performing rights and the copyright, and this seems to be a perfectly fair result (*d*).

Protection of foreign films.

Another point that has given rise to some difficulty is that the Act expressly provides that the performance in public of a dramatic or musical work is not "publication" of a work (*e*), and although this is only expressly provided for in the case of a dramatic or musical work, it is thought that inasmuch as publication means the issue of "copies" of the work to the public (*f*), the exhibition of a film—whether a dramatic or a non-dramatic film—upon the cinematograph screen would not be a publication of the work (*g*). The importance of this, of course, lies in the fact that, except under international arrangement, unpublished works are only entitled to protection under the Act of 1911 if the author was, at the date of the making of the work, a British subject or resident within the parts of His Majesty's dominions to which the Act extends (*h*). A great number of American films are exhibited in England, and as the United States of America is a country with which Great Britain has no international arrangement, and which has obtained no Order in Council under sect. 29 of the Act, it follows that these films do not become entitled to copyright protection under the Act, even though their first exhibition has taken place in England and the only way in which such copyright protection can be obtained is by first "publishing" them in England in some way or another. This state of the law has caused some perturbation amongst American film proprietors, but it is probable that such persons run no very considerable risk, owing to the natural difficulties of copying a cinematograph film. It is believed not to be the custom of owners of cinematograph

(*d*) On the other hand, it has been held in France that a cinematograph film infringes performing rights and not literary rights. In the case referred to leave had been obtained, upon payment of a certain sum, to make and exhibit a film illustrating certain works of the late Alexandre Dumas. The literary and the performing rights in the works of that author were vested in different persons, and the Court held that the sum paid for the cinematograph rights belonged to the owner of the performing rights, and not to the owner of the literary rights: *Levy* v. *Dumas*, Cour de Paris, 17th May, 1912; "Le Droit d'Auteur," 1912, p. 115. The French law does not, however, expressly confer the right to "make" a film upon the owner of the copyright.

(*e*) Sect. 1 (3).

(*f*) *Ib.*

(*g*) See *ante*, p. 37.

(*h*) *Ante*, p. 24.

films to sell the same outright, but only to hire them out to the proprietors of the cinematograph theatres, who are given limited licences to publicly exhibit them. Any breach of the conditions imposed upon the licensee could be restrained by injunction as a breach of contract or confidence (*i*). Further protection may be gained for a dramatic film by publishing simultaneously in Great Britain and America a book or pamphlet containing a short description of the film, its plot and the arrangement of scenes (*k*). If this be done, any cinematograph film which was a colourable imitation of the original film would be an infringement of the copyright in the literary work.

(*i*) Sect. 31, see *ante*, p. 30.

(*k*) The "manufacturing clauses" of the American Copyright Act do not apply to dramatic works, so that these prints need not be printed in America: see *post*, "Copyright in United States of America," *Hervieu* v. *Ogilvie* (1909), 169 Fed. R. 978.

# CHAPTER V.

## MECHANICAL CONTRIVANCES.

Controversy as to gramophones, &c.

THERE is, probably, no topic which has caused so much controversy during recent years amongst those interested in Copyright legislation as the question as to the rights of musical composers to prevent their compositions from being reproduced by mechanical means.

History of the controversy.

In the year 1886, the date of the Berne Convention, the only mechanical means generally known for reproducing music were musical boxes and Barbary organs. When, therefore, at the request of the Swiss delegates to the Conference of Powers which preceded that Convention, it was, in the interests of a national Swiss industry, declared by Article 3 of the Final Protocol that mechanical reproduction of musical airs should be no infringement of copyright, musical composers did not feel that they were abandoning rights of any great value to themselves. But when instruments were invented capable of reproducing not one or two tunes, but any number of tunes, and even the words of songs, by means of perforated rolls, discs and cylinders, and it was found that these evidently supplied a public need and met with a ready market, composers became perturbed. Actions were instituted in many countries with a view to testing whether the manufacture and sale of these contrivances were not an infringement of the composers' copyright.

*Boosey* v. *Whight.*

Composers met with varying success in different countries (*a*). In England the Court of Appeal, affirming Stirling, J., held that the interchangeable parts of a machine for reproducing sounds could not reasonably be taken to be "copies" of sheets of music,

(*a*) In Italy and Belgium the decisions of the Courts appear to have been uniformly in favour of the composers. The French Courts have been hampered by domestic legislation similar in effect to Clause 3 of the Protocol to the Berne Convention, to which, however, a strict construction has been given. Thus the French Courts have held that the permission to reproduce a "musical air" does not authorise the reproduction of the *words* of a song. The American Courts followed the English decisions, and held that mechanical instruments could not reasonably be held to be "copies" of musical works: *White Smith* v. *Apollo Co.* (1906), 147 Fed. R. 226. In Germany legislation was introduced expressly dealing with mechanical instruments in the year 1901.

and therefore that they did not infringe the composer's copyright under the Copyright Act, 1842 (*b*). The correctness of this decision was doubted by many, but the case was not taken to the House of Lords, and an attempt, in the year 1909, to convince the Court that the law had been altered on this point by the Musical (Summary Proceedings) Act, 1902 (*c*), met with no success (*d*); and a like attempt, in the year 1912, to obtain a decision to the effect that the mechanical contrivances infringed a composer's common law copyright met with the same fate (*e*).

**Opposition to amendment of the law.**

Upon the assumption that the case of *Boosey* v. *Whight* (*f*) correctly expounded the British copyright law, a very large industry in the manufacture of these mechanical devices was built up in this country. In the Revised Convention of Berne, 1908, a clause was inserted requiring that signatories to the Convention should give protection to composers against reproductions of their works by mechanical means (*g*). When, therefore, in the year 1910, a Parliamentary Committee was formed to report to the Houses of Parliament how far it was advisable to alter the British law in order to comply with the requirements of the Revised Convention, musical composers met with very powerful opposition from the manufacturing interests. On behalf of the manufacturers it was urged that an industry in which much capital was invested, which gave employment to large numbers, and brought good music into the houses of the poor ought not to be ruined by any alteration of the law, to all of which arguments it was replied that no industry ought to be permitted to flourish upon the methods of the highwayman. In fairness to the manufacturers, it should be said that they all willingly recognised that some remuneration was due to composers whose works were adapted to mechanical reproduction, their chief fear being that, if composers were allowed unlimited powers to either permit or prohibit the reproduction of their works by these means, the result might be that the largest and wealthiest firms engaged in the industry would be able to obtain a monopoly in the most popular works to the prejudice of their smaller competitors in business. With the object of preventing any such result, they urged that some provisions similar to those which had recently been introduced into the American Copyright Act (*h*),

(*b*) *Boosey* v. *Whight*, (1899) 1 Ch. 836; (1900) 1 Ch. 122.
(*c*) 2 Edw. VII. c. 15.
(*d*) *Newmark* v. *National Phonograph Co.* (1907), 23 T. L. R. 439.
(*e*) *Monckton* v. *Gramophone Co.* (1912), 106 L. T. 84.
(*f*) *Supra.*
(*g*) Article 13, Revised Convention of Berne, Appendix B., *post*.
(*h*) United States Copyright Act, 1909, s. 1 (e).

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giving powers to compulsorily acquire licences to reproduce musical works by mechanical means upon payment of a fixed royalty, should be inserted in the English Bill. The manufacturers failed to convince the Copyright Committee, who reported, with some few dissentients, in favour of allowing composers full control over the reproduction of their works by mechanical means. The manufacturers thereupon changed the scene of their efforts to the lobbies of the House of Commons, where they met with better success.

**Amendment of Copyright Bill in Committee.**

The Copyright Bill, as originally drawn, gave effect to the views of the majority of the Copyright Committee and left to composers the full control over mechanical reproduction of their works, but, in Committee of the House of Commons, a clause—now sect. 19 of the Act—was inserted, the short effect of which is to compel a musical composer, if he has granted a licence to one person to reproduce his work mechanically, to grant to any other person a licence to reproduce the same work in like manner upon payment of a certain royalty to the composer. However distasteful this "royalty clause" may be to composers, they must nevertheless admit that, if the case of *Boosey* v. *Whight* (*i*) correctly expounded the old law, their position has been clearly improved by the new Act.

**Provisions of the Act of 1911.**

Turning now to the sections of the Act of 1911 which deal with mechanical reproduction, we find that sect. 1 (2) (d) provides that copyright in the case of "a literary, dramatic or musical work" (*k*) includes the sole right to make or authorise the making of 'any record, perforated roll or other contrivance by means of which the work may be mechanically performed or delivered." This exclusive right is, *primâ facie*, vested in the "author" of the work (*l*), and its term is during the life of the author and fifty years after his death (*m*), or, if the work is unpublished at the date of the author's death, until publication and for fifty years thereafter (*n*).

**Public performance by means of mechanical instruments.**

We also find that an author is given "the sole right . . . to perform . . . the work or any substantial part thereof in public" (*o*), and "performance" is defined as meaning "any acoustic representation of a work . . . including such a representation made by means of any mechanical instrument" (*p*). Thus, the proprietor of the copyright has a clear right to prevent the public performance (*q*) of his work by means of mechanical

(*i*) *Supra.*
(*k*) An "artistic work" is omitted.
(*l*) Sect. 3.
(*m*) Sect. 5 (1).
(*n*) Sect. 17.
(*o*) Sect. 1 (2).
(*p*) Sect. 35 (1).
(*q*) As to the meaning of public performance, see *ante*, p. 163.

instruments, a right which he probably possessed even under the old law (*r*).

Mechanical rights where the copyright has been assigned.

Copyright may, therefore, be infringed either (a) by making the record which is capable of mechanically reproducing the work of another, or (b) by using the record in such a manner as to cause the work to be performed in public. Both these rights belong to the author, and if there has been an assignment of his rights by the author it is submitted that he retains all rights which he does not expressly, or by necessary implication, assign. It is thought, therefore, that whereas an assignment of copyright out and out will carry the right of reproduction by mechanical instruments and the right of public performance by means of the like instruments to the assignee, the assignment of the literary rights alone will not carry the right to make a record by which the work can be mechanically reproduced, for this is an entirely new and, it is thought, distinct right (*s*), although the making of the infringing article is rather in the nature of an infringement of the literary copyright than of the performing rights. On the other hand, the right of public performance by mechanical instruments is not, it is submitted, a right distinct from the right of public performance by other means, and would pass to the assignee of the performing rights, unless expressly excepted from the assignment.

Musical works consisting of words and music.

If the work that has been unlawfully reproduced by means of a record, roll, or other like contrivance, be a musical work consisting of words and music, it may not infrequently arise that the copyright in words and music will be vested in different persons. It is submitted that in that case the manufacturer is liable to be sued for infringement by both or either of those persons, and that the permission to reproduce the song upon a mechanical instrument must be obtained from both authors (*t*). Even if the author of the words has permitted them to be used by the author of the music for publication as a song, that does not, it is submitted, authorise the latter to reproduce the words upon a record or other like contrivance. The Act, no doubt, provides that, once permission has been given to reproduce a song mechanically, the author of the words is subordinated to the author of the music (*u*),

(*r*) *Newmark* v. *National Phonograph Co.* (1907), 23 T. L. R. 439.

(*s*) See as to assignments made prior to the commencement of the Act, sect. 19 (7) (c), *post*, p. 271.

(*t*) In the case of *Rubens* v. *Pathé Frères* (*Times*, 20th Dec., 1912), it was held that the composer of the music could sue in respect of a gramophone record made without his consent without joining the author of the words as his co-plaintiff.

(*u*) Sect. 19 (2) (ii), *post*, pp. 261, 265.

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but this provision of the Act does not, it is thought, apply in the case where no such permission has ever been granted.

**The "royalty section" of the Act.**

We now turn to examine the important provisions inserted in sect. 19 of the Act in the interests of the manufacturers of mechanical instruments and with a view to preventing a monopoly being gained by any particular firm of manufacturers in the works of the best composers. The scheme of the section is to give anyone the right, upon payment of a royalty and complying generally with the provisions of the Act, to make records, perforated rolls or other contrivances by which any particular musical work may be mechanically performed, provided that such contrivances have previously been made by or with the consent or acquiescence of the owner of the copyright in the work. In other words, the owner of the copyright is under no obligation to grant any licence to reproduce his work mechanically, but if he elects to grant any licence he cannot make that licence an exclusive one.

**Application of system to works made after the commencement of the Act.**

It will be convenient to consider in greater detail the working of this royalty system, first, as it applies to works made after the commencement of the Act of 1911, and, secondly, as it applies to works made before the commencement of the Act (*x*). Sub-sect. (2) of sect. 19 is as follows:—

> "It shall not be deemed to be an infringement of copyright in any musical work for any person to make (*y*) within the parts of His Majesty's dominions to which this Act extends records, perforated rolls, or other contrivances by means of which the work may be mechanically performed, if such person proves—
>
> (a) that such contrivances have previously been made by, or with the consent or acquiescence of, the owner of the copyright in the work; and
>
> (b) that he has given the prescribed notice of his intention to make the contrivances, and has paid in the prescribed manner to, or for the benefit of, the owner of the copyright in the work royalties in respect of all such contrivances sold by him, calculated at the rate hereinafter mentioned:
>
> Provided that—
>
> (i) nothing in this provision shall authorise any alterations in, or omissions from, the work reproduced, unless

(*x*) The date of the commencement of the Act is the 1st July, 1912. See *post*, p. 270.

(*y*) This, no doubt, includes a right to sell the record when made: *per* Buckley, L. J., *Monckton* v. *Pathé Frères*, (1914) 1 K. B. at p. 403.

contrivances reproducing the work subject to similar alterations and omissions have been previously made by, or with the consent or acquiescence of, the owner of the copyright, or unless such alterations or omissions are reasonably necessary for the adaptation of the work to the contrivances in question; and

(ii) for the purposes of this provision, a musical work shall be deemed to include any words so closely associated therewith as to form part of the same work, but shall not be deemed to include a contrivance by means of which sounds may be mechanically reproduced."

System only applies to "musical works."

It is to be particularly noticed that this sub-section only applies to "musical works," and no compulsory rights can be acquired under the Act (*z*) to reproduce either literary or dramatic works by means of mechanical contrivances. There is no general definition of a musical work, but it will be noticed that "for the purpose of this provision" a musical work includes "any words so closely associated therewith as to form part of the same work (*a*), but shall not be deemed to include a contrivance by means of which sounds may be mechanically reproduced." Records

(*z*) Except, possibly, under sect. 4 and the proviso to sect. 3.

(*a*) It has already been submitted (*ante*, p. 259) that words and music are so associated together as to become one work only for the purpose of this royalty section, and after permission has once been given for mechanical reproduction. It is very questionable whether this association of words and music is not contrary to the terms of the Revised Convention of Berne. By Article 13 of that Revised Convention it is permissible for any country to impose by its domestic legislation reservations and conditions upon the rights of authors of "musical works" with regard to the adaptation of their works to mechanical instruments, but "musical works" in that article were not intended to include words set to music. This was clearly stated by M. Renault in his report to the delegates who attended the international conference in the year 1908, which report was unanimously adopted by the delegates without alteration. M. Renault says, when dealing with the exact point (Blue Book Cd. 4467, Correspondence respecting Revised Convention, p. 143), "it clearly follows from the principles of the Union that the author of a literary work has the sole right of reproducing his work, and that any unauthorised reproduction is a piracy; any domestic legislation failing to recognise this principle would violate the Convention. The 'Protocol de Cloture' of 1886 contained a derogation from the general principle with regard to 'musical airs,' but this derogation must be strictly confined to the text establishing it. The phrase 'musical airs' does not include words, whether accompanied by music or not. The meaning of the phrase is determined by the fact that in 1886 the subjects chiefly in contemplation were musical boxes and Barbary organs, capable only of reproducing musical airs." Then, after expressing regret that the decisions of the Courts had not always followed this view, he continues:—"We are bound to affirm that the Berne Convention required no modification in order to give protection to the authors of words against reproduction of their words upon a phonograph or gramophone, and that Article 13 of the Revised Convention, which speaks of 'musical works,' should be understood in the same sense as the Protocol of 1886, which speaks of 'musical airs.'" The Revised Convention has since been construed in accordance with the views of M. Renault by the Belgian Courts: *Lecocq* v. *Compagnie Française de Gramophone*, "Le Droit d'Auteur," 1913, p. 99.

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themselves are not, therefore, subject to the royalty system—in other words, if a record has been lawfully made, a second manufacturer of records cannot reproduce directly from the record of the first manufacturer, even upon payment of a royalty, but must make an entirely fresh record.

**Consent of author to first reproduction mechanically.**

The first condition precedent to the right to reproduce a work by means of a mechanical contrivance without the consent of the owner of the copyright is that "such contrivances have previously been made by or with the consent or acquiescence of the owner of the copyright in the work." The principle is that an author is to be entitled to decline to permit his work to be reproduced at all by mechanical means, and no right to reproduce against his consent arises until he has given permission to some person to reproduce in this way, or has acquiesced in such reproduction. Whether, if the proprietor of the copyright has authorised reproduction by one particular contrivance, a claim may be made to reproduce, without his consent, by some other contrivance is not very clear. For instance, if permission has been given to reproduce by a perforated roll, is reproduction by record permissible? If, as seems probable, it should be held that consent to one form of mechanical reproduction gives rise to a right to reproduce by any other form of mechanical reproduction it is thought that the right must be strictly confined to the work, or the portion of the work which has been previously authorised. For instance, if the music of an opera were authorised to be reproduced by means of a perforated roll, the gramophone manufacturers could not, it is thought, insist upon a right to reproduce both words and music by means of a record, for, it is submitted, the consent of both author and composer would be necessary before a song could be lawfully reproduced by mechanical means. So, again, if permission has been given to make a record of a song without accompaniment, perhaps the makers of perforated rolls could claim no right to make a roll which would reproduce the music only without the words of the song, though probably, if the song were permitted to be sung along with an accompaniment, words and music might each be reproduced separately.

**Consent of author and composer of a song requisite.**

The question, above alluded to, whether, in the case of a song, any right to reproduce by other mechanical means upon a royalty basis can be acquired until there has been a consent by both the author of the words and the composer of the music is important, but, although a contrary construction seems possible, it is submitted that the effect of proviso (ii) to sub-sect. (2) of the section is that words and music only become so far associated as to become

one work after there has been a consent to mechanical reproduction by both author and composer (*b*). The consent or acquiescence which is the condition precedent to liberty to reproduce on the royalty system is that of "the owner of the copyright in the work," and even if the song is to be regarded as a single work there seems to be no good reason for saying that the composer of the music, rather than the author of the words, is to be regarded as the owner of the copyright in the composite work. In the case of a joint work the consent of all co-authors would be necessary, and it would seem illogical to put the author and composer of a song in worse positions than joint authors. The object of the proviso is, it is submitted, only to ensure that two royalties shall not be payable in respect of a song, and to make it clear that if words and music have been permitted to be reproduced mechanically both words and music are to be subject to the royalty system, bearing in mind that literary works are not themselves subject to that system.

**Evidence of consent of owner of the copyright.**

It is provided by sub-sect. (5) of sect. 19 that wherever any contrivances whereby musical works may be mechanically performed have been made, the consent of the owner of the copyright is deemed to have been given to the making of such contrivances if he fails to reply to the inquiries prescribed by Board of Trade Regulations within the time prescribed by such regulations. The Board of Trade Regulations, made pursuant to this power (*c*), require that the inquiries under this section are to be directed to the owner of the copyright by name, or (if his name is not known and cannot with reasonable diligence be ascertained) in general terms to the "owner of the copyright" of the musical work, to be sent, if an address within the United Kingdom is known or can with reasonable diligence be ascertained, by registered post to that address; otherwise, the inquiry is to be advertised in the "London Gazette." The notice of inquiry is to contain: (a) a statement of the name of the musical work in respect of which the inquiries are made, and of the author (if known), and (if necessary) a description sufficient to identify the work; (b) a statement of the name, address, and occupation of the person making the inquiries; (c) an allegation that a contrivance has previously been made by means of which the musical

(*b*) Of course, if the non-consenting author or composer were to refrain from interfering after knowledge that his work was being reproduced mechanically, he would doubtless be considered to have "acquiesced" in the making of the contrivance.

(*c*) Regulations 6 and 7 of the Copyright Royalty System (Mechanical Musical Instruments) Regulations, 1912, Appendix E., *post*.

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work may be mechanically performed, with the trade name (if known) and a description of such contrivance; and (d) an inquiry whether the contrivance so described was made with the consent or acquiescence of the owner of the copyright. The prescribed time for reply to such inquiries is to be, where the inquiries are required to be sent by post, seven days after the date when the inquiries would, in ordinary course of post, be delivered, or, in cases where the inquiries are required to be advertised, seven days after the advertisement (*d*).

**Prescribed notice to be given and royalties paid.**

The second condition to be fulfilled by any person who desires to reproduce a work under the royalty system is that he shall give the prescribed notice of his intention to make a contrivance and shall pay in the prescribed manner to, or for the benefit of, the owner of the copyright in the work royalties in respect of all contrivances sold by him, calculated at a rate which will hereafter be referred to. There are two branches of this condition: (a) the giving of a notice, (b) the payment of royalties.

**Prescribed requirements as to notice.**

Under the Board of Trade Regulations (*e*) the notice must be given not less than ten days before any contrivances on which the musical work is reproduced are delivered to a purchaser (*f*). The notice is to be sent by registered post to the owner of the copyright or his agent for the receipt of notice at his address within the United Kingdom if the name and address of such owner or agent can, with reasonable diligence, be ascertained; otherwise the notice is to be advertised in the "London Gazette," and any number of musical works may be included in the same advertisement (*g*). If the notice is sent by registered post, it is to contain (a) the name and address of the person intending to make the contrivances, (b) the name of the musical work which it is intended to reproduce (if known), and (if necessary) a description sufficient to identify the musical work, (c) the class of contrivances on which it is intended to reproduce the musical work (*e.g.*, whether discs, cylinders or music rolls), (d) the ordinary retail selling prices of the contrivances, and the amount of the royalty payable on each contrivance in respect of the musical work, (e) the

(*d*) Regulation 8.

(*e*) Appendix E., *post*. These Regulations are made by virtue of subsect. (6) of sect. 19, which enacts that "for the purposes of this section the Board of Trade may make regulations prescribing anything which under this section is to be prescribed, and prescribing the mode in which notices are to be given and the particulars to be given in such notices, and the mode, time, and frequency of the payment of royalties, and any such regulations may, if the Board think fit, include regulations requiring payment in advance or otherwise securing the payment of royalties."

(*f*) Regulation 3, *semble*, wholesale or retail.

(*g*) Regulation 3.

earliest date at which any of the contrivances will be delivered to a purchaser, (f) whether any other work is to be reproduced on the same contrivance with the musical work specified in accordance with paragraph (b) (*h*). If notice is given by advertisement, the Regulations prescribe that the advertisement "shall give the particulars required by (a) and (b) of Regulation 2, and shall also state an address from which a copy of the notice described in Regulation 2 may be obtained" (*i*). Accordingly, in a case where the name and address of the owner of the copyright is not known, a full notice must be made out containing all the particulars prescribed by Regulation 2, and a copy furnished to the owner of the copyright if he replies to the advertisement, but the advertisement itself need only contain particulars (a) and (b) with an address at which a copy of the full notice can be obtained.

**To whom notice to be given.**

The notice must, it is thought, in a case where the copyright in the work to be reproduced is vested in more than one person, be given to all such persons; but proviso (ii) to sub-sect. (2) enacts that "for the purposes of this provision a musical work shall be deemed to include any works so closely associated therewith as to form part of the same work." This proviso, though not very clearly worded, seems to have the effect of subordinating the owner of the copyright in the words of a song to the owner of the copyright in the music for the purposes of the sub-section. Notice of intention to reproduce a work upon a royalty basis would seem to be sufficient if given to the latter, and he, apparently, can give a receipt for the royalties payable, subject, presumably, to a liability to account to the owner of the copyright in the words (*k*).

**Amount of royalty.**

Next, as to the payment of the royalties. The amount of royalty payable is to be calculated (a) in the case of contrivances sold before July 1st, 1914, by the person making the contrivance, at the rate of $2\frac{1}{2}$ per cent., and (b) in the case of contrivances sold after that date 5 per cent. on the ordinary retail selling price of the contrivance calculated in the prescribed manner, but so that the minimum payable shall be one halfpenny for each separate musical work (*l*) in which copyright subsists reproduced on the contrivance, and that a fraction of a farthing is to be reckoned as a farthing (*m*). The Board of Trade Regulations (*n*) prescribe

(*h*) Regulation 2.
(*i*) Regulation 3 (b).
(*k*) Sect. 19 (4).
(*l*) N.B.—If two works are reproduced on one record, the minimum will be one penny, and so on.
(*m*) Sub-sect. (3). The proviso to this sub-section authorises the Board of Trade seven years after the commencement of the Act, and after holding a public inquiry, to alter the rate, subject to confirmation by Parliament.
(*n*) Regulation 5. See Appendix E.

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that the ordinary retail selling price of any contrivance shall be calculated at the marked or catalogued selling price of single copies to the public, or, if there is no such marked or catalogued selling price, at the highest price at which single copies are sold to the public.

**Mode of payment of royalty.**

Unless otherwise agreed, royalties are payable by means of adhesive labels, purchased from the owner of the copyright and affixed to the contrivance, or, in the case of cylinders, to a carton or box enclosing the cylinder, before the contrivance is delivered to a purchaser (*o*). The owner of the copyright must, by writing sent by registered post, intimate to the person who has given notice of intention to make the contrivance some reasonably convenient place within the United Kingdom from which the labels can be obtained, and supply the same of the required denominations upon tender of the price (*p*). If the labels are not available, either because the owner of the copyright has not sent an intimation of any reasonably convenient place within five days after the notice has been given him, or if he fails to supply the labels within three days after demand duly made, the contrivance may be delivered to purchasers without having labels affixed thereto, and the royalties are to be a debt due from the person making the contrivance to the owner of the copyright, and the maker must keep an account of all contrivances sold by him (*q*). Where the royalties are by agreement payable in any other mode than by means of adhesive labels, the time and frequency of the payment are to be such as are specified in the agreement (*r*).

**Validity of Board of Trade Regulations.**

The question of the validity of these Board of Trade Regulations, and particularly those which require manufacturers to purchase and affix adhesive labels to all contrivances prior to sale, was raised in the recent case of *Monckton* v. *Pathé Frères* (*s*). It was there urged on behalf of the defendants that the statute only required "payment," and that the Board of Trade had only power to prescribe (a) "the mode, time and frequency of the payment of royalties," and (b) regulations "requiring payment in advance, or otherwise securing the payment of the royalties." It was admitted that the purchase and affixing of adhesive labels was not a "mode of payment," but the Court held that it was a means of "securing the payment" of the royalties. "If," said

(*o*) Regulation 4 (a).
(*p*) Regulation 4 (a).
(*q*) Regulation 4 (b). The regulations also prescribe as to size, shape and design of the labels: Regulation 4 (f).
(*r*) Regulation 4 (e).
(*s*) (1914) 1 K. B. 395.

Lord Justice Buckley (*t*), "that word 'securing' means doing some act by which the debt for royalties shall become a secured as distinguished from an unsecured debt, the cross-appellants are right, but if it means ensuring or rendering certain, then they are wrong. The Board of Trade have made regulations whereby, unless otherwise agreed, royalties are to be payable by means of adhesive labels purchased from the owner of the copyright and affixed to the goods. If the copyright owner will not provide the labels, the manufacturer of records may proceed without affixing them, but, in default of agreement to the contrary, the manufacturer must, if the copyright owner provides the labels, buy them and affix them. The defendants contend, and I agree, that regulations in this respect are not within the words 'the mode of payment of royalties.' Payment is one act, supplying the labels is a second, and affixing them is a third. Neither of the last two is any part of the mode of doing the first. But are regulations as to this matter regulations for securing the payment of royalties? I think they are, if 'securing' means 'ensuring.' The royalties here in question are of very small amounts, paid upon, it may be, a vast number of goods. There is, obviously, great difficulty in ensuring that the debt created by the sale of a record shall become known to, and its payment ensured to, the copyright owner. Under these circumstances I think that the fair meaning of the word 'securing' in this context includes the meaning of ensuring, or rendering certain, the payment of royalties. If this be so, as I think it is, the regulations which the Board of Trade have made are not *ultra vires*, and this is my opinion."

In dealing, however, with the similar regulations made by the Board of Trade under sect. 3 of the Act with regard to the payment of royalties in respect of a work compulsorily published twenty-five years after the author's death, we expressed a doubt whether a regulation providing that if the owner of the copyright fails to supply labels, the amount of royalty payable to the owner of the copyright is to be a debt due from the manufacturer, was *intra vires*, upon the ground that the regulation prescribes neither a "mode" of payment, nor "ensures" payment (*u*). For similar reasons a doubt must be expressed as to the validity of the similar regulation in the event of the proprietor of the copyright in a musical work failing to supply labels to a person entitled to reproduce the work by mechanical means.

Effect of non-compliance

If there is any breach by the manufacturer of a record of any

(*t*) At p. 405.

(*u*) *Ante*, p. 105.

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with Regulations.

of the provisions of the Act or the Board of Trade Regulations, the effect will be that the record will be an infringement of the copyright in the work reproduced (*x*), and not only will the manufacturer be exposed to an action for infringement, but also any person who sells the record knowing that such provisions have not been complied with (*y*). Presumably, a vendor who sells a record which has no label attached is put upon his inquiry as to whether the royalty has been paid. It is to be noticed, however, that all the requirements of the Act and the Regulations have not to be complied with at one and the same time, and in particular that payment of the royalties does not become due until a record is sold. The only condition precedent to the actual "making" of the record appears to be that a record has "previously been made by, or with the consent or acquiescence of the owner of the copyright in the work" (*z*). The Regulations do not require that any notice need be given of intention to make the record until ten days prior to the date when any record is "delivered to a purchaser" (*a*). Payment of the royalties is to be made at the time when adhesive labels are supplied by the proprietor of the copyright, and these labels must be procured before a record is sold (*b*). If the owner of the copyright fails to supply labels possibly payment is postponed until demand for payment has been made (*c*).

**Division of royalties.**

It is provided that where a contrivance which reproduces two or more different works in which copyright subsists is made under these compulsory powers, and the owners of the copyright therein are different persons, the sums payable by way of royalties are to be apportioned amongst the several owners of the copyright in such proportions as, failing agreement, may be determined by arbitration (*d*). The amount of royalty in respect of each separate musical work reproduced must be not less than one halfpenny per record (*e*). In the case of co-owners of copyright, where the contribution of one author is not distinguishable from the contribution of another the royalties will, *primâ facie*, belong to them in equal shares (*f*).

**Right to adapt the work for**

Important limitations are put upon the right of a manufacturer who has acquired the liberty to make records under sect. 19 to make

(*x*) *Monckton* v. *Pathé Frères, ubi sup.*
(*y*) Sect. 2 (2).
(*z*) Sect. 19 (2) (a).
(*a*) Regulation 3. Sub-sect. (6) of sect. 19, however, only authorises the making of Regulations prescribing the "mode" in which notices are to be given.
(*b*) Regulation 4. The fixing of the time of payment is within the competence of the Board of Trade: sect. 19 (6).
(*c*) See *ante*, p. 105.
(*d*) Sect. 19 (4).
(*e*) Sect. 19 (3).
(*f*) *Ante*, p. 265.

mechanical reproduction.

alterations in the original work with a view to adapting the same for mechanical reproduction. It is provided by proviso (i) to sub-sect. (2) of sect. 19 that "nothing in this provision shall authorise any alterations in, or omissions from, the work reproduced unless contrivances reproducing the work subject to similar alterations and omissions have been previously made by, or with the consent or acquiescence of, the owner of the copyright, or unless such alterations or omissions are reasonably necessary for the adaptation of the work to the contrivances in question." The capacity of any mechanical contrivance is strictly limited, and it is generally found necessary to compress, arrange, or adapt a musical composition in order to make a satisfactory record. This fact is recognised by the proviso just referred to, which authorises the making of "such alterations and omissions as are reasonably necessary for the adaptation of the work to the contrivance in question," but the author is protected against any travesty of his work. Thus, if a song consists of four verses, undoubtedly it would be permissible to reproduce three only on the record. An alteration in the orchestration would also, probably, be permissible, but not, it is thought, an alteration in the harmony. In a recent case (*g*), the plaintiffs were the assignees of the copyright in the words and music of a song called "Where my Caravan has rested," which was published with a pianoforte accompaniment, but had not been adapted for an orchestra. The work had been first published prior to the coming into force of the Copyright Act, 1911, and was one, therefore, which, under the provisions of the Act, anyone could obtain the right to reproduce mechanically, notwithstanding that records of the work had not previously been made with the consent or acquiescence of the owner of the copyright in the work, and under the Act the right of authorising the working of mechanical contrivances belonged not to the plaintiffs as assignees of the copyright, but to the composer (*h*). The defendants, after giving the necessary notices to the composer and the plaintiffs of their intention to make a contrivance whereby the song might be mechanically reproduced, purchased the song and made copies of it and gave them to musical experts to make therefrom parts for the different instruments of an orchestra, for the purpose of making a disc with an orchestral accompaniment. The plaintiffs thereupon brought an action to restrain infringement of their copyright. It was admitted that the making and using a copy of the plaintiffs' music for the purpose of making an orchestral accompaniment would,

(*g*) *Chappell & Co.* v. *Columbia Gramophone Co.*, (1914) 2 Ch. 124.
(*h*) Sect. 19 (7) (a), (c), *post*, p. 271.

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before the Act of 1911, have been an infringement of the plaintiffs' copyright, but it was urged that, as the orchestration was for the purpose of making a gramophone record, proviso (i) to sub-sect. (2) of sect. 19 justified the defendants in the course they had pursued. It will be noticed that in this case the composer was no party to the action and it was not necessary to decide whether there had been any infringement of his rights, but the Court held that the Act did not affect or diminish the copyright of the assignees, and that the plaintiffs were entitled to succeed in their action. If the composer, to whom any royalties would be payable (*i*), had no right to complain of the defendants' conduct, the effect of this decision seems to be that the rights of the public may be prejudicially affected by an assignment of copyright before the coming into force of the Act of 1911, but it seems very doubtful whether the orchestration of the song was "reasonably necessary for the adaptation of the work to the contrivance in question."

**Records of works made before the Act of 1911.**

We now turn to consider the provisions of the Act relating to works made before the commencement of the Act of 1911. Inasmuch as it was held that the making of records was no infringement of copyright before the Act of 1911, some special provisions were obviously called for, unless, as was desired by the manufacturers of mechanical instruments, the Act was to be given no retrospective operation whatsoever.

The provisions which have been inserted in the Act relating to the matter in question are somewhat complicated. First of all, sect. 24 (1) in effect gives to every person who had copyright in his work at the date of the commencement of the Act—*i.e.*, the 1st July, 1912—in substitution for his then existing rights copyright in his work "as defined by this Act" (*k*). Such copyright includes, as we have seen, the right to reproduce the work in any material form, and particularly the sole right to make a record (*l*). The rights of the owner of the copyright are, however, in the case of all works, qualified by sect. 24 (1) (b), and, in the case of musical works, by sect. 19, sub-sects. (2) and (7). Sub-sect. (2) of sect. 19 is the sub-section already considered, giving the right in certain cases to make records without the consent of the owner of the copyright in the musical work, upon payment of royalties. Sub-sect. (7) provides that the provisions of (*inter alia*) sub-sect. (2) are to apply to musical works published before the com-

(*i*) Sub-sect. (7) (c), *post*, p. 271.

(*k*) This section is more fully considered in the Chapter on "Existing Works," *post*, Chapter VII.

(*l*) Sect. 1 (2) (d).

mencement of the Act, subject to the following modifications and additions:—

"(a) The conditions as to the previous making by, or with the consent or acquiescence of, the owner of the copyright in the work, and the restrictions as to alterations in or omissions from the work, shall not apply:

"(b) The rate of two and one-half per cent. shall be substituted for the rate of five per cent. as the rate at which royalties are to be calculated, but no royalties shall be payable in respect of contrivances sold before the first day of July, nineteen hundred and thirteen, if contrivances reproducing the same work had been lawfully made, or placed on sale, within the parts of His Majesty's dominions to which this Act extends before the first day of July, nineteen hundred and ten:

"(c) Notwithstanding any assignment made before the passing of this Act of the copyright in a musical work, any rights conferred by this Act in respect of the making, or authorising the making, of contrivances by means of which the work may be mechanically performed shall belong to the author or his legal personal representatives and not to the assignee, and the royalties aforesaid shall be payable to, and for the benefit of, the author of the work or his legal personal representatives."

Any work, therefore, published before the 1st July, 1912, may be mechanically reproduced by anyone after giving the prescribed notice (*m*), notwithstanding that the owner of the copyright has never authorised reproduction in this manner: no royalty is payable in respect of any sales made before the 1st July, 1913, if any records were made or on sale before the 1st July, 1910, and in any other case a royalty at the rate of $2\frac{1}{2}$ per cent. only, instead of 5 per cent., is payable; and the right to receive the royalties belongs to the author or his personal representatives, and not to his or their assignee claiming under an assignment made prior to the passing of the Act—*i.e.*, the 16th December, 1911. But in the event of there having been such an assignment, the manufacturer of the record must not, even with the object of making that record, do any act which would be an infringement of the assignee's copyright (*n*).

(*m*) *Ante*, p. 264; *Chappell & Co.* v. *Columbia Gramophone Co.*, (1914) 2 Ch. 124.

(*n*) *Chappell & Co.* v. *Columbia Gramophone Co.*, (1914) 2 Ch. 124, *ante*, p. 269.

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Records actually made before July, 1910.

It is clear from the foregoing that after the 1st July, 1912, no records can be manufactured of musical works published before that date, unless either the consent of the author or his representatives has been obtained, or notices have been given under sub-sect. (2) of sect. 19, and the royalties, if any, are paid prior to sale. With regard, however, to records which were actually manufactured prior to the 26th July, 1910 (*o*), the general provisions of sect. 24 (1) (b) *primâ facie* apply to prevent, in any case where action has been taken before that date, whereby expenditure has been incurred in connection with the reproduction of a work in a manner which at the time was lawful, any retrospective operation of the Act from diminishing or prejudicing "any rights or interests arising from or in connection with such action which are subsisting and valuable at the said date," without payment of compensation (*p*). But this provision is, in the case of musical works, qualified by sect. 19 (7) (*d*), which provides that "the saving contained in this Act of the rights and interests arising from, or in connection with, action taken before the commencement of this Act shall not be construed as authorising any person who has made contrivances by means of which the work may be mechanically performed to sell any such contrivances, whether made before or after the passing of this Act, except on the terms and subject to the conditions laid down in this section."

Intention of the provisions.

It is, we think, probable that, in these provisions, the object of the draftsman of the Act was to provide that, notwithstanding that a record was *made* prior to the commencement of the Act, royalties should be payable if such record were *sold* after that date, except that in a case where records were made or on sale before the 1st July, 1910, such records were to be exempt from payment of royalties for a period of one year after the commencement of the Act, but the draftsman has certainly not used clear and unambiguous language to effect this probable intention.

Does the Act prohibit sale of copies lawfully made?

The real difficulty seems to arise from the fact that the sole right of *selling* copies of his works is no part of the general copyright of an author accorded to him by sect. 1, sub-sect. (2), of the Act (*q*). It is true that sub-sect. (2) of sect. 2 does provide that

(*o*) This was the date when the Copyright Bill of 1910 was first introduced. This Bill was dropped and re-introduced with some modifications in 1911. In sect. 19 (7) (b), however, the date is the 1st July, 1910—*i.e.*, two years before the Act came into operation: *Monckton* v. *Pathé Frères*, (1914) 1 K. B. 395, 402, 412.

(*p*) See *post*, Chapter VII., "Existing Rights," where these provisions are more fully considered.

(*q*) See *Hewitt* v. *Hall* (1862), 6 L. T. 348; *Taylor* v. *Pillow* (1869), L. R. 7 Eq. 418. The point is of importance, not only with regard to records, but

a sale under certain circumstances may be an infringement of copyright, but the sale must be of a copy which "infringes copyright," and it must do so to the knowledge of the seller. The Act, again, contains a definition of the expression "infringing," which, when applied to a copy of a work in which copyright subsists, means "any copy, including any colourable imitation made or imported in contravention of the provisions of this Act." Now it is doubtful whether a record made prior to the commencement of the Act can correctly be said to have been made "in contravention of the provisions of this Act," when the Act was not in force at the date when the record was made; the making of the record was perfectly lawful, and it is not, therefore, easy to see how the record can be regarded as a work which infringes copyright. What one would have expected to find in the Act are clear words making the sale after the Act of a record, lawfully manufactured prior to the Act, to be an infringement of the copyright in the musical composition.

*Monckton* v. *Pathé Frères.*

The difficulty here pointed out seems to have been entirely overlooked in the recent case of *Monckton* v. *Pathé Frères* (*r*). There the plaintiff had, in the year 1911, before the passing of the Copyright Act, 1911, composed and published a musical work called the "Mousmé Waltz." The defendants, who were manufacturers and retailers of gramophone records, after the passing of the Act, but before the 1st July, 1912—the date of the commencement of the Act—made in Belgium records of the plaintiff's musical work, and imported them into this country. After the 1st July, 1912, the defendants sold the records so made and imported, without the plaintiff's consent, and without paying royalties thereon. The question in the action was whether they were entitled so to do, and the Court of Appeal, reversing the decision of Phillimore, J., held that they were not.

Phillimore, J., in his judgment, stated his opinion to be that if sects. 1 and 2 were the only sections of the Act to be considered, their effect was that anybody might make records up to 1st July, 1912, without infringing any copyright given by the new Act, "and that records lawfully made before the commencement of the Act may be lawfully sold after the commencement of the Act" (*s*), but this latter proposition did not meet with the

also with regard to all works in respect of which copyright is more extensive under the new law than the old: sect. 24 (1), provisoes (a), (b); see *post*, Chapter VII., "Existing Works."

(*r*) (1914) 1 K. B. 395.

(*s*) (1914) 1 K. B. at p. 409.

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approval of the Court of Appeal. Lord Justice Kennedy said (*t*): "But on sects. 1 and 2 which I have cited in an abbreviated form, so far as they affect the present case, it is, in my judgment, plain that by selling after July 1st, 1912, when this Act came into operation, without the plaintiff's consent, records which were mechanical reproductions of his original musical work, the 'Mousmé Waltz,' the defendants did on the occasion of each sale commit an act which brought them, according to the express terms sect. 2, within the category of persons to be deemed to be infringers of the plaintiff's copyright." The Lord Justice was, of course, referring particularly to sect. 2, sub-sect. (2), which makes it to be an infringement of copyright for anyone to sell "any work which to his knowledge infringes copyright," but it is submitted that there are here no "express terms" making the defendants' act an infringement of copyright, unless the definition of "infringing" contained in the Act is to be ignored, and there be added to the words contained in the sub-section, "or would infringe copyright if it had been made within the part of His Majesty's dominions in . . . which the sale . . . took place" the additional words, "or if it had been made after the commencement of the Act."

It is, therefore, submitted with deference that a person can only be liable for selling after the commencement of the Act records lawfully made before the commencement of the Act if there are other provisions in the Act prohibiting such sale. It is thought that, without undue straining of language, such a prohibition may be inferred from sect. 19, sub-sect. (7). In the first place we find that that sub-section provides (*u*) that, in the case of musical works published before the commencement of the Act, for the royalty rate of $2\frac{1}{2}$ per cent. is to be substituted a rate of five per cent., "but no royalties shall be payable in respect of contrivances sold before the 1st day of July, 1913, if contrivances reproducing the same work had been lawfully made, or placed on sale, within the parts of His Majesty's dominions to which this Act extends, before the 1st day of July, 1910." Now, if no records made at any time before the commencement of the Act are to be liable to royalties, it was clearly unnecessary to specially exempt records made two years before that commencement from payment of any royalty up to the 1st July, 1913, and, on the other hand, it is an almost irresistible inference from the fact that such records are exempted from royalty, if sold before the 1st July, 1913, that the

(*t*) At p. 408.

(*u*) Sub-clause (b).

Act intended that all copies sold after that date should be subject to payment of royalty. We therefore draw the conclusion from this provision that where records were lawfully made before the 1st July, 1910, no royalty is payable in respect of any records sold before the 1st July, 1913, but that the intention of the Act is that royalties at the rate of $2\frac{1}{2}$ per cent. should be payable in respect of all records sold after the last-mentioned date, although that intention is not expressed in so many words.

Sub-sect. 7 (b) did not, however, cover the facts in *Monckton* v. *Pathé Frères* (*x*), because no records had been made prior to the 1st July, 1910, but there is an inherent improbability that the legislature should provide that records made before that date should be liable to pay royalties from which records made after that date, but before the 1st July, 1912, should be exempted (*y*). The learned Lords Justices who decided that case, proceeding upon the assumption that sects. 1 and 2 of the Act, taken alone, forbade the selling of the records, had little difficulty in determining that neither sect. 24 (1) (b) nor sect. 19 (7) (d) negatively deprived the plaintiffs of rights which they had under the earlier sections of the Act, but if the assumption referred to is—as has been suggested above (*z*)—erroneous, it is more difficult to interpret sects. 24 (1) (b) and 19 (7) (d) as affirmatively giving the plaintiffs rights which the other sections did not confer upon them. If sect. 19 (7) (d) had run "*nothing in this Act contained*" shall "be construed as authorising any person who has made contrivances by means of which the work may be mechanically performed to sell any such contrivances, whether made before or after the passing of this Act, except on the terms and subject to the conditions laid down in this section," it is submitted the section would have been clear and unambiguous, but, unfortunately, the opening words are not "nothing in this Act contained," but "the saving contained in this Act of the rights and interests arising from or in connection with action taken before the commencement of this Act shall not be construed," &c. It would seem that the "saving" which the draftsman was here referring to, is that contained in sect. 24 (1) (b), notwithstanding that, as a matter of fact, that section does not relate to action taken "before the commencement of" the Act, but to action taken "before the 26th day of July, 1910"—and this was the opinion of the Lords

(*x*) *Ubi sup.*
(*y*) See *per* Buckley, L. J., (1914) 1 K. B. at p. 404.
(*z*) *Ante*, p. 274.

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Justices (*a*). If sect. 19 (7) (d) only applied to the saving in sect. 24 (1) (b), it will be noted the defendants were not hit by it, because they had not "taken any action" before the 26th July, 1910, but the Court was of opinion that this was not its only application. "I also think," said Lord Justice Kennedy (*b*), "that, having regard to its collocation as part of sect. 19 and its reference to 'the commencement of this Act,' we ought to regard it as also referring to the almost immediately preceding enactments of sub-sect. 7 (a) and (b) of the same section. The protection afforded by those preceding sub-sections of sect. 19 to the interests of reproducers of musical works published before the commencement of the Act who are to pay only half of the standard royalty, and, further, if there has been a lawful making or placing on sale of such reproductions before July 1st, 1910, the grant of a right for twelve months after the commencement of the Act to sell without payment of any royalty, may, it seems to me, reasonably be treated as a 'saving of the rights and interests arising from or in connection with action taken before the commencement of this Act.' But, be this as it may, the important words in sect. 19, sub-sect. 7 (d), are 'contrivances, whether made before or after the passing of this Act.' They appear to me to create a very strong inference indeed, if inference be needed of the unsoundness of the defendants' contention . . . ." It is, of course, clear that records made before the 26th July, 1910, must have been made before the passing of the Act (*c*), and if sect. 19, sub-sect. 7 (d) were only to apply to the saving in sect. 24 (1) (b), the words, "whether before or after the passing of this Act," would have been unnecessary. Even, therefore, if the construction placed upon sect. 19 (2) in the case of *Monckton* v. *Pathé Frères* involves some straining of its terms, the decision itself is a fair one, and as the case is only of temporary importance, is not very likely to be challenged further.

**Copyright in the records themselves.**

Evidence was given before the British Copyright Committee, 1910 (*d*), that manufacturers of rolls and discs were in the habit of suffering considerable injury from having their rolls or discs pirated by other manufacturers. The original manufacturer might expend considerable skill and money in adapting a work for mechanical reproduction or in hiring a band or singer to play or sing with a view to the making of the record, and then another

(*a*) (1914) 1 K. B. pp. 404, 412.
(*b*) At p. 412.
(*c*) *I.e.*, 16th Dec., 1911.
(*d*) Minutes of Evidence taken before the Law of Copyright Committee (Cd. 5051).

manufacturer, without incurring any such labour or expense, might copy the first record, either directly or indirectly, from the original. The manufacturers, therefore, claimed that mechanical contrivances ought themselves to be made the subject of copyright, and the justice of this claim has been recognised by sect. 19 (1) of the Act of 1911, which is as follows:—

"Copyright shall subsist in records, perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced, in like manner as if such contrivances were musical works, but the term of copyright shall be fifty years from the making of the original plate from which the contrivance was directly or indirectly derived, and the person who was the owner of such original plate at the time when such plate was made shall be deemed to be the author of the work, and, where such owner is a body corporate, the body corporate shall be deemed for the purposes of this Act to reside within the parts of His Majesty's dominions to which this Act extends if it has established a place of business within such parts."

The intention of this provision can be readily conjectured, but its actual phraseology may possibly lead to unexpected results (*e*). The intention probably was simply to prevent one record from being copied directly or indirectly from another record, but the section goes much further than this, because it accords "copyright" in mechanical contrivances, "as if such contrivances were musical works." The term of copyright in the contrivance differs from that enjoyed by the work which has been adapted, being fifty years from the making of the original plate, and, further, a copyright may be acquired in respect of a mechanical adaptation of a non-copyright work. In respect of this copyright, the owner has apparently not merely the right to prevent copies of his record being made directly or indirectly from his plate, but also all the other exclusive rights conferred by sect. 1, sub-sect. 2 (*f*).

Copyright in record is subject to the rights of the composer of the original work.

It is, however, submitted that the copyright conferred upon the record is subject to the rights of the owner of the copyright in the original composition which has been adapted, except in so far as those rights have been interfered with by the express terms of the Act (*g*). For instance, it is submitted that a person who has manufactured a record under the compulsory powers of sect. 19 (2)

(*e*) As to "unpublished" records, see *ante*, p. 24.
(*f*) *Per* Buckley, L. J., *Monckton* v. *Pathé Frères*, (1914) 1 K. B. 395, at p. 405.
(*g*) *Chappell & Co.* v. *Columbia Gramophone Co.*, (1914) 2 Ch. 124.

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does not obtain the right to authorise, as against the owner of the copyright in the original work, a public performance of the work by means of the record, notwithstanding that by virtue of sect. 1 (2) the right of public performance is given to the owner of the copyright in the record. No doubt, sect. 19 (2) authorises the sale of records manufactured under the provisions of the clause, and the seller must have the implied right to authorise the use of the record by performance (*h*), but that performance can only be, it is submitted, of a private or domestic character. If the purchaser of a record were to give a public performance by means of the record he might, possibly, be exposed to two actions, one at the suit of the owner of the performing rights in the original work, and the other at the suit of the owner of the performing rights in the record, but the only section under which compulsory rights of public performance can be obtained appears to be sect. 4 of the Act. To hold the contrary would be manifestly unfair to the owner of the performing rights in the original work, who may be a different person from the owner of the literary rights, and who would have no right to share in any royalties payable by the manufacturer of the record.

**Copyright in a record analogous to copyright in an adaptation.**

The copyright in a record is, in fact, analogous to the copyright which, we have seen (*i*), is obtainable by any person who makes a substantially new arrangement or adaptation of a musical work composed by another. The rights of the adapter are subordinate to the rights of the composer, who can restrain the adaptation if his copyright is still subsisting (*k*). Sect. 19 (2) deprives the composer of the original work of any right to complain of the adaptation of his work for the manufacture and sale of records, but the clause goes no further, and does not, it is submitted, detract in any way from the performing rights of the composer. So, again, clearly the existence of copyright in a record manufactured by one manufacturer does not prevent another manufacturer from making a record of the same work either under the compulsory powers of sect. 19 (2), or by arrangement with the composer; or if the copyright in the original work has run out any manufacturer can freely make records of that work, notwithstanding that some manufacturer may still have an unexpired term of copyright in a record which he has made. But in each case the second manufacturer must make his record independently, and not copy from the first manufacturer.

(*h*) *Per* Buckley, L. J., *Monckton* v. *Pathé Frères*, (1914) 1 K. B. 395, at p. 403.

(*i*) *Ante*, p. 85.

(*k*) *Wood* v. *Boosey* (1868), L. R. 3 Q. B. 223.

No compulsory right to copy a record.

Records made prior to the Act.

It is further expressly provided that records themselves are not subject to the compulsory provisions of the Act (*l*).

Notwithstanding that a record was made prior to the commencement of the Act, it may nevertheless be entitled to copyright, for sub-sect. (8) of sect. 19 provides as follows:—

"Notwithstanding anything in this Act (*m*), where a record, perforated roll, or other contrivance by means of which sounds may be mechanically reproduced has been made before the commencement of this Act (*n*), copyright shall, as from the commencement of this Act, subsist therein in like manner and for the like term as if this Act had been in force at the date of the making of the original plate from which the contrivance was directly or indirectly derived:

"Provided that—

"(i) the person who, at the commencement of this Act (*n*), is the owner of such original plate shall be the first owner of such copyright (*o*); and

"(ii) nothing in this provision shall be construed as conferring copyright in any such contrivance if the making thereof would have infringed copyright in some other such contrivance, if this provision had been in force at the time of the making of the first-mentioned contrivance."

(*l*) Sect. 19 (2), proviso (ii).
(*m*) Sect. 24.
(*n*) *I.e.*, 1st July, 1912.
(*o*) *I.e.*, notwithstanding any assignment.

# CHAPTER VI.

## CROWN AND UNIVERSITY COPYRIGHT.

Claims of the Crown.

It has already been noticed that printing, on its first introduction, was considered in England, as in other countries, to be a matter of State, and that the Crown claimed the right to authorise all species of publication whatsoever (*a*). When the Crown lost this prerogative, it still claimed the exclusive right to print certain works. The claim has been made in respect of the Authorised Version of the Bible (*b*), the Books of Common Prayer, Acts of Parliament (*c*) and other Government publications, law books (*d*), and even almanacks (*e*). The King's Printer and the Universities of Oxford and Cambridge hold patents from the Crown for the printing of Bibles and Prayer Books, and their right to prevent others from printing these works is well established (*f*). Various reasons have been given for the existence of this prerogative of the Crown. Some have given it as their opinion that it is founded on the circumstance of the authorised translation of the Bible having been actually paid for by King James, and its having thus become the property of the Crown. Others again have been of opinion that it is to be referred to another consideration, namely, to the character of the duty imposed upon the chief executive officers of the Government, to superintend the publication of the acts of the legislature and acts of state of that description; and also of those works upon which the established doctrines of our religion are founded, that it is a duty imposed upon the first executive magistrate, carrying with it a corresponding prerogative. That was the opinion of Lord Camden as expressed in the

Bibles and Prayer Books.

(*a*) *Ante*, p. 5.
(*b*) *Universities of Oxford and Cambridge* v. *Richardson* (1802), 6 Ves. 689; *Manners* v. *Blair* (1828), 3 Bli. N. S. 391; *Re Red Letter Testament* (1900), 17 T. L. R. 1.
(*c*) *Baskett* v. *Cambridge University* (1758), 1 W. Bl. 105.
(*d*) *Roper* v. *Streater* (1672), Skin. 234; *Millar* v. *Taylor* (1769), 4 Burr. 2303.
(*e*) *Stationers' Co.* v. *Partridge* (1709), 10 Mod. 105; see *Gurney* v. *Longman* (1806), 13 Ves. 508.
(*f*) See cases cited above in note (*b*).

case of *Donaldson* v. *Becket* (*g*), and of Chief Baron Skinner in *Eyre and Strahan* v. *Carnan* (*h*).

No attempt has ever been made to prevent any person from publishing a translation of one book, or of a part of the Bible, from the original text, and enjoying a copyright in his production. And, with respect both to Acts of Parliament and Bibles, any one is at liberty to print them either in whole, or in part, with notes, provided the notes are *bonâ fide* and not merely illusory (*i*).

**Copyright in ordnance maps, blue books, &c.**

With regard to other works prepared and published by or on behalf of the Government, such as ordnance maps, blue books, &c., there appear to have been no decisions under the old law, but it would seem that the Crown could only have been entitled to copyright therein under the general provisions of the Copyright Acts, which primarily gave the copyright to the author (*k*).

**Provisions of Act of 1911.**

The Act of 1911 now provides (*l*) that, without prejudice to any rights or privileges of the Crown, where any work has, whether before or after the commencement of the Act (*m*), been prepared or published by or under the direction or control of His Majesty or any Government department, the copyright in the work is, subject to any agreement with the author, to belong to His Majesty, and in such case is to continue for a period of fifty years from the date of the first publication of the work.

**Effect of these provisions.**

This section, therefore, whilst preserving any special copyrights of the Crown, as in the case of the Bible and Prayer Book, vests the copyright in all other works prepared by or on behalf of the Government, in the Crown, whether or not the actual author of the work was under a "contract of service" with the Crown (*n*), and the period of copyright is to be a gross period of fifty years "from the date of the first publication of the work." This is the only case under the Act in which copyright dates from publication. There are no express provisions in the Act relating to unpublished works belonging to the Crown, but any copying of these would probably be in breach of confidence (*o*).

**Treasury Minutes of 1887 and 1912.**

The rights of the Crown in Government publications would be enforced by the Treasury (*p*), but the Treasury does not, in

(*g*) (1774), 4 Burr. 2408.
(*h*) Exchequer, 1781, cited 6 Ves. 597, and reported in 6 Bac. Abr. *tit.* Prerogative, 509.
(*i*) *Baskett* v. *Cambridge University* (1758), 1 W. Bl. 105.
(*k*) *Ante*, p. 17. This is subject to sect. 18 of the Literary Copyright Act, 1842 (*ante*, p. 17).
(*l*) Sect. 18.
(*m*) *I.e.*, 1st July, 1912; see sect. 37.
(*n*) Sect. 5 (1).
(*o*) Sect. 31.
(*p*) This only applies to works belonging to the Crown in its corporate capacity. The King, in his personal capacity, has the same rights as the subject. (*Prince Albert* v. *Strange* (1849), 1 H. & T. 1.)

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practice, enforce all its rights. The practice with regard to Crown copyrights has been defined by two Treasury Minutes dated respectively the 31st August, 1887, and the 28th June, 1912. By the first Minute Government publications were divided into the following classes:—

1. Reports of Select Committees of the two Houses of Parliament, or of Royal Commissions.

2. Papers required by statute to be laid before Parliament, *e.g.*, Orders in Council, Rules made by Government Departments, Accounts, Reports of Government Inspectors.

3. Papers laid before Parliament by Command, *e.g.*, Treaties, Diplomatic Correspondence, Reports from Consuls and Secretaries of Legation, Reports of Inquiries into Explosions or Accidents, and other Special Reports made to Government Departments.

4. Acts of Parliament.

5. Official books, *e.g.*, King's Regulations for the Army or Navy.

6. Literary or quasi-literary works, *e.g.*, the Reports of the "Challenger" Expedition, the Rolls Publication, the State Trials, the "Board of Trade Journal."

7. Charts and Ordnance Maps.

According to the Minute of 1912 (*q*) the Crown copyright in works falling within any of the last three classes will generally be strictly enforced, and such works will bear an indication on the title page that the copyright is reserved. In the case of publications falling within any of the first four classes, no steps will ordinarily be taken to enforce the rights of the Crown in respect of copyright, but without prejudice to the right to take proceedings in exceptional circumstances. Acts of Parliament must not, however, except when published under the authority of the Government, purport on the face of them to be published by authority (*r*).

**Copyright at the universities and colleges.**

Upon the introduction of the art of printing into England by Henry VI. a press was set up in Oxford; and an important dominion over the publication of books was, for many years, very naturally assumed by that learned body. The sway was extended

(*q*) Set out in full in Appendix E.

(*r*) On the 23rd October, 1913, a person was convicted at the Guildhall of piracy of the four mile Ordnance survey map and ordered to pay a fine of 40*s.* with 15 guineas costs, and also to give up or destroy all remaining copies. (*R.* v. *Mutch, Times,* 24th Oct. 1913.)

to the sister university, and increased in power by charters and grants conferred upon them by the liberality and bounty of several kings.

Immediately after, and in consequence of, the decision of *Donaldson* v. *Becket* (*s*), the universities hastened to Parliament, and in the same year obtained an Act (*t*) for enabling the two universities in England, the four universities in Scotland, and the several colleges of Eton, Westminster, and Winchester, to hold in perpetuity their copyright in books given or bequeathed to them for the advancement of useful learning and other purposes of education.

The right was to exist in all such books as had, before the year 1775, or should thereafter, be given or bequeathed by the authors of the same, or their representatives, to or in trust for those universities, or any college or house of learning within them, or to or in trust for the colleges of Eton, Westminster, and Winchester, or any of them, for the beneficial purpose of education within them or any of them.

The exception in favour of the universities and colleges was to extend only to their own books, so long as they are printed at the college press and for their sole benefit; and any delegation of the right was to work a forfeiture, and the privilege become of no effect.

As to printing and sale.

A power was given by the Act to the universities to sell or dispose of the copyrights given or bequeathed to them, but if they should delegate, grant, lease, or sell the copyright of any book, or allow any person to print it, their privilege was to cease to exist. The copyright of any work presented to the universities was required to be registered at Stationers' Hall within two months after any such gift should come to the knowledge of the officers of the universities. And special penalties were imposed for any infringement of copyright.

By an Act passed in the forty-first year of Geo. III. c. 107, a similar copyright was given to Trinity College, Dublin, and by the 27th section of the Literary Copyright Act, 1842 (*u*), the rights of the respective universities and colleges above enumerated were saved from the operation of that Act.

Provisions of Act of 1911.

It is now provided by sect. 33 of the Copyright Act, 1911, that nothing therein contained is to deprive any of the universities

(*s*) (1774), 4 Burr. 2408, *ante*, p. 3.
(*t*) 15 Geo. III. c. 53.
(*u*) 5 & 6 Vict. c. 45.

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and colleges mentioned in the Copyright Act, 1775 (*x*), of any copyright they already possess under that Act, but the remedies and penalties for infringement of any such copyright is to be under the Act of 1911 and not under the Act of 1775. The effect of this provision is to preserve all existing perpetual copyrights, subject to the old conditions against sale and as to printing, but to prevent any new perpetual copyrights being created.

(*x*) No mention is made of the 41 Geo. III. c. 107, which, however, is not repealed.

# CHAPTER VII.

## WORKS IN EXISTENCE BEFORE THE ACT OF 1911.

Protection of existing rights.

THE Act of 1911 having repealed all previous statutes conferring copyright (*a*), and it being provided that no person is to be entitled to copyright or any similar right in any work, whether published or unpublished, otherwise than under and in accordance with the provisions of the new Act (*b*), it was necessary to make special provisions with regard to works which were at the date when that Act came into operation entitled to protection against piracy. Accordingly, sect. 24, sub-sect. 1, enacts that "where any person is immediately before the commencement of this Act (*c*) entitled to any such right in any work as is specified in the first column of the First Schedule to this Act, or to any interest in such a right, he shall, as from that date, be entitled to the substituted right set forth in the second column of that Schedule, or to the same interest in such a substituted right, and to no other right or interest, and such substituted right shall subsist for the term for which it would have subsisted if this Act had been in force at the date when the work was made and the work had been one entitled to copyright thereunder."

The substituted rights.

The Schedule referred to in this clause provides that, where "copyright" exists in any work, other than a dramatic or musical work, or where, in the case of a dramatic or musical work both "copyright" and "performing right" exist in the same person, the substituted right is to be "copyright as defined by this Act." For the purposes of this Schedule "copyright" in the case of a

(*a*) Sect. 36.
(*b*) Sects. 31 and 24 (3).
(*c*) *I.e.*, 1st July, 1912 (s. 37 (2)). In applying the Act to foreign countries, an Order in Council may make any modifications which may appear to be necessary with regard to existing works (sect. 29 (1) (vi)), but none of the Orders in Council which have so far been made has altered the date in this portion of the section. Consequently, even the works published in countries (*e.g.*, Denmark) which have only obtained Orders in Council after the 1st July, 1912, become retrospectively entitled to copyright from that date; but by a shifting of the date in sect. 24 (1), proviso (b), to the date of the Order in Council, the rights of persons who have incurred expenditure, &c. are preserved.

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work which, according to the law in force immediately before the commencement of the Act of 1911 has not been published before that date and statutory copyright wherein depends on publication, includes the right at common law (if any) to restrain publication or other dealing with the work; and "performing right" in the case of a work which has not been performed in public before the commencement of the Act, includes the right at common law (if any) to restrain the performance thereof in public. The Schedule goes on to provide that a person who has vested in him at the commencement of the Act the "copyright," but not the "performing right," in a musical or dramatic work is to obtain in substitution for his old rights "copyright as defined by this Act, except the sole right to perform the work or any substantial part thereof in public"; and, *vice versâ*, a person who has the "performing rights," but not the "copyright," in such a work is to obtain "the sole right to perform the work in public, but none of the other rights comprised in copyright as defined by this Act." The general effect, therefore, is to attach any new rights given by the Act, such as the rights of converting a dramatic work into a novel and making records, perforated rolls, cinematograph films (*d*) and so forth, to the owner of the "copyright," in preference to the owner of the "performing rights." In the case of an essay, article, or portion forming part of and first published in a review, magazine, or other periodical or work of a like nature before the commencement of the Act, the substituted "copyright" conferred by the Act is to be subject to any right of publishing the essay, article or portion in a separate form to which the author was entitled at the commencement of the Act, or would, if the Act had not been passed, have become entitled under sect. 18 of the Copyright Act, 1842 (*e*).

**Section only applies to works protected on the 1st July, 1912.**

The crucial date under sect. 24 is the 1st July, 1912—the date of the commencement of the Act. With the sole exception of "records" (*f*), no works which were not entitled to either common law, or statutory, copyright on that date receive any protection under the new Act (*g*). For the purpose, therefore, of

(*d*) As to the application of these provisions to cinematography, see *ante*, p. 253; and as to the special provisions of the Act relating to "records" made before the Act, see *ante*, p. 270.

(*e*) See note to First Schedule of the Copyright Act, 1911. As to sect. 18 of the Copyright Act, 1842, see *ante*, p. 17.

(*f*) *Ante*, p. 279.

(*g*) This is contrary to Art. 18 of the Berlin Convention, which requires that all works shall be protected unless at the date when the Convention comes into force they have ceased to be protected in their country of origin "through the expiration of the term of protection," and, *semble*, for no other

ascertaining whether or not a work was, prior to the 1st July, 1912, entitled to protection or not, it will be necessary to refer to the old law. A general *résumé* of that law has been given in a previous chapter (*h*), and the same may be conveniently summarized as follows:—

1. Unpublished works were protected at common law, and any work (*i*) unpublished on the 1st July, 1912, is, therefore, protected under the new Act.

2. Literary works, including the literary rights in musical and dramatic works, were protected during the life of the author and for a period of seven years after his death, or during a gross period of forty-two years from publication, whichever was the longer period. Any such work published after the 1st July, 1870, or any work of which the author died on or after the 1st July, 1905, is, therefore, protected under the new Act, notwithstanding that there had been no registration of the copyright (*k*). Inasmuch, however, as registration was necessary before any action could be brought in respect of infringement of copyright, it has been held that no action will lie under the new Act in respect of infringements which occurred prior to its commencement, unless the copyright had been registered under the repealed Act of 1842 (*l*).

3. Speeches and lectures delivered in public and without restrictions lost all right to protection, unless certain onerous formalities were complied with (*m*). But a *report* of a speech might be entitled to copyright (*n*).

4. Performing rights were only recognized in the case of dramatic or musical works. The term of copyright, if these works were published in manuscript, was for the life of the author and seven years after his death, or for a gross period of forty years from the date of the first public performance of the work. If the work had not been published in manuscript, the term of the performing rights was uncertain (*o*). In the case of musical works—not of dramatic works—it was essential to the preservation of performing rights that a notice of reservation of those rights should be printed on the title page of every publication

reason whatsoever. Great Britain, therefore, in adhering to the Berlin Convention has stipulated that she shall not be bound by Art. 18. See Chapter on "International Copyright," *post*, Part IV. Chapter I.

(*h*) Part I. Cap. III.

(*i*) But as to paintings, drawings and photographs, see p. 288.

(*k*) *Savory* v. *World of Golf* (1914), 83 L. J. Ch. 824.

(*l*) *Evans* v. *Morris*, (1913) W. N. 58.

(*m*) *Ante*, p. 18.

(*n*) *Walton* v. *Lane*, (1900) A. C. 539.

(*o*) *Ante*, p. 18.

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of a work published after 1882. No musical work, therefore, published after 1882, but before the 1st July, 1912, which omitted to print such notice of reservation obtains any performing rights under the new Act (*p*).

5. Engravings were protected for a period of twenty-eight years from the day of first publication, provided the name of the author and the date of first publication was printed on each copy. In order, therefore, to be entitled to protection under the new Act, engravings must have been published since the 30th June, 1884, and have had the name of the author and date of first publication printed on every copy (*q*).

6. Sculptures were protected for fourteen years after first publication, and for a further fourteen years if the sculptor was still living at the expiration of the first period and had not assigned his copyright, but the name of the sculptor and date of first publication had to be put upon the work (*r*). The following works of sculpture, therefore, receive no protection under the new Act, viz.: (a) all works published before the 1st July, 1884; (b) all works published between the 30th June, 1884, and the 1st July, 1898, unless the author were living fourteen years after first publication and had not assigned his copyright; and (c) all works published before the 1st July, 1912, which did not bear the name of the sculptor and date of first publication.

7. The law with regard to paintings, drawings, and photographs was peculiar (*s*). The statutory term was during the life of the author and for seven years after his death, and this statutory copyright commenced from the date of the making of the work, whether the same was published or unpublished, and although, if the work were unpublished, a common law copyright existed alongside the statutory copyright, probably the common law copyright ran out at the same time as the statutory copyright. Further, except in the case of works executed on commission, copyright was liable to be destroyed if the author did not, upon the occasion of the first sale of his work, reserve the copyright to himself in writing. It consequently follows that no painting, drawing or photograph made before 1st July, 1912, will be entitled to protection under the new Act (a) if the author died before 1st July, 1905, or (b) if the author failed to reserve the copyright in his work on the occasion of the first sale of his work, and the work was not executed on commission. No action could be brought

(*p*) But would seem to be entitled to protection in countries belonging to the Copyright Union under Art. 18 of the Berlin Convention.

(*q*) *Ante*, p. 19. (*r*) *Ante*, p. 20. (*s*) *Ante*, p. 20.

in respect of any infringement committed prior to the date when the copyright was registered, but the copyright itself was not imperilled by failure to register. Therefore the owner of the copyright can sue in respect of any infringement committed after (*t*), but not before (*u*), the 1st July, 1912, notwithstanding that the copyright was not registered under the Act of 1862.

8. Works of architecture (except architects' plans, which were protected as artistic works), choreographic works, pantomimes, and mechanical contrivances for reproducing sounds (*x*) were not entitled to any protection before the Act of 1911, and, with the exception of mechanical contrivances (*y*). none of these works, if made or published before the 1st July, 1912, will be entitled to protection under the Act of 1911.

**Existing rights entitled to benefit of increased protection.**

Although no right which has expired before the 1st July, 1912, will be revived, any right existing on that day will receive the benefit of the more generous treatment given by the new Act, both as regards length of term and increase of protection. The substituted right or interest in that right vests in the first instance in the person in whom the old right or interest was vested immediately prior to the 1st July, 1912, and such substituted right is to "subsist for the term for which it would have subsisted if this Act had been in force at the date when the work was made and the work had been entitled to copyright thereunder," subject, however, to the modification referred to in sect. 3 to the effect that in the case of a work in which copyright subsisted on the 16th December, 1911—the date of the passing of the Act (*z*)—the date when the right to reproduce the work upon payment of a royalty—assuming it to be a work to which the proviso to sect. 3 applies (*a*)—is to be thirty years, instead of twenty-five years, after the author's death.

**New Act may operate in derogation of existing rights.**

These provisions may operate in derogation of existing rights. Thus, under the old law, a photograph was entitled to copyright during the life of the author and for seven years after his death, whereas under the Act of 1911 the period of copyright in a photograph is fifty years from the making of the negative (*b*). The

(*t*) *Savory* v. *World of Golf* (1914), 83 L. J. Ch. 824.
(*u*) *Evans* v. *Morris*, (1913) W. N. 58.
(*x*) *Quære* as to cinematograph works, see *ante*, p. 248.
(*y*) *Ante*, p. 270.
(*z*) N.B.—Not the date of the "commencement" of the Act. In the case of a work made between the 16th December, 1911, and the 1st July, 1912, the period of restricted copyright will begin twenty-five years after the author's death.
(*a*) As to which, see *ante*, p. 102.
(*b*) Sect. 21, *ante*, p. 100.

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copyright in a photograph made more than fifty years before the 1st July, 1912, therefore, instantly lost its copyright although its author might still have been living or have died since the 1st July, 1905. Again, under the old law, the owner of the copyright had an exclusive copyright during the entire period allowed by the law, but, under the new Act, the copyright is only a qualified one after thirty years have elapsed since the author's death. The author of a literary or dramatic work had, under the old law, a period of exclusive copyright lasting for at least forty years from the date when he first published his work. If, therefore, an author published a book in 1880, and died on or before the 1st July, 1882, under the old law the book would have been entitled to an exclusive copyright until the year 1922, but the effect of the new Act would be that immediately upon the commencement of the Act, anybody would have the right to reproduce the book upon payment of a royalty (*c*).

**Cases in which existing rights gain greater benefit than if made after the new Act.**

On the other hand, there appears to be at least one case in which an author who has made his work prior to the commencement of the Act is better off than if he had made it after that date, namely, a foreign author who was not resident in any place to which the Copyright Act, 1911, extends at the time of his making his work. We have seen that such a person, if he made his work after the commencement of the Act, would be entitled to no protection under the Act until he published his work (*d*). There seems to be no ground for thinking that a foreigner was not entitled, under the old law, to common law copyright in England for his unpublished works, and, therefore, the effect of sect. 24 (1) of the new Act seems to be to give to all foreigners whose works were made before the commencement of that Act copyright in their works until first published elsewhere than in a place to which the Act extends.

**No action lies for an infringement prior to the Act, which was not an infringement under old law.**

It is to be noticed that under sect. 24 (1) it is only in relation to the term of copyright that the Act is to be deemed to have been "in force at the date when the work was made." The Act of 1911, however, as has been pointed out, not only generally gives a longer period of protection than under the old law, but it also makes certain dealings with a work to be infringements of copyright which were not infringements under the old law, *e.g.*, dramatization of a novel, making cinematograph films or mechanical contrivances for reproducing musical works (*e*). It is clear that the owner of the substituted right conferred by sect. 24 cannot

(*c*) Sect. 3, proviso. (*d*) *Ante*, p. 27.
(*e*) The rights of owners of existing works in relation to making of records are specially dealt with by sect. 19; see *ante*, p. 270.

sue in respect of any act committed prior to the commencement of the Act of 1911 which was not an infringement of copyright at the date when the act was committed. Under the new Act, however, copyright is infringed not merely by the act of copying a work, but also by such acts as publicly performing a work, or selling, distributing or importing copies of works which are known to infringe copyright (*f*). The draughtsman of the Act would appear to have been under the impression that the vendor or importer of an article which did not infringe copyright at the date when it was made, but which would have infringed copyright if it had been manufactured after the Act, would be exposed to an action for infringement under sect. 2 (2) of the Act. The case of *Monckton* v. *Pathé Frères* (*g*) supports this view, but we have seen reasons for doubting whether this case correctly decided the point in question (*h*), particularly having regard to the section of the Act which defines an "infringing" copy as one "made or imported in contravention of the provisions of this Act" (*i*).

**Protection of vested interests.**

Whether this be so or not, the Act contains special provisions, inserted with the object of preventing persons who have incurred expense before the Act from suffering loss by reason of the increased protection given by the Act. By proviso (b) to sect. 24 (1) it is enacted as follows:—

> "Where any person has, before the twenty-sixth day of July nineteen hundred and ten (*k*), taken any action whereby he has incurred any expenditure or liability in connection with the reproduction or performance of any work in a manner which at the time was lawful, or for the purpose of or with a view to the reproduction or performance of a work at a time when such reproduction or performance would, but for the passing of this Act, have been lawful, nothing in this section shall diminish or prejudice any rights or interest arising from or in connection with such action which are subsisting and valuable at the said date, unless the person who by virtue of this section becomes entitled to restrain such reproduction or performance agrees to pay such compensation as, failing agreement, may be determined by arbitration."

(*f*) Sect. 2 (2).
(*g*) (1914) 1 K. B. 395.
(*h*) *Ante*, p. 273.
(*i*) Sect. 35 (1).
(*k*) This was the date when the Copyright Bill of 1910 was first introduced into Parliament. The Bill was subsequently dropped, but manufacturers then became aware of the Government's intentions. In the application of this provision to foreign countries which obtain hereafter Orders in Council under sect. 29, this date will probably be altered to the date of the particular Order in Council (see Order of 17th March, 1913, applying the Act to the Netherlands, Appendix E., *post*).

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Comparison of this section with sect. 6 of 49 & 50 Vict. c. 33.

The International Copyright Act, 1886 (*l*), contained a provision somewhat similar to the above. That Act was passed in order to enable England to give protection to works published in foreign countries by means of Orders in Council extending the benefit of the British Copyright Acts then in force to such countries. Sect. 6 provided that the author and publisher of any literary or artistic work first produced in a foreign country prior to any Order in Council applicable to that country having been made should be entitled to the same rights and remedies as if the provisions of the Copyright Acts had applied to that country at the date of the said production; but this right was subject to the following proviso:—"Provided that, where any person has, before the date of the publication of an Order in Council, lawfully produced any work in the United Kingdom, nothing in this section shall diminish or prejudice any rights or interests arising from or in connection with such production which are subsisting and valuable at the said date."

Sect. 24 (1) (b) of the Act of 1911 appears to have a wider scope than sect. 6 of the International Copyright Act, 1886. The latter section applied only when a work had been "lawfully produced," whereas, in order that the former section shall apply, it is not necessary for the work to have gone so far as actual production, for it is to apply whenever any person has, before the 26th July, 1910, "taken any action whereby he has incurred any expenditure or liability in connection with the reproduction or performance of any work in a manner which at the time was lawful or for the purpose of, or with a view to, the reproduction or performance of a work at a time when such reproduction or performance would, but for the passing of this Act, have been lawful." Again, under the Act of 1911 it is contemplated that the owner of the new rights is to have the right to compulsorily buy up the rights and interests which are preserved, a feature which is absent from the International Copyright Act, 1886.

On the other hand, the words "nothing in this section shall diminish or prejudice any rights or interest arising from or in connection with such action which was subsisting and valuable at the said date" are practically identical with those contained in the earlier Act, and the question of the meaning of these words in that Act came before the Courts in several cases.

*Moul* v. *Groenings.*

In the case of *Moul* v. *Groenings* (*m*), the plaintiff, a French subject, had composed and first produced in France a musical

(*l*) 49 & 50 Vict. c. 33, s. 6.

(*m*) (1891) 2 Q. B. 443.

composition called the "Caprice Polka," which did not become entitled to copyright in England until after an Order in Council dated the 28th November, 1887. Before the date of that Order, an English publisher, named Lafleur, had printed and published the plaintiff's work in England, and the defendant, a bandmaster, had purchased a copy for 5*s*. for the use of his band, and had played it by his band both before and after such date. In an action for damages for the infringement of copyright and for an injunction, it was held by the Court of Appeal, affirming the judgments of A. L. Smith and Grantham, JJ., that there was evidence to warrant the finding that the defendant had an interest arising from or in connection with the lawful production of the work in the United Kingdom which was subsisting and valuable when the Order in Council was published, and that he was, therefore, protected by the proviso to sect. 6 of the Act of 1886.

Mr. Justice A. L. Smith, in his judgment in the Divisional Court, pointed out that the Legislature contemplated a distinction between "rights" and "interests." He considered that the word "rights" applied to the case of a person who had bestowed original labour upon a work, such as an English adapter or translator of a foreign work, who acquired a "right" to prevent any other person from copying his translation or adaptation, and was of opinion, accordingly, that Lafleur had no such "rights." "But," he proceeded (*n*), "had not Lafleur *an interest* arising from or in connection therewith? If the publisher of a work had invested capital in its production, and depended for the return of that capital upon the sale of copies in stock, or it may be upon the proceeds of a second edition, and was in such a position upon December 2, 1887, why, I ask, has he not an 'interest arising from or in connection with the production of the work subsisting and valuable' upon December 2, 1887? In my judgment he has, and that it was to meet cases such as these, that the word 'interests' was inserted in the proviso in contradistinction to the word 'rights.' He has a direct subsisting pecuniary interest in the continuation of the production or, in other words, in connection with the production; and sect. 6 enacts that this interest is not to be diminished or prejudiced, which a foreigner could distinctly do if he could in such a case, by means of the Act of 1886, stop the further production of the work. This instance of a publisher by no means exhausts the examples which might be given as to whom the proviso would apply, but it suffices to

(*n*) (1891) 2 Q. B. at p. 449.

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accentuate the points now in hand. I hold, therefore, that Lafleur would have an interest within the true reading of the provi assuming that he was in the position suggested on December 2, 1887. Now comes the question as to the defendant. Why had not he, on December 2, 1887, an 'interest arising from or in connection with the performance' of the polka then subsisting and of value? For the reasons above given he had no 'rights' within the proviso; but why not an '*interest*'? The learned County Court judge held that there was evidence that he had an interest subsisting and of value. In my judgment there was evidence that he had an interest then subsisting, viz., an interest to recoup and to obtain a return for the outlay he had been put to in purchasing the piece, in training his band in its performance, and possibly in adapting it to different parts for his men, and that this interest was of value. Whether there be such an interest of value must in each case depend upon the facts of each case. There is also another point, which is this: if all the bandsmen in the kingdom and all others are to be prevented from playing this polka, it might well be that Lafleur's interest in his unsold copies, if such there be, would be seriously affected, and it seems to me that this would also prevent this action from succeeding, if it were proved that Lafleur was in such a position on December 2, 1887."

Mr. Justice Grantham likewise was of opinion that an English publisher of a foreign book would clearly have the right under the section in question to sell all copies unsold at the date of the Order in Council, at least until his present edition was sold out, and he gave some further illustrations of cases to which he considered the section would apply. "Next," he said (*o*), "let us take the case of a manager of a theatre. He translates and produces on the stage a French comedy before the passing of the Act. Can it be said that he ought or was likely to be prejudiced by *ex post facto* legislation, and that, though perhaps only one or two performances had been given and none of the initial expenses of reproduction recouped to him, yet he had no interests arising out of that production which were subsisting and valuable at the date of the coming into operation of the Order in Council giving the foreigner this new right? Next take the case of a composer or publisher of music who incurs considerable expense in printing some musical compositions for a band, and has only sold a few copies, and is dependent on the performance of the

(*o*) At p. 452.

music by those who have already bought it to popularise the music, and so sell the remainder of his edition. He was completely within his legal rights in the publication here of the music. Has he no interests in that publication which would be legal as against an English composer who had delayed the claim of and thus lost his copyright? And if he has as against him this right, he should have the same right as against the foreigner who for the first time was being treated in the same position as the home producer. If the publisher has this right, why then has not the performer of the music the same right apparently reserved to him in the same spirit by this proviso? He might have spent days in teaching his band this music. He might have spent pounds where in this case shillings were spent in the purchase of the music, and he intended probably, as in this case, to continue the performance to recoup himself for his outlay, and to enjoy the valuable interests he had in this music from its great popularity. Would it not be right to preserve his vested interests as well as those of the publisher of the book first mentioned, or the theatrical manager who prepared a French play for the English stage? For these reasons my judgment must be for the defendant, the respondent."

*Schauer v. Field.*

This case was followed by Mr. Justice Chitty in *Schauer* v. *Field* (*p*). The plaintiff, a German, claimed to have the photographic copyright in an oil painting called "Lisette," produced in Germany before December, 1885, and also the copyright in a photograph of "Lisette" as a distinct work of art. In January, 1887, some months before the Order in Council extending the benefit of the International Copyright Act, 1886, to Germany came into operation, the defendants registered as their trade mark for candles, a photograph of "Lisette" on a small scale, with their name and the words "trade mark" across the picture. This trade mark was extensively used by the defendants on their goods; it was also reproduced by them in various sizes and colours by chromolithography on show cards and trade lists for the purposes of advertisements. It was held that the defendants, as the proprietors of the trade mark had an "interest" in advertising it, as they had done, by means of the show cards and trade lists; that this was an "interest" arising from or in connection with the trade mark itself, which was subsisting and valuable at the date of the publication of the Order in Council, and that the defendants were consequently protected by sect. 6 of the Act, and that it was not material to consider the date at which these show

(*p*) (1893) 1 Ch. 35.

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cards were produced; neither was it material that there was a trifling difference between the show cards and the trade mark, so long as the substance of the trade mark had been honestly advertised.

*Hanfstaengl v. Holloway.*

This case must be distinguished from *Hanfstaengl Art Co.* v. *Holloway* (*q*), where a German picture had been used for the purpose of advertising the defendant's well-known pills, but not as a trade mark. It would appear—though it is not distinctly stated in the report—that all copies printed before the Order in Council came into operation had been exhausted and that the plaintiff's complaint was in respect of those subsequently printed. Mr. Justice Charles held that the defendant had not such a "direct subsisting pecuniary interest" in the continuation of the advertisement as to bring his case within the proviso to sect. 6, and he granted an injunction and damages to the plaintiffs.

**The right or interest must have been valuable.**

The right and interest must not only have been subsisting at the crucial date, but must have been of some substantial value. This was decided in a case which came before Mr. Justice Scrutton in the year 1913 (*r*). Strauss' opera "Die Fledermaus" was first published in Austria in the year 1877, at a time when there was no copyright treaty between Great Britain and Austria; but on the 24th April, 1893, such a treaty was signed (*s*), which came into force in 1894, and thereupon the work became entitled to protection in Great Britain, subject to the saving contained in sect. 6 of the International Copyright Act, 1886, in favour of "rights and interests" which were "subsisting and valuable" at that date. In or about the year 1877 the defendants printed and published 500 copies of a waltz taken from the opera, and all these copies were sold before 1881. In 1881 they printed another 100 copies, and in 1882 they had fifty copies still in stock. After that date there was practically no demand for the work, and no further copies were printed until about the year 1912, at which date the defendants still had a few soiled copies in stock. The original plates had disappeared. The defendants had, also, in the year 1878 published "Die Fledermaus" in an album of dance music. In 1880 they printed 100 copies of this album, and they had sixty-three copies on hand in 1912. The learned judge was clearly of opinion that there was no sale for the album between 1882 and 1894. In 1910,

(*q*) (1893) 2 Q. B. 1.

(*r*) *Cranz & Co.* v. *Sheard & Co.* (28th May, 1913, K. B. D.). The Editor has not been able to find any report of this case except in "Le Droit d'Auteur," 1914, p. 69, and the extracts from the judgment here given are re-translated from that report.

(*s*) Appendix B., *post*.

or 1911, a new libretto was written for the old music of the opera, and performed under the title of "The Night Birds," and this brought the music into vogue once again, and thereupon the defendants published 500 copies of the waltz, printed not from the old plates, but from a photograph taken from an old copy. The plaintiffs, in whom the copyright in the work was vested, thereupon brought an action for infringement of the copyright, and the defendants sought to justify their actions under the proviso to sect. 6 of the International Copyright Act, 1886, but the Court held that this proviso did not avail them, and granted an injunction with £5 damages.

In reference to the section of the Act of 1886, Mr. Justice Scrutton remarked:—"According to the terms of the Act the rights and interests must be 'subsisting' and 'valuable.' It is not sufficient that the interest be 'subsisting,' it must also be 'valuable.' An 'interest' is less than a 'right.' One understands by it something which does not create any right recognised by the law, but which would, or might, be transformed into such by an expenditure of capital which my judgment would render useless. If you produce an edition of any size at a time when you lawfully may do so, and if a decision intervenes which prevents you from selling it, it is clear that your interest is diminished or prejudiced. It seems to me that any interest of this kind would have some value, having regard to the above definition of the meaning of 'interest'; but Parliament uses the words 'interests which are subsisting and valuable,' and I read the word 'valuable' as implying substantial value. If any value is sufficient the word 'valuable' was mere surplusage, because any subsisting interest would have some value, even though it might be worth only a farthing, and Parliament does not intend to allow an interest not worth a farthing to affect the issue. The interest must be both 'subsisting and valuable.'" After reviewing the facts above set out the judge proceeded:—"Can it be alleged from these facts that any rights or interests arose from such publication? There existed no 'rights,' that is admitted; but did any 'interest' exist? In 1894 there did exist an interest, because the defendants were in possession of a certain number of copies, the exact number has not been proved, but I believe they were less than 100. I think that was sufficient to create an interest. I incline to think, therefore, that there was a 'subsisting' interest in 1894, but I am sure that that interest could not be recognised as having any positive value. I do not think that at that time any musical publisher in England would have given Mr. Sheard sixpence for all the unsold copies he then

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had in stock, the piece was out of fashion, like so many others, and it remained out of fashion during the ensuing twenty years, and it only came into favour when Mr. Beecham once again introduced 'Die Fledermaus' into England, where the work had been forgotten for twenty years. I consider, then, that in 1894, when the Order in Council relating to Austria came into force, that there was no existing interest which could be regarded as 'valuable.'"

Application of these cases to the new Act.

The cases above referred to may be taken as illustrating the nature of the "rights" and "interests" which are to remain unprejudiced under the Act of 1911. It is to be remarked that the proviso to sect. 24 applies to a case where "any person" has incurred expenditure or liability, so that not only the rights and interests of the person who actually incurred the expenditure or liability are safeguarded, but also the rights and interests of all persons deriving title under such person. Thus, it was suggested in *Moul* v. *Groenings* (*t*) that not only were the interests of the publishers of the music protected, but also the interests of all persons who purchased copies of the piece, even though they purchased after the original work became entitled to protection, so that purchasers could lawfully perform in public from the copies purchased by them. The ground given for this suggestion was that otherwise the interests of the publisher in his copies would be prejudiced, for purchasers of music purchase them with a view of performance, and to deprive the publisher of his market amongst public performers would reduce his chances of clearing off his stock (*u*). The same argument would apply with almost equal force to purchasers of dramatic works which were lawfully published before the 26th July, 1910, but it is submitted that although prior to the Act of 1911 it was no infringement of copyright to dramatize a novel (*x*), the effect of the proviso to sect. 24 is not to give to purchasers of books purchased from a stock in existence before the above-mentioned date any right to dramatize the same after that date. Novels are not usually purchased with the object of dramatizing them, and to deprive the publisher of his power to sell a novel with a right to dramatize the same could hardly restrict his market or operate to the prejudice of any right or interest of his which was subsisting or valuable on the date in question. On the other hand, if a person had before the 26th July, 1910, incurred expenditure or liability in actually dramatizing a novel, then his

(*t*) (1891) 2 Q. B. 443, 453.
(*u*) *Per* A. L. Smith, J., (1891) 2 Q. B. at p. 450.
(*x*) *Ante*, p. 19.

rights or interests would be protected under the proviso to sect. 24.

Can works lawfully made prior to the Act be lawfully sold after the Act?

The sale, after the commencement of the Act, of an article which was made prior to that date, is clearly legalised by this proviso (b), provided the making of it was no infringement of copyright at the time when the article was made. Whether, therefore, in the absence of that proviso there is anything in the Act which would have prohibited such a sale is not, perhaps, a matter of great importance; but we have already given reasons for doubting whether a sale of any article which has been lawfully made can be restrained under the general provisions of the Act (*y*), and it is not easy to find any words in sect. 24 specially forbidding the sale of works lawfully made prior to the commencement of the Act (*z*). Proviso (b) does indeed suggest that, under certain circumstances, the owner of the copyright is to be entitled to restrain the "reproduction" or "performance" of a work in respect of which expenditure or liability has been incurred prior to the Act, but a sale is neither "reproduction" nor "performance" (*a*).

Compulsory acquisition of rights and interests preserved by sect. 24 (1) (b).

The rights and interests which are preserved by proviso (b) to sect. 24 must not be exercised if "the person who by virtue of this section becomes entitled to restrain such reproduction or performance agrees to pay such compensation as, failing agreement, may be determined by arbitration." Inasmuch as all that the owner of the copyright has to do is to "agree" to pay the compensation (*b*), presumably as soon as he gives notice to the owner of the right or interest preserved of his willingness to compensate him the latter will be unable to continue to reproduce or perform the work in which he has such right or interest, except at the peril of an action for infringement of copyright. The Act gives no guide as to the elements to be considered in assessing the amount of compensation payable, but, presumably, the person compensated has a right to receive an amount which will be sufficient not only to indemnify him against all costs and liability actually incurred, but also to compensate him for loss of profits, if reasonably capable of assessment.

(*y*) *Ante*, p. 273.

(*z*) "It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction: and the same rule involves another and subordinate rule to the effect that a statute is not to be construed so as to give a greater retrospective operation than its language renders necessary": *per* Lindley, L. J., *Lauri* v. *Renad*, (1892) 3 Ch. 402, at p. 421.

(*a*) It will be remembered that the rights of composers of music published prior to the Act in respect of mechanical reproduction are dealt with by another section. See *ante*, p. 270.

(*b*) Cf. sect. 3 (proviso) and sect. 19 (2) (b), where the expression is "has paid."

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Assignments prior to the new Act.

It is reasonably clear that if the copyright in a work existing prior to the commencement of the Act has been assigned, the assignee, and not the assignor, will *primâ facie* become entitled to all the new rights, such as the right of authorising adaptations for cinematograph purposes (*c*), dramatizing novels, and publicly performing works other than dramatic works, but the increased term of copyright is to belong to the author. This is provided for by proviso (a) to sect. 24 (1), which is as follows:—

> "If the author of any work in which any such right as is specified in the first column of the First Schedule to this Act subsists at the commencement of this Act has, before that date, assigned the right or granted any interest therein for the whole term of the right, then at the date when, but for the passing of this Act, the right would have expired the substituted right conferred by this section shall, in the absence of express agreement, pass to the author of the work, and any interest therein created before the commencement of this Act and then subsisting shall determine."

Partial assignment.

The above provision only applies to the case of an assignment or grant of an interest covering the whole term of copyright. If the author had parted with his copyright for a period less than the whole original term, he would have a reversionary interest which would automatically confer upon him, by virtue of the earlier provisions of the section, the substituted right which would become exerciseable by him upon the falling in of his reversion. If, however, the author had granted a licence to one person for a portion of the old term, and then to another for the residue of that term, it is conceived that he would have granted an "interest" in his copyright "for the whole term," within the meaning of the proviso.

Assignment by a person, other than the author, carries the extended term.

It is, however, important to observe that the proviso only applies to a case where the assignment or licence has been made or granted by "the author" of the work. If, in any case, the copyright vested in the first instance in any person other than the author (*d*), then an assignment or licence by such person would *primâ facie* pass to the assignee or licensee the benefit of the extended time conferred by the new Act.

(*c*) As to cinematographs, see *ante*, p. 253. The right of making records of works in existence before the Act is specially dealt with by sect. 19 (7), *ante*, p. 271.

(*d*) *E.g.*, in the case of collective works (*ante*, p. 17) or works of art executed upon commission (*ante*, p. 20). In the case of collective works, the right of the author to publish his article separately after twenty-eight years (5 & 6 Vict. c. 45) is expressly reserved by the note to the First Schedule of the Act.

Effect upon existing agreements where the Act reduces the term of copyright.

It has been pointed out that in some cases the new Act may have the effect of reducing the term of copyright (*e*), and the Act contains no provisions as to how this is to affect previous assignments or licences. If an author has sold his copyright outright, and the transaction has been completed, the purchaser would appear to have no equity to demand a return of any portion of his purchase-money; a purchaser must take subject to the risks of any future Act of Parliament causing a depreciation in the subject-matter of his purchase. Moreover, if the Act has only the effect of reducing the period of exclusive copyright, the assignee will have the right to receive during the balance of the original term of copyright the royalties payable by any person who, under the proviso to sect. 3, compulsorily reproduces the work, for subsect. (2) of sect. 5 only prohibits any assignment of the reversionary period of copyright when made after the passing of the new Act (*f*). But if the author has arranged with a publisher that he should have the sole and exclusive right of publishing his work during the entire term of copyright, the author might, by reason of the proviso to sect. 3, or some other provision of the new Act, become unable to give the sole and exclusive right which he has contracted to give. In that case, it is thought that the agreement will generally be avoided as from the date when the author ceases to be able to give the sole and exclusive right, upon the ground that the agreement has become impossible of performance by reason of an alteration in the law (*g*).

Rights of assignee or licensee where extended term vests in the author.

Although, as we have seen, the benefit of any extended term of copyright conferred by the new Act *primâ facie* vests in the original author of the work, and not in his assignee or licensee, it would obviously be unfair to deprive the assignee or licensee of the right to reap any advantage from the market which he has created. It often happens that the publisher to whom the copyright belonged during the period of its existence still retains an advantage over his trade competitors, after the period of copyright protection has ceased. The Act recognises this by providing that the person who immediately before the date when the copyright would have expired under the repealed statutes, was the owner of any right or interest in the copyright is to be entitled at his option either:—

"(i) on giving such notice as hereinafter mentioned, to an assignment of the right or the grant of a similar interest

(*e*) *Ante*, p. 289.
(*f*) *I.e.*, 16th December, 1911.
(*g*) *Baily* v. *De Crespigny* (1869), L. R. 4 Q. B. 180.

therein for the remainder of the term of the right for such consideration as, failing agreement, may be determined by arbitration; or

(ii) without any such assignment or grant, to continue to reproduce or perform the work in like manner as theretofore subject to the payment, if demanded by the author within three years after the date at which the right would have so expired, of such royalties to the author as, failing agreement, may be determined by arbitration, or, where the work is incorporated in a collective work and the owner of the right or interest is the proprietor of that collective work, without any such payment."

The notice referred to must be given not more than one year nor less than six months before the date at which the right would have so expired, and must be sent by registered post to the "author" (*h*), or, if he cannot with reasonable diligence be found, advertised in the "London Gazette" and in two London newspapers (*i*).

First option.

It is submitted that the true construction of the first option given is, that a person who has obtained an assignment of the old term of copyright is entitled to an assignment of the new right, but not to the grant of a licence; and, *vice versâ*, that a person who has obtained a licence for the whole of the old term is entitled to a "similar" licence for the residue of the new term, but not to an assignment of the right. As a matter of fact, however, the proviso to sect. 3, under which any person is entitled to reproduce a work, when thirty years have elapsed since the author died, upon payment of a royalty, must in many cases operate to prevent the grant of a licence "similar" to the expired licence, if that licence were originally exclusive, but this would not apply to a licence to perform a work, nor, *semble*, to a licence to reproduce a photograph (*k*). But if an assignee of the old term is in a position to require the assignment of the extended term to him (*l*), such assignment will be subject to the rights of others to manufacture under the proviso above referred to, but

(*h*) This expression includes his personal representatives (sub-sect. (2)).

(*i*) The giving of this notice presumably binds the person giving it to purchase the right or interest. It is not clear how the assignment or grant, as the case may be, is to be obtained if the author or his personal representatives cannot be found. The person giving the notice, however, will obtain an equitable title.

(*k*) *Ante*, pp. 103, 106.

(*l*) Practically, the right to require an assignment will not arise during the author's lifetime, so that the proviso to sub-sect. (2) of sect 5 will not apply.

with the benefit of any royalties payable by such other manufacturers.

Second option.

If the assignee elects to adopt the second option given him by the proviso, he is not required to give any notice to the proprietor of the copyright, who will forfeit any right to royalties if he fails to demand them within three years after the date when the old copyright would have expired. That this term should run, not from the date when the assignee actually exercises his right to continue to reproduce or perform the work, but from the date when the old term of copyright would have expired, seems a little unfair. The effect is to impose upon the author, or his personal representatives, an obligation to demand from the assignee payment of royalties whether such assignee does or does not propose to continue reproduction or performance; for otherwise, if no further reproduction or performance by the assignee occurred for three years after the expiry of the term, upon a strict construction of the proviso the assignee would be at liberty to reproduce or perform without being liable to make any payment to the author or his representatives. The right, however, is only to reproduce "in like manner as theretofore," so that the assignee has not the right to publish or perform the work in any manner he may please, as he would have if he accepted the first option given him by the proviso.

In the case of any work falling under the proviso to sect. 3, it seems probable that the royalties payable by an assignee or licensee who adopted option number two would be fixed at the same rate as the royalties payable by any other member of the public, namely, at the rate of ten per cent. on the price at which he publishes the work after the expiration of his original term. The advantage that the assignee, in that case, has over the general public is that he is under no obligation to give the notices prescribed for the general public (*m*).

Sale of stock on hand.

The point again arises as to whether, if the assignee elects to take neither of the options conferred upon him by proviso (a), he is at liberty to sell any stock remaining on hand, without any payment to author or his personal representatives. The question turns upon whether or not there are any provisions in the Act which render a sale of copies, lawfully made, an infringement of copyright, and has already been considered (*n*).

Collective works.

It is provided by proviso (a) that where a work, the copyright in which was assigned before the commencement of the Act, is

(*m*) *Ante*, p. 103.

(*n*) *Ante*, pp. 165, 272.

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incorporated in a collective work, and the owner of the assigned right or interest is the proprietor of that collective work, such proprietor is to be entitled, during the extended term of copyright, to continue to reproduce the work without any payment to the author or his personal representatives. He can, however, only reproduce "in like manner as theretofore," so that he cannot reproduce, without payment, an article contributed to the collective work, except as part of that collective work. Under sect. 18 of the Literary Copyright Act, 1842 (*o*), it often happened that the copyright of an article contributed to a collective work vested *ab initio* in the proprietor of the work (*p*). In that case there would have been no assignment by "the author," and therefore proviso (a) has no application: the extended term of copyright will belong to the proprietor of the collective work, subject to the concurrent right of the author, if the collective work was of a periodical nature—not otherwise—to publish his article in "separate form" when twenty-eight years have elapsed since the original publication (*q*). If, however, either because the author expressly reserved the copyright in his article or for any other reason, the copyright did not originally vest in the proprietor of the collective work, but became the property of the author, then, notwithstanding any subsequent assignment or grant of licence to publish during the whole period of the old copyright made or given by him, the benefit of the extended term will belong to the author or his personal representatives, but the proprietor of the collective work will have the right, as against the author or his representatives, to continue to publish the article "in like manner as theretofore" without payment.

(*o*) *Ante*, p. 17.
(*p*) *Lawrence* v. *Aflalo*, (1904) A. C. 17.
(*q*) See note to First Schedule to the Act of 1911.

# PART IV.

# INTERNATIONAL AND COLONIAL COPYRIGHT.

## CHAPTER I.

### INTERNATIONAL COPYRIGHT.

Copyright primarily a matter of municipal law.

"THE actual law of nations," observes Mr. Curtis (*a*), "knows no exclusive right of an author to the proceeds of his work, except that which is enforced by the municipal law of his own country, which can operate nowhere but in its own jurisdiction. As soon as a copy of a book is landed in any foreign country, all complaint of its republication is, in the absence of a treaty, fruitless, because no means of redress exist, except under the law of the author's own country. It becomes public property, not because the justice of the case is changed by the passage across the sea or a boundary, but because there are no means of enforcing the private right."

Originally, a book written by a foreigner and published abroad, could obtain no protection in this country (*b*).

International copyright formerly regulated by treaties.

Prior to 1886, international copyright was regulated by treaties: in England the Crown being authorised by the International Copyright Act, 1844 (*c*), and various amending Acts (*d*), by Order in Council, to direct that foreign works should be entitled to copyright in the United Kingdom. Pursuant to these Acts a large number of Orders in Council were promulgated, and various European countries had copyright treaties *inter se*. The general purport of these was to give the authors of works first published in one of the federated States the same privileges in the other States as would have been enjoyed if the work had been first published there.

(*a*) "Copyright," p. 22; *Morocco Bound Syndicate* v. *Harris*, (1895) 1 Ch. 534.
(*b*) *Guichard* v. *Mori* (1831), 9 L. J. Ch. (O. S.) 227.
(*c*) 7 & 8 Vict. c. 12.
(*d*) 15 & 16 Vict. c. 12; 25 & 26 Vict. c. 68; 38 & 39 Vict. c. 12.

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The Berne Convention, 1887.

A complicated state of circumstances arose, for the rights of an author in foreign countries varied according to the particular treaty or Order in Council, and in 1885 an attempt was made by several of the great Powers meeting in Conference to secure uniformity throughout their dominions. Great Britain was a party to this Conference, which resulted in the framing of a Convention, known as the Berne Convention, whereby the contracting States were constituted into a Union for the protection of the rights of authors over their literary and artistic works" (*e*). To enable Great Britain to give effect to this Convention by Orders in Council the International Copyright Act, 1886 (49 & 50 Vict. c. 33), was passed.

Additional Act of Paris, 1896.

In the year 1896 another Conference of the Powers was held in Paris to consider certain modifications of the original Convention which experience had shown to be necessary or expedient. This Conference resulted in what was called the "Additional Act of Paris, 1896," which was adopted by Great Britain on the 7th March, 1898: but Great Britain was then unable to accept an "Interpretative Clause" that was agreed to by the other Powers (*f*).

The Revised Berne Convention of Berlin, 1908.

In the year 1908 a further Conference of the Powers was held in Berlin, the object of which was "to secure, if possible, a general agreement to such a revision of the Berne Convention and the Additional Act of Paris as would enable the contracting States to sign a single new instrument containing stipulations of a more complete and simple character, with a view not only to afford a more effectual protection to the author, but also to remove the more salient difficulties which had been encountered in the working of the existing arrangements" (*g*). The result of this Conference was the Revised Berne Convention, 1908, which now replaces the original Convention of 1887, and the Additional Act of Paris, 1896, except that States who were signatories of the original Convention and the Additional Act of Paris may still elect to be bound by the provisions of these Conventions in preference to those of the Revised Convention (*h*). Great Britain has now adhered to the Revised Convention of 1908 (*i*). An additional Protocol was agreed to on the 20th March, 1914 (*k*).

(*e*) Berne Convention, 1887, Art. 1. See text of this Convention, Appendix B. Great Britain adhered to this Convention on 28th November, 1887.
(*f*) See text of "Additional Act of Paris" and "Interpretative Clause," Appendix B.
(*g*) Report of British Commissioners, Blue Book, 1909, Miscellaneous (No. 2) Cd. 4467, p. 5.
(*h*) Revised Convention, Art. 27. See text of Revised Convention, and a comparison between the terms of this and the previous Conventions, Appendix B.
(*i*) Order in Council, 24th June, 1912, Appendix C. (*k*) *Post*, p. 310.

The system adopted in 1885.

The promoters of the International Conference in 1885 had two possible systems open to them in framing a Convention: the system of a uniform Code for all countries who should join the Union, and the system of national treatment, leaving each country to apply its own laws to the works of foreigners. The first system was rejected as impossible at that time, having regard to the very divergent laws of the countries represented at the Conference, and a mixed system was adopted. Every State joining the Union was to accord to authors who were citizens of, or who published their works in, any country of the Union the same treatment as that accorded to their own citizens, whilst, at the same time, certain uniform rules as to protection were laid down, limited, however, to certain matters (*l*). The tendency of subsequent revisions of the original Convention has been towards the establishment of a uniform Code for all countries, although the time has not yet arrived for a complete abandonment of the mixed system.

Fundamental principle of Convention.

The fundamental principle of the original Berne Convention is to be found in Articles 2 and 3, which provided that authors of any of the countries of the Union or their lawful representatives should enjoy in the other countries for their works, either not published or published for the first time in one of those countries, the rights which the respective laws did then or might hereafter grant to natives; and that the stipulations of the Convention were to apply equally to the publishers of literary and artistic works published in one of the countries of the Union, even though the authors belonged to a country which was not a party to the Union. Thus the rights of foreigners were to be assimilated to the rights of natives.

This fundamental principle is now to be found in Articles 4, 5, and 6 of the Revised Convention, the phraseology of which is clearer than that used in the original Convention. Article 4 provides as follows:—

"Authors who are subjects or citizens of any of the countries of the Union shall enjoy in countries, *other than the country of origin of the work*, for their works, whether unpublished or first published in a country of the Union, the rights which the respective laws do now or may hereafter grant to natives as well as the rights specially granted by the present Convention."

The above Article, it will be noticed, protects an author in

(*l*) See speech of M. Osterrieth delivered at the assembly of the Powers at Berlin in October, 1908. Blue Book, 1909, Cd. 4467, pp. 64 *et seq.*

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countries other than the country of origin of the work. The following Article (5) confers protection in the country of origin:—

"Authors being subjects or citizens of one of the countries of the Union, who first publish their works in another country of the Union, shall have in this latter country the same rights as native authors."

Articles 4 and 5 relate only to the works of citizens of a Unionist country. Article 6 protects persons who are not citizens of a Unionist country, and is as follows:—

"Authors not being subjects or citizens of one of the countries of the Union who first publish their works in one of those countries shall enjoy in that country the same rights as native authors, and in the other countries of the Union the rights granted by the present Convention."

**Rights of citizens of a Unionist country.**

The result of the above Articles is that citizens of a Unionist country are to be accorded national treatment in every Unionist country for (a) unpublished works, (b) works published in the Unionist country in which protection is sought, and (c) works published in another Unionist country; but, subject to the provisions as to simultaneous publication hereafter referred to, they lose all protection in the Union if they publish their works in a non-Unionist country. Thus, a British subject can claim in, say, France, national treatment for his unpublished works and for his published works if they were first published in Great Britain, France, or any other Unionist country. Similarly, if he is a French subject who has published in England, he can claim protection in France as well as in England. This last point, viz., that a citizen of one Unionist country publishing in another Unionist country could claim protection in his own country was not expressly provided for by the original Convention, which only spoke of a Unionist author being protected in *other* Unionist countries, although a British author publishing in a Unionist country was granted protection in Great Britain by virtue of para. 3 of the British Order in Council of 28th November, 1887, which adopted the Berne Convention (*m*).

**Rights of citizens of a non-Unionist country.**

Turning next to the position of authors who are not citizens of any Unionist country, but who first publish in a Unionist country, we find that according to the text of the Revised Convention there are to be accorded (a) in the country of first publication, "the same rights as native authors"; (b) in other countries of the Union, "the rights granted by the present Convention." No protection is accorded by the Convention to the unpublished works

(*m*) Report of Copyright Committee, 1909, p. 12.

of citizens of a non-Unionist country, wherever they may be resident at the time of the making of their works (*n*). An American author therefore gains no copyright in France under the Convention for his unpublished works, but if he were to publish his works first in France, England, or any other Unionist country, the country of publication, and all other Unionist countries were, under the original text of the Revised Convention, bound to accord protection to the works.

Objections to Article 6.

The fact, therefore, that Article 6 of the Convention required that non-Unionist authors should be given "the same rights as native authors" in the country of first publication operated to prevent such country from discriminating against any particular non-Unionist country. For instance, America requires that any books in the English language shall, under the notorious "manufacturing clause," be printed in America in order to gain copyright there (*o*). It was impossible for England, without infringing the Convention, to retaliate by requiring that American books must be printed in England, for she would not then accord to Americans "the same rights as native authors." England herself has probably no desire to retaliate (*p*), but at the Imperial Copyright Conference, which the home Government held in the year 1910 with the colonial representatives then in England, their opinions were invited upon the subject of copyright generally, and in particular as to whether Great Britain and her colonies should adhere to the Revised Berne Convention. A resolution was passed by those representatives that "the Conference is of opinion that, if possible, it should be made clear on ratification that the obligations imposed by the Convention on the British Empire should relate solely to works the authors of which are subjects or citizens of a country of the Union, or *bonâ fide* resident therein; and that in any case it is essential that the above reservation should be made in regard to any self-governing dominion which so desires" (*q*).

Copyright Act, s. 23.

It was, no doubt, owing to this resolution that sect. 23 was introduced into the British Copyright Act, 1911, which section is as follows:—

> "If it appears to His Majesty that a foreign country does not give, or has not undertaken to give, adequate protection

(*n*) In this respect the British Copyright Act, 1911, is more generous than the Convention requires (sect. 1 (1) (b)).

(*o*) See United States, *post*, Part V.

(*p*) A clause which it was proposed to insert in the Copyright Bill to this effect was defeated in the House of Commons. See, however, sect. 23 of the Act.

(*q*) Report of Imperial Copyright Conference, 1910 (Cd. 5272).

to the works of British authors, it shall be lawful for His Majesty by Order in Council to direct that such of the provisions of this Act as confer copyright on works first published within the parts of His Majesty's dominions to which this Act extends, shall not apply to works published after the date specified in the Order, the authors whereof are subjects or citizens of such foreign country, and are not resident in His Majesty's dominions, and thereupon those provisions shall not apply to such works."

Additional Protocol, 1914.

Great Britain did not, upon ratifying the Revised Berne Convention, make any such reservation as was suggested by the above resolution of the Imperial Copyright Conference (*r*), and it is obvious that if the Crown had made any such Order in Council as is authorised by this section, it would have violated Article 6 of the Revised Convention. Great Britain, therefore, opened up negotiations with the other Powers who had adhered to the Convention with a view to obtaining their consent to a modification of this Article, and eventually an Additional Protocol to the Convention was, on the 20th March, 1914, unanimously agreed to by the countries concerned. Article 1 of this Additional Protocol (*s*) provides as follows:—

"Whenever any country outside the Union fails to give adequate protection to the works of authors who are the subjects or citizens of one of the countries of the Union, nothing in the provisions of the Convention of the 13th November, 1908, shall be deemed to prejudice in any manner whatsoever the right of the Contracting States to impose restrictions upon the protection accorded to works whose authors, at the time when such works are first published, are subjects or citizens of any such country outside the Union and are not actually domiciled in one of the countries of the Union."

Whether any country does or does not take advantage of the liberty given by this Article to impose restrictions upon the protection given to the works of foreign authors is, of course, entirely optional, and at the time of writing it is believed that no country has taken any steps to do so, although the way is now clear for Great Britain to put sect. 23 of the Act of 1911 into force if she desires to do so. The Protocol is not to have retrospective effect (*t*); it is to be ratified within twelve months from the 20th March,

(*r*) See Order in Council, 24th June, 1912, Appendix C., *post*.

(*s*) A full translation of this Additional Protocol will be found in Appendix B., *post*. The Editor has not, however, been able to obtain any official translation into English, and he has accordingly translated from the French original which will be found in "Le Droit d'Auteur," 1914, p. 45.

(*t*) Art. 3.

1914, and to come into force one month after ratification (*u*), and any country imposing restrictions is to notify the Swiss Government (*x*).

Country of origin.

Inasmuch as an author's rights may vary according to what country happens to be the country of origin of his work, it is provided by Art. 4, § 3, of the Revised Convention that "the country of origin of the work shall be considered to be, in the case of unpublished works, the country to which the author belongs; in the case of published works, the country of first publication; and in the case of works published simultaneously in several (*y*) countries of the Union, the country the laws of which grant the shortest period of protection. In the case of works published simultaneously (*z*) in a country outside the Union and in a country of the Union, the latter country shall be considered exclusively as the country of origin." This Article is practically a reproduction of Art. 2, § 3 and § 4, of the Berne Convention, except that the case of simultaneous publication in a Unionist and a non-Unionist country has been, at the suggestion of the English delegates, for the first time expressly provided for.

It will be noticed that this paragraph of Art. 4 provides for three cases: (i) unpublished works; (ii) works simultaneously published in two or more Unionist countries; (iii) works published simultaneously in a Unionist and a non-Unionist country. In the first case the country of origin of the work is the country to which the author belongs (*a*), in the second case, the country which gives the shorter period of protection, in the third case, the Unionist country.

What is "publication"?

Roughly, therefore, copyright under the Revised Convention depends, in the case of an unpublished work, upon the nationality of the author; in the case of a published work, upon the nationality of the work. Para. 4 of Art. 4 of the Convention defines "publication" as follows: "By 'published works' must be understood, for the purposes of the present Convention, works, copies

(*u*) Art. 5.
(*x*) Art. 4.
(*y*) No doubt this word is equivalent to "two or more."
(*z*) By virtue of sect. 35 (3) of the English Act of 1911 works are to be deemed to be simultaneously published in two places if the period between the two publications does not exceed fourteen days; but this might not be considered simultaneous publication according to foreign law. If, therefore, a British author publishing in, say, America and England, desires foreign protection for his work, publication in England should not be delayed beyond the day of publication in America.
(*a*) The English Act (sect. 1) confers British copyright upon an author of an unpublished work who is resident (*i.e.*, domiciled, sect. 35 (5)) in the British Dominions, but this is to be more generous than the Convention requires.

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of which are issued by a publisher. The representation of a dramatic or dramatico-musical work, the exhibition of a work of art, and the construction of a work of architecture shall not constitute a publication."

This definition is "for the purposes of the present Convention" only, and does not prevent a Unionist country from prescribing other rules for its own citizens. The Report of the British Copyright Committee, 1909 (*b*), doubts the correctness of the English translation of the above paragraph, and suggests that the word translated "publisher" would have been better translated by words including "anyone who issues copies" (*c*), and the definition of "publication" in the British Act has been framed in accordance with this opinion (*d*). The definition is one that presents difficulties of construction (*e*), and is, of course, important because a citizen of a non-Unionist country has not, under the Convention, any copyright in his unpublished works; in order to gain such protection he must first publish in a Unionist country. An American citizen has no rights, under the Convention, in France for his unpublished works, and a British subject publishing in Austria has no copyright, under the Convention, in any of the Unionist countries. Publication must, it is thought, be substantial and *bonâ fide* (*f*). It would not be sufficient, for instance, merely to print a foreign publisher's name on the title page of a book, although it would not, it is thought, be necessary to ensure publication in a particular country that the book should be printed in that country. It is to be particularly noticed that the representation of a dramatic work, performance of a musical work, exhibition of a work of art, and the construction of a work of architecture do not constitute publication. How then can such works be published? In the case of a dramatic work and a musical work, by printing and publishing the libretto or score. In the case of a work of art, such as a picture, presumably by publishing sketches, photographs, &c. of the work. The English Act has, however, expressly provided that "the issue of photographs and engravings of works of sculpture and architectural works of art shall not be deemed to be publication of such works" (*g*). The ground of this distinction between works of sculpture and

(*b*) p. 14.
(*c*) This paragraph in the original French reads: "Par œuvres publiées, il faut dans le sens de la présente Convention, entendre les œuvres éditées."
(*d*) Sect. 1 (3).
(*e*) See as to some of these difficulties, *ante*, p. 37.
(*f*) See sect. 35 (3) English Act; *Day* v. *Fieldman*, (1914) W. N. 258.
(*g*) Sect. 1 (3), and see sect. 2 (1) (iii).

of architecture, on the one hand, and other works of art, such as pictures, on the other hand, would appear to be because it was considered that the reproduction in the flat of a work in the round or in relief could not truly be a "copy," but it is not clear why this should be so (*h*), and it is doubtful whether any such distinction is sanctioned by the Convention.

**Some results of the provisions as to publication.**

Somewhat curious results follow from these provisions as to publication. For instance, a non-Unionist author is not protected, as regards performing rights, if he performs his play without publishing any copies thereof, but he acquires protection for his performing rights in all Unionist countries if he first publishes his play in a Unionist country. Presumably, however, he could not sue for infringements of his performing right prior to publication. On the other hand, a Unionist author is protected in all Unionist countries so long as he only performs his play, but if he first publishes his play in a non-Unionist country he immediately loses all rights in Unionist countries.

**Publication must be authorised.**

It is, of course, understood that there can be no publication of a work within the meaning of the Convention unless the same be an authorised publication. Articles 5 and 6 both refer to "*authors* . . . who first publish their works," &c. (*i*).

**No formalities.**

It was provided by Article 2 of the original Berne Convention that enjoyment of the rights conferred by the Convention should be "subject to the accomplishment of the conditions and formalities prescribed by the law of the country of origin of the work," and in order to make it clear that the formalities of the country in which protection was sought need not be complied with the Interpretative Declaration of Paris provided that the copyright should depend upon these conditions and formalities "solely." It followed from these provisions that it was always necessary where a foreigner sought protection in a country other than that in which he first published his work, to inquire as to what formalities were prescribed by the country of origin of the work, and, moreover, the question was raised whether if a work was totally unprotected in its country of origin it could claim any protection in other Unionist countries. Obviously, such questions might involve inquiries into difficult points of foreign law upon which the local tribunal might find it

(*h*) In America it has been held that the copyright in a statue can be infringed by a photograph (*Bracken* v. *Rosenthal* (1907), 151 Fed. R. 136), and sect. 2 (1) (iii) of the English Act seems to imply that this would be so in England. See *ante*, p. 191.

(*i*) See sect. 35 (2) of British Act.

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hard to pronounce a correct decision (*k*). The Revised Convention, however, marks a considerable advance in principle by providing, in Art. 2, para. 2, that "the enjoyment and exercise of" copyright in the various countries "shall not be subject to the performance of any formality," and that "such enjoyment and such exercise are independent of the existence of protection in the country of origin of the work"—that is to say, there are not to be any formalities precedent to obtaining copyright, such as mention of reserve of copyright, &c., nor any formalities precedent to the bringing of an action for infringement, such as the registration which was necessary, under the repealed English legislation, prior to the commencement of proceedings to enforce copyright in a literary work. "Consequently"—as the paragraph proceeds—"apart from the express stipulation of the present Convention, the extent of protection, as well as the means of redress secured to the author to safeguard his rights shall be governed exclusively by the laws of the country where protection is claimed." Again, however, it is to be noted that this paragraph only applies for international purposes—any country is at liberty to impose any restrictions it pleases upon works published in that country; but it cannot impose conditions upon foreign works.

The term of protection.

Under the Revised Convention the only case in which it is necessary to refer to foreign law is in order to determine the period for which a work is entitled to protection. By Art. 2, para. 2, of the original Convention it was provided that copyright "must not exceed, in the other countries, the duration of the protection granted in the said country of origin." At the meeting of the representatives of the Powers at Berlin in 1908, an effort was made to induce the Powers to agree to a uniform term of protection as a condition of membership of the Union. This effort did not, however, entirely succeed, and Article 7 of the Revised Convention was agreed to as a compromise. This Article is as follows:—

"The term of protection granted by the present Convention

(*k*) For instance, the point was raised in the German Courts as to whether Oscar Wilde's work, "Salome," would have been debarred from copyright in England upon the ground that the work was blasphemous. In England it was provided by sect. 2 (3) of the International Copyright Act, 1886 (now repealed), that "the International Copyright Acts and an Order made thereunder shall not confer on any person *any greater right* or longer term of copyright in any work than that enjoyed in the foreign country in which such work was first published." As to the difficulties that arose upon the words "any greater right," see *Hanfstaengl* v. *Empire Palace*, (1894) 3 Ch. 109; and as to compliance with the conditions of the country of origin, *Sarpy* v. *Holland*, (1908) 2 Ch. 198.

shall include the life of the author and fifty years after his death.

"Nevertheless, in case such term of protection should not be uniformly adopted by all the countries of the Union, the term shall be regulated by the law of the country where protection is claimed, and must not exceed the term fixed in the country of origin of the work. Consequently the contracting countries shall only be bound to apply the provisions of the preceding paragraph in so far as such provisions are consistent with their domestic laws.

"For photographic works and works produced by a process analogous to photography, for posthumous works, for anonymous or pseudonymous works, the term of protection shall be regulated by the law of the country where protection is claimed, provided that the said term shall not exceed the term fixed in the country of origin of the work."

Although this Article provides that where the periods of copyright in two countries do not agree, the protection in the country where protection is sought "must" not exceed the term fixed in the country of origin of the work, the British Copyright Committee (*l*) are, no doubt, correct when they interpret this expression to mean that, though a country is bound to accord the lesser period, it is at liberty to give as much longer protection as it considers fit to do.

Effect of Art. 7.

The effect of Art. 7 is to establish the life of an author and a period of fifty years after his death as the ideal period of copyright for works other than photographs, but at the same time, not to exclude from the Union a country which accords a lesser period of protection. If any country does accord a lesser period of protection to native works, then that country is not obliged to accord to foreign works a longer period of protection than that allowed by its domestic laws, and works published in that country cannot claim in other Unionist countries longer protection than that allowed in the country of origin.

No difference between published and unpublished works.

It is to be noticed that the Convention does not—as the English Copyright Act does—draw any distinction between published and unpublished works, and neither are required to be protected for any longer period than the life of the author and fifty years from his death.

Protected works.

We now turn to consider what are the works which must be protected. Article 1 states that the Contracting States are con-

(*l*) Report of Copyright Committee, p. 18.

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stituted into a Union for the protection of the rights of authors over their "literary and artistic works." Art. 2 then provides that the expression "literary and artistic works" shall include any production in the literary, scientific, or artistic domain, whatever may be the mode or form of reproduction, such as books, pamphlets, and other writings; dramatic or dramatico-musical works, choreographic works the acting form of which is fixed in writing or otherwise (*m*), musical compositions with or without words; works of design, painting, architecture, sculpture, engraving or lithography; illustrations, geographical charts; plans, sketches, and plastic works relative to geography, topography, architecture or science. Prior to the Revised Convention, there was no obligation to protect choreographic works or works of architecture, but in countries where such works received protection the other Unionist countries were entitled to the benefit of such protection.

Adaptations.

Art. 2 of the Convention then goes on to provide that "translations, adaptations, arrangements of music and other reproductions in an altered form of a literary or artistic work, as well as collections of different works, shall be protected as original works, without prejudice to the rights of the author of the original work. The contracting countries shall be bound to make provision for the protection of the above mentioned works. Works of art applied to industrial purposes shall be protected so far as the domestic legislation of each country allows."

The provisions of Art. 2 as to adaptations must be read in conjunction with Art. 12, which declares that amongst unlawful reproductions must be "specially" included "unauthorised indirect appropriations of a literary or artistic work, such as adaptations, musical arrangements, transformations of a novel, tale, or piece of poetry into a dramatic piece, and *vice versâ*, &c., *when they are only the reproduction of that work in the same form or in another form, without essential alterations, additions, or abridgements, and do not present the character of a new original work.*" The italicised words are unfortunate, as they seem to imply that if a copyist has added new matter which gives to his work the character of a new original work, he is not guilty of piracy.

Translations.

It will be noticed that translations are to be protected, and this, apparently, whether the same are authorised or not, subject to the rights of the author of the original work. Art. 8 deals with the rights of the author of the original work, stipulating that "the

(*m*) As to the meaning of this expression, see *ante*, p. 81.

authors of unpublished works, being subjects or citizens of one of the countries of the Union, and the authors of works first published in one of those countries, shall enjoy in the other countries of the Union, during the whole term of the right in the original work, the exclusive right of making or authorising a translation of their works."

The question of translations is of prime importance from the international point of view, for it is only by means of translations that an author of a literary or scientific work can practically make his work known in a country speaking another language than his own. Complete liberty of authorising translations has only been gained for the first time under the Revised Convention. The original Convention only gave the exclusive right of translation for a period of ten years from publication of the original work, and this only to authors who were subjects of a Unionist country. The Additional Act of Paris gave to such authors the exclusive right of translation during the whole period of copyright in the original article, subject, however, to the condition that an authorised translation, in the language for which protection was claimed, should be published in a Unionist country within ten years from the first publication of the original work. Under the Revised Convention authors—whether citizens of a Unionist country or not—who first publish in a Unionist country enjoy the exclusive right of authorising a translation during the entire period of copyright in the original work, free from any such condition as to publication of an authorised translation. Citizens of non-Unionist countries, however, have no right to protection against translations of their unpublished works.

Photographs.

Photographs are specially dealt with by Art. 3, which provides that "the present Convention shall apply to photographic works and to works produced by a process analogous to photography. The contracting countries shall be bound to make provision for their protection"; but, by Art. 7, the term of protection for photographs is to be regulated by the law of the country where protection is claimed, provided that such term is not to exceed the term fixed in the country of origin of the work. There are no provisions for determining who is the "author" of a photograph.

These provisions as to photographs mark a considerable advance, for under the original Convention and the Additional Act of Paris, these works were only protected so far as the domestic laws of the various countries admitted such works to protection.

As pointed out above, the last paragraph of Art. 4 provides that

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the exhibition of a "work of art" does not constitute a publication of the work, but, photographs being separately dealt with, it is not clear that they are "works of art" within the meaning of this Article.

**Anonymous and pseudonymous works.**

The period of protection for anonymous and pseudonymous works is to be regulated by the law of the country where protection is claimed, but is not to exceed the term fixed in the country of origin of the work (Art. 7). In the case of such works the publisher whose name is indicated on the work is to be "entitled to protect the rights belonging to the author," and he is to be deemed, "without other proof," to be the legal representative of the anonymous or pseudonymous author (Art. 15).

**The effect of author's or publisher's name appearing on the work.**

The object of this last clause is to preserve the anonymity of the author. The first part of the same Article provides that, "in order that the authors of works protected by the present Convention may, in the absence of proof to the contrary, be considered as such, and be consequently admitted to institute proceedings against pirates before the Courts of the various countries of the Union, it will be sufficient that their name be indicated on the work in the accustomed manner." It is not, of course, essential that either the author's or the publisher's name should appear upon a work, for copyright is not to be "subject to the performance of any formality" (*n*), but the author or publisher, as the case may be, acquires certain advantages by reason of his name so appearing in any proceedings that he may take in any country for protecting his rights, the author not having to prove his proprietorship of the copyright and the publisher (in the case of anonymous or pseudonymous works) not having to prove his authority to institute proceedings on behalf of the author. The defendant is at liberty, however, in either case to prove that the plaintiff in fact has no rights. If the name of the author or publisher, as the case may be, does not appear upon the work, the plaintiff must in all cases prove his title in the usual way (*o*).

**Newspapers.**

Art. 9 relates to newspapers. Newspaper contributors are divided into three classes: (1) "serial stories, tales and all other works, whether literary, scientific or artistic, whatever their object, published in the newspapers or periodicals of one of the countries of the Union"; (2) newspaper "articles" (*p*), other than serial stories and tales; and (3) news of the day, and miscellaneous information which is simply of the nature of items of news.

(*n*) Art. 4.
(*o*) See sect. 6 (3) of the British Copyright Act, and *ante*, p. 207.
(*p*) Not "pictures," therefore.

The first class receive absolute protection, and may not be reproduced without the consent of the authors. It is to be noticed that *all* contributions to *periodicals* fall within this class. The reproduction of the second class of contribution may be expressly forbidden, but, if not so forbidden, may be reproduced "by another newspaper" (*q*), subject to the condition that "the source" be indicated, which expression is intended to include mention of the author's name, if the article is signed (*r*). The legal consequences of an omission to indicate the source is to be determined by the laws of the country whe e protection is claimed. To the third class "the protection of the present Convention shall not apply"—that is to say, whilst the piracy of news is not explicitly rendered lawful, mere news is not to be the subject of copyright. There is nothing, however, to prevent any country holding, on other grounds, the piracy of news to be prohibited.

**Performing rights.**

The performing rights of authors of dramatic and musical works, whether published or unpublished, are protected by Art. 11. Under the original Convention these rights had to be specially reserved by notice on the title page, if the work was published, but the Revised Convention provides that authors, to enjoy protection, shall not be bound to forbid the public representation or performance thereof. By the same Article, authors of dramatic or dramatico-musical works are to be protected during the existence of their right over the original work, against the unauthorised public representation of translations of their works. The wording of this clause seems to imply that the right of forbidding the public performance of an authorised translation of a dramatic work belongs to the author of the original work, unless, of course, such right has been assigned to the translator.

**Gramophones, &c.**

Protection against mechanical reproduction was accorded for the first time by Art. 13 of the Revised Convention. The original Convention had expressly provided by Art. 3 of the Closing Protocol that the manufacture and sale of instruments serving to reproduce mechanically "musical airs" in which copyright subsisted was not to be considered as constituting an infringement of musical copyright. Art. 13 of the Revised Convention is as follows:—

"The authors of musical works shall have the exclusive right of authorising (1) the adaptation of those works to instruments which can reproduce them mechanically; (2) the public performance of the said works by means of these instruments.

"Reservations and conditions relating to the application of this

(*q*) Not by a magazine.
(*r*) See Report to the Berlin Conference, Blue Book, Cd. 4467, p. 133.

Article may be determined by the domestic legislation of each country in so far as it is concerned; but the effect of any such reservations and conditions will be strictly limited to the country which has put them in force.

"The provisions of paragraph 1 shall not be retroactive, and consequently shall not be applicable in any country of the Union to works which have been lawfully adapted in that country to mechanical instruments before the coming into force of the present Convention.

"Adaptations made in virtue of paragraphs 2 and 3 of the present Article, and imported without the authority of the interested parties into a country where they would not be lawful, shall be liable to seizure in that country."

**Art. 13 confined to "musical works."**

It is important to notice that this Article only refers to "musical works." This restricted application is intentional. The framers of the original Convention appear to have been of opinion that all literary, dramatic and musical works would have been naturally protected, by virtue of Art. 4 of the Convention (*s*), against all mechanical reproductions, but for the provisions of Clause 3 of the Closing Protocol, which they considered to be in derogation of the author's rights. This Clause was inserted in the Closing Protocol in the interests of the Swiss manufacturers of musical boxes, which, of course, were only capable of reproducing tunes, not words. The Article, therefore, was confined to reproduction of "musical airs." Whether mechanical reproduction of literary and dramatic works was forbidden under the general terms of Art. 4 (*s*) of the original Convention, turns upon the meaning of the word "protection." In some countries it has been held that gramophones, &c. are infringements of copyright, in others the contrary has been held (*t*). The representatives of those countries in which it has been held that mechanical contrivances do infringe copyright considered, therefore, that Art. 13 of the Revised Convention was in derogation of the rights of authors, because by the second paragraph thereof, reservations and conditions may be imposed by domestic legislation, and these representatives were consequently unwilling that this Article should be given any wider application than Clause 3 of the Closing Protocol. Art. 13 was probably, therefore, not intended to apply even to the words of songs (*u*).

(*s*) Art. 2 of the Revised Convention.
(*t*) Including England, see *ante*, p. 256.
(*u*) See Correspondence respecting Revised Convention of Berne, 1909, Blue Book, Cd. 4467, pp. 142, 143. But see sect. 19 (2) (ii) of the British Act of 1911, *ante*, p. 261. Art. 13 is also silent upon the question of public performances of copyright works by means of mechanical instruments.

Reservations and conditions.

As pointed out above, power is given by the second paragraph of Art. 13 to any country to impose reservations and conditions as to mechanical reproductions of musical works, but the effect of any such reservations and conditions are to be strictly limited to the country which has put them in force. The effect of this is not, it is apprehended, to confine the operation of the particular reservations and conditions to native works. For instance, if a country adopts, as England has, the compulsory royalty system, such system, it is submitted, may, and does, apply to foreign works as well as to native works, but reproductions under such a system, in one country of the Union, will not render such reproductions lawful in any other country of the Union, and it is expressly provided by the last paragraph of the Article that such reproductions are liable to seizure, in the event of their being imported, without the authority of the interested parties (*x*), into a country where they would not be lawful.

Retrospective operation of Art. 13.

With regard to the paragraph relating to the retroactivity of Art. 13, the British Copyright Committee in their Report (*y*) remark that the paragraph is somewhat ambiguously worded. They state that the opinion of the Committee was "that the object of the paragraph is that manufacturers who have, at the time of the coming into force of the Revised Convention, lawfully adapted works (that is to say, adapted them without infringement of author's rights) to mechanical instruments, may still proceed to manufacture records in respect of the works which they have so adapted. But a difference of opinion arose as to whether, where there had been any adaptation to mechanical instruments of a work at the time of the coming into force of the Convention, that particular work would be free to be adapted by any manufacturer for any kind of instrument, or whether the manufacturer who had adapted it would be the only manufacturer who could produce the records of the work without the author's consent. A narrow majority of the Committee were in favour of the former view, which, in their opinion, is in accordance with the exact words of the latter part of the paragraph, and leaves all manufacturers upon an equal footing as regards works which by virtue of the paragraph might be reproduced without the author's consent, so that the effect of treating a manufacturer as having a vested interest in the work which he has adapted will be to give every other manufacturer practically the same freedom."

(*x*) That is to say, the author and any persons having exclusive rights of mechanical reproduction in the country into which the works are imported.

(*y*) p. 26.

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Protection of discs, rolls, &c.

There is no express provision in the Revised Convention protecting the mechanical contrivances themselves against piracy, but, indirectly, manufacturers may obtain such protection by virtue of the rights of the author in the original work under the Convention.

Cinematographs.

A separate Article is devoted to cinematograph productions. This is Art. 14, the first paragraph whereof protects authors of literary, scientific, or artistic works by conferring on them the "exclusive right of authorising the reproduction and public representation of their works by cinematography." But a cinematographic work may be an original creation, and so, by the second paragraph of the same Article, it is provided that "cinematograph productions shall be protected as literary or artistic works if, by the arrangement of the acting form or the combinations of the incidents represented, the author has given the work a personal and original character." Again, an original work may have been employed in creating the scenes of a cinematograph production. If that is done without the consent of the author of the original work, it will be an infringement of the latter's copyright, but that has seemed to the authors of the Revised Convention no good ground for depriving the author of the cinematograph work of copyright in his work. Consequently, the third paragraph of Art. 14, in close analogy with the second paragraph of Art. 2, runs as follows:—"Without prejudice to the rights of the author of the original work, the reproduction by cinematography of a literary, scientific, or artistic work shall be protected as an original work." Finally, it is provided that "the above provisions apply to reproduction or production effected by any other process analogous to cinematography" (*z*). Art. 14 of the Revised Convention is entirely new.

Procedure.

The remedy of a person whose work has been pirated is to be governed by local law. It is provided by the second paragraph of Art. 4 that, "apart from the express stipulations of the present Convention, the extent of protection, as well as the means of redress secured to the author to safeguard his rights, shall be governed exclusively by the laws of the country where protection is claimed" (*a*). However, seizure of the pirated copies is a

(*z*) See as to cinematography generally, *ante*, p. 247.

(*a*) An important and instructive case recently came before the Paris Court of Appeal which, affirming the decision of the Seine Civil Tribunal, held that the manager of the Paris branch and representative in Paris of an Argentine newspaper was liable in damages for putting on sale in France copies of the newspaper printed in Buenos Ayres, and containing pirated portions of a novel written by a French author. This liability, the Court stated, would

remedy which ought to be secured to authors by the legislation of every Unionist country, for Art. 16 provides as follows:—

"Pirated works may be seized by the competent authorities of any country of the Union where the original work enjoys legal protection.

"In such a country the seizure may also apply to reproductions imported from a country where the work is not protected, or has ceased to be protected.

"The seizure shall take place in accordance with the domestic legislation of each country."

Notwithstanding the provisions of the Convention each Unionist country is to be at liberty "to permit, to control, or to prohibit, by measures of domestic legislation or police, the circulation, representation, or exhibition of any works or productions in regard to which the competent authority may find it necessary to exercise that right" (Art. 17).

Retroactivity.

A notable alteration has been made as regards retroactivity in the Revised Convention. Under the original Convention it was provided that its provisions should apply to all works which at the time of its coming into force had "not yet fallen into the public domain in their country of origin." The Revised Convention (Art. 18) only excepts works which have, at the moment of its coming into force, fallen into the public domain in their country of origin "through the expiration of the term of protection." Works, therefore, which have, in the country of their origin, lost their protection owing to failure to comply with formalities, such as registration, notice of reserve of copyright, and so forth, are intended to be protected under the Revised Convention, as also, apparently, are works which were previously entitled to no protection whatsoever, *e.g.* (in some countries), works of architecture and photographs (*b*). The Article in question will also apply to works published in new countries adhering to the Convention (*c*). The effect of these provisions upon the translating right may be particularly observed. If a work has been published less than ten years prior to the entry into force of the Revised Convention, such works will be entitled to the benefit of the new protection. If, on the other hand, they were published

exist "even if the legislation of the country of publication accorded no protection to copyright": *Foley* v. *Cazaux*, "Le Droit d'Auteur," 1913, p. 100.

(*b*) It will be remembered that there are special provisions as to the retrospective operation of the clause relating to mechanical instruments: see *ante*, p. 321. The British Copyright Act does not comply with the provisions as to retroactivity, and in adhering to the Revised Convention Great Britain has made a reservation upon the point (see Appendix C.).

(*c*) See para. 4 of Article 18.

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more than ten years prior to the Revised Convention, then if any translation has been lawfully published in the country where protection is sought, the provisions of Art. 8 cannot be invoked by the proprietor of the copyright in the original work, but if there has been no such publication, the author will have the benefit of the new provisions (*d*).

The third paragraph of Art. 18, however, provides that the application of the principle laid down in the first and second paragraphs is to take effect according to the stipulations contained in special Conventions existing or to be concluded to that effect between countries of the Union, and that in the absence of such stipulations, the respective countries are to regulate, so far as they are respectively concerned, the manner in which the said principle is to be applied.

**The Convention only provides a minimum of protection.**

The Revised Convention only provides for a minimum protection, it is not intended to prevent any Unionist country which may feel more liberally disposed from granting more extensive protection. Art. 19, therefore, provides that "the provisions of the present Convention shall not prevent a claim being made (*e*) for the application of any wider provisions which may be made by the legislation of a country of the Union in favour of foreigners in general." This clause operates to prevent a Unionist author from being in a worse position than a non-Unionist author; but it does not enable a Unionist author to claim more extensive rights than those accorded solely to natives, nor does the clause introduce the "most favoured nation" treatment, because a claim can only be made if the more extensive rights are accorded to foreigners "in general."

**Existing treaties.**

Art. 20 enables Unionist countries to conclude or maintain treaties conferring wider protection than that provided for by the Convention, but the present tendency is to discountenance such treaties as between Unionist countries as being superfluous and tending to complicate the law (*f*).

**Rights of British authors in foreign countries.**

If, then, an author belonging to one country of the Union desires to ascertain his rights in respect of his literary or artistic work in another country of the Union, he must consult the following four sources:—

1. The law of the country of origin of the work to ascertain the term of protection.

(*d*) See remarks of M. Renault, Blue Book of Correspondence, p. 147.
(*e*) Presumably this is to be taken as equivalent to giving a *right* to claim.
(*f*) *E.g.*, the treaty between Switzerland and Japan, previously in force with regard to copyright, was denounced in the year 1911.

2. The Revised Convention which stipulates a minimum protection.

3. The law of the country in which protection is sought, for everything relating to the nature of, and procedure for, enforcing the protection to which he is entitled, and, in particular, to see whether the local law is in any points more favourable than the Convention.

4. The particular treaties existing between the two parties to the Union, if they accord more extensive protection than the Convention (*g*).

**No action in England for infringement abroad.**

The English Courts have no jurisdiction to restrain a threatened infringement of copyright in a foreign country, even though that country be a member of the Copyright Union, but proceedings must be taken in the Courts and according to the law of the foreign country (*h*).

**Present members of the Copyright Union.**

At the moment of writing the following countries form the Copyright Union:—Belgium, Denmark, France with Algeria and her colonies, Germany, Great Britain with some of her colonies and dependencies (*i*), Hayti, Italy, Japan, Liberia, Luxemburg, Monaco, the Netherlands with the Dutch East Indies, Norway, Portugal, Spain, Sweden, Switzerland, Tunis (*k*). Although Italy and Sweden are members of the Union they have, neither of them, ratified the Revised Convention of Berne: Italy is bound by the original Convention of 1886, with the Additional Act of Paris, 1898, and the Interpretative Declaration of the same year (*l*), Sweden by the original Convention and the Interpretative Declaration, but not the Additional Act of 1898. It is, however, anticipated that Italy and Sweden will both, at an early date, ratify the Revised Convention (*ll*). Of the other countries of the Union Denmark, France, Tunis, Great Britain, the Netherlands, Japan and Norway have only ratified the Convention subject to certain reservations. The reservation in the case of Denmark is as to newspaper and magazine articles (remaining bound by Art. 7 of the original Convention as amended by the Additional Act); in the case of France and Tunis, as to works of art applied to

(*g*) Inasmuch as Great Britain has only one copyright treaty, and that with Austria, which is not a member of the Union, British authors are not concerned as to this last source.

(*h*) "*Morocco Bound*" *Syndicate* v. *Harris*, (1895) 1 Ch. 534.

(*i*) As to the Colonies of Great Britain, see "Colonial Copyright," *post*.

(*k*) It is anticipated that Hungary will shortly adhere to the Convention. Denmark joined the Union on 28th June, 1912, Holland on the 9th October, 1912, Portugal on 18th March, 1911. The other countries were all parties to the Union before 1908.

(*l*) *Ante*, p. 306.

(*ll*) Italy has now done so. *See* Addenda.

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industrial purposes (remaining bound by the provisions of the original Convention and Additional Act); in the case of Japan, as to (a) translating right (remaining bound by Art. 5 of the original Convention, as amended by the Additional Act), and (b) as to performing rights in musical works (remaining bound by Art. 9, para. 3, of the original Convention); in the case of Great Britain, as to the retrospective operation of the Convention (remaining bound by Art. 14 and para. 4 of the Final Protocol of the original Convention, as amended by the Additional Act); in the case of the Netherlands, as to translations and newspaper and magazine articles (being bound by Arts. 5 and 7 of the original Convention and the Additional Act); and in the case of Norway, as to works of architecture, newspaper and magazine articles, and the retrospective operation of the Convention (remaining bound by Arts. 4, 7 and 14 of the original Convention).

**Power to extend the Act to foreign countries.**

The powers enabling the Crown to ratify the Revised Convention are to be found in sect. 29 of the Copyright Act, 1911. By this section His Majesty is authorised by Order in Council to direct that that Act (except such parts, if any, thereof as may be specified in the Order) shall apply—

> " (a) to works first published in a foreign country to which the Order relates, in like manner as if they were first published within the parts of His Majesty's dominions to which the Act extends;
>
> (b) to literary, dramatic, musical, and artistic works, or any class thereof, the authors whereof were at the time of the making of the work subjects or citizens of a foreign country to which the order relates, in like manner as if the authors were British subjects;
>
> (c) in respect of residence in a foreign country to which the Order relates, in like manner as if such residence were residence in the parts of His Majesty's dominions to which the Act extends;
>
> and thereupon, subject to the provisions of the Act and of the Order, the Act is to apply accordingly."

**Conditions to be observed.**

The right to make such Orders is subject to the following provisions:—

> (i) before making an Order in Council under the section in respect of any foreign country (other than a country with which His Majesty has entered into a convention relating to copyright), His Majesty must be satisfied that that foreign country has made, or has undertaken to make, such provisions, if any, as it

appears to His Majesty expedient to require for the protection of works entitled to copyright under the provisions of Part I. of the Act;

(ii) the Order in Council may provide that the term of copyright within such parts of His Majesty's dominions as aforesaid shall not exceed that conferred by the law of the country to which the Order relates;

(iii) the provisions of the Act as to the delivery of copies of books are not to apply to works first published in such country, except so far as is provided by the Order;

(iv) the Order in Council may provide that the enjoyment of the rights conferred by the Act shall be subject to the accomplishment of such conditions and formalities (if any) as may be prescribed by the Order;

(v) in applying the provision of the Act as to ownership of copyright, the Order in Council may make such modifications as appear necessary having regard to the law of the foreign country;

(vi) in applying the provisions of the Act as to existing works, the Order in Council may make such modifications as appear necessary, and may provide that nothing in those provisions as so applied shall be construed as reviving any right of preventing the production or importation of any translation in any case where the right has ceased by virtue of section five of the International Copyright Act, 1886 (*m*).

It will be remembered that under sect. 1 of the Copyright Act, 1911, copyright subsists: (a) in works first published in those parts of His Majesty's dominions to which the Act extends; (b) in unpublished works the author of which was at the date of making the same a British subject; and (c) in unpublished works where, at the date of making the same, the author was resident in such parts of His Majesty's dominions as aforesaid. If, therefore, an Order in Council is made, under sect. 30, with regard to any particular country, copyright under the British Act is conferred upon: (i) works published in that country; (ii) unpublished

(*m*) 49 & 50 Vict. c. 33. It was provided by this section that if at the end of ten years after publication of a book or dramatic piece no authorised translation in the English language has been produced, the right to prevent the production in and importation into the United Kingdom of an unauthorised translation of the work is to cease. The various Orders in Council made under the section provide in the manner suggested by this proviso. See the Orders set out in Appendix C.

works of citizens of that country; and (iii) unpublished works of persons resident in that country. The Act, therefore, more than satisfies the requirements of the Revised Convention, for the terms of that Convention do not require that protection shall be accorded to the unpublished works of a foreigner merely resident in a country of the Union at the time of making his work.

**Order in Council of 24th June, 1912.**

A general Order in Council was made on the 24th June, 1912, extending the benefit of the Act to the then members of the Copyright Union, with the necessary modifications in the case of those countries which had only partially adhered to the Revised Convention, and further Orders in Council have been made as fresh countries have adhered to the Convention. These Orders in Council will be found set out in Appendix C.

**British colonies.**

The position of the British Colonies and Dependencies with regard to countries belonging to the Copyright Union will be considered under Colonial Copyright.

**Treaty with Austria.**

Great Britain has a special copyright treaty with Austria, which differs in some respects from the Berne Convention (*n*). Under this treaty authors of literary or artistic works, which have been first published in the dominions of one of the contracting parties, are to have in the dominions of the other contracting party the same legal remedy against all infringements of their rights as if the work had been first published in the country where the infringement may have taken place, but these advantages are only to be reciprocally guaranteed to authors when the work in question is also protected by the laws of the State where the work was first published, and the duration of protection in the other country is not to exceed that which is guaranteed to authors in the country where the work was first published.

This treaty first came into force on the 11th May, 1894, under an Order in Council made by virtue of the International Copyright Act, 1886 (*o*). Since the passing of the Act of 1911, a fresh Order in Council has been made under sect. 29 extending the provisions of that Act to Austria, subject to certain modifications (*p*).

**Pan-American Convention.**

In addition to the Berne Convention, there are other American Conventions—the Montevideo Convention and the various Pan-American Conventions. To none of these is Great Britain a party. The Montevideo Convention (11th January, 1889) adopts a wholly different principle to that of the Berne Convention,

(*n*) Set out in full in Appendix B.
(*o*) See *ante*, p. 306.
(*p*) The Order in Council will be found set out in Appendix C.

conferring upon an author belonging to one country of the Union in the other countries of the Union the rights which he enjoys in the country where he first publishes, not the rights which authors enjoy in the country where the infringement takes place, so that under this Convention the law of the country of origin follows the work into the other countries of the Union.

This Convention has only been ratified by Argentina (1894) (*q*), Bolivia (1903), Paraguay (1889), Peru (1889), and Uruguay (1892). The Pan-American Conventions are those of Mexico City (1902), Rio de Janeiro (1906), and Buenos Ayres (1910) (*r*). The later of these Conventions are both modifications of the original Convention of 1902, and all adopt the Berne principle of according national protection to works published in any of the countries of the Union, but under the Convention of 1902, in order to obtain copyright in another country, it is an "indispensable" condition that the author or his representatives shall address a petition to the official department of each government, claiming the recognition of the right. This has, however, been modified by the later Conventions, and under the Convention of 1910, it simply provided that "the acknowledgment of a copyright obtained in one State, in conformity with its laws, shall produce its effects of conferring full right in all the other States without the necessity of complying with any other formality, provided always there shall appear in the work a statement that indicates the reservation of the property right." The Convention of 1902 was ratified by Guatemala (1902), Salvador (1902), Costa Rica (1902), Honduras (1904), Nicaragua (1904), and the United States (1908). The Convention of 1906 was ratified by Guatemala (1907 and 1909), Salvador (1907), Nicaragua (1908), Costa Rica (1908), and Chile (1910). Twenty Powers, including all the South American countries, except Bolivia, were parties to the Convention of 1910, but it has so far been ratified only by the United States (1910).

**International copyright with the United States.**

There is no treaty between Great Britain and the United States on the subject of copyright, and it was not until 1891, after the passage of the Act commonly called the "Chace Act," that British authors could obtain any effective protection for their works in that country. The Chace Act is now repealed by the

(*q*) France adhered to the Convention on 3rd July, 1897, Spain on 29th Dec., 1899, Italy on 18th April, 1900, and Belgium in 1903. The adhesion of all four countries has been accepted by Argentina and Uruguay; that of Belgium by Paraguay also. For a case in which a Spanish author successfully invoked the aid of this Convention, see "Le Droit d'Auteur," 1913, p. 66.

(*r*) The full text of these Conventions will be found in Bowker on Copyrigh (American, published by Constable & Co., 1912), pp. 633 *et seq.*

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Copyright Act, 1909, under which British authors can obtain a certain measure of protection for their works, by virtue of a proclamation by the President of the United States, to the effect that the British law grants to citizens of the United States the benefit of copyright on substantially the same basis as its own citizens (*s*). American citizens are able to obtain copyright in their works by first publishing them in England, or simultaneously (*t*) in England and America; but, inasmuch as no Order in Council relating to the United States has been made under sect. 29 of the British Act of 1911, American citizens are not entitled to copyright in their unpublished works, or in their works first published in America only. They could, however, sue in England in respect of any publication in breach of trust or confidence (*u*).

(*s*) See *post*, "Copyright in United States of America," Part V.
(*t*) As to the meaning of this expression, see *ante*, p. 41.
(*u*) *Ante*, p. 30.

# CHAPTER II.

## COLONIAL COPYRIGHT.

Colonial Conference, 1910.

In the year 1910, during the presence of representatives of the British colonies and dependencies in England, a conference of those representatives was held upon the subject-matter of copyright in the British dominions. Mr. Sydney Buxton, the then President of the Board of Trade, urged upon the representatives the extreme desirability of obtaining a uniform code of copyright laws which should apply throughout the King's dominions. At this Conference certain resolutions were passed, generally recognising this desirability, but insisting, at the same time, that, at any rate, self-governing colonies ought not to be bound by any Imperial Copyright Act, or be made party to any Convention or treaty entered into by the home Government, without the assent of those colonies, and that all colonies ought to have the right to make local modifications in the law (*a*). Effect has been largely given to the recommendations of this Conference in the British Copyright Act, 1911, but as the process of obtaining a uniform code of copyright laws throughout the dominions is not yet completed (*b*), it is still necessary to understand the law as it existed prior to the Act of 1911.

Law prior to Act of 1911.

The Literary Copyright Act of 5 & 6 Vict. c. 45, expressly extended copyright to every part of the British dominions (*c*), but none of the Acts relating to artistic or dramatic copyright contained any similar provision. The Fine Arts Copyright Act, 1862, did refer to the British dominions, giving copyright in all works made in the British dominions or elsewhere (*d*), but it was held that there was nothing in that Act to extend the copyright throughout the British dominions, the provisions of sects. 8 and 10 providing for the recovery of the penalties in England, Scotland and Ireland, and forbidding the importation into the United

(*a*) Report of Colonial Conference, 1910 (Cd. 5272).
(*b*) See as to local legislation of particular colonies, Chapter III., *infra*.
(*c*) Sect. 29.
(*d*) Sect. 1.

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Kingdom of copies made in any part of the British dominions indicating a contrary intention (*e*).

Whilst, therefore, a British author publishing a literary work in the United Kingdom obtained under the Literary Copyright Act, 1842, an imperial copyright, extending throughout the British dominions, and was thus enabled to prevent piracies in any colony, a British artist first publishing in the United Kingdom obtained no imperial copyright, but, if he desired to prevent infringements in a colony, must have acquired local copyright according to the laws of the particular colony.

**Rights of colonial authors in United Kingdom.**

On the other hand, it was held that the Literary Copyright Act, 1842, did not confer copyright in the United Kingdom on works first published in the colonies (*f*); but this grievance was removed by the International Copyright Act, 1886 (*g*), which, by sect. 8, provided that the Copyright Acts should, subject to the provisions of the Act of 1886, apply to a literary or artistic work first produced in a *British possession* in like manner as they applied to a work first produced in the United Kingdom: provided (a) that the enactments respecting the registry of the copyright in such work should not apply if the law of such possession provided for the registration of such copyright; and (b) that where such work was a book the delivery to any persons or body of persons of a copy of any such work should not be required. If, therefore, in the particular colony there was no provision for registration, then the registration must have been effected in this country.

**Result.**

The result, therefore, was that any work produced in the colonies became entitled to the same copyright as it would have obtained if it had been first produced in the United Kingdom, but that although literary works published in the United Kingdom obtained copyright throughout the dominions, this was not the case with regard to artistic works.

**Foreign reprints forbidden to be imported into colonies.**

By sect. 17 of the Literary Copyright Act all persons, other than the proprietor of the copyright or persons authorised by him, were forbidden to import into any part of the British dominions, for sale or hire, any printed book first composed or written or printed and published within the United Kingdom, wherein there should be copyright, and reprinted in any country or place out of the British dominions, under penalty of £10, and double the value of the books (*h*). Complaints arose, especially from Canada, with

(*e*) *Graves & Co.* v. *Gorrie*, (1903) A. C. 496.
(*f*) *Routledge* v. *Low* (1868), L. R. 3 H. L. 100.
(*g*) 49 & 50 Vict. c. 33.
(*h*) And see the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36),

regard to this prohibition. It was contended that in the sparsely populated colonies, where the circulating library system did not prevail, the price of English books was practically prohibitive, whilst English publishers feared to issue special cheap colonial editions, because they would not be able to prevent their re-importation into Great Britain. With a view to remedy these grievances, in 1847 there was passed an Act, commonly known as the Foreign Reprints Act (*i*), enabling the Crown by Order in Council to suspend the prohibition against importation into the colonies of English copyright works, subject to their making suitable provisions for the protection of British authors. Under this Act numerous Orders in Council were issued by virtue of which cheap foreign reprints of copyright works were permitted to be imported into various colonies.

**Provisions of Act of 1911.**

The provisions of the Copyright Act, 1911, relating to the British possessions are contained in sects. 25 to 28. The countries subject to the Crown are divided into three classes: (a) dominions of the Crown other than self-governing colonies; (b) self-governing colonies, meaning thereby the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa and Newfoundland (*k*); and (c) protectorates and Cyprus.

**Non-self-governing colonies and protectorates.**

The provisions of the Act relating to colonies, other than the self-governing dominions, and to the protectorates and Cyprus, are comparatively simple. Sect. 25 (1) enacts that the Act, "except such provisions thereof as are expressly restricted to the United Kingdom (*l*), shall extend throughout His Majesty's dominions," subject to a saving in respect of a self-governing dominion; and sect. 28 enables His Majesty by Order in Council to extend the Act to any territories under his protection, and to Cyprus, "and on the making of such Order this Act shall, subject to the provisions of the Order, have effect as if the territories to which it applies, or Cyprus, were part of His Majesty's dominions to which this Act extends." The legislature of any British possession to which the Act extends has, however, power to modify, or add to, any of the provisions of the Act in its application to the possession, but, except so far as such modifications and additions relate to procedure and remedies, they are only to apply to works the authors whereof were, at the time of the making of the

ss. 151, 152; and *Black* v. *Imperial Book Co.* (1903), 5 Ontario L. R. 184; (1905), 21 T. L. R. 540, under "Canada," *post*, p. 342.

(*i*) 10 & 11 Vict. c. 95. Its official title is the Colonial Copyright Act, 1847.

(*k*) Sect. 35 (1).

(*l*) *I.e.*, sects. 11 and 12 relating to summary remedies.

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work, resident in the possession, and to works first published in the possession (*m*).

Thus, for the purposes of copyright, the colonies, other than the self-governing colonies, are treated as parts of the United Kingdom, and British copyright will extend to all such colonies, and *vice versâ* colonial copyright will extend to the United Kingdom, except those modifications and additions to the British Act which the legislature of any colony may make, those only applying locally (*n*). Similarly, the following protectorates, to which by an Order in Council dated the 24th June, 1912, the British Act was extended, are equally considered for copyright purposes to be part of the United Kingdom, namely, Cyprus, the Bechuanaland Protectorate, East Africa Protectorate, Gambia Protectorate, Gilbert and Ellice Islands Protectorate, Northern Nigeria Protectorate, Northern Territories of the Gold Coast, Nyasaland Protectorate, Northern Rhodesia, Southern Rhodesia, Sierra Leone Protectorate, Somaliland Protectorate, Southern Nigeria Protectorate, Solomon Islands Protectorate, Swaziland, Uganda Protectorate, and Weihaiwei.

Self-governing dominions.

The position of the self-governing dominions is, under the Act, rather more complicated. The Act does not apply to such dominions without their consent, and the Act leaves it open to any such dominion to take any one of the following five courses:—

1. It may take no steps whatever. In this case the enactments which are repealed by the Act, so far as they are operative in the dominion, continue in force (*o*). At the time of writing, neither Canada nor the South African Union has taken any steps in the matter, and the repealed statutes, therefore, remain in force in those colonies.

2. It may repeal the old statutes (*p*). No colony has taken this course. If any colony were to do so, British authors would have no protection in that colony, except such as might be accorded by local legislation.

3. It may declare by its legislature the British Act to be in force in its territory either with or without any modifications or additions (*q*), but such modifications or additions, except in so far

(*m*) Sect. 27.

(*n*) India has passed an Act containing local modifications, and also providing for summary remedies for infringement (see *post*, Chapter III.); Jersey provides summary remedies (Law of 14th Jan., 1913), as also does the Isle of Man (Law of 5th July, 1912). The Copyright Act comes into force in the different colonies on varying dates, see sect. 37.

(*o*) Sect. 26 (2), but *quære* whether the author's unpublished works are protected: sect. 26 (3).

(*p*) Sect. 26 (1).

(*q*) Sect. 25 (1).

as they relate exclusively to procedure and remedies, or are necessary to adapt the Act to the circumstances of the dominion, must apply only to (a) works of authors resident in the dominion, and (b) works first published in the dominion (*r*). Newfoundland has adopted the Act without, and the Commonwealth of Australia with, such modifications and additions (*s*). Newfoundland and Australia are, therefore, to be considered as part of the United Kingdom for copyright purposes, subject, in the case of Australia, to the local modifications for colonial authors.

4. It may pass legislation giving to British authors resident elsewhere than in the colony, and to foreign authors resident in the parts of the King's dominions to which the Act extends (*t*), rights within the colony "substantially identical" with those conferred by the Act, and the fact that "the remedies for enforcing the rights or the restrictions on importation of copies of works manufactured in a foreign country under the law of the dominion, differ from those under this Act" is not to prevent the rights from being "substantially identical" (*u*). In this case, upon a certificate by "the Secretary of State" (*x*) that the above conditions exist, the particular dominion is, for the purposes of the rights conferred by the Act of 1911, to be treated as if it were a dominion to which the Act extended. Colonial authors will thus obtain protection under the British Act; British authors will obtain protection under the local Act. The object of this fourth alternative is to enable a self-governing dominion, whilst giving full protection to British authors, to differentiate against foreign authors. At the conference of the colonial representatives previously referred to (*y*) a resolution relating to international copyright was passed declaring that, in the opinion of the conference, first, save in so far as it may be extended by Orders in Council, copyright under the new Imperial Act should subsist only in works of which the author is a British subject, or is *bonâ fide* resident in one of the parts of the British Empire to which the Act extends: and that such copyright should cease if the work be first published elsewhere than in such parts of the Empire; and secondly, that "if possible, it should be made clear on ratification that the obligations imposed by the convention on the British Empire should relate solely to works the authors of

(*r*) Sect. 27.
(*s*) See *post*, Chapter III.
(*t*) N.B.—Not necessarily to foreign authors resident elsewhere, even if they first publish their works in Great Britain.
(*u*) Sect. 25 (2).
(*x*) *Quære*, which?
(*y*) *Ante*, p. 331.

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which are subjects or citizens of a country of the Union or *bonâ fide* resident therein, and that in any case it is essential that the above reservation should be made in regard to any self-governing dominion which so desires." Under this third alternative, then, a self-governing dominion might by its legislation discriminate against certain foreign countries and refuse protection to the works of authors who are citizens of such countries, and thus to provide against the importation of works "manufactured in a foreign country" (*z*) into the colony, notwithstanding that the works might be the subject of copyright protection in some parts of the Empire. The difficulty in taking such a course has hitherto been that it would have constituted an infringement of Article 6 of the Revised Berne Convention, which provided that authors, not being subjects or citizens of one of the countries of the Union who first publish their works in one of those countries, should enjoy in that country the same rights as native authors, but this difficulty has been removed by the recent Additional Protocol of 1914 (*a*). No self-governing dominion appears to have adopted this fourth alternative, but it is possible that Canada may shortly do so.

5. It may pass legislation giving "adequate protection" (*b*) within the dominion for the works (whether published or unpublished) of authors who at the time of the making of the work were British subjects resident elsewhere "than in the particular dominion" (*c*). Under this alternative the self-governing colony is not required to give any protection to foreigners wherever resident or wherever they may first publish their works, and the colony does not become a dominion to which the Act of 1911 extends; the position is simply that the colony comes into a position under which it may negotiate with the home Government and each other self-governing dominion as to the mutual protection to be given to their works. The Crown in Council may, for the purpose of giving reciprocal protection, direct that the Imperial Act, except such parts (if any) thereof as may be specified in the Order, and subject to any conditions contained therein, shall, within the parts of the Crown's dominions to which the Act extends (including a dominion which is for the purposes of the Act to be treated as if it were a dominion to which the Act extends), apply to works the

(*z*) N.B.—A self-governing dominion, it will be noticed, is not, under this alternative, to be at liberty to legislate against the importation of works manufactured in Great Britain. The proprietor of the copyright could prevent this if he chose, under sect. 14 (7) of the Imperial Act.

(*a*) See *ante*, p. 310.

(*b*) "Substantially identical" are the words in sub-sect. 2 of sect. 25.

(*c*) Sect. 26 (3).

authors whereof were, at the time of the making of the work, resident in the particular self-governing dominion and to works first published in that dominion. Similarly, the Governor in Council of any self-governing dominion to which the Act extends (including as aforesaid) is authorised to confer within that dominion the like rights as the Crown in Council is authorised to confer within other parts of His Majesty's dominions (*d*). It is further provided that, save as provided in any Order in Council, works the authors whereof were resident "in a dominion to which this Act does not extend" are not, whether they are British subjects or not, to be entitled to any protection under the Imperial Act, except such protection as is by the Act conferred on works first published within the parts of His Majesty's dominions to which the Act extends (*e*). The unpublished works, therefore, of a British author resident in a colony which has adopted this fifth alternative are only protected so far as the Order in Council directs. In fact, under this alternative, colonial authors must have regard to the Order in Council as well as the Act in order to discover their rights in Great Britain, and British authors must look to the local legislation and the order of the Governor in Council in order to discover their rights in the colony. This fifth alternative appears to be the one which has been adopted by New Zealand.

**Importation into and from the colonies.**

It is important to observe that, whichever alternative has been adopted, it is open to the proprietor of the copyright to prevent the importation into any colony of copies of his work made out of that colony, so that, if a British author were to assign his colonial copyright, the assignee could prohibit the importation of British-made copies into the colony (*f*); and similarly, the British author could prevent the importation of colonial copies into Great Britain, for those copies "if made in the United Kingdom would infringe" his copyright (*g*). The same rules would apply, *mutatis mutandis*, if a colonial author were to assign his British rights (*h*), but, as it is only the "owner of the copyright" who can prevent importation either into the United Kingdom or the colonies, licensees should be careful to recognise their position. A British author who has given a licence to publish a colonial edition can prevent colonial copies being imported into Great Britain (*i*), but the licensee cannot prevent British copies from being imported into the colony;

(*d*) Sect. 26 (3).
(*e*) *Ib.*
(*f*) Sect. 14 (7).
(*g*) Sect. 14 (1); see *ante*, p. 201.
(*h*) Sub-sect. (7).
(*i*) Sub-sect. (1).

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and *vice versa*, a colonial author who has given a licence to publish a British edition can prevent British copies from being imported into the colony (*k*), but the licensee cannot prevent colonial copies from being imported into Great Britain.

International arrangements.

With regard to any international arrangements which may be made by the Mother Country, it is provided that any Order in Council made under sect. 29 of the Act (*l*) is to apply to all His Majesty's dominions, except the self-governing dominions and any other possession specified in the Order (*m*). Accordingly, the various Orders in Council which have been made under that section (*n*) have applied the Convention to all the dominions, colonies and possessions of the Crown, with the exception of the self-governing dominions, and also to Cyprus and the Protectorates to which the Copyright Act was by Order in Council extended (*o*). With regard to the self-governing dominions the Act authorises the Governor in Council of any such dominion to which the Act extends to make, as respects that dominion, the like Orders as the Crown in Council is, under sects. 29 and 30, authorised to make with regard to dominions other than self-governing dominions, and the provisions of those sections are, with the necessary modifications, to apply accordingly (*p*). Orders in Council have, under this power, been made by Australia, New Zealand, and Newfoundland. It will thus be seen that the Revised Convention of Berne applies throughout the dominions, with the exception of Canada and the Union of South Africa. These last-mentioned dominions, in the meantime, remain bound under the International Copyright Act, 1886, by the original Berne Convention as modified by the Interpretative Declaration of Paris (*q*).

(*k*) Sub-sect. (7).
(*l*) See *ante*, p. 326.
(*m*) Sect. 30 (1), (3).
(*n*) See these Orders set out in Appendix C.
(*o*) See the list given on p. 334, *ante*.
(*p*) Sect. 30 (3).
(*q*) *Mary* v. *Hubert* (1906), 15 Quebec R. 381.

# CHAPTER III.

## LOCAL COPYRIGHT LAWS OF BRITISH COLONIES AND POSSESSIONS.

### (a) *Canada.*

Canadian difficulties.

THE unsatisfactory condition of the copyright laws as they affect Canada, referred to in the last edition of this work, still continues at the moment of writing, but there is foundation for the hope that Canada will shortly pass a Copyright Act which will place the law in a more satisfactory position.

The difficulty experienced by Canada in falling into line with the other colonies and dependencies of the United Kingdom is due almost entirely to her proximity to the United States, the enterprise of whose publishing firms has threatened to strangle the native book-producing industry. The following is a short history of the Canadian Copyright legislation.

Acts of 1875 and 1886.

The fundamental Act is the Canadian Copyright Act, 1875 (*a*), which gives copyright for twenty-eight years from the time of recording the copyright as therein directed to any person domiciled in Canada, or in any part of the British dominions, or being the citizen of any country having an international copyright treaty with the United Kingdom (*b*), who is the author of any book, map, chart, or musical composition, or of any original painting, drawing, statue, sculpture, or photograph, or who invents, designs, etches, engraves or causes to be engraved, etched, or made from his own design any print or engraving, and the legal representatives of such person, the sole right and liberty of printing, reprinting, publishing, reproducing and vending such literary, scientific, or artistic works or compositions, in whole or in part, and of allowing

(*a*) Substantially re-enacted with some alterations, first by the Revised Statutes, 1886, c. 62, and later by Revised Statutes, 1906, c. 70. The earlier Acts, with the later Act of 1900 hereafter referred to, will be found set out in full in the Appendix to the fourth edition of this work.

(*b*) These words cover the case of any country which is a party to the Berne Convention. They also cover Austria, which has a copyright treaty with Great Britain, though Canada is not included in that treaty, but Canada contends that the words do not cover the United States, see *infra*. The Act of 1889 proposed to limit the words by adding "in which Canada is included."

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translations to be printed or reprinted and sold of such literary works from one language into other languages (*c*).

Term of copyright and in whom vested.

If at the expiration of the term of twenty-eight years, the author or any of the authors (when the work has been originally composed and made by more than one person) be still living, or being dead have left a widow or a child or children living, the same exclusive right is continued to such author, or if dead, then to such widow and child or children, as the case may be, for the further term of fourteen years, provided that within one year after the expiration of the first term the title of the work be again recorded, and all other regulations required to be observed in regard to original copyrights are complied with in respect to such renewed copyright (*d*).

Conditions on which copyright depends.

In order to entitle an author to the benefit of copyright under this Act, the following conditions must be complied with:—

1. Such literary, scientific, or artistic works must be printed and published or reprinted or republished in Canada, or in the case of works of art, must be produced or reproduced in Canada, whether so published or produced for the first time or contemporaneously with or subsequently to the publication or production elsewhere (*e*).

2. In the case of a book, map, chart, musical composition, photograph, print, cut, or engraving, two copies must be deposited at the office of the Minister of Agriculture; and so in the case of paintings, drawings, statuary and sculpture, unless a written description of such works is furnished to the Minister of Agriculture (*f*).

3. Information must be given of the copyright being secured, by causing to be inserted in the several copies of every edition on the title-page, or on the page immediately following, if it is a book, or if it is a map, chart, musical composition, print, cut, engraving, or photograph, by causing to be impressed on the face thereof, or if a volume of maps, charts, music, engravings or photographs upon the title-page or frontispiece thereof, the following words, "Entered according to Act of Parliament of Canada in the year , by A. B., at the Department of Agriculture" (*g*). As regards paintings, drawings, statuary, and sculptures, the sig-

(*c*) Sect. 4, Act of 1875; and Act of 1886.
(*d*) Sect. 5, Act of 1875; sect. 17, Act of 1886.
(*e*) Sect. 4 (2), Act of 1875; sect. 5 (1), Act of 1886. The section places no limit on the time within which republication must be effected.
(*f*) Sect. 7, Act of 1875; sect. 9, Act of 1886.
(*g*) Under an amending Act of 1908, the following short form of copyright notice is now substituted, "Copyright, Canada, 19 , by A. B."

nature of the artist is deemed sufficient notice of the proprietorship (*h*).

4. Whenever the author of a literary, scientific, or artistic work or composition which may be the subject of copyright has executed the same for another person, or has sold the same to another person for due consideration, such author will not be entitled to obtain or retain the proprietorship of such copyright, which is by the said transaction virtually transferred to the purchaser, who may avail himself of such privilege unless a reserve of the said privilege be specially made by the author or artist in a deed duly executed (*i*).

Interim copyright.

Pending the publication or republication in Canada of a literary, scientific, or artistic work, the author may secure interim copyright (*i.e.*, for one month from the date of the original publication elsewhere) by depositing a copy of the title or a designation of the work intended for publication or republication in Canada. The author must publish the registration of this interim copyright in the "Canada Gazette" (*k*). When interim copyright is secured the work must be published in Canada within one month of its original publication elsewhere under a maximum penalty of 100 dollars (*l*).

Piracy.

Offenders forfeit the plate and every sheet copied, and are liable to a penalty varying from ten cents to a dollar for every sheet—half to the proprietor and half to the Crown.

Assignment.

The right is assignable either as to the whole or in part by an instrument in writing made in duplicate and recorded in the Office of the Minister of Agriculture (*m*).

Importation.

Sect. 15 (*n*) of the Act provides that "works of which the copyright has been granted and is subsisting in the United Kingdom, and copyright of which is not secured or subsisting in Canada under any Canadian or Provincial Act, shall upon being printed and published, or reprinted and republished in Canada, be entitled to copyright under this Act; but nothing in this Act shall be held to prohibit the importation from the United Kingdom of copies of such works legally printed there."

If, on the other hand, a work be copyrighted in Canada, then such importation into Canada is forbidden (*o*); and by sect. 4 of the Imperial Act (38 & 39 Vict. c. 53), which authorised the

(*h*) Sect. 9, Act of 1875; sect. 12, Act of 1886.
(*i*) Sect. 16 in both Acts.
(*k*) Sect. 10, Act of 1875; sect. 13, Act of 1886.
(*l*) Sect. 17, Act of 1875; sect. 33, Act of 1886.
(*m*) Sect. 18, Act of 1875; sect. 15, Act of 1886.
(*n*) Sect. 6, Act of 1886.
(*o*) Sects. 11 and 13, Act of 1875; sects. 30 and 32, Act of 1886.

Crown to assent to the Canadian Act of 1875, it was provided that when any book in which there is imperial copyright becomes entitled to copyright in Canada "it shall be unlawful for any person, not being the owner in the United Kingdom, of the copyright in such book, or some person authorised by him, to import into the United Kingdom any copies of such book reprinted or republished in Canada."

**British works entitled to copyright in Canada.**

In order to appreciate the effect of this legislation as regards British and foreign authors, it must be remembered that the Imperial Copyright Act, 1842 (*p*), conferred upon any person first publishing a literary work in the United Kingdom copyright not only in the United Kingdom, but in the colonies and dominions of the Crown. On the other hand, the Fine Arts Copyright Act, 1862 (*q*), did not confer any imperial copyright, and a British artist could only obtain copyright in his pictures under the Canadian Act (*r*). It has been held that the Canadian Act of 1875 did not abrogate, so far as Canada was concerned, the Imperial Act of 1842 (*s*).

**Foreign reprints may not be imported into Canada.**

Canada at first took advantage of the Foreign Reprints Act, 1847 (*t*), but later she declined to make the collection of *ad valorem* duties required by the Act, and thereupon it ceased to have any force in Canada, and it became illegal under the Imperial Act of 1842, s. 17, to import into Canada any books, wheresoever printed, which had British copyright, and this notwithstanding that the notices to the Customs authorities required by sect. 152 of the Customs Consolidation Act, 1876 (*u*), had not been given, for that section has no application where a colony makes, as Canada does, its own Customs arrangements (*x*).

**Complaints of Canadian publishers.**

This state of the law as to copyright gave great dissatisfaction to Canadian printers and publishers. They complained that they were damaged, on the one hand, by authors belonging to the United States publishing in Great Britain and thus securing copyright in Canada, and, on the other hand, by British authors making arrangements with United States publishers whereby the latter secured the Canadian, as well as the United States, market, the consequence being that Canada was flooded with cheap

(*p*) 5 & 6 Vict. c. 45.
(*q*) 25 & 26 Vict. c. 68.
(*r*) *Graves* v. *Gorrie*, (1903) A. C. 496.
(*s*) *Smiles* v. *Belford* (1877), 1 Ont. App. R. 436; *Morang* v. *Publishers' Syndicate* (1900), 32 O. R. 393; *Black* v. *Imperial Book Co.* (1903), 5 Ontario L. R. 184; (1905), 21 T. L. R. 540; *Hawkes* v. *Whaley, Royce & Co.*, "The Author" for 1913, p. 202.
(*t*) 10 & 11 Vict. c. 95, *ante*, p. 332.
(*u*) 39 & 40 Vict. c. 36.
(*x*) *Black* v. *Imperial Book Co.*, *supra*; see *ante*, p. 333.

American reprints which Canada had no power to exclude, to the great detriment of their trade. The Berne Convention only added to these grievances; as it enlarged the class of persons who could obtain copyright in Canada without republishing there.

In the year 1889 the Dominion Parliament, in order to remedy these grievances, passed an Act to amend the Copyright Act, 1875, but the assent of the Crown was refused, and the Act has never become effective law. After some continuous controversy, however, between the colony and the home Government, a compromise was effected, and a Canadian Act was passed in the year 1900 amending the Act of 1886, and this Act duly received the assent of the Crown (*y*). By sect. 1 of this amending Act it is provided that if a book "as to which there is subsisting copyright under the Copyright Act" has been first lawfully published in any part of the British dominions other than Canada, and if it is proved to the satisfaction of the Minister of Agriculture that the owner of the copyright so subsisting and of the copyright acquired by such publication has lawfully granted a licence to reproduce in Canada, from movable or other types, or from stereotype plates, or from electroplates or from lithograph stones, or by any process for facsimile reproduction, an edition or editions of such book designed for sale only in Canada, the Minister may, notwithstanding anything in the Copyright Act, by order under his hand, prohibit the importation, except with the written consent of the licensee, into Canada of any copies of such books printed elsewhere. Two copies may, however, be specially imported for the *bonâ fide* use of any public free library or any university or college library, or for the library of any duly incorporated institution or society for the use of the members of such institution or society.

Act of 1900.

By sect. 2, the prohibition against importation may be revoked if (a) the licence to reproduce in Canada has terminated or expired; or (b) the reasonable demand for the book in Canada is not sufficiently met without importation; or (c) the book is not, having regard to the demand therefor in Canada, being suitably printed or published; or (d) any other state of things exists on account of which it is not in the public interest to further prohibit importation.

This Act applies to books only, and further, only to books that are copyright in Canada, for the "Copyright Act" mentioned in sect. 1 means the Canadian Copyright Act of 1886. The objec-

Effect of the Act of 1900.

(*y*) 63 & 64 Vict. c. 25 (Canadian), commonly known as "the Fisher Act."

tionable feature of the 1889 Act, whereby an author practically would have lost his copyright in Canada, unless he acquired local copyright also, is dropped. The Act does not touch imperial copyright, and whether a British author takes advantage of the Act, or does not, rests entirely with himself. If he desires to do so, he must make arrangement with a local publisher, and a special Canadian edition must be printed in Canada, though the type need not be set there. Thereupon the Canadian publisher will acquire local copyright for the Canadian edition, and the author or anybody else will be prohibited from importing copies of the work into Canada, but otherwise the author's imperial copyright will not be affected, so that the local copyright is in addition to and concurrent, though not coterminous, with imperial copyright, and affords additional protection and relief. If, on the other hand, the author does not desire to take advantage of the Act of 1900, his imperial copyright remains unaffected.

**Present state of the law.**

Such is the state of the law at the present time. Canada is, of course, one of the self-governing dominions, and sect. 25 (1) of the Imperial Act of 1911 does not, therefore, apply to her. Until such time as she either adopts the Act of 1911, or passes legislation of her own giving such rights "substantially identical with the provisions of that Act or such adequate protection" as will entitle her to an Order in Council under sect. 26 (3) (*z*), the old statutes, including the Literary Copyright Act, 1842, still apply (*a*), so that literary works entitled to imperial copyright under that Act are entitled to protection in Canada; but, on the other hand, pictures, drawings, and photographs are not entitled to any such protection. Some doubt has further arisen as to whether books published after the commencement of the Act of 1911 (*b*) are protected in Canada, inasmuch as under the Act of 1842 registration at Stationers' Hall was necessary before any action for infringement could be brought (*c*), and such registration is no longer possible (*d*).

**Desirability of copyright legislation in Canada.**

It will be seen, therefore, that Canadian legislation bringing that colony into line with the Mother Country is eminently desirable, and it seems probable that some such legislation will be passed at an early date. In fact, in the year 1911, a bill was introduced into the Canadian Parliament following generally the lines of the Imperial Copyright Act, 1911, but for the moment the bill has

(*z*) *Ante*, p. 336.
(*a*) Sect. 26 (2).
(*b*) *I.e.*, 1st July, 1912.
(*c*) *Ante*, p. 16.
(*d*) Cf. *Evans* v. *Morris*, (1913) W. N. 58.

been dropped. The Canadian grievance is mainly against the United States, because American authors are able to acquire British copyright by publishing their works simultaneously in America and England. The works then become entitled to copyright in Canada, and can be imported into Canada without infringement of copyright. The desire of Canada is that such works shall only be entitled to copyright in that country if they have been printed there—in other words, to retaliate upon the United States for the presence of the "manufacturing clause" in their copyright code (*e*). Hitherto the home Government has felt constrained to refuse assent to any Canadian legislation which would have any such effect, because in doing so they would have acted in contravention of Art. 6 of the Revised Convention of Berne, which required that every country of the Copyright Union should accord to authors not the subjects or citizens of any one of the countries of the Union, who first publish their works in this country, "the same rights as native authors." Now, however, that Article 6 of the Revised Convention has been modified by the Additional Protocol of 20th March, 1914 (*f*), it seems probable that a Canadian Act will be passed discriminating against the United States, but giving greater security to British works.

### (b) *Newfoundland.*

Newfoundland has taken the third course referred to on p. 334 as open to the self-governing dominions, and has adopted the British Copyright Act, 1911, and declared that that Act, except those clauses which are expressly restricted to the United Kingdom, shall be in force in the colony (*g*), and her adhesion to the Revised Berne Convention has been notified to the countries of the Union, subject to the same reservation as to the retrospective operation of the Convention as was made by Great Britain (*h*). The adhesion dates from the 1st July, 1912.

### (c) *South African Union.*

At the time of writing the Union has passed no copyright legislation, but it is anticipated that the Union will, at an early date, take advantage of the option given by sect. 25 (2) of the Copyright Act, 1911, and pass an Act conferring upon authors rights "sub-

(*e*) See "United States of America," Part V, *post*.
(*f*) See *ante*, p. 310.
(*g*) An Act respecting copyright, 1912 (2 Geo. V. c. 5).
(*h*) See *ante*, p. 286, n. (*g*).

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stantially identical" with those accorded by the Imperial Act (*i*). In the meantime, however, the laws of each particular colony remain in force locally, though imperial copyright will be regulated by the old imperial statutes (*k*).

Cape Colony.

Cape Colony has four copyright statutes dated respectively 1873, 1888, 1895, and 1905. The Act of 1873 relates to books, musical works, and maps, the period of protection being the life of the author and five years or a gross period of thirty years, whichever shall be longer. The Act of 1905 relates to artistic works, the period of protection being, in the case of works of painting or sculpture, the life of the author and thirty years; in the case of engravings, not published or incorporated in books, thirty years from the end of the year of first sale, exposure for sale, or registration. Registration in the case of books seems to be optional, but in the case of artistic works compulsory, and four copies of any book published in the colony must be delivered to the Registrar of Deeds within a month, to be transmitted by him to certain named libraries (*l*). Under the Act of 1873 the proprietor of the copyright is given an action for damages, and under the Copyright Protection Act, 1895, the importation of reprints of books registered under the Act of 1873 is prohibited, provided notice be given to the Collector of Customs.

Natal.

Natal, under Acts of 1897 and 1898, grants protection to literary and artistic works for the life of the author and seven years after his death, or for forty-two years, whichever period is the longer, two copies to be deposited for registration within three months from publication.

Transvaal.

The Transvaal, by an Act of 1887 (*m*), gives protection to literary and artistic works for a period of fifty years from the first publication, dating from the time of registration, or if the author survives that period during the residue of his life. The work must be printed in the colony, and three copies thus printed must be deposited with the Registrar, but by a resolution of the Volksraad in 1895, this printing condition may be waived in the case of countries giving reciprocal advantages.

Orange Free State.

The Orange Free State has no copyright law.

(*i*) A copyright committee appointed by the legislature made an interim report and drafted a proposed Bill, but the same remains in abeyance for the present.

(*k*) Copyright Act, 1911, s. 26 (2), *ante*, p. 334.

(*l*) Books Registry Act, 1888.

(*m*) This Act will be found set out more fully in the fourth edition of this work, p. 524.

## (d) *The Australian Commonwealth.*

Copyright Act, 1912.

The Commonwealth Copyright Act, 1912 (*n*), declares the British Act to be in force in the Commonwealth, subject to certain modifications. Sect. 10 empowers the seizure of infringing copies imported into the Commonwealth in substantially the same language as that employed in sect. 14 of the British Act. Sect. 11 enables the Governor-General in Council to direct that the British Act and the Commonwealth Act shall extend to literary, musical, dramatic, and artistic works first produced or published in any part of the King's dominions to which the British Act does not extend in like manner as if the works had been first published or produced in the Commonwealth, subject substantially to provisoes similar to provisoes (i) to (vi) in sect. 29 (1) of the British Act.

Summary remedies.

The Act further provides, in sects. 14 to 21, certain summary remedies for infringement of copyright. Sect. 14 is in language identical with that of sect. 11 of the British Act, except that sub-sect. (4), preserving the Musical (Summary Proceedings) Copyright Act, 1902, and the Musical Copyright Act, 1906, is omitted. The summary remedies in the Australian Act are, however, wider than those contained in the British Act. Sect. 15 enacts that "any person who, for his private profit, permits any theatre or other place of entertainment to be used for the performance in public of any musical or dramatic work, without the consent of the registered owner of the sole right to perform or authorise the performance of the work in the State or part of the Commonwealth where the theatre or place is situated, shall be guilty of an offence, unless he was not aware, and had no reasonable ground for suspecting, that the performance would be an infringement of the right to perform or authorise the performance of the work" (*o*)—penalty, £10. Sect. 17 provides that "the registered owner of the sole right to perform, or authorise the performance of, a musical or dramatic work in the Commonwealth, or any part thereof, or the agent of such owner appointed in writing may, by notice in writing, in accordance with the prescribed form, forbid the performance in public of the work, in infringement of his right, and every person to whom a notice has been given in accordance with this section shall refrain from performing or taking part in the performance in public of the work in infringement of the right of such owner,"

(*n*) No. 20 of 1912, set out in Appendix D. This Act repeals the earlier Copyright Act, 1905.
(*o*) Cf. sect. 2 (3) of the British Act.

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subject to a penalty of £10. Any person who, without just cause, gives notice in pursuance of this section is liable to a penalty of £20. These sections are calculated to be helpful in the case of piracies committed by travelling dramatic companies. Sect. 16 gives power to grant warrants authorising seizure of infringing copies offered for sale, and to search premises upon which it is suspected that there are infringing copies (*p*). Summary proceedings must be commenced within six months from the date of the offence, and a conviction is subject to appeal (*q*). The summary remedies do not apply to works of architecture, and the special remedies provided for by sects. 15, 16, and 17 can only be taken advantage of by owners who have registered their copyright under the Act (*r*).

Registration.

The Act provides for registration of copyright, and assignments and transmissions thereof, but such registration is entirely optional (*s*). The advantages of registration appear to be, first, that the summary remedies prescribed by sects. 15, 16, and 17 in case of infringement are open only to a registered owner, and, secondly, because the register is to be *primâ facie* evidence of the particulars entered therein (*t*). Whether registration is sufficient if made before action is brought, as was held under the British Copyright Act, 1842 (*u*), or whether the remedies are only applicable if registration takes place before infringement, is a point that will probably have to be decided by the Courts. Two copies of any book the copyright in which is sought to be registered must be deposited with the Registrar (*x*), and one copy of every book which is first published in the Commonwealth must be sent by the publisher to the Librarian of Parliament within a month after publication (*y*).

Rules have been made under this Act prescribing the method of registration and forms of application; also with regard to the collection of royalties under sects. 3 and 19 (2) of the British Act of 1911 (*z*). These rules follow, generally, the rules made by the Board of Trade in England under the same sections (*a*).

(*p*) These powers are not confined, as in the British Musical Copyright Act, 1906, to musical works.

(*q*) Sects. 19, 20.

(*r*) Sect. 26.

(*s*) Sects. 26, 29.

(*t*) Sect. 33, but even without registration the copyright owner will have the benefit of the presumptions contained in sect. 6 (3) of the Imperial Act: see *ante*, p. 207.

(*u*) See *ante*, p. 16.

(*x*) Sect. 38. All correspondence should be addressed to "The Registrar of Copyrights, Commonwealth Offices, Treasury Place, Melbourne."

(*y*) Sect. 40.

(*z*) Statutory Rules of 1913, No. 338.

(*a*) Appendix E., *post*.

Notice has been given to the countries concerned of the adhesion of the Commonwealth of Australia with Papua and Norfolk Island to the Revised Convention of Berne, subject to a reservation as to the retroactive provisions of the Convention. The adhesion dates, in the case of the Australian Commonwealth and Norfolk Island, from the 1st July, 1912; in the case of Papua from 1st February, 1913.

### (e) *New Zealand.*

Copyright Act, 1913.

New Zealand has recently passed a Copyright Act (*b*), which came into force on the 1st April, 1914, and is based upon the British Act of 1911, together with modifications as to registration, summary remedies, and otherwise, similar to those contained in the Australian Act of 1912 (*c*). The Act, in fact, repeats, in a different order, but in similar language, the sections of the British Act with the following modifications. Sect. 3, which corresponds with sect. 1 of the British Act, provides that copyright shall subsist in New Zealand in every original literary, dramatic, musical, and artistic work if (a) in the case of a published work, it was first published in New Zealand; and (b) in the case of an unpublished work the author was, at the date of the making of the work, a British subject or resident in New Zealand, but in no other works, except so far as the protection conferred by the Act is extended by the Governor in Council thereunder. Sect. 28 (*d*) authorises the Governor in Council to direct that the Act shall extend, subject to the provisions of the section and the Order, (a) to works first published in any part of the British possessions to which the Order relates in like manner as if such works were first published in New Zealand; (b) in respect of residence in any part of the British dominions to which the Order relates in like manner as if such residence were residence in New Zealand. It is further provided (*e*) that any Order made under the section may provide (a) that the term of copyright shall not exceed that conferred by the law of that part of the British dominions to which the Order relates; (b) that the enjoyment of the rights conferred by the Order shall extend to New Zealand only, and shall be subject to the accomplishment of such conditions and formalities as may be prescribed by the Order; (c) for the modification of any provision of the Act as to ownership of copyright or otherwise, having regard to the law of the part of the British dominions to which the Order relates; (d) that the

(*b*) 22nd Nov., 1913.
(*c*) *Ante*, p. 347.
(*d*) Cf. sect. 29 of the British Act.
(*e*) Sect. 28 (2).

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Act may extend to existing works protected in the part of the British dominions to which the Order relates, but subject to the modifications, restrictions, and provisions set out in the Order. But no Order is to be made under this section unless the Governor in Council is satisfied that the part of the British dominions in relation to which the Order is proposed to be made, has made, or undertaken to make, such provisions, if any, as he thinks sufficient for the protection of works first produced or published in New Zealand and entitled to copyright therein (*f*).

**Protection of British works.**

It will thus be seen that the Act itself only accords copyright to works first published in New Zealand and to the unpublished works of persons who are British subjects or resident in New Zealand. But under sect. 28 the Governor in Council may extend the benefit of the Act to works first published in any other part of the British possessions and to the works of authors resident in any other part of the same possessions. A colonial Order has been made extending the Act to Great Britain, and an Order in Council under sect. 26 (3) of the British Act will doubtless extend the benefit of that Act to New Zealand works, so that there may be mutual protection in the two countries.

**Protection of foreign works.**

With regard to foreign works generally, sect. 33 of the New Zealand Act confers upon the Governor in Council similar powers, and subject to similar conditions, as are conferred upon the Crown in Council by sect. 29 of the British Act. An Order has been made, accordingly, extending the provisions of the Act to countries belonging to the Copyright Union and Austria as from the 1st April, 1914, from which date New Zealand may be regarded as a party to the Revised Berne Convention.

The New Zealand Act further contains sections similar to sects. 14 to 21 of the Australian Act conferring summary remedies for infringement of copyright, and it also provides for optional registration of all works, with similar advantages to those given by the Australian Act, repeating, in effect, sects. 28 to 40 of that Act (*g*).

In applying sect. 14 of the British Act relating to importation of infringements, the New Zealand Act provides that notices against importation given to the Commissioners of Customs and Excise in the United Kingdom, and by them transmitted to the

(*f*) General rules have been made under the Act dated 27th March, 1914. These rules are very similar to the rules made by the Australian Commonwealth. Official correspondence should be directed to "The Registrar of Copyright, Wellington."

(*g*) See *ante*, p. 348.

Customs authorities in New Zealand, shall be considered as given by the owner of the copyright to the Minister of Customs in New Zealand (*h*).

## (f) *British India.*

The Indian Government has taken advantage of the power conferred by sect. 27 of the British Act and has by a recent Act (*i*) introduced local modifications and additions to the British Act. The most important modification is contained in sect. 4, which provides, with regard to works first published in India, that the right of producing, reproducing, performing, or publishing a translation shall be restricted to a term of ten years from the day of first publication of the work, but that if during this period the author or any person authorised by him shall have published in any language whatsoever a translation of such work, the exclusive right of producing, reproducing, performing, or publishing a translation in that language shall not be subject to the above restriction (*k*). A musical work is defined as "any melody or harmony, combined or not, fixed by writing" (*l*). Sects. 7 to 12 provide certain summary remedies for infringement of copyright, similar to those contained in sect. 11 of the British Act.

(*h*) Sect. 2.
(*i*) Indian Copyright Act, 1914 (No. 3 of 1914).
(*k*) Cf. sect. 5 of the International Copyright Act, 1886 (49 & 50 Vict. c. 33).
(*l*) Sect. 5.

# PART V.

# COPYRIGHT IN FOREIGN COUNTRIES.

## France.

The French copyright law stands sadly in need of codification, the laws on the subject numbering about a score.

Before entering into any details of the law of copyright under the different heads of literature, the drama, music, and art, it will tend to make the subject clearer, and will be more useful for reference, first, to give an account of the principal laws on the subject in their order of date, and then touch upon the application of these laws.

Decree of 13th Jan., 1791.

The first decree on copyright is that of 13th—19th January, 1791, concerning public performances.

*Art.* 1. Any citizen may open a public theatre and give representations of pieces of every kind on condition of making a declaration, previously to the establishment of his theatre, at the local municipality (*a*).

*Art.* 2. The works of authors dead five years or more before the date of this decree are public property, and may, notwithstanding all ancient privileges, which are abolished, be represented in any theatre.

*Art.* 3. The works of living authors cannot be represented in any public theatre throughout France without the formal consent in writing of such author under penalty of confiscation of the gross receipts from such representations for the benefit of the authors (*b*).

*Art.* 4. The provision of Art. 3 applies to works already represented, whatever the former regulation may have been; nevertheless agreements which may have been made between comedians and living authors or authors dead within five years shall be performed.

(*a*) The liberty was suppressed in 1806, and not re-established till the decree of the 6th Jan., 1864.

(*b*) The provision as to confiscation of receipts is reproduced in Art. 428 of the Penal Code now in force.

*Art.* 5. The heirs or assigns of authors shall be the proprietors of their works for the period of five years after the death of the author (*c*).

Then follows a further decree on the same subject dated 19th July—6th August, 1791.

The drama. Decree, 19th July, 1791.

*Art.* 1. Conformably to the provisions of Arts. 3 and 4 of the decree of 13th January last, concerning public performances (*spectacles*), the works of living authors, although represented before that date, whether engraved or printed or neither, cannot be represented in any public theatre throughout the kingdom without the formal written consent of the authors, or in the case of authors dead within five years before the 13th day of January, that of their heirs or assigns, under penalty of confiscation of the gross receipts from such representations for the benefit of the author, his heirs, or assigns.

*Art.* 2. Agreements between authors and managers (*entrepeneurs*) shall be free.

Literary copyright. Decree, 19th July, 1793.

Then follows the decree of the National Convention of 19th—24th July, 1793, relating to the right of property of authors in works of literature (*écrits*) of all kinds, of composers of music, of painters and draughtsmen (*dessinateurs*). This may be looked upon as the fundamental law on copyright although the majority of its provisions have been modified by subsequent legislation. They are as follows:—

Duration.

*Art.* 1. The authors of writings (*écrits*) of all kinds, composers of music [architects, sculptors] (*d*), painters and draughtsmen, who engrave pictures or drawings, shall enjoy during their whole life the exclusive right to sell, and distribute their works within the territory of the Republic, and to assign their property in such right in whole or in part. [Sculptors and ornamental designers are to have the same rights, whatever may be the merit or destination of the work.] (*e*).

*Art.* 2. Their heirs or assigns shall enjoy the same right for the space of ten years after the death of the author (*f*).

(*c*) The duration of the right has been extended by the law of 14th July, 1866.

(*d*) These words were inserted by the law of 11th March, 1902.

(*e*) This provision is also new (law of 11th March, 1902). The enumeration contained in this article is not exclusive: it applies to all works of art, and was held to apply to manufacturing designs until the law of 18th March, 1806. "Lois françaises et étrangères," by M. Lyon-Caen. Paris, 1889.

(*f*) The time has been successively increased by the laws of the 5th Feb., 1810, the 8th April, 1854, and the 14th July, 1866.

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*Art.* 3. The magistrates (*officiers de paix*) (*g*) shall be bound to confiscate for the benefit of the authors, composers, painters or draughtsmen and others, their heirs or assigns, all copies of editions printed or engraved without the formal permission in writing of the authors.

*Art.* 4. Every infringer (*contrefacteur*) shall be bound to pay to the true proprietor a sum equivalent to the price of 3,000 copies of the original edition (*h*).

*Art.* 5. Every seller of a pirated edition, if not convicted of being the infringer, shall be bound to pay to the true proprietor a sum equivalent to the price of 500 copies of the original edition (*h*).

*Art.* 6. Every citizen who produces a work, whether of literature or engraving of whatever kind, must deposit two copies at the National Library or at the Stamp Office of the Republic, for which he will get a receipt duly signed, failing which he can have no right of action against an infringer (*i*).

*Art.* 7. The heirs of an author of a work of literature or engraving, or of every other production of the intellect or genius which can be classed as a work of art, shall have the exclusive property of such work during ten years (*k*).

Posthumous works.

Proprietors by descent, or any other title, of posthumous, literary, and dramatic works have the same rights as the author; and the provisions of the law concerning the exclusive property of authors and its duration are applicable to such proprietors (*l*).

Law of 1st Sept., 1793.

A further law was enacted on the 1st September, 1793, in relation to theatres and to the right of representation and performance of dramatic and musical works. By this law the decree of the 30th August, 1792, was repealed, and all the provisions of the laws of the 13th January, 1791, and the 19th July, 1793, were made applicable, and the supervision of public performances was declared to continue to belong exclusively to the municipal authorities. Managers or partners were directed to keep a register in which they should enter (the entries to be signed by the police officers on duty) at every performance the pieces played to show the number of performances of each piece.

Law of 22nd March, 1805.

Posthumous works were dealt with by the law of the 22nd

(*g*) By the law of June, 1795, these functions were transferred to (*commissaires de police*) police superintendents, or where there were none to the magistrates (*juges de paix*).

(*h*) But see the Penal Code of 1810.

(*i*) The deposit is now regulated by the law on the liberty of the press of the 29th July, 1881. See p. 357.

(*k*) The time was successively increased by the laws of the 5th Feb., 1810, and 8th April, 1854, and is now fifty years under the law of the 14th July, 1866.

(*l*) Decrees, 8th Dec., 1805, 8th June, 1806; see also decree of 15th Oct. 1812.

March, 1805, which enacted "that the owners, by inheritance or any other right, of a posthumous work have the same rights as the author, and the provisions of the laws on the exclusive property of authors and on their duration are applicable, provided that the posthumous works are printed separately and without being joined to a new edition of works already published and become public property" (*m*). Books of the church were specially dealt with by the law of the 29th March, 1805, and official documents by the law of 20th February, 1809.

Law of 8th June, 1806.

Under the law of the 8th June, 1806, authors and managers are to be free to fix by mutual agreement the remuneration payable to the former, either in a fixed sum or otherwise.

The local authorities are to keep a strict eye on the performance of these agreements.

The proprietors of posthumous dramatic works have the same rights as the author, and the provisions relating to the property of authors and its duration are applicable to such works as is provided by the law of the 22nd March, 1805.

Law of 5th Feb., 1810.

Under the law of the 5th February, 1810, confiscation and fine for the benefit of the State, without prejudice to the provisions of the penal code, will take place in the following cases:—

If there is a piracy, that is to say, if a work is printed without the consent and to the prejudice of the author or publisher or their representatives.

In this case this shall be in addition to the damages to the author or publisher or their assigns; and the edition or the pirated copies shall be confiscated to their profit (*n*).

The penalties and the damages shall be decided by the police or criminal court according to the circumstances and the law.

Offences shall be reported by the inspectors of the press and of the book trade, police officials, and in addition by the officers in charge of the custom house as to books coming from foreign countries.

A law of the 20th February, 1809, regulated the publication of manuscripts belonging to libraries and other institutions.

Procedure and remedies.

The "Code Civil," Arts. 544, 1302, the *Code de Procédure Civile*, Arts. 59 and 1036, and the *Code d'instruction criminelle*, Arts. 637 and 638, define property in general, indicate the remedies and procedure of injured parties, and limit the time

(*m*) This law is applicable to musical works, and by the law of the 8th June, 1806, was declared to be applicable to dramatic works. "Lois françaises et étrangères," par M. Lyon-Caen.

(*n*) Repealed by the Penal Code of 1810.

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during which actions may be brought. These general provisions are also applicable to copyright.

Penal Code on piracy.

The *Code Pénal* of March, 1810, Arts. 425 to 429, makes piracy a misdemeanour (*délit*).

The drama. Law of 3rd Aug., 1844.

The law of 3rd August, 1844, provides that the widows and children of the authors of dramatic works shall have from that date the right during twenty years to authorise the representation and to confer the advantages arising from such works in conformity with the provisions of Arts. 39 and 40 of the imperial decree of the 5th February, 1810 (*o*). Art. 39 of that decree made the widow's right dependent on the marriage agreement. Art. 40 provided that authors, whether natives or foreigners (*p*), of every work printed or engraved, might assign their right to a printer or bookseller or any other person who would then be substituted in their place, for them and their representatives according to the preceding Article.

Reciprocity. Decree, 28th March, 1852.

By the decree of 28th March, 1852, it is made unlawful, without the permission of the author, to publish a work already published in a foreign country with which no copyright convention exists. This decree will be dealt with more fully hereafter (*q*).

Copyright law, 8th April, 1854.

By the law of 8th April, 1854, repealed by the law of the 14th July, 1866, the twenty years term of copyright vested in the children of the author was extended to thirty years.

On the 6th January, 1864, a new law was enacted in relation to theatres.

On the 16th May, 1866, the following provision was made with regard to mechanical musical instruments:—

The manufacture and sale of instruments mechanically reproducing musical airs which are private property, do not constitute the act of piracy provided and punished by the law of the 19th July, 1793 (*r*).

Copyright law, 14th July, 1866.

Then comes the law of the 14th July, 1866, by which protection of copyright is given to all heirs of an author for fifty years after his death. The provisions of this law are as follows:—"The duration of the rights given by former laws to the heirs, irregular successors (*successeurs irréguliers*), donees, and legatees of authors, composers, or artists is extended to fifty years from the death of the author."

(*o*) Repealed by the law of the 14th July, 1866.
(*p*) Understood to be confined to works published in France. "Lois françaises et étrangères," par Lyon-Caen.
(*q*) *Post*, p. 366.
(*r*) This clause will be more fully considered under "Musical Copyright," *post*.

During this term of fifty years the spouse of such author, whatever may be the provisions of the marriage contract, and independently of the rights of such spouse under the *régime de la communauté*, has a life interest in the rights which the deceased spouse has not alienated by assignment during life or by will.

Nevertheless, if the author leaves *héritiers à réserve*, such life interest is reduced in favour of such heirs in accordance with the provisions of Arts. 913 and 915 of the Civil Code. The above laws for the most part deal with the duration of copyright and its mode of descent. In other respects the provisions are general and somewhat difficult to apply in particular cases. Reference to the decisions of the French Courts is, therefore, necessary for an elucidation of the law.

Law of 29th July, 1881.

On the 29th July, 1881, a law was passed relating to the liberty of the press: it provides that upon publication of any printed matter, the printer (*s*) shall, under penalty of a fine of 16 to 300 francs, deposit two copies for the national collections. The names and addresses of the proprietor and printer must also be given. In Paris this deposit shall be made at the Ministry of the "Intérieur"; at the *préfecture* for the chief town of the departments; at the *sous préfecture* for the county towns of the hundreds; and for other towns at the town clerk's office. *Bulletins de votes* (voting lists), commercial and trade circulars, and *les ouvrages dits de ville ou bilboquets* are excepted from this provision.

The preceding provisions are applicable to every kind of printed matter or reproductions intended to be published; but in the case of prints, music, and generally of reproductions other than printed matter, the deposit prescribed by the preceding Article is to be of three copies.

Laws of 1902 and 1910.

A law of 11th March, 1902, extended copyright protection to works of sculpture and architecture; and a law of 9th April, 1910, provided that the alienation of a work of art should not, in the absence of contrary agreement, carry the copyright.

## *Literary Copyright.*

Literary copyright.

The works of literature protected by the copyright laws are comprised in the terms "*écrits en tout genre*" which occur in

(*s*) It has been suggested that the duty should be laid upon the publisher. The provisions as to deposit do not apply to works published in a foreign country which is a party to the Berlin Convention, 1908. See *post*, p. 367.

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the law of 19th July, 1793. The following are a few of the principal decisions on the meaning of this expression:—

What protected.

A compilation effected by an author by means of analysis and classification, such as a descriptive catalogue, a nautical almanac, or a dictionary, and having a scientific or literary character, is entitled to protection. A catalogue of works of art exhibited at the Palais de l'Industrie has been protected (*t*), but not a catalogue of postage stamps (*u*).

Newspapers.

A newspaper may reproduce news, whether telegraphic or not, received and published by another newspaper (*x*); but reports, *e.g.*, of public meetings, may be the subject of copyright (*y*); and literary articles and romances in a newspaper remain the property of the author, provided it be duly registered (*z*). Public dissertations and lectures of professors cannot be published without the consent of the authors (*a*). The publication of private correspondence is not allowed without the consent of the writer or his heirs (*b*).

Manuscripts and translations.

Manuscripts form a distinct category, and can only be published by the heirs or assigns, and not by the creditors of the author (*c*). A translation is the property of the translator, and cannot be copied (*d*), but it cannot be made without the consent of the author of the original or his legal representatives (*e*).

Duration.

Rights of author's widow.

The duration of literary copyright is regulated by the law cited above of the 14th July, 1866. By this law the surviving widow has a right of survivorship over the works left by her husband, even when by the marriage settlement and the law of succession she has no such right in respect of other property of her husband: if the author have assigned his rights the widow has no right of survivorship over the purchase-money (*f*).

Rights of widower of an authoress.

The widower of an authoress has the same rights in respect of her literary works as the widow of an author.

Posthumous works.

The proprietors of posthumous works who publish them have the same rights as authors, on condition that they do not publish such works in a collection with the other works of the author (*g*).

(*t*) Seine, 1st Aug., 1892, Société des artistes.
(*u*) Seine, 20th Dec., 1895, Mauret.
(*x*) Cass. 8th Aug., 1861, Havas.
(*y*) Nancy, 14th April, 1902, Société des gens de lettres.
(*z*) Cass. 29th Oct., 1830, Le Pirate.
(*a*) Paris, 18th June, 1840, Hérit. Cuvier; Lyon, 17th July, 1845, Marie; Seine, 9th Dec., 1902, Esmen.
(*b*) Paris, 11th June, 1875, Gentil.
(*c*) Dijon, 18th Feb., 1870, de Chapuys.
(*d*) Cass. 25th July, 1824, Ladvocat.
(*e*) Paris, 17th July, 1847, Leclerc.
(*f*) Fliniaux, l. c. p. 98.
(*g*) Fliniaux, l. c. p. 98. Law of 22nd March, 1805, *ante*, p. 355.

It is the opinion of M. Pouillet that, in the case of anonymous or pseudonymous works, the life of the publisher is substituted for that of the author (*h*).

The State. The State enjoys copyright in perpetuity over works published by its order or by its agents (*i*).

Registration and deposit. In order that an author may be fully protected, and have a right of action in cases of piracy, the printer must deposit two copies of the work at the Ministry of the Interior at Paris, and at the Prefecture for county towns: at the town clerk's office for other towns under the law of the 29th July, 1881 (*k*). A receipt is given as evidence.

The copyright of a MS., even of a play already performed, is protected without the deposit of copies, so long as it has not been made public by printing. But once printed, the author or publisher who neglects the formality of deposit in accordance with the provisions of the law, cannot prosecute infringers of his rights in either a civil or criminal court. The right does not depend upon deposit, but only the title to sue, and an author, after deposit, can sue in respect of infringements committed prior thereto (*l*).

Assignment. Assignment of literary copyright is regulated by the general law as to assignment of property. Heirs can assign their rights in the same way as an author, either in whole, or in part, for a consideration or not. An author who has assigned the right to publish an edition of one of his works, is bound not to publish a fresh edition before the former one is exhausted (*m*).

The assignment without any reserve of a work to which an author has put his name, does not give the person to whom it is assigned the absolute disposal of it to such an extent that he can alter it by changes or additions (*n*).

In those cases where an alteration in the law extends the term of copyright granted to the heirs of an author, the extended term is considered to belong to the family of the author in preference to his assigns, and the term vested in the persons to whom it has been assigned is that existing at the date of the assignment in conformity with the Civil Code, Art. 1153. Hence the extension of the term of copyright granted by the laws of 8th April, 1854, and the 14th July, 1866, is for the benefit of the author's heirs,

(*h*) Pouillet, Propriété Littéraire et artistique, 4th ed., sect. 147.
(*i*) Cass. 27th May, 1842, Gros; Paris, 5th May, 1877, Peigné.
(*k*) See *ante*, p. 357.
(*l*) Pouillet, sects. 432 *et seq.*
(*m*) Cass. 22nd Feb., 1847, Laurent. A publishing agreement is not assignable. Seine, 30th Nov., 1892, André.
(*n*) Paris, 14th Aug., 1860, Peigné. Seine, Tr. Civ. 12th Jan., 1875, Vve. Michelet.

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and not of the publishers to whom he may have assigned his works (*o*).

Piracy.

Piracy under the French law is the illegal reproduction of the works of another, literary or musical, not yet public property, which reproduction is made publicly with the intention to injure, whether by printing or public representation. Piracy gives rise, as a misdemeanour, to an "*action correctionnelle*"; if the intention to injure be not proved, the author of the work reproduced may bring a civil or commercial action for compensation in respect of the damage done to him. Piracy is committed although the offender may not have completed the printing of the work.

A literal copy (*la copie servile*) of about one-fourth of a work constitutes the offence of partial piracy. *Il y a également contrefaçon, quelle que soit la matière de la reproduction ou la qualité de l'auteur ou du propriétaire de l'ouvrage contrefait. Elle est indépendante des moyens à l'aide desquels elle est produite* (*p*).

Abridgments and compilations.

An abridgment is an infringement of copyright, but the rules relating to infringement must not be applied strictly when the work in question is an historical or biographical dictionary, works of this nature being necessarily compilations, of which the elements are either in the public domain or taken from the same sources and have always inevitable points of resemblance; but it is not permissible for an author of a new work of this character to copy his predecessors and appropriate their work (*q*). Acknowledgment of the source from which extracts have been taken will not necessarily cause a piracy.

The following are a few decisions on cases of piracy: (1) Piracy is committed from the moment there is a violation of the absolute right of property given by law, no matter what be the merit or importance of the work pirated (*r*). (2) It is a piracy to copy without authorisation a work even of small extent and to annex it to another work of a different author (*s*). (3) The composers of airs or of musical works can prevent such airs from being inserted without their consent in other works, even though they may have tolerated such insertion for a longer or shorter period.

Piracy, whether whole or partial, forbidden.

The law prohibits piracy whether total or partial. There is no doubt that the protection of the law is extended to every work in its entirety, and to all its parts. It therefore follows that

(*o*) Paris, 12th July, 1852; Cass. Ch. Crim. 29th April, 1876, Pradier; Cass. Ch. req. 20th Nov., 1877, Degorce—Cadot.
(*p*) Code du Théâtre, &c. C. Le Seine, Paris, 1878.
(*q*) Seine, 12th Jan., 1893, Larousse.
(*r*) Paris, 11th March, 1869, aff. Godchau.
(*s*) Paris, 27th June, 1812, aff. St. Georges.

partial piracy is an offence of the same order as total piracy. The law has taken care expressly to provide for this, as may be seen from the words "*en entier ou en partie*," in Art. 425 of the Code Pénal (*t*).

Translation.

Owing to their generality the provisions of the law of 1793 apply to every sort of reproduction which infringes the right of property of another. The translation of a French book into a foreign tongue is such a reproduction (*u*).

The following points have also been decided:—

Points of note which have been decided.

(1) That it is piracy to borrow from a published work, its subject, general plan, and the development of its episodes (*x*); (2) that it is piracy to publish in the form of a pamphlet the analysis of a play, even when accompanied with critical remarks, if such publication would clearly interfere with the sale of the original work (*y*); (3) that it is piracy for a newspaper to give literally an analysis of all the chapters of a romance, even when accompanied by critical remarks, if it is clear that such reproduction will interfere with the sale of the original, by revealing the plan and most important details of the work (*z*); (4) that it is a piratical reproduction to publish and sell a faithful *résumé* of a play so as to injure its sale (*a*); (5) that it is piracy on the part of an author to give his work a title analogous to that of another work already published, when he follows the plan and borrows passages from it (*b*).

### *Dramatic and Musical Works.*

Dramatic and musical copyright.

The publication of dramatic and musical works is regulated by the same laws as those relating to literary works.

Joint productions.

A work which consists of words and music by different authors is the joint property of the two, and cannot become public property until the rights of the heirs of each have expired: the unexpired rights of the heirs of one of the authors prolongs the existence of the rights of the heirs of the other author (*c*).

Taking plot of novel for drama.

It is lawful to appropriate the plot of a novel for the purposes of a drama, but the characters, situations, and episodes must be

(*t*) Pouillet, sect. 466.
(*u*) Paris, 17th July, 1847, aff. Lecointe.
(*x*) Paris, 20th Feb., 1872, aff. Sarlit.
(*y*) Nimes, 25th Feb., 1864, aff. Offray.
(*z*) Paris, 13th July, 1830, aff. Darthenay, Dall. 30, 2, 235.
(*a*) Paris, 12th March, 1845, aff. Durand.
(*b*) Cass. 26th Nov., 1853, Laurent de Villedenil, Roland de Villargues, Art. 425, Code Pénal.
(*c*) Paris, 27th June, 1866, Gérard.

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changed so as to make a new work (*d*). The turning of a drama into a novel is an infringement (*e*).

Registration and deposit.

Published dramatic works must be deposited like other literary works—and the same with regard to music with a text. In the case of music without words there is no law compelling deposit, but in practice it is generally made. The law of deposit is now regulated by the law of the 29th July, 1881: three copies are required (*f*).

Representation.

The exclusive right of representation of dramatic and musical works is by the law of 14th July, 1866, secured to the author for life, and to his heirs for fifty years after his death, exactly as in the publication of works of literature.

The right of representation is distinct from the right of publication, each being guaranteed by different enactments, the former by the law of 1791 and Art. 428 of the Penal Code, the latter by the law of 1793 and Art. 452 of the Penal Code. All works intended for public performance are protected, as plays, operas, and musical compositions, whether vocal or instrumental, and dance music, as well as other compositions. The right of representation comprises, as regards the author, merely the right to authorise the representation of his work; the right of publication comprises the right to reproduce the work by copies printed, engraved, or written by hand for circulation from one person to another. Hence, it follows that the granting of one of these rights does not include the granting of the other. Therefore, the director of a theatre authorised to *represent* a dramatic work cannot contend that he is invested with the *right of publication*, and, consequently, with the right of copying it for the purpose of representing it (*g*). Cinematographs infringe the performing rights, rather than the literary rights (*h*).

An author who publishes his dramatic work in print does not lose thereby the exclusive right of representation.

Musical works.

The publisher of the music of an opera is not impliedly authorised by his contract with the composer alone to print the words with the music (*i*).

Gramophones, &c.

The law with regard to mechanical instruments stands in a peculiar position. By the law of 16th May, 1866, it is provided that the manufacture and sale of instruments mechanically re-

(*d*) Paris, 20th Feb., 1872, Delagrave.
(*e*) Seine, 23rd June, 1897, Heritiers de Dumas.
(*f*) See *ante*, p. 357.
(*g*) Pouillet, sect. 746.
(*h*) *Calmann-Levy* v. *Dumas*, Cour de Paris, 17th May, 1912.
(*i*) Trib. Corr. de la Seine, 2nd Aug., 1826.

producing "musical airs" which are the subject of copyright, shall not be deemed to infringe that copyright. This law was passed in order to enable France to comply with her treaty obligations with Switzerland, that country having stipulated for some such provision in the interests of her local "musical box" industry. The law in question has received a strict construction in France, and it has frequently been held to apply to musical "airs" alone, and not to authorise the reproduction mechanically of words as well as music. Under the Revised Berne Convention (Art. 13), to which France is a party, all musical works are to be protected against mechanical reproduction. It follows, therefore, that foreign musical composers have greater rights in France than those accorded to native authors, and, consequently, there is a strong movement in France for the repeal of the law of 1866, and it is probable that this movement will shortly meet with success. The right of public performance by means of mechanical instruments falls within the prohibition contained in the law of 1791, and the law of 1866 has not derogated from the rights of the musical composer in this respect (*k*).

As regards French plays not yet public property, their plan, subject, characters, arrangement of scenes and actions are of capital importance, independently of style, language, and composition. It is, therefore, piracy to write a similar work, even in a foreign language, without the sanction of the author of the original, and any such imitation may be confiscated and the performance stopped, unless a new work is produced.

The right which belongs to the author of a dramatic work of preventing the representation of an imitation of his work in a foreign language, is distinct from and independent of the right to prosecute for piracy committed by printing. Consequently, loss by prescription of the right of action against the person committing piracy, does not involve loss of the right to forbid the representation of such work (*l*).

Adaptations.

The following cases have been decided as to adaptations: (1) That it is piracy to adapt a novel for the theatre without the consent of the author (*m*); (2) That the transformation of a dramatic work in prose into an opera is also an act of piracy (*n*); (3) That it is piracy to modify a theatrical piece, so as to adapt it for use as an opera libretto, if the plot and arrangement of the

(*k*) Justice de Paix de Douai, 31st July, 1906.
(*l*) Code du Théâtre: C. Le Seine, Paris, 1878.
(*m*) Paris, 27th Jan., 1840, aff. de Musset; Dall. V. Prop. litt. No. 187.
(*n*) Paris, 6th Nov., 1841, aff. Victor Hugo.

scenes (*la disposition des scènes et la marche générale de l'ouvrage*) have not been altered (*o*).

**Piracy of an unpublished play.**

This principle applies also to unpublished works, and it has been decided that it is piracy to take down by shorthand during representation an unpublished play, for the purpose of having it printed (*p*).

**Right of representation independent of deposit.**

Deposit is only necessary in cases of works printed or engraved, and when a piece has been printed or engraved without the formality of deposit, it does not follow that the author loses his right to control the representation. He can always prosecute those who in contravention of his rights represent his works, whether printed or engraved, although no deposit has taken place (*q*).

**Combined effect of laws of 1791 and 1793.**

The combined effect of the laws of 13th of January and 6th August, 1791—19th July and 1st September, 1793, is to guarantee to the authors of dramatic works the right of property in such works, and the right to dispose of them during their lives, either for the double purpose of publication by printing and representation, or separately for either of these purposes (*r*).

**Penalties.**

Every infringement of the right of public representation is punishable by confiscation of the gross receipts for the benefit of the author. This principle is established by the law of July—August, 1791, and Art. 428 of the Code Pénal (*s*).

### *Artistic Copyright.*

**Artistic copyright.**

The law of 19th July, 1793, puts "*les peintres et dessinateurs qui font graver des tableaux ou dessins*" on the same footing with "*les auteurs d'écrits en tout genre*"; and the law of 11th March, 1902, has expressly brought architects and sculptors within the law, and rendered any inquiry as to the merit or destination of their work unnecessary.

**Duration.**

The duration of the copyright is the same as in the case of other works, namely, the life of the artist and fifty years after his death.

**Works protected.**

Artists have a latitude which is not allowed to others. They may utilise the ideas and works of other people on condition that their work is not a servile reproduction, and that it possesses a certain amount of originality.

(*o*) Paris, 30th Jan., 1865, aff. Scribe.
(*p*) Paris, 18th Feb., 1836, aff. Fréd. Lemaître, Dall. V. Prop. litt. No. 345.
(*q*) Code du Théâtre, &c.: C. Le Seine, Paris, 1878.
(*r*) Etude sur la Prop. des Œuvres posthumes: E. Collett & C. Le Seine, Paris, 1879.
(*s*) Code du Théâtre, Lois, Règlements, Usages, Jurisprudence, par C. Le Seine, Paris, 1878.

It is not lawful to reproduce for sale an engraving or picture which belongs to another by sculpture, drawing, painting on porcelain, or by needlework, even though in the case of a picture, the colours be omitted (*t*); but a partial copying may be lawful, so long as the copyist does not do anything to endanger the reputation of the artist (*u*). Fraudulent placing of a name upon paintings, sculptures, designs and music is an offence dealt with by the law of 9th February, 1895.

**Photographs.**

Photographs, not being expressly dealt with by any legislation, have been a matter of controversy. Three theories have been propounded:—(a) that all photographs are protected under the law of 19th July, 1793; (b) that no photographs are protected; (c) that only photographs that have artistic merit are protected. Theory (b) is clearly incorrect, but, until recently, the Courts have generally leant in favour of the view that artistic merit is a condition of protection. It is doubtful, however, whether this is any longer so, particularly having regard to the fact that under the law of 1902, above referred to, architects and sculptors are entitled to copyright in their works "whatever be the merit or destination of the work" (*x*).

**Alienation of material object does not convey copyright.**

It was held in a series of cases decided by the French Courts that the assignment of an artistic work *primâ facie* carried with it the copyright. This has now been altered by the law of 9th April, 1910, which enacts that "the alienation of a work of art does not, in the absence of contrary agreement (*y*), include the alienation of the right of reproduction." There was, however, a departmental decree to the effect that when artistic works were purchased for the State, all rights of reproduction should pass to the State. A decree has been recently issued modifying the previous decree, the effect of the later decree being that, whilst the State reserves the right, in the case of artistic works commissioned for, or purchased by the State, to authorise the reproduction of the same by engravings or photographs in works or publications relating to artistic or historical education, and the copying of the works by students, artists are to have the right to prevent third persons from copying the works for commercial purposes. No work commissioned, or acquired by, the State may be repeated without the express authority of the Education Department (*z*).

(*t*) Fliniaux, l. c. p. 111.
(*u*) Paris, Cour d'Appel, 26th Nov., 1902, Trouillebert.
(*x*) See *Roland* v. *X.*, Trib. Civ. de la Seine, 30th Dec., 1911.
(*y*) "In the absence of express agreement to the contrary," were the words appearing in the Bill as originally drafted; but the word "express" was struck out during the passage of the Bill through Parliament.
(*z*) Decree of 18th March, 1913, "Le Droit d'Auteur," 1913, p. 74.

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Registration and deposit.

By the laws of the 19th July, 1793, and 9th January, 1828, engravings, lithographs, and other printed works of art had to be deposited at the National Library; and those artists who omit this formality cannot prosecute anyone for piracy. The deposit is now regulated by the law of 29th July, 1881, and three copies must be deposited by the printer. On the other hand, no such formality is required in the case of works of art executed on wood, marble, metal, and ivory (*a*).

Piracy.

Piracy of works of art is punishable in the same manner as literary piracy, and the pirated work is liable to seizure and confiscation.

### *Rights of Foreigners.*

France has always been exceedingly liberal to foreigners in the matter of copyright (*b*).

In the absence of treaty.

A foreigner who publishes in a country with which France has no copyright treaty is now protected by the decree of the 28th March, 1852, but he can only sue for infringement if he complies with certain formalities. The decree is as follows:—

*Art.* 1. Piracy on French territory of works published abroad and comprised in Article 425 of the Penal Code constitutes a misdemeanour (*délit*).

*Art.* 2. The same holds good with regard to the sale, export, and consignment of pirated works. The export and consignment of such works are offences of the same kind as the introduction into French territory of works which, after having been printed in France, have been pirated abroad.

*Art.* 3. The offences referred to by the preceding articles are punishable in accordance with Articles 427 and 429 of the Penal Code, and Article 463 (*c*) is also applicable.

*Art.* 4. Nevertheless, a prosecution can only take place under the conditions imposed with respect to works published in France, notably by Article 6 of the law of 19th July, 1793, which relates to the formalities of deposit (*d*).

At first sight, this decree seems to assimilate the rights of foreigners to those of citizens, but in the year 1857 the Court of Cassation decided that, no mention being made, in the decree, of Article 428 of the Code Pénal, foreigners cannot complain of

(*a*) Paris, 26th Feb., 1868; Cass. 12th June, 1868, Mathias.
(*b*) Merlin, Questions de Droit, Contrefaçon, sect. vii.
(*c*) Art. 463 merely allows the reduction of penalties where there are extenuating circumstances.
(*d*) The deposit is now regulated by the law of the 29th July, 1881, *ante*, p. 357.

the representation of their works (*e*), and the majority of modern text writers are of opinion that a foreigner cannot claim a longer or more extensive right of translation or reproduction than in the country of first publication, and that if treaties less favourable have been concluded between France and any nation, these treaties have the effect of excluding the decree of 28th March, 1852. These questions have, however, lost much of their practical importance by reason of the treaties and conventions to which France has become a party.

**Conventions and treaties.**

France, with Algeria and her colonies, was one of the signatories of the Berne Convention of 1886 and the Additional Act of Paris of 1896. She has ratified the Revised Convention of 1908, subject to a reserve as to works of applied art, being authorised to do so by a law of 28th June, 1910. She is also a "proclaimed country," entitled to the benefit of the American Copyright Act, 1909, and has acceded to the Convention of Monte Video, though her accession has so far only been accepted by the Argentine Republic (3rd March, 1896) and Paraguay (7th April, 1900). A copyright law for Morocco is contemplated.

In the case of foreign works published in any country which is a party to the Revised Berne Convention, none of the formalities required for native works need to be complied with (*f*).

The following treaties are in force:—

| | |
|---|---|
| Austria-Hungary ..... .. | 11th December, 1866. |
| Bolivia ..... | 8th September, 1887. |
| Brazil ..... | 16th December, 1913. |
| Congo ..... | 18th November, 1899. |
| Costa Rica ..... | 28th August, 1896. |
| Ecuador ..... | 9th May, 1898. |
| Germany ..... | 8th April, 1907. |
| Greece ..... | 22nd April, 1912. |
| Guatemala ..... | 21st August, 1895, 16th August, 1899. |
| Italy ..... | 9th July, 1884. |
| Japan ..... | 14th September, 1909. |
| Mexico ..... | 27th November, 1886. |
| Monaco ..... | 9th November, 1865. |
| Montenegro ..... | 24th January, 1902. |
| Netherlands ..... | 29th March, 1855, 27th April, 1860. |

(*e*) Court of Cassation, 14th Dec., 1857, Verdi-Pataille, 58, 100; *contra*, Paulmier and Lacon, tom. ii., No. 677, pp. 234—236.
(*f*) *Magalhaes* v. *Munoz*, Trib. de Comm. de la Seine, 13th Nov., 1913.

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|---|---|
| Portugal ..... | 11th July, 1866. |
| Roumania ..... | 6th March, 1907. |
| Russia ..... | 29th November, 1911. |
| Salvador ..... | 9th June, 1880. |
| Spain ..... | 16th June, 1880. |

## BELGIUM.

From 1791 to 1814 copyright in Belgium was the same as in France, the two countries being united during that time, and the French laws, subject to certain alterations made by local legislation, continued in force until 1886. The present law governing copyright in Belgium is a law of 1886, the provisions of which are substantially as follows:—

### *Part I. Of Copyright in General.*

Copyright in general.

*Art.* 1. The author of a literary or artistic work has alone the right of reproducing it or of authorising its reproduction in any manner and in any form whatsoever.

Duration.

*Art.* 2. This right is prolonged for fifty years after the death of the author for the benefit of his heirs or assigns.

Copyright personal property.

*Art.* 3. Copyright is personal property, transferable and transmissible, in whole or in part, in conformity with the rules of the Civil Code.

Posthumous work.

*Art.* 4. The owners of a posthumous work enjoy copyright for fifty years from the day of publication, representation, performance or exhibition.

An Order in Council shall determine in what manner the date from which the term of fifty years shall run is to be ascertained (*g*).

Work in collaboration.

*Art.* 5. When the work is the result of collaboration, copyright exists for the benefit of all the persons entitled for fifty years from the death of the surviving contributor.

*Art.* 6. When there is joint copyright, the exercise of the right is subject to agreement. In default of agreement, no one of the co-owners can exercise it alone, the right of deciding in case of disagreement being reserved to the Court.

Nevertheless each of the owners is free to prosecute in his own name and without the intervention of the others, any infringement of the copyright, and to claim damages for his share.

(*g*) See Order in Council of the 27th March, 1886, and the ministerial decree of the 3rd April, 1886.

The Courts are empowered at all times to impose such limits on a permission to publish the work as they shall judge useful to prescribe; they shall be able, on the request of an opposing co-owner, to determine that he shall not participate in either the expenses or benefits of publication, or that the collaborator's name shall not appear on the work.

**Anonymous work.**

*Art.* 7. The publisher of an anonymous or pseudonymous work is considered, as regards third parties, to be the author.

As soon as the author discloses his identity, he regains full possession of his legal rights, *il reprend l'exercice de son droit.*

**Limit to transferee's rights.**

*Art.* 8. The transferee of copyright or of the object which (*matérialise*) represents a work of literature, of music, or of the draughting arts cannot modify the work, for the purposes of sale or profit, nor publicly exhibit the work modified, without the consent of the author or his representatives.

**Protection from seizure.**

*Art.* 9. Literary or musical works are not at any time while unpublished, and other works of art, while they are not ready for sale or publication, are not during the life of the author, liable to seizure.

## *Part II. Of Copyright in Literary Works.*

**Extent of literary copyright.**

*Art.* 10. Copyright is applicable not only to writings of every kind, but to lectures, sermons, addresses, speeches, or to any other verbal expressions of thought.

Nevertheless, speeches delivered in deliberative assemblies, in the public sittings of the Courts, or in political meetings can be freely published; but the author alone has the right of printing them separately.

**Public documents.**

*Art.* 11. Official decrees or orders of the administration (*Les actes officiels de l'autorité*) are not the subject of copyright. All other publications made by the State or public administrative bodies are the subject of copyright, either for the benefit of the State or such public administrative bodies, during a period of fifty years from their date, or for the benefit of the author if he has not alienated his right in favour of the State or such administrative bodies.

An Order in Council is to determine the manner in which the date of publication is to be ascertained (*h*).

**Translations.**

*Art.* 12. Copyright in a literary work includes the right of making or authorising the translation of it.

(*h*) See *post*, the Order in Council of the 27th March, 1886, and the ministerial decree of the 3rd of April, 1886.

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Quotations.

*Art.* 13. Copyright does not prevent the right of making quotations when used for purposes of criticism, argument, or instruction.

Newspaper articles.

*Art.* 14. Every newspaper may reproduce an article published in another newspaper on condition of indicating the source, unless the article bears a *special* warning that reproduction is forbidden (*i*).

Right of representation.

*Art.* 15. The right of representation of literary works is regulated in conformity with the provisions relating to musical works (*k*).

## *Part III. Of Copyright in Musical Works.*

Musical works.

*Art.* 16. No musical work can be *publicly* performed or represented, in whole or in part, without the consent of the author (*l*).

*Art.* 17. Copyright in musical compositions includes the exclusive right of making arrangements on the *motifs* of the original composition.

*Art.* 18. In the case of works composed of words or libretti together with music, the composer and the author respectively shall not be able to bring out their work with a new collaborator. Nevertheless they shall have the right of independently turning it to account, by publications, translations, or public performances.

## *Part IV. Of Copyright in Artistic Works.*

Plastic works.

*Art.* 19. The transfer of a work of art does not carry with it the transfer of the right of reproduction to the benefit of the purchaser.

*Art.* 20. Neither the author nor the owner of a portrait has the right to reproduce it or exhibit it publicly without the consent of the person portrayed or his representatives, during twenty years from his decease; with the said assent, the owner has the right of reproduction, but the copy must not bear an indication of an author's name.

*Art.* 21. The reproduction of a work of art by manufacturing processes, or by processes applied to manufactures, remains nevertheless subject to the provisions of the law.

(*i*) This article is recognised as applying to telegrams of literary or scientific merit.

(*k*) This is said to aim at public readings.

(*l*) This provision is open to abuse, and there is some agitation for its repeal or modification. It has been held that the proprietor of a *café chantant* is liable for music played at his *café*. Gramophones and instruments of a like nature come within this article and are infringements of the author's rights.

*Parts V. and VI. Of Piracy and its Repression.*

*Arts.* 22 to 35 relate to procedure and remedies civil and criminal. A pirate is liable to fine and damages, and infringing articles may be confiscated.

Part VII. provides for the rights of foreigners.

Part VIII. contains the transitory provisions.

No express mention is made in this law as to photographs. It is clear that some photographs are protected, but not all; in fact, the law seems to have adopted the unfortunate system of laying upon the Courts the burden of deciding in every case whether the particular photograph is "artistic," in which event alone it will be entitled to protection (*m*). Photographs.

With reference to posthumous works a subsequent Order in Council, dated the 27th March, 1886, after stating that Art. 4 of the Act of 1886 applied to literary and dramatic works, musical, and dramatic musical compositions, and to plastic works, gave notice that special registers were open at the Department of Agriculture, &c., for the registration of (a) posthumous literary, musical, or plastic works published, represented, performed, or exhibited after the 5th April next, of which the proprietors or persons entitled should desire to obtain the benefit of Art. 4; (b) of publications made by the State or administrative bodies, the author's rights in which were reserved according to Art. 11 of the Act of 1886. Posthumous works. State publications.

Such registration must, under penalty of forfeiture, be applied for within six months of publication, representation, or performance in the case of a literary, dramatic, or musical work, or of exhibition in the case of a work belonging to the plastic arts. Registration.

The persons interested shall receive a certificate of the registration applied for.

The forms of the registers, affidavits, and certificates are to be determined by the Department of Agriculture. Forms were appended to the Order. Further forms were issued by the department on the 3rd April, 1886, and the same department issued a circular to the provincial governors on the 30th April, 1886, calling their attention to the principal points in the new law.

(*m*) Sometimes pictorial cards are only protected if they have complied with the formalities necessary to obtain protection as designs: see *Bastyns* v. *Van Neck*, Antwerp, Trib. de Commerce, 22nd May, 1906; *Van Os* v. *Pauwels*, Antwerp, Trib. de Commerce, 15th June, 1906; "Le Droit d'Auteur," 1912, pp. 112, 113.

PART V. BELGIUM.

## *Rights of Foreigners.*

Without treaty.

Art. 38 of the law of 1886 grants protection to foreigners, without any condition of reciprocity. Its provisions are as follows:—

Foreigners enjoy in Belgium the rights secured by the present law, but their rights shall have no longer duration than the duration fixed by Belgian law. And if their rights cease earlier in their own country, they shall cease at the same moment in Belgium (*n*).

Treaties and Conventions.

Belgium was a party to the Berne Convention of 1886, and she ratified the Additional Act of Paris and the Interpretative Declaration of 1896. She is also a party to the Revised Convention of 1908, to which, by a law of the 23rd May, 1910, "full and complete" effect is given; and in the year 1903 she acceded to the Monte Video Convention, though her accession has, so far, only been accepted by the Argentine Republic and the Republic of Paraguay. The United States have "proclaimed" Belgium as a country entitled to the benefit of the American Copyright Act, 1909, even as to mechanical music, and she has treaties in force with the following countries:—

| | |
|---|---|
| Austria ..... | 7th December, 1910. |
| Congo ..... ..... | 20th December, 1898. |
| Germany ..... | 16th October, 1907. |
| Holland ..... | 30th August, 1858. |
| Mexico ..... | 7th June, 1895. |
| Portugal ..... | 11th October, 1866. |
| Roumania ..... | 10th April, 1910. |
| Spain ..... | 26th June, 1880. |

### HOLLAND AND THE NETHERLANDS.

Copyright in Holland.

Previously to the French Revolution, Holland acknowledged the author's right as a perpetual one, capable of transmission to heirs or assigns for ever. Privileges were granted either by the Provincial Government or by the States General. These privileges, however, could be retracted as in the case of Rousseau in 1760, because "*le livre était impie, scandaleux, pernicieux et propre à démoraliser la jeunesse inexpérimentée de l'unique voie du salut.*" But this system was abolished under the influence of the French Revolution. The French laws put in force after the

(*n*) This clause is objectionable in that it imposes on the Belgian Tribunals the necessity of examining into foreign law.

junction of Holland to that country were abrogated in 1814, and in 1817 a new code was enacted, which remained in force until the passing of the Act of the 28th June, 1881 (*o*), which had for its object the regulation of copyright and was the governing law—except as to artistic works, which apparently were unprotected—until the passing of the recent law of 23rd September, 1912, which repealed all previous laws on the subject of copyright. This new law was passed expressly with a view to enable Holland to adhere to the Revised Berne Convention, and its provisions are largely based upon that Convention. The text of the material sections of the law is as follows (*p*):—

*Part I. General Provisions.*

*Art.* 1. Copyright is the exclusive right of the author of a literary, scientific or artistic work, or his representatives, to publish or reproduce the same, subject to the provisions of this law. Nature of copyright.

*Art.* 2. Copyright is personal property. It may be transferred by succession, and may be assigned wholly or partially. All assignments, total or partial, must be under seal. Only the rights expressly, or by necessary implication having regard to the nature and object of the agreement, included, pass by the assignment. An author's copyright in a work, as well as the right of the heir or legatee of the author over any unpublished work, is not liable to execution.

*Art.* 3. If the author is a married woman, her husband cannot, without her concurrence, deal with the copyright, and the marriage contract cannot derogate from this provision. Author of a work.

*Art.* 4. In the absence of proof to the contrary, the person who is indicated as such in the work, or in the absence of any such indication, the person who is named as such by the publisher at the time of publication, shall be considered the author of a work. If at the time of the delivery of a lecture or performance of a musical work, which has not previously been printed, no statement is made as to authorship, the lecturer or performer is, in the absence of proof to the contrary, to be deemed the author.

*Art.* 5. In the case of a literary, scientific, or artistic work consisting of the works of two or more individuals, the person editing or supervising the composition of the collective work, or Collective works.

(*o*) It may be remarked that this law contained a *manufacturing clause* similar to the manufacturing clause of the American law.

(*p*) Translated from "Le Droit d'Auteur," 1912, p. 146.

failing any such person, the person who collects the separate works shall subject to the rights of individual contributors in their separate contributions, be deemed the author of the collective work. The reproduction or publication by any person, other than the author or his representatives, of any separate work incorporated in the collective work which is itself the subject of copyright, shall be deemed to be an infringement of the copyright in the collective work. If the separate work has not been previously published, its reproduction or publication by the author or his representatives shall, in the absence of contrary agreement, be deemed an infringement of the copyright in the collective work, if the reproduction or publication fails to mention the work of which the same forms a part.

*Art.* 6. If a work has been made according to the plans and under the direction and supervision of a third person, the latter shall be deemed to be the author.

*Art.* 7. If, according to his contract of employment, one person is obliged to produce certain definite literary, scientific, or artistic works, his employer shall, in the absence of contrary agreement, be deemed to be the author.

*Art.* 8. If a work is published as the production of a public institution, association, foundation, or commercial company, without indication of any real person as the author thereof, the institution, association, foundation, or company shall be deemed to be the author, unless it be proved that the publication, under the circumstances proved, was illegal.

*Art.* 9. In the case of anonymous or pseudonymous works, as against third persons the publisher whose name is indicated on the work or, failing him, the person who appears as printer, may enforce the copyright for the benefit of the true owner thereof.

*Art.* 10. The expression "literary, scientific, or artistic work" shall include the following:—

(a) Books, pamphlets, newspapers, collections, and all other writings;

(b) dramatic and dramatico-musical works;

(c) lectures;

(d) choreographic works and pantomimes, the mode of performance of which is fixed in writing or otherwise;

(e) works of design, painting, architecture, sculpture, lithography, engraving, and other figures;

(f) geographical charts;

(g) plans, sketches, and plastic works relative to architecture, geography, topography, or any other sciences;

(h) photographic and cinematographic works and works produced by any like process;

(i) works of art applied to industry;

and, generally, all productions in the literary, scientific, or artistic domain, whatever may be the mode or form of reproduction. Translations, adaptations, arrangements of music, and other reproductions in an altered form of a literary, scientific, or artistic work, as well as collections of different works, shall be protected as distinct works, without prejudice to the rights of the author of the original work.

*Art.* 11 relates to official publications as to which there is no copyright, unless specially reserved.

*Art.* 12. Publication of a literary, scientific, or artistic work includes:— Publication.

(a) publication of a reproduction of the whole or part of a work;

(b) putting the whole or part of a work, or any reproduction thereof, into circulation, although it may not have been published by means of printing;

(c) recitation, delivery, performance or public exhibition of the whole or part of a work, or any reproduction thereof:

a work is to be deemed to be recited, delivered or performed in public, even though the recitation, delivery or performance takes place at a private club open to members upon payment either by the taking of a share or otherwise. The same applies to a public exhibition.

*Art.* 13. Reproduction of a literary, scientific, or artistic work includes a translation, musical or dramatic adaptation, and generally any total or partial adaptation or imitation in any modified form which cannot be regarded as an original work. Reproduction.

*Art.* 14. Reproduction of a work capable of appeal to the ear includes the manufacture of cylinders, discs, and other objects intended to enable the whole or part of a work to be heard by a mechanical process.

*Art.* 15. Copyright in a newspaper or periodical is not infringed by the reproduction in another newspaper or periodical of articles, of communications or other matters, provided their source is clearly acknowledged. But stories or novels appearing in newspapers or periodicals may not be reproduced without the authority of the author or his representatives. The like authorisation is needed in the case of other articles, when the author or editor expressly forbids reproduction in the number of the newspaper or periodical which contains the article. In the case of Restrictions on copyright.

PART V. HOLLAND.

periodicals a general prohibition at the head of each number will be sufficient, but no prohibition is effective as regards political articles, news of the day, or miscellaneous news. The provisions of this clause apply to reproductions in languages other than the original (*q*).

*Art.* 16 Copyright in published literary, scientific, or artistic work is not infringed by the reproduction of short portions, compositions, or poems included in anthologies or other works of an educational or scientific character, or contained in advertisements or criticisms published in newspapers or periodicals, provided that the work from which they are taken and the name of the author, if disclosed, is mentioned. This provision applies to reproductions in languages other than the original. The works referred to in Art. 10 (e) may, in the like circumstances and under the like conditions, be reproduced in entirety, if by reason of its dimensions or process of execution, the copy clearly differs from the original; but when two or more of these works have been published together the reproduction of one only is permissible. A concise summary of a public lecture, not yet published in print, may be published as a report in a newspaper or periodical, provided the name of the lecturer be indicated.

*Art.* 17. The copyright in a literary, scientific, or artistic work is not infringed by the reproduction of a limited number of copies thereof intended exclusively for practice, study, or personal use and, in the case of works referred to in Art. 10 (e), the reproduction, by reason of its dimensions or process of execution, clearly differs from the original; but this provision does not apply to rebuilding of architectural works.

*Art.* 18. The copyright in any of the works referred to in Art. 10 (e) which are permanently exposed to public view is not infringed by a reproduction which, by reason of its dimensions or process of execution, clearly differs from the original and, in the case of works of architecture, is confined to the exterior aspect.

*Art.* 19. The copyright in a portrait is not infringed by a reproduction made by, or on behalf of, the person portrayed, or by, or on behalf of, his next of kin after his decease. If the portrait is composed of two or more likenesses the several persons portrayed have not, as regards the others portrayed, any right of reproduction, except with the consent of those others or, during a period of ten years after their decease, of their next of kin. Next of kin include ancestors to the first degree, a spouse, and children.

(*q*) This clause does not comply with the provisions of the Revised Convention of Berne.

Likewise the reproduction of a *photographic portrait* in a newspaper or periodical is no infringement of copyright, provided the reproduction be by, or with the consent of, any of the above-mentioned persons and that the name of the photographer, if indicated on the portrait, is mentioned. This article only applies if the portrait has been executed upon a commission given by, or on behalf of, the persons portrayed.

*Art.* 20. The owner of the copyright in a portrait may not, in the absence of agreement to the contrary, publish it without the consent of the person portrayed, or, during a period of ten years after his decease, without the consent of his next of kin. If the portrait is composed of two or more likenesses, the reproduction of the entire picture depends upon the consent of all the persons portrayed or, for a period of ten years after their decease, the consent of their next of kin. Next of kin has the same meaning as in Art. 19, and this article likewise only applies to commissioned portraits.

*Art.* 21. The owner of the copyright in a portrait which has not been executed upon a commission given by, or on behalf of, the person portrayed may not publish it so long as the person portrayed or, within a period of ten years after his death, certain relatives have any legitimate interest in opposing publication.

*Art.* 22. In the interest of public order and justice pictures of any kind may be publicly exhibited.

*Art.* 23. In the absence of agreement to the contrary, the owner of a work of design, painting, architecture or sculpture, or a work of art applied to industry may publicly exhibit it, or, for the purposes of sale, may reproduce it in a catalogue, without the consent of the owner of the copyright.

*Art.* 24. In the absence of agreement to the contrary, the painter of a picture may, notwithstanding that he has parted with the copyright, paint similar pictures.

*Art.* 25 imposes limitations upon the rights of owners of any of the works numbered (a) to (h) in Art. 10 to alter the works, or their titles, or their authors' names. Generally speaking, the permission of the author and the owner of the copyright will be necessary for any of these purposes.

## *Part II. Protection of Copyright and Penal Provisions.*

**Protection of copyright.**

*Art.* 26. If the copyright in a work is vested in two or more persons in common, the exercise and protection of the copyright shall belong to all the owners of the copyright collectively, or

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by the person nominated by agreement between them, or, failing agreement, by the president of the Court to which the first of them may apply. There is no appeal from the decision of the Court. When a person has been nominated by agreement, he may be removed by the owners of the copyright and another nominated in his place.

*Art.* 27. Notwithstanding a total or partial assignment of the copyright, an action for damages will lie against an infringer at the suit of the author (*r*).

Procedure and remedies.

*Arts.* 28 to 36 relate to procedure and remedies. Generally, the infringer is liable to penalties and damages, and infringing articles may be confiscated.

## *Part III. Duration of Copyright.*

Period of copyright.

*Art.* 37. Subject to the provisions of this Part of this law, copyright terminates at the expiration of a period of fifty years reckoned from the date of the death of the author of the work. In the case of a copyright belonging to two or more authors in common, the period is to be reckoned from the date of the death of the last survivor.

*Art.* 38. In the case of anonymous or pseudonymous works, copyright is to terminate at the expiration of a period of fifty years reckoned from the last day of the civil year in which the work is first published by or on behalf of the owner of the copyright. The same applies to works of which, under the provisions of Arts. 7 or 8 hereof, a public institution, association, foundation or commercial company is deemed to be the author, and also to works first published after the author's death.

*Art.* 39. The exclusive right of translating a printed work terminates at the expiration of a period of ten years reckoned from the last day of the civil year in which the work is first published by or on behalf of the owner of the copyright, so far as regards languages in which the author has not published or caused to be published any translation in any of the countries belonging to the Copyright Union. The exclusive right of delivering in public lectures, executions or performances of a work in a language other than the original lasts for the same period as the exclusive right of translation (*s*).

(*r*) This is a somewhat peculiar provision, but presumably the author will have to prove that he has suffered personal loss.

(*s*) This clause is contrary to the provisions of the Revised Berne Convention (see *ante*, p. 316), and has prevented Holland from giving full adherence to that Convention (see *post*, p. 380).

*Art.* 40. The copyright in photographic and cinematographic works or works obtained by similar processes terminates at the expiration of a period of fifty years reckoned from the last day of the civil year in which the work is first published by or on behalf of the owner of the copyright.

*Art.* 41. In applying the three last preceding Articles hereof, works appearing in incomplete parts are only to be deemed published upon the publication of the last part. As regards works consisting of two or more volumes, numbers or sheets, or appearing at intervals, and also as regards reports or communications issued by societies or privately, each volume, number, sheet, or report or communication is to be deemed a separate work.

*Art.* 42. Notwithstanding anything herein contained, copyright cannot be claimed, either in the European parts of the Kingdom or in the Dutch Indies, in a work the copyright in which has determined in the country of origin of the work.

*Part IV. Modifications of the Bankruptcy and Penal Codes.*

Bankruptcy and criminal proceedings.

*Art.* 43 modifies Art. 21 of the bankruptcy law, and provides that copyright is not to pass for the benefit of creditors only "if it is not liable to be taken in execution."

*Art.* 44 provides that an infringer of copyright shall be liable in certain cases to fine and imprisonment.

*Part V. Application to Dutch Indies.*

Dutch Indies.

*Art.* 45 applies the law to the Dutch Indies, except those portions of the law which relate to procedure and remedies criminal and civil; other provisions on these matters being substituted.

*Part VI. Transitory Provisions.*

Transitory provisions.

*Art.* 46 repeals the law of 28th June, 1881.

*Art.* 47. This law applies to all literary, scientific or artistic works published for the first time by or on behalf of the author in the European parts of the Kingdom or in the Dutch Indies, whether before or after this law comes into force, as well as to all unpublished works of which the authors are Dutchmen or Dutch subjects. For the purposes of this Article a work is deemed to be published when it has been issued by a publisher by means of printing or, generally, when reproductions thereof have been published. The representation of a dramatic or dramatico-musical

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work, the performance of a musical work, the exhibition of a work of art, and the construction of a work of architecture shall not constitute a publication within the meaning of this clause. Provided always that no proceedings will lie for any acts which at the date when they were committed were not illegal by virtue of any existing law or convention.

*Arts.* 48 to 50. Works the copyright in which had expired at the date when the new law came into force are not to be protected thereunder, and articles lawfully manufactured under the old law, &c. may be sold, &c. for a period of two years only after the coming into force of the new law (*t*).

*Art.* 51. Assignments of copyright under certain circumstances are exempted from stamp duty.

*Art.* 52. This law may be cited as "The Copyright Law, 1912."

*Art.* 53. The law to come into force on the first day of the month following its promulgation.

### *Rights of Foreigners.*

The above law, by its text, only applies to works first published on Dutch soil and to the unpublished works of Dutch subjects, but, by a law of 26th June, 1911, the Crown was granted the power to adhere, for Holland and her colonies, subject to reservations, to the Revised Berne Convention and to enter into treaties. Holland was not a party to the original Berne Convention, but she has recently, by royal decree of the 9th October, 1912, for herself, and by later decrees for her colonies of the Dutch Indies (1st January, 1913), Curaçoa (26th February, 1913) and Surinam (5th April, 1913), adhered to the Revised Berne Convention of 1908, subject, nevertheless, to reservations as regards: (a) translating rights, as to which she is bound by Art. 5 of the Convention of 1886, as modified by the Additional Act of Paris, 1896; (b) newspapers and reviews, as to which she is bound by Art. 7 of the Convention of 1886, as modified by the Additional Act of Paris, 1896; and (c) performing rights over translations of dramatic or dramatico-musical works, as to which she is bound by Art. 9, para. 3, of the Convention of 1886. Subject as aforesaid, the Revised Berne Convention is, by the law of 26th June,

(*t*) This limitation to a period of two years (expiring the 1st Nov., 1914) has caused some apprehension amongst Dutch publishers, particularly publishers of illustrated works. Until the new Act, artistic works were unprotected (see *ante*, p. 373). Petitions have been presented to alter Art. 50.

1911, given legislative operation in Holland. Holland is also a "proclaimed country" under the American Act of 1909. The only countries with which Holland appears to have any copyright treaties are Belgium (30th June, 1858) and France (19th April, 1884).

## THE GRAND DUCHY OF LUXEMBOURG.

Copyright before 1898.

From the date of the French Revolution to 1817, the Duchy of Luxembourg was subject to French laws. These were replaced or modified by the Dutch law of the 25th January, 1817, and by various decrees of the Grand Duke made in execution of resolutions of the Germanic Diet. Under these laws the copyright in literary and artistic works lasted for the life of the author and thirty years after, and for life and ten years in the case of musical and dramatic works.

Law of 1898.

The legislation on the subject was defective and confused when in 1888 the government of Luxembourg was authorised to join the Berne Convention. After her adhesion to the Convention the necessity for a revision of her legislation became more pressing, and in the year 1898 a new law was passed which repealed all previous laws on the subject. This new law of 1898 is in fact a textual reproduction, with certain modifications, of the Belgian law which we have already set out and to which we would refer the reader (*u*).

The Luxembourg Copyright Law differs from the Belgian law in the following particulars only:—

Definition of literary and artistic works.

Art. 1, after enacting, as in the Belgian law, that the author of a literary or artistic work has alone the right of reproducing it or authorising its reproduction in any manner and in any form whatsoever, defines "literary and artistic works" as "books, pamphlets, and all other writings; dramatic or dramatico-musical works, musical compositions with or without words; works of design, painting, sculpture, and engraving; lithographs, illustrations, geographical charts; plans, sketches, and plastic works relative to geography, topography, architecture, or science in general; works of architecture; photographic works, and other works produced by a like process; in fact, every production whatsoever in the literary, scientific, or artistic domain which can be published by any mode of impression or reproduction."

Anonymous works.

Art. 7, relating to anonymous works, has the following addition: "If the true name of the author be disclosed by the

(*u*) *Ante*, p. 368.

PART V. LUXEMBOURG.

author, or his duly authorised representatives, the period of protection shall be calculated by the life of the author."

Translations.

Art. 12, relating to translations, is much more elaborate than the corresponding article in the Belgian law, and is as follows: "Authors and their assigns enjoy the exclusive right of making or authorising the translation of their works during the whole period of their copyright in the original work. Nevertheless, the exclusive right of translation shall be lost if the author neglect for a period of ten years from the publication of the original work to publish or cause to be published a translation into the language in respect of which protection shall be claimed.

"For works published in incomplete parts (*livraisons*) the period of ten years commences from the date of the publication of the last part of the original work.

"For works composed of many volumes published at intervals as well as for bulletins or collections (*cahiers*) published by literary or scientific societies or by private persons, each volume, bulletin, or collection is, with regard to the period of ten years, considered as a separate work.

"In the cases provided for by this present Article for the calculation of the period of protection, the 31st December of the year in which the work was published is to be taken as the date of publication."

Newspapers.

Art. 14, as to newspapers, differs from Art. 14 of the Belgian law, and is as follows: "Serial stories, including novels, published in newspapers or periodicals, may not be reproduced in original or translation without the sanction of the authors or their lawful representatives. This stipulation shall apply equally to other articles in newspapers or periodicals, when the authors or publishers shall have expressly declared in the newspaper or periodical itself in which they shall have been published that the right of reproduction is prohibited. In the case of periodicals, it shall suffice if such prohibition be indicated in general terms at the beginning of each number. In the absence of prohibition such articles may be reproduced on condition that the source is acknowledged. Articles of political discussion, news of the day, miscellaneous information, *and copies from literary or artistic works for publications intended for instruction, or having a scientific character, or for chrestomathies*, may be freely published."

Musical works.

Art. 16, relating to musical works, has the following addition: "The right of the author or his lawful representatives applies to the public performance of unpublished musical works as well as to published works, the public performance whereof has been

expressly prohibited by the author on the title-page or head of the work."

Art. 26 is new, and makes it an offence to add, erase, or alter the name upon manufactured articles.

### *Rights of Foreigners.*

Luxembourg has always given liberal protection to foreign works. Works published in foreign countries are accorded protection, even in the absence of treaties. Art. 39 of the law of 1896 is as follows:—

"Foreigners enjoy in the Grand Duchy the rights conferred by this law, but the period of protection shall not exceed the period fixed for the work in question by the law of Luxembourg."

Luxembourg became a party to the Berne Convention in 1888, and she accepted the Additional Act of Paris and Interpretative Clause of 1896. On the 14th July, 1910, she adhered to the Revised Convention. She is a "proclaimed country," even with regard to mechanical instruments, under the American law of 1909, but she has no other treaty engagements.

## THE GERMAN EMPIRE.

Recent copyright laws.

Literary and musical copyright was, until recent years, regulated in the German Empire by a law of the 11th June, 1870: artistic copyright by laws of the 9th and 10th January, 1876. In the year 1901 the law of the 11th June, 1870, was repealed and replaced by a law of the 19th June, 1901, which is the fundamental law governing copyright in literary and musical works at the present day. The Act of 1901 has, however, been amended by a law of the 22nd May, 1910, passed with a view to bringing the German legislation into conformity with the provisions of the Revised Berne Convention, 1908. The laws of the 9th and 10th January, 1876, relating to works of figurative art and photographs respectively were, in the year 1907, replaced by a law of 9th January, 1907, which, as amended by another law of the 22nd May, 1910, is the governing law upon artistic copyright.

Law of 19th June, 1901, as amended.

The law of 19th June, 1901, is very long and elaborate. The following is a summary of the law as modified by the law of 1910, the modifications introduced by the latter law being indicated in italics (*x*).

(*x*) The full text of the law as modified, will be found translated into French in "Le Droit d'Auteur," 1910, pp. 88 *et seq.*

PART V. GERMANY.

Works protected.

The persons entitled to protection under this law are: (1) authors of writings, lectures and speeches intended for education, instruction or amusement; (2) authors of musical works; (3) authors of scientific or technical illustrations, including plastic works, which, having regard to their principal object, cannot be regarded as artistic works (*y*). *Choreographic works and pantomimes are protected as literary works, even though their acting form is fixed otherwise than by writing* (*z*). (Art. 1.)

Definition of author.

The person who has created the work is to be deemed the author of it, the person who has translated a work is to be deemed the author of the translation, and the person who has adapted a work in any manner is to be deemed the author of the adaptation. *When a literary or musical work is applied to the parts of instruments used for reproducing sounds mechanically, by the personal intervention of a performer, the part so made is to be treated as an adaptation of the work. The same follows when the application is made by means of perforations, stamping, arrangement of points or any other like means, and the work done is of an artistic character. In the former case the performer, and in the latter case the person who has applied the work, is to be deemed the adapter of the work.* (Art. 2.)

Anonymous works.

In the case of anonymous or pseudonymous works, the publishers are, in the absence of stipulation to the contrary, to be reputed the authors. (Art. 3.)

Encyclopædias and collaborations.

In the case of encyclopædias and works of a similar character the proprietor (*Herausgeber*) or, if he be not named, the publisher (*Verleger*) is deemed the author of the entire work (Arts. 4 and 7); but collaborations, when the work of the individuals cannot be distinguished, are the property of the collaborators jointly. (Art 6.)

When a writing is accompanied by a musical setting or illustrations, the author of each of these creations is a distinct author. (Art. 5.)

Assignment.

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