



CANADA

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Royal Commission on  
Patents, Copyright, Trade Marks  
and Industrial Designs

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REPORT ON  
COPYRIGHT

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EDMOND CLOUTIER, C.M.G., O.A., D.S.P.  
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY  
OTTAWA, 1957.

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### **CORRIGENDUM**

to the Report on Copyright of the Royal Commission on  
Patents, Copyright, Trade Marks and Industrial Designs.

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*Page 22, third paragraph, second line:*

delete the hyphen and the word "six".

*Page 25, second paragraph, fourth line:*

the word "a" should be inserted before the word "problem".

*Page 30, last paragraph, first line:*

replace the word "Rome" by the word "Berne".

*Page 120, subparagraph (b) of section 7:*

add the word "public" before the word "performance" in the third line and add the words "in public" after the word "heard" in the last line.



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Patents, Copyright, Trade Marks  
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TO HIS EXCELLENCY THE  
GOVERNOR GENERAL  
IN COUNCIL

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## PART I

### INTRODUCTORY

#### Section 1—Terms of Reference

By commission, dated June 10, 1954, we were appointed Royal Commissioners

to inquire as to whether Federal legislation relating in any way to patents of invention, industrial designs, copyright and trade marks affords reasonable incentive to invention and research, to the development of literary and artistic talents, to creativeness, and to making available to the Canadian public scientific, technical, literary and artistic creations and other applications, adaptations and uses, in a manner and on terms adequately safeguarding the paramount public interest, the whole in the light of present-day economic conditions, scientific, technical and industrial developments, trade practices and any other relevant factors or circumstances, including practices under or related to the said legislation and any relevant international convention to which Canada is a party.

These terms of reference relate to four more or less separate fields of inquiry. We think it advisable to make a report on the conclusion of our inquiry in each field although our report on trade marks will not have to be very extensive owing principally to the newness of existing legislation. Copyright seems somewhat more urgent than patents, trade marks or industrial designs, chiefly because Canada has signed two international conventions but has delayed adherence to these conventions pending, as we understand it, our report on copyright. We are, therefore, submitting this report on copyright alone.

On or about August 20, 1954, we sent a questionnaire pertaining to patents, copyright and industrial designs to a carefully compiled list of corporations, firms, associations and individuals. This list was intended to include all those in Canada who would be specially interested in any of the subjects of the inquiry. The part of the questionnaire relating to copyright is attached as Appendix "A". In the latter part of October, 1954, we inserted a notice in the *Canada Gazette* and in newspapers published in all the Provinces of Canada, of public hearings, stating the time and place when these hearings would begin and inviting those desiring to make representations at the hearings to communicate with the secretary. The public hearings received a considerable amount of notice in the press and on the radio and we think that every reasonable opportunity has been given to those desiring to make representations to do so. An indication of those who have made representation to the Commission is to be found in Appendix "B".

Apart from such representations, we have had throughout the course of the inquiry the benefit of private discussions with many persons who have specialized in or who have special knowledge of copyright matters. Throughout the inquiry also we had continuously before us copyright legislation of other countries and reports pertaining thereto, and, in addition, two of our number visited Washington, London, Paris, Berne and The Hague to discuss problems with foreign experts, both in government and out.

#### Section 2—The Gregory Report

In particular we have had invaluable assistance from the report of a committee appointed by the President of the Board of Trade of the United Kingdom



in April, 1951, of which the chairman was H. S. Gregory, referred to sometimes herein as the Gregory Committee and sometimes as the Committee of the Board of Trade. This Committee was appointed—

To consider and report whether any, and if so what, changes are desirable in the law relating to copyright in literary, dramatic, musical and artistic works with particular regard to technical developments and to the revised International Convention for the Protection of Literary and Artistic Works signed at Brussels in June, 1948, and to consider and report on related matters.

The law relating to copyright in the United Kingdom is contained in the Imperial Act of 1911. Our own governing statute is the Copyright Act, Chapter 55, Revised Statutes of 1952, which is almost the same in its provisions as our Copyright Act of 1921 which came into force by proclamation on January 1, 1924. Of course it contains important amendments passed from time to time in the intervening years, while leaving the main principles and most of the words of the Act of 1921 unchanged. As the Act of 1921 embodied the general principles and adopted many of the express provisions of the Imperial Act of 1911, the value to us of the report of the Gregory Committee can easily be appreciated. We have, of course, carefully studied the Copyright Act of the United Kingdom which was passed on November 5th, 1956, and proclaimed on June 1st, 1957, following thorough and extended debate in both houses of the United Kingdom Parliament and in a Standing Committee of the House of Commons. Indeed we have delayed this report until we could get the benefit not only of perusal of the reports of these debates but of study of the new United Kingdom Act as finally passed. For the foregoing reasons, while our recommendations differ in many respects from those of the Gregory Committee and there are many provisions of the new United Kingdom Act which we are not prepared to recommend for enactment by Canada, we will necessarily make frequent references in this report to the provisions of the new United Kingdom Act.

The quotation of many of the sections of that Act in this report coupled with recommendations, in some cases, that legislation to the same effect be enacted in Canada must not be taken as implying that we consider that the same language should be used by the draftsman of Canadian legislation. Quotation seemed to be by all odds the most concise way of leading up to our recommendations.

Nor should these numerous references to sections of the United Kingdom Act be considered as reflecting any thought in this Commission that such Act was to be taken as the prototype from which the framework of any new Canadian Act should necessarily be derived. In fact, many of the principles embodied in this report had been agreed upon and the suggestions relating thereto had been reduced to draft form before the enactment of the United Kingdom Act of 1956.

As will be evidenced by certain parts of this report, and more particularly by the exhaustive discussions on the matter of term, full consideration has been given to United States copyright legislation, its governing principles and its importance in relation to the Canadian economy. The Commission has also considered the text of the more recent acts or important amendments enacted in other countries, such as, for instance, Switzerland. It has obtained and considered the text of the "projet de loi" (bill) prepared in 1947 by the Intellectual Property Commission of the Department of Youth, Arts and Letters of France, which bill does not appear to have been enacted yet, and the Commission has given much attention to works analyzing and commenting on this "projet de loi". For the purpose of comparison with the principles recognized by United Kingdom Courts

on basic or otherwise important subjects in the copyright field, decisions of the Courts of the United States and of France (more particularly those of the Cour de Cassation in the latter case) have been studied and, notwithstanding the absence of specific references to them, the analyst of this report will have noticed the influence of this material on our final conclusions and recommendations.

However, as noted above, the United Kingdom Act, besides being the latest legislation in the field of copyright, is an enactment which replaces the Imperial Copyright Act of 1911 upon which our own Act of 1921 was modelled. Furthermore, in certain parliamentary systems such as that of France there is no hansard or similar available verbatim report of debates on proposed legislation; and the only available recent verbatim reports of debates dealing with copyright are of those which took place in the Parliament of the United Kingdom, leading as they did to many important amendments to the original copyright bill. Consequently, although the substance of the provisions which we recommend do in many and important respects depart from the philosophy which certain sections of the United Kingdom Act reflect, we have found it extremely useful, once this Act had been passed, to refer to its text in discussing the actual principles which we have been appointed to study and report upon.

### **Section 3—The Meaning of Copyright**

It is difficult, and perhaps unnecessary, to define copyright. A definition is contained in our Copyright Act but this to be intelligible must be supplemented by other provisions of the Act defining various kinds of works and providing that copyright shall subsist in certain other subject matters as if they were works. (See Section 4, sub-section (3)). Section 3 says that "for the purposes of this Act, copyright means the sole right to produce or reproduce the work in any material form whatsoever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public; if the work is unpublished, to publish the work or any substantial part thereof"; and it is also provided by the Act that certain additional rights, e.g., the rights to translate, to dramatise, to broadcast, and to make records or films of a work, are to be included in the term "copyright". The copyright laws do not protect ideas as the patent laws do, but merely expressions of ideas. Copyright is in effect a right to prevent the appropriation of the expressed results of the labours of an author by other persons. That an author should have this right, at least for a limited period, is generally recognized—on the ground of justice, expediency, or both.

The right is regarded by some as a "natural right" on the ground that nothing is more certainly a man's property than the fruit of his brain. It is regarded by others as not a natural right but a right which the state should confer in order to promote and encourage the labours of authors. Generally speaking, those who appeared before us advocating strong and long protection held the first view; those who were in favour of weaker and shorter terms of protection held the second. We find it unnecessary to go on record with a confession of faith in either doctrine to the exclusion of the other.

## **PART II**

### **INTERNATIONAL COPYRIGHT CONVENTIONS**

#### **Section 1—Importance in Copyright Legislation**

The Imperial Act of 1911 and our Act of 1921 were framed in such a way as to accord as nearly as possible with the Convention of the Berne Union as revised at Berlin in 1908. The Berne Union was originally a group of countries which signed a convention in 1886 by which each country agreed to give certain rights in respect of works of their nationals to the nationals of the other countries signing. Canada, through and on the initiative of the United Kingdom, became a party to the Berne Convention and to the Paris Amendment of that Convention in 1896, being the only North American country to do so. Canada also became a party to the Berlin Revision of 1908, the United Kingdom adhering on Canada's behalf and at its request in December of 1923. Canada also became a party to the Rome Revision, 1928, of the Berne Convention. Canada is therefore commonly referred to as a Berne Union country. Canada is morally obligated in passing legislation to respect the Rome Revision—or Rome Convention—of 1928. This fact places important limits upon its freedom of action in legislating and has a bearing on the recommendations made in this report. Since the Rome Revision of 1928, there has been another revision of the Berne Convention, the Brussels Revision of 1948. While Canada signed this revision it has not acceded to it. Our terms of reference require us to have regard only to "any relevant international convention to which Canada is a party". It is, however, impossible for us to avoid consideration of the question whether Canada should accede to the Brussels Revision—or Brussels Convention, as it is often called.

In addition to the Berne Convention and the revision of this Convention, another international copyright convention has necessarily been considered by us. This is the Universal Copyright Convention which was signed at Geneva on September 6, 1952, by eighty-six countries. Four countries followed with their signatures within the time within which signature was permitted, so that there are ninety signatories to this Convention. Canada has not ratified this Convention. It will be necessary for us to consider whether Canada should do so. If Canada does, it will be obligated to respect in its legislation the Universal Copyright Convention. We append to this report as Appendices "C" and "D" respectively,

(1) the text of the Rome Revision of the Berne Convention, to be referred to as the Rome Convention, and the Brussels Revision of the Berne Convention, to be referred to as the Brussels Convention. These are set out in parallel columns for purposes of comparison; and

(2) the text of the Universal Copyright Convention.

A brief summary of the purposes and principles of (1) the Rome Convention, (2) the Brussels Convention and (3) the Universal Copyright Convention will now be attempted.

#### **Section 2—The Rome Convention**

The main purpose of the Rome Convention is to assure a certain minimum of copyright protection in each of the countries of the Union, (the word Union

being used as meaning the group of countries which are parties to the Rome Convention), to authors who are not nationals of that country. But this is far from a complete statement of the purposes and principles of the Convention. These can be gathered only from certain express provisions of the Convention the effect of which is as follows:

(a) Unpublished Works

Authors who are nationals of a Union country shall enjoy in every country of the Union other than their own country

- (1) national treatment, that is, the copyright protection which the former country gives to its own nationals;
- (2) convention rights, that is, the rights specially granted by the convention.

But authors shall enjoy these rights in respect of (1) without formality and with respect to (2) also without formality and whether available to nationals or not.

Authors who are not nationals of a Union country are guaranteed no rights under the convention in Union countries with respect to unpublished works.

(b) Published Works

Authors who are nationals of a Union country and who first publish in a Union country shall receive in Union countries other than the country of first publication (where there is simultaneous publication in more than one country, first publication is deemed to occur in the country according the shortest term of protection):

- (1) national treatment
- (2) convention rights.

Neither class of rights is subject to formality and convention rights are available whether accorded to those who first publish in such other country or not.

Authors who are nationals of one country of the Union and first publish in another country of the Union shall have national treatment in that country and, of course, in all other Union countries the rights outlined above.

Authors who are not nationals of a Union country but who first publish in a Union country shall (subject to subsection (2) of Article 6) enjoy national treatment in that country and convention rights in all other Union countries.

Authors who first publish in a non-Union country are guaranteed no rights under this Convention after publication regardless of nationality, residence or domicile.

As we understand the scheme of the Convention,

(1) no author of an unpublished work is assured of any rights under the convention in his own country,

(2) a unionist author who first publishes in a Union country, other than his own, is to receive national treatment in that country and national treatment plus convention rights in all other countries of the Union (including his own), and

(3) the Convention does not assure an author, who is a national of a Union country and who first publishes in his own country, any rights in his own country.

In short, the Convention is not concerned with the treatment of a native author, unless (oddly enough) he first publishes in a convention country other than his own. Aside from this anomaly, the Convention deals solely with the rights of foreigners in the various adhering countries.

### **Section 3—The Brussels Convention**

The purposes and principles of the Brussels Convention are similar to those of the Rome Convention. But the list of convention rights is somewhat expanded. In particular, an author is assured of a term of protection of at least his life and fifty years after his death (with exceptions as to certain classes of works). This Convention is studied in detail in Section 5 of this part.

### **Section 4—The Universal Copyright Convention**

The main purposes and principles of the Universal Copyright Convention appear from Article II which is as follows:

1. Published works of nationals of any Contracting State and works first published in that State shall enjoy in each other Contracting State the same protection as that other State accords to works of its nationals first published in its own territory.
2. Unpublished works of nationals of each Contracting State shall enjoy in each other Contracting State the same protection as that other State accords to unpublished works of its own nationals.
3. For the purpose of this Convention any Contracting State may, by domestic legislation, assimilate to its own nationals any person domiciled in that State.

If the Convention went no further it would simply assure to an author who was a national of a contracting state *or* who first published in a contracting state national treatment in each other contracting state. But following articles assure him of certain convention rights in each other contracting state. For example, the only formalities that may be required as a condition of copyright in published works is that the work bear the symbol © and the name of the copyright proprietor and the year of first publication placed in such a manner and location as to give reasonable notice of claim of copyright; no formalities may be required as a condition of copyright in unpublished works; and certain periods of protection are assured.

Other purposes of each of the three conventions will appear from the conventions themselves.

### **Section 5—Should Canada Accede to the Brussels Convention?**

Some of the obligations by which Canada is not bound under the Rome Convention but which accession to the Brussels Convention would place upon Canada are the following:

(a) A further obligation in respect of public performance of works. The only Rome Convention obligation in respect of public performance generally is that to be found in Article 11 (1) which is as follows:

The stipulations of the present Convention shall apply to the public representation of dramatic or dramatico-musical works and to the public performance of musical works, whether such works be published or not.

This Article does not impose upon a Rome Convention country the obligation to give authors the exclusive right of authorizing the public performance of their works. It simply provides that the stipulations of the Convention shall apply to public representations and public performances. The words "stipulations of the present Convention" refer particularly to Article 4 under which "the extent of protection is governed by the law of each country". (See Ladas, *The International Protection of Literary and Artistic Property*, Vol. I, par. 187, page 404.) As stated by the Berne Union office at the Brussels Convention—(Documents de la Conférence de Bruxelles, p. 252—our translation):

Article 11 as it was drafted at Berlin and retained at Rome simply provides that the stipulations of the Convention shall apply also to the right of presentation and performance. That means that as far as this prerogative is concerned the nationals of any of the countries of the Union shall enjoy the same rights in each contracting country as the nationals of that country according to the general and fundamental rule laid down in Article 4.

Were Canada to accede to the Brussels Convention it would be bound by Article 11 (1) of that Convention which is as follows:

The authors of dramatic, dramatico-musical or musical works shall enjoy the exclusive right of authorizing (i) the public presentation and public performance of their works; (ii) the public distribution by any means of the presentation and performance of their works.

The application of the provisions of Articles 11 bis and 13 is, however, reserved. with the following results:

(i) Canada probably, or at least arguably, could not impose restrictions on the author's exclusive right to authorize public performance of his work at agricultural fairs or by religious, charitable or fraternal organizations.

(ii) Canada probably, or at least arguably, could not provide, generally, that it is not an infringement of a copyright in any broadcast work for the person receiving the broadcast to cause it to be seen or heard in public. It is true that Article 11 (1) (Brussels) is subject to Article 11 bis which by paragraph (2) leaves it to the legislation of a Union country to determine the conditions under which the author's exclusive right of authorizing among other things "the communication to the public by loud speaker or any other similar instrument transmitting by signs, sounds or images the radio-diffusion of the work" may be exercised, but Article 11 bis (2) probably does not mean that such right can be wholly denied.

(iii) If at any time Canada wished to change its law so that public performance in order to be infringement must be for profit (as the copyright law of the United States provides) it could not do so.

(b) An obligation to make relaying of copyright broadcast works, whether by wire or not, infringements; or in other words, an obligation to confer on authors the exclusive right, not only of authorizing the broadcast of their works, but of authorizing their relaying by air or by rediffusion. By rediffusion we mean transmission of a broadcast work by the person receiving the broadcast, simultaneously with the broadcast, over paths provided by a material substance (e.g. wires). We do not wish to recommend that such a right be conferred on authors, for reasons given below. The Gregory Committee did not recommend such a right. It was not until the Bill which matured into the United Kingdom Act was passed by the House of Lords and was under consideration by a Standing Committee

of the House of Commons that provision for such a right was placed in it, and then, it would appear, only because the Government had become satisfied that accession to the Brussels Convention would make it necessary for United Kingdom legislation to contain such a provision, as otherwise Article 11 bis (Brussels) would not be complied with. It is true that the United Kingdom Parliament by Section 40 of the new United Kingdom Act made an exception of a very important class of rediffusion (under the authority of Article 11 bis (2)) but the United Kingdom Parliament could not, we think, have excepted all rediffusion consistently with its prospective obligations under the Brussels Convention.

(c) An obligation to set the term of protection for all literary and artistic works (including dramatic and musical works) as the life of the author and at least 50 years after his death. As results:

(i) Canada could not provide as it does in Section 7 (1) of our Copyright Act that there is a licence as of right 25 years after the author's death. Section 7 (1) is as follows:

7.(1) After the expiration of twenty-five years, or in the case of a work in which copyright subsisted on the 4th day of June, 1921, thirty years, from the death of the author of a published work, copyright in the work shall not be deemed to be infringed by the reproduction of the work for sale if the person reproducing the work proves that he has given the prescribed notice in writing of his intention to reproduce the work, and that he has paid in the prescribed manner to, or for the benefit of, the owner of the copyright, royalties in respect of all copies of the work sold by him, calculated at the rate of ten per cent on the price at which he publishes the work.

(ii) Canada would be obliged to repeal or at least radically amend Section 13 of our Copyright Act which is as follows:

13. Where, at any time after the death of the author of a literary, dramatic, or musical work that has been published or performed in public, a complaint is made to the Governor in Council that the owner of the copyright in the work has refused to republish or to allow the republication of the work or has refused to allow the performance in public of the work, and that by reason of such refusal the work is withheld from the public, the owner of the copyright may be ordered to grant a licence to reproduce the work or perform the work in public, as the case may be, on such terms and subject to such conditions as the Governor in Council may think fit.

(iii) Canada could not set a term, in respect of published works, of a fixed number of years from publication, or in respect of publicly presented or publicly performed works, of a fixed number of years from public presentation or performance.

As we interpret the Rome Convention no party to it is bound by it to confer copyright protection for the life of the author and fifty years after his death unless and until a time comes when all the parties to the Rome Convention uniformly adopt this period of protection, and in the meantime any party to the Convention may vary the term. There were at the beginning of the present year and, as far as we can ascertain, still are ten countries other than Canada, parties to the Rome Convention, which have not adopted the term of life of author and fifty years the majority of these countries having adopted a term which on the whole is considerably shorter. Moreover it would appear to us that Canada itself has not provided "protection" within the meaning of Article 7 of the Rome Convention for the life of the author and fifty years after his death. While the term provided by our Act is often referred to as "life of author plus fifty years" or in some such way, the term of copyright protection is really the life of the

author and twenty-five years after his death, the author's representatives having only a right to royalties, with no right to prevent copying, for an additional twenty-five years, or, viewed in the light of Section 13 of our Act, our term of protection is only for the life of the author. As indicated below we do not wish to recommend that the term of protection shall be the life of the author and fifty years after his death.

(d) An obligation to remain bound by the Brussels Convention for at least six years after we accede to it. This obligation results from Article 29 (Brussels). Under the Rome Convention we are free to leave the Berne Union on one year's notice. See Article 29 (Rome).

(e) An obligation to submit unsettled disputes between this country and any other country or countries of the Union to the International Court of Justice, unless some other method of settlement is agreed upon. That there are obscurities in the Brussels Convention was recognized by the Gregory Committee (see Report, part 1, par. 2). Indeed we have noticed several, unnecessary to mention in detail. Having regard to these, we would be reluctant to recommend that Canada submit itself to the interpretation of the Convention by any authority other than its own Parliament. We think that the terms of our association with the Berne Union, as embodied in a Convention to which we are a party, should remain subject to the interpretation of the Parliament of Canada. If Parliament acts irresponsibly the other parties to the Convention may rely on such remedies as the Convention gives them. We have no expectation, however, that Parliament will act in other than a responsible way. It may be noted that the Universal Copyright Convention provides that a dispute between two or more contracting States concerning the interpretation or application of the Universal Copyright Convention not settled by negotiation shall, unless the States concerned agree upon some other method of settlement, be brought before the International Court of Justice for determination. The Universal Copyright Convention is, we think, much more free from obscurities and ambiguities than either the Rome Convention or the Brussels Convention and we do not think that the presence of the clause in the Universal Copyright Convention which we have mentioned should deter us from ratifying the Universal Copyright Convention.

(f) Possible obligations, the full extent of which are not clear to us, in reference to the "distribution" of works including films. See Article 11 (1) and Article 14 (1).

(g) Possible obligations, the full extent of which are not clear to us, regarding industrial designs. It will be noted that Article 2 (1) provides that the term "literary and artistic works" shall include "works of applied art" and that Article 2 (4) provides that such works shall enjoy protection. It is true that Article 2 (5) provides that it shall be a matter for legislation in the countries of the Union to determine the extent of the application of their laws to works of applied art and industrial designs and models, as well as the conditions under which such works, designs and models shall be protected. But it is a question whether, if Canada becomes a party to the Brussels Convention, it could repeal or refrain from enacting industrial designs legislation altogether. As will be seen, we propose to recommend the enactment of industrial design legislation but we do so with misgivings as to its overall advantages to this country and we think we should preserve our freedom to get rid of it altogether.

We do not feel that we can recommend the assumption by Canada of the foregoing obligations. It is true that Canada's representatives signed the Brussels



Convention and it is quite possible that had we been representatives of Canada we would have done the same thing in view of the fact that the implications of becoming a party to the Convention can only be realized after long periods of intensive study and also because subsequent technological developments could not have been foreseen. Furthermore, Canada's representatives in 1948 did not have before them the Universal Copyright Convention, then not completed, nor the protracted debates in the United Kingdom Parliament of which we have had the benefit. Moreover our representatives knew that mere signing did not bind Canada but that only subsequent ratification or accession would do so.

Article 28 of the Brussels Convention limits the period for ratification to that expiring on the 1st of July, 1951. Canada did not ratify. But the Convention provides in Article 28 (3) that countries that shall not have ratified the Convention by the 1st of July, 1951, may accede thereto in accordance with the procedure therein specified. Canada has not acceded. Our recommendation is that Canada refrain from acceding to the Brussels Convention.

### **Section 6—Should Canada Ratify the Universal Copyright Convention?**

The next question that arises is whether Canada should ratify the Universal Copyright Convention. As a signatory it has the right to do so under Articles VIII and IX but before it does it must be in a position under its domestic law to give effect to the terms of the Universal Copyright Convention (Article X). In our opinion Canada should, after passing the legislation carrying out the recommendations in this report, ratify the Universal Copyright Convention. The main advantage to Canada of ratifying the Universal Copyright Convention is that Canadian authors first publishing their works in a country other than the United States which is a party to the Universal Copyright Convention and their assignees will receive copyright protection under the law of the United States, in the United States, upon complying with the relatively simple formalities mentioned in Section 4 above provided for in Article III, paragraph 1, of the Universal Copyright Convention. This would mean that Canadian authors first publishing their works in countries other than the United States would be freed from the requirements of the United States law as to registration and notice and that Canadian authors whose works are in the English language would also be freed from the present requirements as to printing in the United States. Although, as we understand, many Canadian authors now have their works printed in the United States, the time may come when a great many more of them will print first in Canada and in that event it would be a substantial advantage to them to be free of the United States' requirements as to registration, notice and printing. The Canadian printing trade can only benefit from Canada ratifying the Universal Copyright Convention.

We have mentioned the United States but similar advantages will be enjoyed by Canadian authors and their assignees in the other countries which are parties to the Universal Copyright Convention although these advantages will be much less important than those to be enjoyed in the United States. The advantages in the United States that we have mentioned will not be confined to proprietors of copyright in works by Canadian authors but will be enjoyed also by any proprietors of copyright in works first published in Canada other than works of United States nationals.

### **Section 7—Should Canada Ratify the Protocols Annexed to the Universal Copyright Convention?**

There are three protocols annexed to the Universal Copyright Convention. Canada is a signatory to all three.

*Protocol 1.*—This concerns the application of the Universal Copyright Convention to the works of stateless persons and refugees. It provides that stateless persons and refugees who have their habitual residence in a State party to the Protocol shall for the purposes of the Convention be assimilated to the nationals of that State. We think that this Protocol should be ratified by Canada and that the Governor in Council should be given power by Order in Council to effect the assimilation referred to in the Protocol.

*Protocol 2.*—This concerns the application of the Universal Copyright Convention to the works of certain international organizations. The Protocol provides that the protection provided for in Article II (1) and (2) shall apply to works published for the first time by the United Nations, by the Specialized Agencies in relationship therewith, or by the Organisation of American States. We recommend the ratification of this Protocol and the enactment of a section empowering the Governor in Council to designate the organizations to which the Section is to apply, extending copyright protection to works published for the first time by any organization so designated, the term of protection to be fifty-six years from publication, and making provisions for the existence of copyright in unpublished works made by or under the direction or control of such organizations. The reasons for providing for a term of protection of fifty-six years will be given later.

*Protocol 3.*—This concerns the effective date of instruments of ratification or acceptance of or accession to the Universal Copyright Convention. We recommend the ratification of this Protocol.

### **Section 8—Should Canada Remain a Member of the Berne Union?**

The question which next arises is whether Canada should remain a member of the Berne Union. This question may be expressed as a question whether Canada should denounce the Rome Convention. This it has the right to do on one year's notice. Assuming that Canada becomes a party to the Universal Copyright Convention, we can see no advantages in denouncing the Rome Convention and we can see a distinct disadvantage in doing so. This disadvantage flows from Article XVII of the Universal Copyright Convention and the appendix declaration relating to that Article. The result of this Article and the declaration is that if Canada denounces the Rome Convention, works that have as their country of origin Canada will not be protected by the Universal Copyright Convention in the countries of the Berne Union. Such works would then not be assured of any convention protection whatever. In the result, unless Canada could make satisfactory bilateral agreements with countries in which it desired protection for works of which Canada is the country of origin, such works would be without any assurance of protection in countries which are members of the Berne Union. It is true that there would be assurance of protection in countries which are parties to the Universal Copyright Convention and are not members of the Berne Union but this would leave such works without assurance of protection in many countries as to which they have that assurance now. It is true also

that by publishing in Canada and a Berne Union country simultaneously a Canadian author would be assured of protection in Berne Union countries because his simultaneous publication in a Berne Union country would be regarded as first publication in that country (see Article 4 (3) of the Rome Convention). In other words Canadian authors could secure protection by the same method by which United States authors have secured protection in Berne Union Countries for so long, a method which has been referred to as the back door method. We are not disposed to recommend a step which would entail reliance on this method of obtaining protection nor are we disposed to recommend that we embark upon a program of making bilateral agreements instead of relying on convention protection. We do not recommend denunciation of the Rome Convention. It follows that any legislation that we recommend must comply with that Convention.

It may be that, in becoming a party to the Berlin Revision of the Berne Convention in 1923, Canada was not too well advised. Apart from Haiti and Brazil no nations in the Western Hemisphere are members of the Berne Union. Canada became bound, originally, in 1887, by the Berne Convention, by Great Britain's ratification (made subject to the understanding that the British Government could denounce the Convention later for certain British possessions including Canada).

Nevertheless, we are not disposed, at this time, to recommend denouncing the Rome Convention but we do suggest that at future convention revisions the growing economic and commercial significance of intellectual property be accorded greater recognition.

We are persuaded that the growing material well-being and the increasing leisure enjoyed by Canadians and others will assure the future growth and proliferation of the entertainment industry. Additionally, the phenomenal development of the advertising and related public relations organizations involves expanded use of intellectual property in this field. In these circumstances we have some misgivings as to whether all the requirements of the Rome Convention and even of the Universal Copyright Convention—perhaps suitable enough at the present time—will be found desirable in the future.

Specifically, there is reason to believe that the ownership of copyright in a work, or the partial ownership, or rights to use the work in various ways, arising out of assignments, partial assignments, licensing agreements, etc. ought to be ascertainable with greater certainty and less difficulty than is now possible. It is not difficult to foresee a time when suitable provision for registration of such rights would be in the general interest.

If Canada is to remain a party to the Convention, we believe our representatives should bring these and related matters forward when revisions of conventions are under consideration.

### *PART III*

#### **TERM OF COPYRIGHT**

Assuming that we remain members of the Berne Union bound by the Rome Convention, refrain from acceding to the Brussels Convention, and ratify the Universal Copyright Convention, what should be the term of copyright for: (a) published works and (b) unpublished works? The question of term will now be discussed.

##### **Section 1—Published Works**

Under our present Act the works in which copyright subsists are original literary, dramatic, musical and artistic works. Some of these works are published and some unpublished. Publication in relation to any work means the issue of copies of the work to the public (with certain express exceptions). Our recommendation is that it be enacted that publication of a literary, dramatic, musical or artistic work be defined as the issue of reproductions of the work to the public but that the following shall not be regarded as publication:

- (a) the performance, or the issue of records, of a literary, dramatic or musical work, the exhibition of an artistic work, the construction of a work of architecture, or the issue of photographs or engravings of a work of architecture or of a sculpture;
- (b) except in so far as it may constitute an infringement of copyright, a publication which is merely colourable and not intended to satisfy the reasonable requirements of the public.

As to first publication, a publication in Canada or in any other country should not be treated as being other than the first publication by reason only of an earlier publication elsewhere if the two publications took place within a period of not more than thirty days.

Under our present Act the term of copyright for published works is not related to the date or year of publication. We recommend, generally speaking, and subject to the variations mentioned in the sections below relating specifically to literary, dramatic and musical works, and to artistic works, that the term of copyright for published works be related to the year of publication and that the term be for a period expiring at the end of fifty-six years from the time of publication or at the death of the author, whichever is later. Whenever in this report a period is stated as running from the time of publication, public performance, offer for sale to the public of records, broadcasting, or death, as the case may be, it is meant to run from the first day of January next following publication, etc., as the case may be.

It would appear that in the case of joint authors Canada is not permitted by the Rome Convention to provide that the term of protection will expire before the death of the author who dies last. See Article 7 bis (3). Consequently, in the case of joint authors it would not be permissible for Canada to enact that the term of protection expire fifty-six years from publication. If this cannot be done in respect of joint authors it should not be done in respect of sole authors. Consequently as a practical matter it is not permissible to deprive any author of protection during his lifetime. Were it not for Article 7 bis of the Rome Conven-

tion we would be disposed to recommend that in regard to published works the term of protection expire fifty-six years after publication; and we now give our reasons why we think that this would be an appropriate term for Canadian copyright:

(i) In the first place we are of the opinion that the present term is, all things considered, too long. Of course the proposed term may be longer than the present one in certain exceptional cases. For example, if an author dies one year after publishing his work our present term of copyright protection (if copyright protection be taken as including the protection the copyright owner has after the first twenty-five years after the author's death) is fifty-one years from publication and under our proposal it would be fifty-six years. But if an author publishes his work when he is twenty-one years of age and lives to be ninety-one, the term of his copyright after publication at present is one hundred and twenty years, while under our proposal the term would be only seventy years. We would expect that in most cases the actual term of protection under our proposal would be fifty-six years from publication. When we say that we think that the present term is on the whole too long, we realize that this is very much a matter of personal opinion or judgment. The proper length of a term of copyright protection after publication depends to some extent on whether copyright should be regarded as a right of property in an author's material, of identical character with the right of property in land or chattels, or whether it should be regarded as a right conferred by the state on the author not so much for his benefit as to secure his services to the public by offering a reward for labour.

We do not think that either conception can be wholly excluded. As indicated earlier in this report, theoretically if copyright is regarded as identical with the right of property in land or chattels it should be perpetual, and practically no one advocates that. Copyright is almost universally regarded as a right which should properly be of limited duration.

In recent times copyright in such works as motion pictures and gramophone records has become increasingly important and there has been a tendency to provide that the term of copyright run for a limited time from a certain event, such as the making of the motion picture or record. The same approach is used in fixing the term of copyright in photographs. There does not seem to be much reason in principle why the creators of these works should not be protected for life and fifty years or even perpetually, if copyright is regarded as identical with the right of property in land and chattels.

It may be that our thinking as to the proper length of copyright protection has been influenced by the views as to term of copyright which to a considerable extent prevail in the rest of North America. In the United States the maximum term of copyright for published works is fifty-six years from publication and in Mexico, the term generally speaking is much shorter than that presently prevailing in Canada.

(ii) We consider that a term of copyright which runs for a definite number of years from publication is fairer than one which is based upon the death of the author in that it makes for greater equality in the treatment of authors. Assuming that under our recommendation most works will enjoy a term of protection of fifty-six years from publication, the elderly author is granted a property right by the state which is as valuable as that granted the younger author. There will, of course, be cases where the protection given the young author will run more than fifty-six years from publication because he will die more than fifty-six years

after publication but the present disparity in the treatment of young authors and older authors will be very much lessened. In this connection, it may be noted that, as early as 1879 Pouillet, a French author whose work on copyright is still quoted as an authority (although his views on this particular point have not prevailed) warned that this discrimination between authors, which results from the calculation of a fifty year copyright, not from the date of publication of the work, but from the date of the death of the author, created an unfair situation which needed to be remedied. See *Traité de la Propriété Littéraire et Artistique*, Paris, 1879, page 124.

(iii) The date on which published works fall into the public domain can, we think, in most cases, be determined with more certainty if the term of copyright runs for a definite number of years from publication rather than for the life of the author and fifty years. The Universal Copyright Convention by Article III, paragraph 1, provides that any contracting state which, under its domestic law, requires as a condition of copyright compliance with certain formalities, including manufacture or publication in that contracting state, shall regard these requirements as satisfied with respect to all works protected in accordance with the Universal Copyright Convention and first published outside its territory and the author of which is not one of its nationals, if from the time of the first publication all the copies of the work published with the authority of the author or other copyright proprietor bear the symbol © accompanied by the name of the copyright proprietor *and the year of first publication* placed in such manner and location as to give reasonable notice of claim of copyright. Works published by citizens of the United States in the future will doubtless continue to bear the year of publication, which is a condition of copyright now. Published works of authors who are citizens of other countries which are parties to the Universal Copyright Convention and which are designed for circulation in the United States will, because of the provisions of Article III, paragraph 1, just quoted, almost certainly also bear the year of first publication. It is probable that most works intended for circulation in Canada will also be intended for circulation in the United States. It may therefore be expected that most published works as to which it may become desirable to know when the term of copyright expires, and which are published hereafter, will bear the year of first publication. If the term of copyright runs from that year, it will be easy to determine the year when the copyright expires. Under the present system by which a term extends for fifty years after the death of the author it is, in many cases, difficult to determine the date of the death of the author. At least this was the effect of some of the representations made to us.

It is true that a person who wishes to know at the end of fifty-six years after publication whether a work is in the public domain will not know this for certain from the fact alone that the fifty-six years have expired if our recommendation as to term is accepted. He will have to ascertain whether the author is still alive, but it is very much easier to find out whether an author is still alive than to find out whether he died more than fifty years ago.

(iv) We think also that it is desirable to have a term of copyright in Canada which corresponds as closely as possible with the term of copyright in the United States. It seems rather unfair that the works of United States authors should remain in copyright in Canada long after they have fallen into the public domain in the United States. As will be seen below, one performing rights society in Canada owns the performing rights in approximately three million musical works.

As to these the strong probability is that the bulk of those which are performed in Canada are the works of United States authors and composers. Under our present law many of these keep falling into the public domain in the United States while remaining in copyright in Canada. We have no comparable data with regard to literary works but it is reasonable to assume that a large number of literary works of United States authors must be in the public domain in the United States but still in copyright in Canada. We are informed that about 90% of copyrighted works in the United States do not have their twenty-eight year term of copyright renewed but that the other 10% includes practically all works the copyright in which has an enduring value. If, therefore, Canada were to make its term fifty-six years from publication we would ensure that most works of importance enjoying copyright in both the United States and Canada would enjoy virtually the same term of copyright protection. This advantage, and we consider it such, is to some extent diminished by our proposed provision that the term shall not expire in the author's lifetime. But this provision would, we consider, affect only a very small proportion of published works.

The chief countries other than the United States with whose periods of copyright protection Canada's period should, if possible, correspond are the United Kingdom and France; and the acceptance of our recommendation would place the period of protection in Canada further out of line with the periods of protection in those countries than would retention of Canada's present period of protection. Nevertheless the desirability from the practical viewpoint of equality between the periods in Canada and the United Kingdom or between the periods in Canada and France is not as great in our opinion as that of equality between the periods in Canada and the United States, either from the standpoint of Canada or from the standpoint of the United Kingdom or France, as the case may be.

We realize that in recommending that Canada change the termination of the copyright in published works from the expiration of fifty-six years from the death of the author to the expiration of fifty-six years from the time of publication or to the death of the author, whichever is later, we are recommending what may appear to many as a startling change in our legislation. It will probably be argued by some that we have misinterpreted the Rome Convention; or that even if we have not, Canada ought not to be the only member of the Berne Union to base the term of protection on publication rather than on the life of the author; or that the time for Parliament to have adopted a term based on date of publication was in 1921 rather than now and that having made a decision to the contrary then, it should not reverse it now; or that any transitional provisions to be just must necessarily result in so long a period when works will exist side by side with different terms of copyright protection that the change is not worth making; or that some Berne Union countries may by placing a different interpretation on the Rome Convention refuse our authors protection there altogether, thereby necessitating the protracted and arduous negotiations of bilateral agreements, preceded perhaps by counter retaliation, with all the uncertainties involved in such a course of events.

We have carefully considered all these objections to the course we are recommending and still wish to recommend it. There is a valid answer to each of the objections suggested above. We feel that we are not recommending an unjust, ungenerous or niggardly measure of protection to authors. Certainly it is not our wish to do so. It was, we surmise, the hope of the members of the

Berne Union for many years that the United States would eventually join the Berne Union and adopt the term of protection set out in the recent conventions. We are satisfied that the overwhelming probability is that the United States will not do so either in the near or distant future. It has taken a leading part in promoting another convention, the Universal Copyright Convention, giving itself complete liberty to retain the principle of basing the term on the date of publication. We wholly agree with that principle for the reasons given above. We consider, in the light of hindsight, that Canada, a North American country with innumerable intimate relations with the United States copyrightwise, would have been well advised if it had not adopted the term of protection which it did in 1921. And we do not think it is too late to correct the situation now. Apart from those beneficially interested in preserving as long a term of protection as possible, we think that there are not many Canadians, who, when they realize that the term of protection is the life of the author and fifty years, do not consider it too long, especially after they come to realize as well that there are and will be great numbers of works the copyright in which is owned by United States citizens which are in the public domain in the United States but subject to copyright in Canada.

If the Government considers that it is undesirable because of the objections mentioned above, or others, to make the change of term we recommend, most of this report will still be applicable to our conditions and problems. But even if it is decided to continue the present term of protection we would still recommend that Canada do not accede to the restrictive Brussels Convention.

We would in that case recommend, for example, the retention of Section 7 of our present Act, which Canada would be obliged to repeal if it acceded to the Brussels Convention.

We have been referring to the present term of protection as the life of the author and fifty years after his death, but this, as we have mentioned once or twice, is not accurate. By virtue of the provisions of Section 7 of our present Act the term of protection is the life of the author and twenty-five years after his death, the author's representatives having only a right to royalties for another twenty-five years. Moreover, by virtue of Section 13 of our Act quoted above the author is entitled to complete protection only for life. His representatives may in certain circumstances be compelled to allow publication or performance after his death contrary to their wishes.

We are of opinion that our proposal as to term is in effect a limitation of term for published works to a period computed from the first publication of the work within the meaning of Article IV, paragraph 2, of the Universal Copyright Convention and that, therefore, if we enact it before ratifying the Universal Copyright Convention it will not in any way conflict with the Universal Copyright Convention, any more than it will with the Rome Convention.

## **Section 2—Unpublished Works**

The term which we recommend for this class of works will vary according to the work and the term in each case will be dealt with later. (Records, films and broadcasts we do not propose to refer to as "works"; and the term of protection of these will also be dealt with later.)



## **PART IV**

### **NEW CLASSES OF COPYRIGHT OWNERS; CONSIDERATION OF NEW RIGHTS FOR EXISTING CLASSES**

The new United Kingdom Act creates certain new copyrights not before known to the law. In particular copyright in broadcasts is given to broadcasting bodies and copyright in published editions is given to publishers. These copyrights are separate and apart from the copyright of the authors of the works broadcast or published, as the case may be, and set up new classes of copyright holders. In addition, the new United Kingdom Act adds substantially to the rights of existing classes of copyright holders. In particular it makes broadcasting itself a restricted act irrespective of whether the broadcast is a public performance. It makes the causing of a work to be transmitted to subscribers to a diffusion service a restricted act. By restricted acts are meant acts which, if not authorized by the copyright owner, are infringements. We have considered first whether any and what new classes of copyright owners should be created and then whether any and what new rights should be given to existing classes of copyright owners.

#### **Section 1—Creation of a Broadcaster's Right**

We have come to the conclusion that we should recommend the creation of a broadcaster's right and that the acts restricted by the copyright in a television or sound broadcast should be (a) the recording by a film record or any other device of the images or the sounds of the broadcast or both; (b) the use of such a recording for broadcasting or diffusing; (c) the use of such a recording for causing the broadcast to be seen or heard in public; (d) rebroadcasting the broadcast, subject to the qualifications set out in Section 3 of Part XI.

We had representations from the Canadian Broadcasting Corporation (to be referred to as the CBC) to the effect that a program of the CBC consisting of a play had been made into a record without its authority, though with the authority of the author of the play, and that this record had been used for profit-making purposes. The CBC felt that this was an unjust appropriation of the results of its labour, skill and expense, and that it should have copyright in its broadcasts, which would be infringed by such an act. It perhaps should be pointed out that in this particular instance the CBC could have protected itself by taking an appropriate assignment of the author's copyright, although had the play not been in copyright, protection could not have been obtained in this way. Broadcasting in Canada is carried on in part by the broadcasting stations of the CBC and in part by privately-owned broadcasting stations (to be referred to as private broadcasters). What the CBC submitted that we should recommend was that the broadcaster should have the right to prevent the copying of its programs by rebroadcasting or by rediffusion or by the making of records for sale, and to prevent the performance in public of the program at the receiving end of the broadcast, these rights to be additional to the rights of the authors in any of the works broadcast. The private broadcasters, as represented by the Canadian Association of Radio and Television Broadcasters, expressly dissociated themselves from this submission.

This submission of the CBC was given additional point as far as rediffusion of broadcasts is concerned, by a decision of the Exchequer Court in *Canadian Admiral Corporation Limited v. Rediffusion Inc. (1954) Ex. C.R. 382* which decided that rediffusion by wire is not in itself a public performance and therefore not restrainable by the author of the work broadcast.

We were told that it is possible to rediffuse broadcasts by wire, with omissions of the advertising which they contain or with the substitution of other advertising, thereby enabling the person rediffusing the broadcast to impair its value to those advertising originally—that there is problem of mutilation of broadcasts. We were told also that those broadcasting by television sporting events and the like, often wish to make the broadcasts available in certain areas only, as otherwise the attendance at the events might be so lessened that the right to broadcast by television might not be granted, that the practice of blacking out certain areas is therefore used, and that it is possible for a person rediffusing the telecast to wire it into the blacked out areas. It is obvious that some of the practices mentioned above are unfair to the broadcaster and that the law should afford, if it does not now afford, some effective way of preventing them.

It would appear, however, that the Governor in Council or the Minister of Transport, as the case may be, has under existing legislation full power to control relaying of broadcast programs by air and, by virtue of his power to withhold licenses from commercial receiving stations, to control rediffusion by them by wire. As to relaying by air, there would appear to be no stations in Canada at present using off the air pick up of broadcasts but one station (in Argentia, Newfoundland) has recently been licensed to do so with respect to the transmissions of a station in St. John's, Newfoundland. As to rediffusion by wire, the situation is as follows. There are at the present time 111 stations rediffusing television broadcasts to subscribers. They are located as follows: Quebec, 70; Ontario, 18; British Columbia, 14; New Brunswick, 4; Alberta, 3; Saskatchewan, 2. Nearly all rediffusion stations in Canada are in the nature of community antennae systems. They rely for their revenues entirely on charges levied against their customers. Typical installation charges run from \$100 to \$125, with monthly fees normally varying between \$4 and \$7. In many cases rediffusion stations were organized by television receiver dealers and in these cases the installation of a television set purchased from the dealer was one of the considerations for the supply of the service. Normally a Canadian rediffusion station supplies services to fewer than 200 subscribers.

A person desiring to use off the air pick up of broadcasts (which we have referred to as relaying by air) may apply to the Minister of Transport for a license to do so. The license is granted only after referring it to the CBC for a recommendation and only upon the approval of the Governor in Council. Licenses are granted only on the conditions, among others, (a) that no rebroadcasting will be permitted of the transmission of any station in Canada without its consent and (b) no broadcasting will be permitted of the transmission of any station outside of Canada. It will be seen that the control by a broadcasting station of the simultaneous rebroadcasting of its programs is complete.

All rediffusion stations operate under licenses from the Department of Transport, being commercial broadcast receiving stations. Each license is issued by the Minister of Transport and is subject to the following conditions among others: (a) the licensed station shall receive signals only from the broadcasting stations that are specified in the license and (b) during the scheduled hours of operation of the licensed station, broadcasting received by that station shall not

be altered or curtailed in any way except by agreement with the broadcasting station. The regulations also provide that "nothing in these regulations shall be construed as conferring the right to use broadcasting received from a broadcasting station for any purpose other than that agreed to by the licensee of that broadcasting station". The licenses issued have authorized rediffusion of broadcasts of both Canadian and American stations. The effect of these regulations is to give the broadcaster the power to control the rediffusion of his broadcasts.

The recording of sound or television broadcasts by means of films, records or otherwise is not, however, controllable by the CBC or the Department under any existing legislation and probably cannot constitutionally be made subject to Federal control under the Federal power to legislate in respect of radio broadcasting.

With regard to the CBC submission that a broadcaster originating a program which it broadcasts should have the right to prevent its performance in public at the receiving end, we recommend against it, and both as to sound broadcasts and television broadcasts. This question was considered at length by the Gregory Committee which recommended that as to sound broadcasts no such new right be created but that as to television broadcasts such new rights should be created. The new United Kingdom Act provides that one of the acts restricted by the broadcaster's copyright which the Act creates shall be, in the case of a television broadcast, causing it in so far as it consists of visual images, to be seen in public, or in so far as it consists of sounds, to be heard in public, if it is seen or heard by a paying audience. In Canada not only are sound broadcasts heard in many public places but television broadcasts are also seen in public places. The public places we have in mind are hotel lounges, restaurants and other commercial establishments of one kind or another where members of the public normally have time to wait or stay for a while. In these places the broadcasts are not heard or seen by paying audiences and no instance was brought to our attention of fees being charged for admission to places for the privilege of seeing television broadcasts or hearing sound broadcasts. It was feared by the Gregory Committee that motion picture theatres would exhibit television performances. No instances of that kind in Canada were brought to our attention. Indeed, television has been introduced, and is being introduced, into the homes in Canada at such a rapid rate that we think that the fear of the use of these performances for direct profit is illusory. It is unlikely that persons will pay for admission to places of entertainment for the purpose of seeing television. To the extent that they do so, however, we cannot see that the broadcaster has any complaint. For the viewer it is merely an alternative method of availing himself of television facilities.

Somewhat similar considerations apply to the CBC submission that the broadcaster's copyright should be such as to enable him to prevent rediffusion of his programs. We cannot make any such recommendation for reasons which will appear when we consider what acts should be restricted by the copyright of authors and composers and other proprietors of what is often called the head copyright.

The broadcaster's copyright should however enable him to prevent a rebroadcast of his original broadcast. Our precise recommendations as to the extent and limit of the proposed broadcaster's right will appear later.

The foregoing discussion brings about the question: what is a program? If a broadcast consisted of one vocal or instrumental solo, would it be a program? There would seem to be something anomalous about giving

a broadcaster a copyright in the broadcast of the solo when the soloist has none. The soloist, as one would think, contributes more creative talent to the broadcast than does the broadcaster, yet it seems impossible to distinguish between the degrees of creativity that go into the preparation of broadcasts. In the new United Kingdom Act what it is proposed to protect is described as a broadcast, not a program, and we are of opinion that for the purposes of the foregoing we shall have to regard every broadcast as a program created by the broadcaster.

## **Section 2—Creation of a Publisher's Right Not Recommended**

Section 15 of the new United Kingdom Act provides that copyright shall subsist subject to the provisions of the Act in a published edition of any one or more literary, dramatic or musical works. This section was enacted in pursuance of a recommendation of the Gregory Committee which is summarized on page 124 of its report as follows:

That protection should be given to typographical arrangements against exact copying, irrespective of any copyright subsisting in the basic literary work involved, the period of protection ending 25 years from the 1st January following first publication of the arrangement protected; that it should be a condition of securing relief that the date of first publication is indicated on the work, or is furnished by the publisher if so requested; that the right given in a typographical arrangement should not operate to prevent copying in recognised libraries, as recommended in Part III of this Report.

The protection was sought in the United Kingdom by the Publisher's Association which asked for protection for typographical arrangements so that a particular edition of a literary or musical work printed by or for a publisher could not be directly and exactly copied by an unscrupulous competitor by photolithography or similar means. It was pointed out to the Gregory Committee that it is now possible by photographic processes to produce reprints quickly and, compared with the costs involved in type-setting, relatively cheaply. The Gregory Committee says in paragraph 306 of their report:

If the literary or musical work printed is in copyright, such copying would, of course, require the consent of the copyright owner, and this would also be the case if the edition includes original artistic works in copyright. But if the work printed is itself out of copyright, there is nothing to prevent the unscrupulous competitor from copying the work photographically and so benefiting unfairly from the work of the original publisher. The Association added that in certain foreign countries the law of unfair competition prevented this kind of copying by competitors but no such remedy is available in this country.

While it can be argued that the work which a publisher does in bringing out an edition of a literary or musical work involves the use of as much creative talent as that employed by a record manufacturer in producing a record, we are averse to creating a new copyright unless the need is conclusively demonstrated. It is, we think, undesirable to place in the Copyright Act any more provisions than can be helped which have for their main purpose the prevention of unfair competition in the production and sale of industrial or quasi-industrial products. If the need should arise in the future it can be met by the appropriate legislative authorities, preferably we should think, not by way of a copyright provision.

## **Section 3—Right to Control Rediffusion of a Broadcast**

We now come to the question of what new rights, if any, should be given to existing classes of copyright owners. We are of opinion that the acts restricted

by the author's copyright should include (as they do under our present legislation) not only performance of his work in public but as a separate restricted act and irrespective of the public performance of it, the broadcasting of his work, but we do not think that where he has authorized the broadcasting of his work he should have the right to prevent a person who receives the broadcast from, simultaneously with reception, causing it to be heard or seen in public or re-diffusing it.

Where the author authorizes a broadcast he should be deemed to authorize its broadcasting in a wide sense. Some potential listeners within the range of the broadcast may receive it by ordinary radio or television receiving sets. Others may prefer to have it wired into their homes by a rediffusion system which would appear to be merely another method of assuring reception. The author in our opinion should not be entitled to prevent the rediffusion if he has authorized the broadcast. The position is not so clear with regard to those who are not within the range of the broadcasting station and to whom the broadcast is rediffused. However, in such a case the royalty or fee paid by the broadcaster to the author or head-copyright proprietor will presumably be based upon the extent of the listening audience whether this audience is within the range of the broadcast or is reached only by rediffusion. Consequently there would seem in this case as well as in the other no justification for an additional fee collectable from the rediffusing body. The broadcast itself may not be authorized by the head-copyright owner. The person rediffusing would ordinarily have no means of knowing this and we do not think it would be desirable to have a special kind of restricted act such as the rediffusing knowingly of an unauthorized broadcast, provided a suitable measure of damages payable by the unauthorized broadcaster is provided for. We are recommending such a provision in section 1 of Part VIII.

#### **Section 4—Right to Control Diffusion of a Work**

Later we recommend an additional right in head-copyright owners relating to diffusion (as distinguished from rediffusion) which will be dealt with fully when we reach it.

#### **Section 5—Right to Control Performance in Public of a Broadcast**

With regard to the right of a copyright owner to prevent a person receiving a broadcast from causing it then and there to be seen or heard in public, we may note in passing that by virtue of subsection (7) of Section 50 of our Copyright Act a performing rights society has not the right to collect a royalty from such a person (except in the case of theatres ordinarily and regularly used for entertainments to which an admission charge is made) and no such royalties are paid by the persons receiving. Under the subsection quoted the Copyright Appeal Board may provide for the collection in advance from radio broadcasting stations of fees in respect of public performance of this kind, and for some years the tariffs approved by the Copyright Appeal Board provided for the payment by the broadcasters of \$1,000 per annum in respect of all such public performances in Canada, a provision which has been discontinued. We see no reason for this imposition of a nominal fee in respect of persons receiving the broadcasts and causing them to be seen or heard in public. If we were to adopt the provisions of the new United Kingdom Act, persons receiving a broadcast of copyright material and causing it to be seen or heard in public would be liable for the

payment of the following fees: (1) a fee to the owner of the copyright in the broadcast, if a television broadcast and shown to a paying audience; (2) a fee to the owner of the copyright in the film if the telecast was of a film; and (3) fees, perhaps several in number, to the authors of the copyright material in the broadcast. As will be seen, we are recommending against his being liable for any of these fees. The broadcast may at the moment it is broadcast, freely and without infringement of anyone's copyright be caused to be seen or heard in public at the receiving end and with or without profit.

## **PART V**

### **PRINTING CLAUSES IN PRESENT LEGISLATION**

#### **Section 1—These Clauses No Longer Desirable**

The principle of making full copyright protection to some extent conditional upon printing in Canada receives some recognition in Sections 14, 15, 16 and 28 (1), (2) and (3) of our Act.

Section 14 provides that any person may apply to the Minister for a license to print and publish in Canada any book wherein copyright subsists, if at any time after publication and within the duration of the copyright the owner of the copyright fails to print the said book or cause the same to be printed in Canada or to supply by means of copies so printed the reasonable demands of the Canadian market for such book. Section 15 extends a similar principle to certain books begun as serials in certain other countries. Section 16 contains supplementary provisions and also provides that Sections 14, 15 and 16 do not apply to any work of which the author is a British subject, other than a Canadian citizen, or the subject or citizen of a country that has adhered to the Berlin Revision (1908) of the Berne Convention and a certain protocol thereto. The most relevant part of this protocol is as follows:

Where any country outside the Union fails to protect in an adequate manner the works of authors who are subject to the jurisdiction of one of the contracting countries, nothing in the Convention of the 13th November, 1908, shall affect the right of such contracting country to restrict the protection given to the works of authors who are at the date of the first publication thereof subjects or citizens of the said non-Union country, and are not effectively domiciled in one of the countries of the Union.

Canada tried at times between 1911 and 1921 to frame legislation which would be in accord with the Berlin Revision of the Berne Convention (1908) and at the same time would either require authors to print their works in Canada as a condition of copyright or at least subject them to compulsory licensing if they did not do so. One of the reasons for the desire to have manufacturing or printing clauses in our Act was that the United States had had them in theirs since 1891. From 1909 the United States copyright law provided that the owner of the copyright in a book or periodical first published outside the United States in the English language could obtain copyright protection in the United States (called *ad interim* protection) for five years from first publication but that if he imported into the United States more than 1,500 copies of the work during that period or failed to print the work in the United States during that period, his United States copyright ceased. This had the effect in many cases of compelling owners of copyright in works in English to print them in the United States as a condition of enjoying appropriate copyright protection in the United States.

Canada could not, once it adhered to the Berlin Revision of the Rome Convention, enact a manufacturing clause applicable to a United States citizen who first published his work in a Berne Union country unless Canada did so by virtue of the protocol mentioned above. On July 27, 1923, the Canadian Government passed an Order in Council which set out certain provisions of the

protocol and restricted the grant of copyright in accordance with the protocol in regard to the United States and stated that the restrictions to which rights of authors who are subject to the jurisdiction of the United States are subjected are set forth in sections of our Copyright Act of 1921 (which had been enacted but not proclaimed) these sections being the same as Sections 14, 15, 16 and 28 of our present Act. It is clear that the manufacturing or printing clauses in these sections were regarded as consistent with the Berne Convention as revised (at least so far as United States citizens are concerned) only because of the printing clauses in the United States Copyright Act.

These clauses in the United States Copyright Act have now been made inoperative in regard to all authors who are citizens or subjects of, or whose works were first published in, a country which is a party to the Universal Copyright Convention except those who are citizens of or domiciled in the United States and except as to works first published in the United States; and the United States, in order to comply with the Universal Copyright Convention, must leave them inoperative as long as the United States remains party to that Convention. If, as we recommend, Canada becomes a party to the Universal Copyright Convention, it would appear that Canada should repeal its printing clauses, at least so far as they apply to United States citizens. Moreover, as parties to the Rome Convention it would appear that we would no longer be justified in applying printing clauses to United States citizens as it can hardly be said that the United States now fails to protect in an adequate manner the works of Canadian authors first published outside the United States.

It would manifestly be undesirable to retain the printing provisions in so far as Canadian authors alone are concerned as we would be subjecting them to restrictions not applicable in Canada to citizens of the United States or of any other country which is a party to the Universal Copyright Convention or to any author who first published in any country other than Canada which is a member of the Berne Union. Indeed we suspect that the main reason they were made applicable to Canadians was that to get the United States to continue its copyright protection to works of Canadian authors Canada was obliged not to extend to Canadian citizens more protection than it gave United States citizens, which meant that Canada had to subject its own citizens to the same restrictions as those to which it subjected United States citizens.

In the result, we recommend the repeal of Sections 14, 15 and 16 and of subsections (1) and (2) of Section 28, and that any provision that takes the place of subsection (3) (c) of Section 28 leave out any reference to printing or making in Canada.

As regards the practical effects of repeal, we think that they are unimportant. Only two licenses have been applied for under Section 14 and none, so far as we are aware, under Section 15. As to Section 28 (1) and (2), no one appearing before us seemed to attach any importance to them.

## **Section 2—The Goad's Plan Issue**

Section 14 was regarded by one organization as of importance but only if the Act were amended in another important respect. This organization is the Independent Fire Insurance Conference and their submission must now be considered.

The Independent Fire Insurance Conference (to be referred to as the Conference) is a group of 64 "non-tariff" fire insurance companies doing business in



Canada. It has had a long controversy with a body called Canadian Underwriters Association (to be referred to as the Association) a company incorporated in 1937 whose membership consists of 183 "tariff" fire insurance companies which do business in Quebec and Ontario. At the instance of companies making up the Association in 1917 (it was not then incorporated) and associations of tariff underwriters in New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland, a company called Underwriters Survey Bureau Limited (hereinafter called the Bureau) was incorporated in 1917. The Bureau was to keep the existing Goad plans of Ontario, all provinces to the East and Newfoundland, up to date and make new plans for the members of the Association and of the other associations. The activities of the Association with respect to fire insurance relate only to Ontario and Quebec.

The Goad plans were plans of cities and towns so made as to be useful in the writing of fire insurance by showing the location and character of buildings and their protection and exposure. They took their name from their makers, the Chas. E. Goad Co. The fire insurance plans in Canada had for about fifty years before 1917 been made by Chas. E. Goad Co. and were known as Goad plans. For such plans to be of much use they must be kept up to date. Until the end of 1916 they were revised by the Goads from time to time and sold to anyone who wanted to buy them. At the end of 1916 the Goads decided to make no new plans in Canada and to discontinue making revisions of existing Canadian plans. It was then that the Bureau was set up for the purposes mentioned above. The Eastern Canada and Newfoundland Goad plans of members and their agents were to be kept accurate by having revisions prepared by the Bureau pasted on them. When it was realized that it would be necessary to reprint the sheets of plans which became cluttered with revisions, an agreement was made with the Goads in January 1918 permitting the Bureau to reprint such revised sheets at a set license fee per copy. The Goads continued in business selling to the public copies of plans prepared and revised up to 1917. These will be referred to as the "original Goad plans". In 1931 the Goads closed their business in Canada and sold and assigned their copyright in the Canadian and Newfoundland plans to the Bureau.

Since 1917 the Bureau has continued to make and revise plans. The plans so revised will be referred to as the "revised Goad plans".

The Association from 1917 has tried to keep the revised Goad plans away from non-Association companies and their agents as far as possible. Association members in their agreements with their agents have stipulated that the agents are not to use or permit any other person to use these plans except in connection with the business of the members of the Association. As an estimated 95% of the agents are agents for non-members as well as for members, the extent of the efficacy of this stipulation may well be imagined. However, Conference members find themselves inconvenienced and handicapped by not having ready access to the revised Goad plans. In order to counteract this handicap many of the Conference companies began in the early thirties or before to copy the plans by means of photostat machines. The members of the Association, then unincorporated, and the Bureau, thereupon brought an action against one of the non-Association companies which was copying and obtained an injunction and

damages. Before the action reached its final stages on appeal non-Association members applied to Parliament for an amendment to Section 4 of the Copyright Act to read as follows:

Notwithstanding the provisions of the preceding subsections of this Section, any person interested may apply to the Minister alleging, in the case of any work wherein copyright subsists, whether published or unpublished, that there has been an abuse of the rights conferred by this Act and asking for relief.

The application went to a Committee and was refused.

The Court having expressed the opinion in the action mentioned that the revised Goad plans were unpublished works, it was not open to the Conference to apply to the Minister for a compulsory license under Section 14. Even if the revised Goad's plans were published works an application under Section 14 would appear to be a somewhat unsatisfactory step to take, for two reasons. First, Section 14 does not apply to any work the author of which is a British subject other than a Canadian citizen or the subject or citizen of a country that has adhered to the Convention, etc. We were told that the authors of the revised Goad plans are numerous—often ten or fifteen authors of one plan—being employees of the Bureau. It would seem possible that in many cases one or more of such authors would be a British subject other than a Canadian citizen; or the subject or citizen of a Convention country. Secondly, it seems to be not much more than an accident that the section applies to such an application at all. The purpose of the section was to compel printing in Canada and the supply of the reasonable requirements, etc., by copies printed in Canada rather than in certain other countries. The Conference members are not in the least interested in the place of printing of the revised Goad plans.

The Conference now submits that we should recommend a change in the definition of publication. The present definition is found in Section 3 (2), the relevant part of which is as follows:

For the purposes of this Act, "publication" in relation to any work means the issue of copies of the work to the public.

The Conference submits that the following sentence should be added:

A work shall be deemed to be issued to the public if copies of the work are directly or indirectly let for hire or licensed for commercial use, notwithstanding that such copies of the work are not issued for sale.

As the revised Goad plans are probably licensed by the Bureau to members of the Association for commercial use and are even more probably licensed by the members to insurance agents for commercial use, these plans, if such an amendment were passed, would be published works and any person could then, without palpably having no ground to stand upon, apply to the Minister for a license under Section 14 (1) however doubtful the outcome of such application might be. (It may be noted that it was strongly argued that the so-called agents of Association members are in reality independent contractors.)

We are not disposed to recommend such an amendment to the present definition. We cannot foresee its ramifications. The right of an author to prevent publication of a work of his is an important and fundamental one. The moment publication takes place time starts to run against his copyright, and in circumstances such as those under discussion, if Section 14 remains in force, he might be compelled to license others to print. It seems to us that generally speaking ordinary commercial use of a work by the copyright proprietor or his servants or agents which falls short of being an issue of copies to the public should not subject him

to these consequences—such use for example, as the use of original actuarial tables applicable to certain situations. Should an architect be deemed to publish his plans if he places them in the hands of a property owner proposing to build? We think not.

Canada should not, it seems to us, get too far from traditional and accepted definitions of publication in copyright law—or from definitions that are used in international conventions. We do not think that the present definition of publication in the Act should be substantially changed.

We have recommended above that Section 14 be repealed. If this recommendation is accepted, then unless some other provision for compulsory licensing of works is enacted to take its place, the addition to the definition of publication requested by the Conference would be of no benefit to them. It might be thought that the Act should contain a provision in respect of published works that if at any time the copyright owner fails to supply the reasonable demands of the Canadian market a license to print or publish without the copyright owner's consent should be available. We do not share this opinion. Copyright owners who have published works should in general have the right to cease to publish and to prevent other persons not authorized by them from publishing. Certain exceptions have been made in the Act as to periods after the author's death, but in our opinion these exceptions should not be extended—certainly not to an author's lifetime.

If then no changes of a general nature in the law which would be helpful to the Conference members can be recommended, should a special provision be enacted tailor-made to fit their specific complaint? Such a provision could, we think, only be justified if (a) there is an overriding public interest in making it easier for non-tariff companies to compete with the tariff companies than is possible under the existing copyright law or (b) the non-tariff companies have what may be called a moral claim to relief. Although there was much discussion with us of the methods of operation of tariff and non-tariff companies and of the usefulness of each type of company to the public, we do not consider that the question whether facilitation of more competition with the tariff companies constitutes an overriding public interest is one which we are either qualified or expected to determine. We should, however, consider whether the non-tariff companies have a moral claim to relief.

The main grounds on which it was urged that printing and publishing of the revised Goad plans by members of the Conference should be authorized was that they had subscribed to the Goad plan service and thereby materially helped to establish it on the "assurance" that they would receive a continuous revision service, that their funds had thus helped to supply the Association with a basis on which to build their "unpublished" system and to cut off the service to those who were not prepared to join the Association, and that the Association by its effort to "stifle competition" is abusing its copyright. It was submitted that the law should provide a remedy for such abuse.

Nothing was brought to our attention, however, to show that the non-Association companies when they subscribed to the Goad plan service many years ago received any assurance that the service would continue indefinitely. After revisions by the Goads ceased in 1916 it must have been apparent to the non-Association companies that they could not rely on further revisions being made by the Goads. Instead of making them themselves, upon which they would have copyright in their revisions, they were apparently content to have their competitors, the Association companies, through the Bureau, make the revisions.

Copies of the original plans were procurable from the Goads until 1931; and had the non-Association companies made their own revisions they would have had everything they required up to that year. If after 1931, the supply of unrevised Goad plans had become inadequate they might have been procurable under the compulsory licensing provisions of Section 14. The acquisition by the Bureau of the copyright in the original plans in 1931 did, however, mean that sooner or later it might become impossible for the non-Association companies to obtain the original Goad plans. This acquisition (with the use to which it was put) has the appearance of an astute, perhaps overly astute, manœuvre to deprive competitors of a useful tool of trade. But it seems to us that the most the non-Association companies can reasonably complain of is that this manœuvre of the Association, this getting to the Goads first, so to speak, has deprived them of the use of the original plans to the extent needed. There appears to be nothing in the whole course of events to give them any moral or other claim to the right to copy the revisions. These revisions according to all accepted copyright principles are subject to copyright held by the Bureau (or its employees). So long as they are unpublished works no one should be free to copy them without the Bureau's consent. And as the Conference companies are not in the least interested in being enabled only to copy the original Goad plans without the revisions, there is no amendment to the Act useful to the Conference which we would be prepared to recommend. On the other hand, we do not recommend against giving relief to the Conference companies by amendments affecting copyright if Parliament considers that the public has an important—what we have called an overriding—interest in the increased facilities for competition with the tariff companies which the relief applied for would give the non-tariff companies. It might be advisable, however, for any such amendments to be enacted in a separate act.

## PART VI

### REGISTRATION PROVISIONS

The present Act contains provisions for registration. These are to be found, and connected matters are dealt with, in Sections 31 to 41 inclusive. Registration is not compulsory. The author neither foregoes nor forfeits copyright by non-registration. But by virtue of Section 40 (3) the grantee of an interest in a copyright, either by assignment or license, forfeits his interest if he does not register his grant before there is registration of a grant to a subsequent assignee or licensee for valuable consideration without actual notice. In other words, a grantee of a copyright whose title would otherwise be good may find that his title is defeated, in certain circumstances, by his failure to register. It was submitted to us by La Societe des Ecrivains Canadiens that Section 40 (3) contravenes the Rome Convention which provides that the enjoyment and exercise of the rights of authors shall not be subject to the performance of any formality. We have been unable to assess with certainty the validity of this contention. On the one hand it may be argued that the Rome Convention provides only for the exemption of authors from formalities as a condition of the coming into existence or the continuation in their ownership of copyright and not for the exemption of all copyright proprietors. On the other hand it may be argued that it is the copyright itself that is protected from the necessity of compliance with formalities and that every copyright proprietor has the same protection as the author. It is arguable that the latter is the principle of a similar provision of the Universal Copyright Convention (Articles I and III). If Section 40 (3) offends against the Rome Convention or the Universal Copyright Convention, or both, it is, of course, obvious that a provision (to the proposal of which we gave serious consideration) making the enforceability of every assignee's copyright dependent on registration before the act of infringement complained of would also offend against one or both of the Conventions. If we were called upon to express an opinion, we would, we think, say that such a provision would not offend against either Convention and it may be that at some future time Parliament will take this view and wish to enact such a provision.

Registration of copyright by a person claiming to be a copyright owner may often be advantageous to him as a result of one or both of the two following provisions:

(i) Section 36 which is as follows:

- (1) Every register of copyrights under this Act shall be prima facie evidence of the particulars entered therein and documents purporting to be copies of any entries therein or extracts therefrom, certified by the Commissioner of Patents or the Registrar of Copyrights and sealed with the seal of the Copyright Office, shall be admissible in evidence in all courts without further proof or production of the originals.
- (2) A certificate of registration of copyright in a work shall be prima facie evidence that copyright subsists in the work and that the person registered is the owner of such copyright.

As a result of this section, in an action for infringement of copyright where the defence is that copyright did not subsist in the work at the time of the act

complained of, the burden is on the defendant of disproving subsistence of copyright if the plaintiff before action has registered the copyright and procured a certificate of registration.

Further, in an action for infringement where the defence is that the plaintiff was not the owner of the copyright at the time of the act complained of, the burden is on the defendant of disproving the plaintiff's title if the latter has registered the copyright and procured a certificate of registration before the act complained of.

In order to register the copyright (under the Copyright Rules made by P.C. 1854 of December 1st, 1954) the plaintiff must have first stated in his application that he was the owner of the copyright; but it seems anomalous that a mere statement by a prospective plaintiff should be sufficient, in the absence of evidence to the contrary, to prove his case.

(ii) Section 22 which is as follows:

Where proceedings are taken in respect of the infringement of the copyright in any work and the defendant in his defence alleges that he was not aware of the existence of the copyright in the work, the plaintiff is not entitled to any remedy other than an injunction in respect of the infringement if the defendant proves that at the date of the infringement he was not aware, and had no reasonable ground for suspecting that copyright subsisted in the work; but if at the date of the infringement the copyright in the work was duly registered under this Act, the defendant shall be deemed to have had reasonable ground for suspecting that copyright subsisted in the work.

On the other hand, registration may deprive a party of certain presumptions in certain actions as a result of Section 20 (3) (b) (a deprivation which appears to be unjustifiable in the case of the presumption under 20 (3) (b) (i).) Section 20 (3) (b) is as follows:

In any action for infringement of copyright in any work, in which the defendant puts in issue either the existence of the copyright, or the title of the plaintiff thereto, then, in any such case,

(b) the author of the work shall, unless the contrary is proved, be presumed to be the owner of the copyright; and where any such question is at issue, and no grant of the copyright or of an interest in the copyright, either by assignment or licence, has been registered under this Act, then, in any such case,

(i) if a name purporting to be that of the author of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the author of the work; and

(ii) if no name is so printed or indicated, or if the name so printed or indicated is not the author's true name or the name by which he is commonly known, and a name purporting to be that of the publisher or proprietor of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed, or indicated shall, unless the contrary is proved, be presumed to be the owner of the copyright in the work for the purpose of proceedings in respect of the infringement of copyright therein.

We are of opinion that there should be no provision that production of a certificate of registration shifts the burden of proof to the defendant in an infringement action. We think, to use the words of the Gregory Report (par. 286), that any hardship which copyright owners may suffer from being obliged to prove their cases without the assistance of registration certificates is a "further example of what they must reasonably accept in return for the very considerable benefits of securing copyright protection without formality or fee". Section 36 should, therefore, be repealed. If it is, the provisions relating to registration of copyright may as well be repealed also and we so recommend.

It follows that the reference to registration in Section 20 (3) (b) should be deleted. Our recommendations as to re-draft of this section will be found below. If as we have recommended the burden is on the plaintiff in an infringement action (where issue is joined) to prove the subsistence of copyright in a work, or his title to the copyright, as the case may be, he should however have the benefit of the presumption set out in Section 20 (3) (b) (i) of our Act without running the risk of rebuttal of that presumption by a register. The presumption referred to in Section 20 (3) (b) (ii) is discussed below.

As to Section 22, we could not recommend the maintenance of a register merely for the purpose of making it impossible for a defendant in an infringement action to prove that he had no reasonable ground for suspecting or believing that copyright subsisted in a work. The absence of the assistance which a register would give a plaintiff in any infringement action in this regard is another example of what copyright owners "must reasonably accept in return for the very considerable benefits of securing copyright protection without formality or fee".

As to the registration of assignments we are of opinion that the only provision that would be helpful in any substantial degree would be a provision making the enforceability of an assignee's copyright conditional on registration before the act of infringement complained of. This would be an exceedingly useful provision. We believe that most copyrights are owned by assignees (e.g., the assignees of performing rights in musical works). The provision in question would enable any member of the public to ascertain definitely the owner of any assigned copyright work. But such a provision in addition to being expensive in its operation might be regarded by some as of doubtful consistency with one or both of the Conventions with which we think Canada should comply and we are not disposed to recommend its enactment. This being so, we think the present provision for registration of assignments may as well be repealed and we so recommend.

## *PART VII*

### **PROTECTION—BY STATUTE DIRECTLY AND BY ORDER IN COUNCIL**

The first question that naturally arises in this part is what works are to receive protection under Canadian legislation. The requirements of the Rome Convention and the Universal Copyright Convention come down to this—that Canada must, to comply with those Conventions, protect every original unpublished work, if the author was at the date of the making of the work a citizen or national of a convention country, meaning a country which is a party to either one of the Conventions, and that Canada must also protect every original published work, if (a) the work was first published in a convention country, or (b) the author of the work was at the time of its publication a citizen or national of a country in respect of which the Universal Copyright Convention was in force. We think that the protection of our Act should extend not only to these works but to every original unpublished work, if the author was at the date of the making of the work domiciled or resident in Canada. In this connection we use the word “work” as not including a motion picture film which will be dealt with separately below. Films are frequently, if not usually, made by corporations and the wording used above would not apply. It will be remembered that we are not using work as including the recording of a musical, literary or dramatic work or the records embodying that recording, nor are we using it as including broadcasts. We note from the United Kingdom Act that there are many works to which the United Kingdom will be obligated to give protection under the Brussels Convention or the Universal Copyright Convention, or both, which are not protected directly by the statute itself. Provision is, however, made for extending protection to those works by Order in Council (see Section 32 of the new United Kingdom Act). We think that the extension of protection by Order in Council should be provided for in our legislation as it is in the new United Kingdom Act.



## PART VIII

### COPYRIGHT IN ORIGINAL WORKS

We propose now to make certain recommendations first in regard to copyright in literary, dramatic and musical works and then in regard to copyright in artistic works. Certain definitions or explanations of the expressions to be used should be stated at the outset.

By Canadian we mean a Canadian citizen or person domiciled or resident in Canada. The term "work" does not include a record, a motion picture film or a broadcast. These will be dealt with separately. While the protection recommended extends only to Canadians or to works first published in Canada, it should be borne in mind that a work is to be considered first published in a country if there is simultaneous publication in that country and another country and publications are considered simultaneous if they took place within a period of not more than thirty days.

Moreover, we are recommending elsewhere in the report that the Government be given power to extend by Order in Council the protection which we are here recommending for works of Canadians or works first published in Canada to other works so that Canada may (a) discharge its convention obligations, and (b) give protection to some or all British subjects other than Canadians if the Government sees fit to do so. It may be noted that the new United Kingdom Act gives protection expressly to works of British subjects, and Canada may wish to reciprocate by doing the same either in whole or in part.

It should be borne in mind also that when we speak of the acts restricted by copyright we mean the acts which in the absence of authorization by the copyright owner would be infringements, and that when we refer to "the work" in enumerating restricted acts we mean either the work or any substantial part of it. These definitions and explanations relate not only to literary, musical, and dramatic works (which are dealt with in Section 1) but also to artistic works (which are dealt with in Section 2).

#### Section 1—Copyright in Literary, Dramatic and Musical Works

Our recommendations with regard to literary, dramatic and musical works which should receive protection, the term of the protection and the nature of the protection will now be set out.

Copyright should subsist in every original literary, dramatic or musical work which is unpublished and of which the author was, at the time when the work was made, or if the making of the work extended over a period, was for a substantial part of that period, a Canadian.

Where an original literary, dramatic or musical work is published, copyright should subsist in the work (or if copyright in the work subsisted immediately before its publication, should continue to subsist) if the work was first published in Canada or the author of the work was at the time when the work was first published a Canadian or the author had died before that time but was a Canadian immediately before his death.

If there has been no publication of the work or performance of the work in public or offer for sale to the public of records of the work or broadcasting

of the work before the expiration of seventy-five years after the author's death or one hundred years after the work was made, whichever is later, copyright in the work should then expire. The reason for this recommendation will be given later in this section.

If there has been publication of the work, performance of the work in public, offer for sale to the public of records of the work or broadcasting of the work at any time before the expiration of the period mentioned in the last paragraph, copyright in the work should subsist for fifty-six years after the first occasion of any such publication, performance, offer for sale or broadcasting, and should then expire unless the author is living in which event it should not expire until the author's death. The reasons for this recommendation are set out in the section of this report above relating to term of protection.

It should be provided that references to doing any act in relation to a work include reference to the doing of that act in relation to an adaptation of the work.

The acts restricted by the copyright in literary, dramatic or musical works should be:

- (a) reproducing the work in any material form;
- (b) publishing the work;
- (c) performing the work in public;
- (d) broadcasting the work;
- (e) causing the work to be transmitted to subscribers to a diffusion service;
- (f) making any adaptation of the work;
- (g) doing in relation to any adaptation of the work any of the acts specified in relation to the work in paragraphs (a) to (e).

Adaptation should be defined as meaning in relation to a literary or dramatic work any of the following, that is to say:

- (i) in the case of a non-dramatic work, a version of the work (whether in its original language or a different language) in which it is converted into a dramatic work;
- (ii) in the case of a dramatic work, a version of the work (whether in its original language or a different language) in which it is converted into a non-dramatic work;
- (iii) a translation of the work;
- (iv) a version of the work in which the story or action is conveyed wholly or mainly by means of pictures;

and in relation to a musical work as meaning an arrangement of the work; so however that the mention of any matter in this definition of "adaptation" shall not affect the generality of the words "reproducing the work in any material form".

The reason for the foregoing recommendation that the copyright in literary, dramatic and musical works as to which there has been no publication, public performance, offer for sale of records to the public, or broadcasting, should expire seventy-five years after the author's death or one hundred years after the work was made, whichever period ends later, will now be given.

The Gregory Committee gave much attention to the question as to when manuscripts not published by an author in his lifetime could be copied and published without infringing copyright. The result of their recommendations is to be found in Section 7 (6), (7), (8) and (9) (d) of the new United Kingdom Act. In these subsections only manuscripts or copies kept in certain libraries, museums and other institutions are dealt with. We think that there would be

no serious objection to providing for the complete expiration of copyright in literary, dramatic and musical works as to which there is no publication, etc., whether letters, diaries or other works, provided a sufficient length of time is required to elapse both after the time the works came into existence and after the author's death. When this question was considered in the Standing Committee of the House of Commons in the United Kingdom it was argued that if copyright had not continued in Boswell's London Journal until the time it was found it probably could not have found a publisher. We doubt this, having in mind the numerous publications of works in the public domain. It would be of assistance to biographers and historians to be able to publish letters and other manuscripts without being obliged to seek out and settle with the owners of copyright in an unpublished work of an author long dead. Of course they could not publish them unless the owners of the letters or manuscripts permitted access to them. But these owners might not, and in the case of letters, ordinarily would not, be the owners of the copyright. The owners of the copyright would we think be adequately protected if the copyright in such cases expired seventy-five years after the author's death, or one hundred years after the work was written, whichever period ends later.

It should be noted that not all of the restricted acts mentioned above in this section should in all circumstances be infringements, even though unauthorized by the copyright owner. "Performing the work in public" would normally include any mode of visual or acoustic presentation, e.g., causing visual images or sounds to be seen or heard in public by operating radio or television receiving apparatus. We think, however, that when the owner of the copyright in a work authorizes the broadcasting of the work either by radio or television he should be taken to have authorized its communication to persons who hear or see it at the receiving end. In our opinion it should be provided that reception of a broadcast work in copyright and causing it to be heard or seen in public as and when it is broadcast is not a restricted act. This principle is to a large extent recognized by subsection (7) of Section 50 of our Act to which we have referred and which will be discussed later. It should also be provided that if a work is transmitted to subscribers to a diffusion or rediffusion service reception of the diffused or rediffused work and causing it to be heard or seen in public as and when it is diffused or rediffused is not an infringement. As already stated, we use the word rediffusion, as distinguished from diffusion, as meaning the relaying of broadcasts over paths provided by wire or other material substance simultaneously with reception. But we think that any rediffusion of a work or causing it to be heard or seen in public at the receiving end of a broadcast or rediffusion of a broadcast, as and when it is broadcast without the license of the owner of the copyright in the work should be taken into account in assessing damages in any proceedings against the broadcaster in respect of that copyright in so far as that copyright was infringed by him in making the broadcast and there should be a provision to this effect. And any causing of a work to be heard or seen in public at the receiving end as and when a work is diffused without the license of the owner of the copyright in the work should be taken into account in assessing damages in any proceedings against the person diffusing in respect of that copyright in so far as that copyright was infringed by him in making the diffusion and there should be a provision to this effect.

It should we think be made clear that diffusion, as used in (e) in the list of restricted acts above does not include rediffusion. While diffusion (by wire or some such material path) to subscribers to a diffusion service should be a

restricted act as partaking of the nature of performance in public, we think that rediffusion should be regarded as more of the nature of a means of facilitating reception of the broadcast. The reasons why we do not think that rediffusions of broadcasts should be restricted acts are set out above in section 3 of Part IV.

It is, of course, possible for broadcasts to be rebroadcast simultaneously with their reception, although we know of no instances of this in Canada at present. Should "broadcasting" as used in (d) above include such rebroadcasting? We think so. If a broadcasting station could tune into a broadcast and simultaneously rebroadcast it without obligation to head-copyright owners we think the results might be unfair and undesirable. The rebroadcasting station would likely look for its compensation for rebroadcasting to the sponsors of the program rebroadcast. This might reduce the amount they would be willing to pay the station making the original broadcast and thereby indirectly prejudice the head-copyright owners. In our view both the head-copyright owners and the original broadcaster should have the right to prevent such a use of the works broadcast. The situation in respect of the person rediffusing a broadcast program is different. He would, we assume, normally rely on his service fees for his revenues rather than on payments from the sponsors of the programs which he rediffuses. As he would not invade the revenue field of the broadcaster the head-copyright owner would not be prejudiced. If the situation changes factually so that rediffusing bodies do invade the revenue field we have mentioned, consideration should be given to amendments. Meantime we think it undesirable to enable a head-copyright owner who has authorized a broadcast to recover against a person who by rediffusion has merely given the broadcast fuller coverage.

This reasoning does not apply to diffusions by wire as distinguished from rediffusions. Persons who cause the work to be transmitted to subscribers to a diffusion service (as distinct from a rediffusion service) should be in the same position as broadcasters as far as liability to the head-copyright owner is concerned, although the fee chargeable should of course not necessarily be on the same basis. Disseminators of wired music to subscribers are now paying royalties in Canada, at least in cases where there is a public performance at the receiving end. We think that they should be liable whether there is a public performance at the receiving end or not.

Then too there is the matter of public performance by means of a gramophone in any place other than a theatre that is ordinarily and regularly used for entertainments to which an admission charge is made. Subsection (7) of Section 50 of our Act provides that no fees shall be collectable (probably the prohibition extends only to performing rights societies) from the owner or user of the gramophone in respect of such public performances. We make recommendations with respect to this subsection in Section 5 of Part XIII.

## **Section 2—Copyright in Artistic Works**

We think that an artistic work should be defined as meaning a work of any of the following descriptions:

- (a) paintings, sculptures, drawings, engravings and photographs, all irrespective of artistic quality.
- (b) works of architecture being either buildings or models for buildings.
- (c) works of artistic craftsmanship not falling within either (a) or (b).

It may be noted that in our present Act only architectural works *of art* are included in artistic works. (Section 2 (a) and (b).) It would appear, however, that Canada is bound by the Rome Convention to protect all works of architecture. See Article 2 (1). To do so obviates the difficulty of the task of a court in determining whether a building or structure has artistic character or design.

Copyright should subsist in every original artistic work which is unpublished and of which the author was at the time when the work was made, or, if the making of the work extended over a period, was for a substantial part of that period, a Canadian.

Where an original artistic work is published, copyright should subsist in the work (or if copyright in the work subsisted immediately before its publication, should continue to subsist) if the work was first published in Canada, or the author of the work was at the time of first publication a Canadian, or the author had died before that time but was a Canadian immediately before his death.

We think that, subject to the provisions respecting photographs and engravings, the term of copyright in artistic works should be for a period expiring fifty-six years after the author's death but if the work is published in the author's lifetime it should expire at the end of fifty-six years after publication or at the author's death, whichever event is later.

We think that the copyright in a photograph should subsist until the end of the period of forty years from the time when the photograph was taken. We note that in the United Kingdom Bill, as introduced into the House of Lords, it was provided that the copyright in a photograph should expire at the end of the period of twenty-five years from the end of the calendar year in which the photograph was taken. This provision was in accordance with the recommendations of the Gregory Committee. The Gregory Committee (par. 312) gave no reasons for this recommendation other than to say:

It seems to us that a period of 50 years is unduly long for the protection of photographs and we recommend that this period should be reduced to a period which would terminate 25 years from the 1st January following the date upon which the photograph was taken.

In the United Kingdom Act, as passed, the term provided for photographs is fifty years from the end of the calendar year in which the photograph is first published.

The term of protection in our Copyright Act for photographs is fifty years from the making of the original negative from which the photograph was directly or indirectly derived. We are in accord with the view of the Gregory Committee that this term is unduly long and that it would be desirable to bring the term of protection for photographs more nearly in accord with the term of protection for films which we later recommend should be forty years from the first exhibition of the film.

As to engravings, the term of protection, both in the United Kingdom and in Canada, has in the past been and is now assimilated to that of the protection of literary, dramatic and musical works. We think that where there has been no publication of the engraving before the expiration of seventy-five years after the author's death or one hundred years after the engraving was made, whichever is later, copyright in the engraving should then expire; and that if there has been publication of the engraving at any time before the expiration of this period copyright in the engraving should subsist for fifty-six years after such publication and should then expire unless the author is then alive, in which event it should not expire until the author's death.

The new United Kingdom Act, Section 3 (5), specifies two other restricted acts, viz. "(c) including the work in a television broadcast; (d) causing a television programme which includes the work to be transmitted to subscribers to a diffusion service". The inclusion of these in the list of restricted acts in the United Kingdom Act may be required by Article 11 bis of the Brussels Convention. But we do not think it is required of Canada by Article 11 bis of the Rome Convention. True, the latter provides that "authors of literary and artistic works shall enjoy the exclusive right of authorizing the communication of their works to the public by radio-communication". But in our opinion this Article does not mean that authors must be given the right to prevent the communication of their artistic works, as we propose that they be defined, by television broadcast or diffusion.

The exhibition of artistic works in public has never, so far as we can learn, been a restricted act. It is not a performance in public. If a work is one the performance of which in public is a restricted act there is every reason why the broadcasting of that work should be a restricted act. This we think must have been the principle on which Article 11 bis (Rome) was based. The Article gave rise to discussions at the Brussels Conference as to its meaning. There seems to have been no consensus that "radio-communication" included television broadcasting. And we do not think it was intended to do so, having in mind the stage which the technical development of broadcasting had reached in 1928.

The term "literary and artistic works" as used in Art. 11 bis (Rome) includes dramatic and musical works: Art. 2 (Rome). It would appear to us that the term "literary and artistic works" as used in Art. 11 bis in all probability was intended to include only those which could be communicated by the radio-communication of sound. This would not include artistic works in the sense of the definition proposed above. Our present Act does not throw any light on the question, as it simply (in section 3 (1) (f)) adopts the words of Art. 11 bis (Rome) and makes it a restricted Act "in case of any literary, dramatic, musical or artistic work, to communicate such work by radio-communication".

We are not in favour of including, as restricted acts, the (c) and (d), mentioned above, of the new United Kingdom Act. If there is a good reason for making exhibition of an artistic work by a television broadcast or by diffusion a restricted act while at the same time exhibition of the work in public otherwise is not, this reason has not occurred to us. And so far as we are aware it has never been a part of the system of copyright with which this country is familiar that exhibition of an artistic work in public should be assimilated to performance in public of a musical or dramatic work and made a restricted act.

### **Section 3—Ownership of Copyright in Literary, Dramatic, Musical and Artistic Works**

We start with the principle that the author or originator of the work is the first owner of the copyright. To this principle there are certain exceptions in our Act and in Section 4 of the new United Kingdom Act which apply only in the absence of agreement (written or oral) to the contrary. The moment these exceptions are introduced questions of difficulty arise.

*Exception 1.* Works made in the course of an author's employment. Generally speaking copyright in a work made in the course of an author's employment by

another person should vest in that other person. But of this principle there has been in the past one qualification. See our Act, Section 12 (3) and Imperial Act of 1911, Section 5 (1) (b). This qualification is that where the work is an article or other contribution to a newspaper, magazine or similar periodical, there shall in the absence of an agreement to the contrary be deemed to be reserved to the author the right to restrain the publication of the work otherwise than as part of a newspaper, magazine or similar periodical. Note the following effects of this exception and its qualifications:

(a) There is a discrimination in favour of employed contributors to periodicals. For example, a commercial artist in the employ of an advertising agency who paints a picture to be used on posters cannot restrain its use otherwise, e.g., on greeting cards or as pictures in houses.

(b) The contributor to the periodical has no copyright. He merely has a "right to restrain". If the periodical proprietor or his assignee or an infringer makes profits out of the use of the contribution for other than periodical purposes the author has no action for damages or accounting for profits. The periodical proprietor has the copyright. If this is infringed it is he who is entitled to damages or accounting for profits; not the author. All the author can do is restrain the infringement.

(c) The right to restrain is absolute. It does not depend on whether or not the defendant was a bona fide purchaser of the copyright for value without notice that the author's contribution was to a periodical, or was a bona fide licensee.

Should this special treatment of employed contributors to periodicals (e.g., members of a newspaper staff) be extended to all employees? This is, we think, out of the question. It will be noted that the employed periodical contributor's right of restraint is not to restrain the use to use for the express or immediate purpose for which the contribution was made, but only to restrain it to periodical use. To carve out categories of use to which publication should be restrainable by employees in other businesses would be impossible. If we moved in the other direction and restrained use of all employers to the immediate purposes of works it would place an intolerable restraint on employers, as for instance, in the case of business letters written by employees. We think that the general principle that copyright in a work made in the course of an author's employment by another person should vest in that person unless there is an agreement to the contrary is the correct one and that there should be no qualification in favour of employee contributors to periodicals. Needless to say the present statutory qualification, or a variation of it, could be created by agreement between the employer and the employee.

*Exception 2.* Engravings, photographs and portraits. See Section 12 (2) of our Act and Section 5 (1) (a) of the Imperial Act of 1911. This exception is that where in the case of an engraving, photograph or portrait, the plate or other original was ordered by some person and was made for valuable consideration in pursuance of that order, then in the absence of any agreement to the contrary, the person by whom such plate or other original was ordered shall be the first owner of the copyright. Note:

(a) The engraving or photograph may or may not be a portrait.

(b) If the order was for a painting or drawing, the subsection extends only to the painting or drawing of a *portrait*.

(c) The subsection applies only when *the plate or other original* was ordered.

The principle of the subsection should, we think, be maintained. The important works dealt with are (i) photographs (whether portraits or not) and (ii) portraits other than photographs.

As to (a) and (c), we agree with the Gregory Committee's observation that "the ordering of the 'plate' is an unreal test in relation to the normal procedure when professional photographs are made; a person requiring such a photograph does not contemplate that he is ordering or paying for the negative, and indeed some methods of photography do not involve the existence of a negative in the ordinary sense. The relevant consideration in such a case would appear to be whether the taking of the photograph was commissioned by the sitter or offered by the photographer". (Par. 268.) The main reason why the first owner of the copyright should be the person commissioning is that that person is likely to have a highly personal interest in permitting or refusing to permit reproduction. And this applies not only to photographic portraits but to other photographs which he commissions. The photographer, for example, should not be free to permit the use of the photograph for advertising, for distribution on cards, or otherwise, without the consent of the person commissioning, whether the photograph is a portrait or a picture of a house, a factory or anything else. On the other hand, the photographer might conceivably have a personal interest in preventing the person commissioning from using, let us say, a poor photograph for certain purposes, for instance, the use of a passport photograph for publication in newspapers. A balance must be struck between these conflicting considerations, and we have concluded that the considerations in favour of vesting the copyright in the person commissioning are more weighty. It may be noted that this conclusion accords with the disposition of the matter embodied in the new United Kingdom Act. We recommend therefore that where a person commissions the taking of a photograph (or the making of an engraving) and pays or agrees to pay for it in money or money's worth and the photograph is taken (or the engraving made) in pursuance of that commission the person who so commissions shall be entitled to the copyright in the absence of any agreement to the contrary.

As to (b), here in our opinion the element of creativeness would ordinarily bulk larger than in the case of photographs but we think that the copyright should in the absence of any agreement to the contrary go to the person commissioning where the work painted or drawn is a portrait. Where it is not a portrait, copyright should go to the person commissioning, provided however that if the work was commissioned or ordered for a particular purpose communicated to the author before the work was made, in the absence of any agreement to the contrary, the author should have the right to restrain its publication, reproduction or broadcast for a different purpose. If, for example, a person commissions an artist to paint a picture (other than a portrait) for the decoration of his dwelling house, he should be restrainable by the author from later reproducing it, publishing it or broadcasting it or licensing any of these acts without the author's consent. Such a provision would enable an artist who painted a landscape on commission from a house owner for the decoration of his house to prevent it from being published, for example, for advertising purposes or for the advancement of purposes with which the author did not wish to be even indirectly associated.

What should the law be as to other works commissioned for valuable consideration? Briefly we think it should be the same as that applicable to non-portrait paintings and drawings. In the absence of any agreement to the contrary, the copyright should go to the person commissioning but if the work was com-



missioned or ordered for a particular purpose communicated to the author before the work was made, the author should have the right to restrain the use of the work for another purpose by publication or what otherwise would be an infringement if the author owned the copyright. For example, the proprietor of a periodical commissions A to write an article and informs the author that he wants it for publication in his periodical. The author would have the right to restrain its publication in other periodicals or (with other articles) in book form, or for any purpose other than the communicated purpose—and not only its publication but any other dealing with the article which would be an infringement if the author were the copyright owner.

One reason for leaving the copyright in commissioned works with the person commissioning is that to leave it with the person commissioned makes (we think) too sharp a differentiation between the case where there is a contract of service and the case where there is a contract for services. Many cases would be on the border line. A is on the staff of a newspaper and is directed to write an article. His employer has the copyright. B is not on the staff and agrees for valuable consideration to write an article. Both get paid by the same person. Their expenses are probably paid in both cases. If A is not to have the copyright, why should B? But the purposes to which the article is to be put are, we think, likely to be more important to B than to A. So B is entitled to have protection against unauthorized publication, etc., of his work.

This suggested disposition of the matter presents some difficulties:

(1) Disputes might arise as to the ambit of the communicated purposes and as to whether there was any communication of purposes.

(2) Who may be restrained other than the person commissioning?

(3) Is an infringer to go scot-free of damages unless the person commissioning wishes to proceed?

As to (1), it might be required that the communication must be in writing. We cannot recommend this. It would largely defeat the value to the author of the right to restrain. In many cases he might be commissioned by telephone and required to act immediately.

As to (2), we think that everyone should be restrainable, even an assignee or licensee of the copyright who had no notice of the communicated purpose. An "innocent" assignee or licensee would be in no worse position than innocent infringers who are subject to injunction. To provide that an assignee or licensee who takes his assignment or license bona fide for value and without notice is not restrainable might satisfy the requirements of exact justice to a fuller extent but would introduce further complications—and we think rather unnecessarily. If an assignee or licensee from a commissioning person (who, of course, is neither the author nor the assignee of the author) chooses to publish without finding out whether there was a communicated purpose or not he suffers no great hardship if he finds himself restrained, but without any liability for damages. The assignor or licensor in effect represented himself as having a complete copyright when he had only a qualified one. Whatever remedy the assignee or licensee may have against the assignor or licensor he should not be free from restraint by the author.

As to (3), the infringer could always be restrained by the author not because the author has an action for infringement—he would have none—but because of the statute.

It should be borne in mind that the rights of the person commissioning or employing and those of the author may always be rendered precise by agreement. It is only when no agreement is made that the statute determines where the

copyright lies and whether it is absolute or qualified. Possibilities of disputes as to who owns the copyright and as to whether there was a communicated purpose and as to its extent can be avoided by written agreement.

While it is tempting to recommend a provision that an "agreement to the contrary" to be effective must be in writing, this might, we think, result in injustice in some cases and we do not recommend it although we would have no strong objection to it. We had representations in favour of such a provision.

#### **Section 4—Anonymous and Pseudonymous Works and Works of Joint Authorship**

We recommend that:

it be provided that where the first publication

- (i) of a literary, dramatic or musical work of which there has been no previous performance in public, offer for sale to the public of records, or broadcasting;
- (ii) of an engraving, or
- (iii) in the author's lifetime, of any other artistic work (other than a photograph)

is anonymous or pseudonymous then any copyright subsisting in the work shall continue to subsist until the end of the period of fifty-six years from the end of the calendar year in which the work was first published and shall then expire; but this provision shall not apply in the case of a work, if at any time before the end of the fifty-six year period mentioned it is possible for a person without previous knowledge of the facts to ascertain the identity of the author by reasonable inquiry. This however does not mean that other provisions may not lead to the same result in a particular case. For example, a literary, musical or artistic work may be published anonymously or pseudonymously and it may be quite possible to ascertain the identity of the author—yet the term of the copyright might be fifty-six years from the first publication because the author dies before the expiration of that period.

Provision (iii) seems at first sight rather unhelpful—as a person desiring to reproduce, and relying on this provision must be able first to assure himself, although the publication is anonymous or pseudonymous, that the author was alive at the time of first publication. But this might not be in all cases impossible—and it manifestly should not be provided, in relation to this class of artistic works, that anonymous or pseudonymous publication after the author's death brings into being a fifty-six year term.

The main purpose of the recommendation with respect to the possibility of ascertaining identity is to deal with the cases of authors who have published under pseudonyms but whose identity is no secret. If such an author should outlive the fifty-six year period we think that he should retain copyright until his death.

Strictly speaking, or at least theoretically, this recommendation should in the case of literary, musical and dramatic works relate not only to publication which is anonymous or pseudonymous but to public performance, offer for sale to the public of records of the work and broadcasting of the work, where the identity of the author is not disclosed; but we think that to extend the special provision beyond anonymous or pseudonymous publication would be an exercise in unnecessary refinement.

It should be provided that a publication of a work under two or more names shall not be taken to be pseudonymous unless all these names are pseudonyms.

As to joint works, there should be a provision that "work of joint authorship" means a work produced by the collaboration of two or more authors in which the contribution of each author is not separate from the contribution of the other author or authors.

In relation to a work of joint authorship, copyright should subsist in it if, and only if, at least one of the joint authors is what we may call an "eligible author", that is an author who if he had been the sole author of the work would have been entitled to copyright in it. An instance of an author who would not be an "eligible author" would be one of the joint authors of a work first published in a non-Convention country, he not being a national of a Convention country.

In relation to a work of joint authorship, copyright in which subsists for fifty-six years from a certain event (publication, public performance, offer for sale of records to the public or broadcasting) it should continue to subsist thereafter if and so long as an eligible author lives and should then expire.

In considering our recommendation that if there has been no publication of a literary, dramatic or musical work or performance of the work in public or offer for sale to the public of records of the work or broadcasting of the work before the expiration of seventy-five years after the author's death or one hundred years after the making of the work whichever is later copyright should then expire, a question may arise in relation to a work of joint authorship as to what date is to be taken as the date of the author's death. This date should be the date of the death of the last surviving eligible author.

In relation to a work of joint authorship of which one or more of the authors are not eligible authors, the other author or authors should be entitled to the copyright.

A situation might arise in reference to a published work of joint authorship where:

- (a) the duration of copyright may under other provisions of the Act depend on the date of the death of "the author" rather than on the date of first publication; and
- (b) the work was first published under two or more names and either
  - (i) one or more of the names (but not all) were pseudonyms, or
  - (ii) all of the names were pseudonyms but it is possible for a person without previous knowledge of the facts to ascertain the identity of any one or more (but not all) of the authors by reasonable inquiry.

In this situation what should such a person be entitled to regard as the date of the death of the author? It would seem to us that in such a situation a person interested in reproducing the work should be entitled to regard as the date of the death of "the author", the date of the death of the last surviving eligible author who did not publish under a pseudonym or whose identity a person without previous knowledge of the facts could within fifty-six years of the first publication of the work have ascertained by reasonable inquiry.

We recommend the enactment of provisions which will give effect to the views expressed in the last paragraph. The detail may not be worked out with precise accuracy but we have tried to make the recommended principle clear.

There should be a provision that unless it is otherwise provided any reference to an author of a work shall be construed, in relation to a work of joint authorship, as a reference to all the authors of the work.

## PART IX

### INFRINGEMENT OF COPYRIGHT IN ORIGINAL WORKS BY IMPORTATION, SALE AND OTHER ACTS

The substance of Section 17 (1) of our Act should be retained. This subsection is as follows:

Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright.

Section 17 (4) should be replaced by provisions to the following effect:

(a) The copyright in a literary, dramatic, musical or artistic work is infringed by any person who without the license of the owner of the copyright imports an article (otherwise than for his private use) into Canada if to his knowledge the making of that article constituted an infringement of that copyright or would have constituted such an infringement if the article had been made in Canada; provided however that it shall not be an infringement to import any article for the use of an institution of learning if the article was not imported for sale or hire either to students or others, or to import any article for the use of a public library if the article was not imported for sale but this proviso in so far as it applies to public libraries shall apply only to those of a class prescribed by regulations made by the Governor in Council which shall secure that the libraries to which the regulations apply are not conducted for profit.

(b) The copyright in a literary, dramatic, musical or artistic work is infringed by any person who in Canada and without the license of the owner of the copyright—

(i) sells, lets for hire, or by way of trade, offers or exposes for sale or hire any article, or

(ii) by way of trade exhibits any article in public,  
if to his knowledge the making of the article constituted an infringement of that copyright or (in the case of an imported article) would have constituted an infringement of that copyright if the article had been made in Canada.

(c) The last paragraph shall apply in relation to the distribution of any articles either—

(i) for purposes of trade, or

(ii) for other purposes, but to such an extent as to affect prejudicially the owner of the copyright in question,  
just as it applies in relation to the sale of an article, but distribution of an imported article by an institution of learning, and not by way of sale or hire, or by a public library of the class prescribed by regulations as set out above, and not by way of sale, shall not be an infringement.

If these provisions are adopted and Sections 27 and 28 of our Act are repealed, the right of a person to import for his private use will be clear. Nor can there be any serious prejudice to the copyright owner in permitting so limited an importation. The rights of institutions of learning and public libraries to import, which our present Act was apparently intended to give, will be continued but (on one view of the meaning of Section 28 (3) of our Act) with some alteration. Institutions of learning will infringe if they import for sale or hire books or other articles the making of which to their knowledge constituted infringement or would have constituted infringement if made in Canada. Otherwise they will

not infringe. Is this assimilation of the position of institutions of learning not importing for sale or hire to that of persons importing for private use defensible? We have come to the conclusion that it is. The practice has gone on for a long time. Canadian agents of foreign publishers, rather than the authors, are, we think, the chief objectors. We cannot see that it is the function of copyright law to protect them.

Similar considerations apply to the public libraries. Here we use the phrase "sale" instead of "sale or hire" for two reasons: (a) a public library may, we think, make some small charges which are arguably for the use of books without thereby putting itself in the profit making category, and (b) the class of public libraries to which the provision is to apply, unlike the institutions of learning, is to be delimited by regulations which will ensure that the libraries to which the regulations apply are not conducted for profit.

We are not unmindful of the strong representations which were made against such provisions as those in Section 28 (3) (a) and (c) of our present Act but we are not prepared to go further than the foregoing recommendations. We are, as indicated above, recommending the complete elimination of Section 28 (3) (b) and (d) of our Act.

Section 5 (5) and (6) of the new United Kingdom Act is as follows:

5. (5) The copyright in a literary, dramatic or musical work is also infringed by any person who permits a place of public entertainment to be used for a performance in public of the work, where the performance constitutes an infringement of the copyright in the work:

Provided that this subsection shall not apply in a case where the person permitting the place to be so used—

- (a) was not aware, and had no reasonable grounds for suspecting, that the performance would be an infringement of the copyright, or
  - (b) gave the permission gratuitously, or for a consideration which was only nominal or (if more than nominal) did not exceed a reasonable estimate of the expenses to be incurred by him in consequence of the use of the place for the performance.
- (6) In this section "place of public entertainment" includes any premises which are occupied mainly for other purposes, but are from time to time made available for hire to such persons as may desire to hire them for purposes of public entertainment.

This section bears some resemblance to Section 17 (5) of our Act which is as follows:

Copyright in a work shall also be deemed to be infringed by any person who for his private profit permits a theatre or other place of entertainment to be used for the performance in public of the work without the consent of the owner of the copyright, unless he was not aware, and had no reasonable ground for suspecting, that the performance would be an infringement of copyright.

We see no good reason for recommending the enactment of provisions similar to subsections (5) and (6) of Section 5 of the new United Kingdom Act or the retention of Section 17 (5) of our present Act. A theatre proprietor is now and should under any new legislation be liable as an infringer if he authorizes an infringement of copyright in the theatre, and we do not see why the law should go further and make him liable unless he shows that he had no reasonable grounds for suspecting that copyright would be infringed in his theatre. Our Section 17 (5) is by no means a dead letter. In some circumstances the performing rights societies have, or claim to have, rights of actions against hotel proprietors who permit the use of parts of their premises by persons who perform musical works in public there. The section enables a

performing rights society owning the copyright to collect performing right fees from a hotel proprietor if the performance was unlicensed unless the proprietor can prove that he was not aware and had no reason to suspect that works in copyright were to be performed. It seems to us that this is a kind of contributory infringement which should not be treated as an infringement at all. The owner of a hall should not, we think, be called upon when he permits the use of his hall to enquire into the question as to whether an infringement of copyright is to be committed in the hall. An infringement of copyright is not in our opinion a sufficiently serious offence against law or morality to justify the imposition of so serious a burden on the hall owner. As will be seen later, the performing rights in a musical work are sometimes claimed by more than one society and there is no practicable way in which the hall owner can ascertain for sure which is the owner. The person seeking the use of the hall may have a license from one society and believe (wrongly) that that society is the owner and that there will be no infringement. Yet with two societies in the field it may be impossible for the hall owner to prove that he had no reason to suspect that the performance would be an infringement. Must the hall owner either refuse to make the hall available or run the risk of an action being brought against him? This is not, we think, a situation into which the principle of contributory infringement should be imported.

## PART X

### EXCEPTIONS FROM COPYRIGHT PROTECTION

#### Section 1—General Exceptions from Protection of Literary, Dramatic and Musical Works

Article 2 (3) of the Rome Convention is as follows:

The countries of the Union shall be bound to make provision for the protection of the above-mentioned works.

If copyright be defined, as it is in Section 3 (1) of our Act as including the sole right to reproduce a work or any substantial part thereof, and if the creation of such a right in the author is an essential part of the protection mentioned in Article 2 (3), then any diminution of this right not expressly sanctioned by the Convention is forbidden by it. Yet the legislation of many Union countries provides that various reproductions not expressly approved by the Convention shall not constitute infringements. An example is Section 17 (2) (a) of our Act which provides that any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary shall not constitute an infringement. This is an example of a category of dealing with works which is generally if not universally regarded as clearly outside the scope of copyright. Ladas (Vol. I at p. 540) in the work cited above, says:

The legal basis of the protection of copyright is the creative work of the author, and the social interest in such effort and in its result. The work exists in order that it may be used. Culture and civilization proceed by the accumulation of values. New authors and artists build on what their predecessors have created. It follows that the copyright of the author does not prevent the following dealings with a work:

- (a) personal use and reproduction of the work for personal use;
- (b) free use of the work as a point of departure or as an inspiration for the creation of new work, possessing its own originality, and an independent individuality.

Similarly, "quotations", within certain limits, have generally been regarded as outside the scope of copyright. The exact dividing line between "quotations" and "borrowings" is hard to draw. But even certain borrowings have by many countries been regarded as permissible under the Convention even though not expressly permitted by it. See Ladas, Vol. I, Part Second, ch. XVII. Finally certain quotations and borrowings are expressly permitted by the Convention. See Article 9 (2) and (3) and Article 10.

Bearing these considerations in mind we have had to consider what quotations and borrowings should be declared in our legislation not to be infringements. The new United Kingdom Act has numerous provisions pertaining to fair dealing and allied matters and it will be convenient to consider these provisions.

The following fair dealing provisions of the new United Kingdom Act appeal to us as desirable: 6 (1), (2) and (3):

6. (1) No fair dealing with a literary, dramatic or musical work for purposes of research or private study shall constitute an infringement of the copyright in the work.
- (2) No fair dealing with a literary, dramatic or musical work shall constitute an infringement of the copyright in the work if it is for purposes of criticism or review, whether of that work or of another work, and is accompanied by a sufficient acknowledgment.

(3) No fair dealing with a literary, dramatic or musical work shall constitute an infringement of the copyright in the work if it is for the purpose of reporting current events—

(a) in a newspaper, magazine or similar periodical, or

(b) by means of broadcasting, or in a cinematograph film, and, in a case falling within paragraph (a) of this subsection, is accompanied by a sufficient acknowledgment.

The only question that suggests itself is whether Canada can consistently with the Rome Convention provide that fair dealing with a literary, dramatic or musical work shall not constitute an infringement if it is for the purpose of reporting current events to the public by means of broadcasting or in a motion picture film. This question arises from the fact that Article 10 bis of the Brussels Convention has no counterpart in the Rome Convention. We think that Article 9 (3) of the Rome Convention, which provides that the protection of the Convention shall not apply to news of the day nor to miscellaneous information having the character of mere items of news, authorizes the provision in question; and that if it does not, fair dealing with a work for the purpose of conveying news of current events is not necessarily within the scope of copyright. There is, we think, no question but that the other fair dealings mentioned in the subsections of the United Kingdom Act quoted may be declared in our legislation not to be infringements, either by virtue of the express terms of the Rome Convention or because they are not necessarily within the scope of copyright.

We recommend the enactment of legislation to the same effect as Section 6 (1), (2) and (3) of the United Kingdom Act.

We think also that without limiting the generality of Section 6 (3) there should be a special provision concerning speeches and we use this word as including lectures, sermons and other addresses.

Our present Act is unclear as to whether a person who delivers a speech in public, but not from notes, has copyright in the speech. By virtue of Section 2 (v) of our present Act it may be that he has. Section 2 (v) is as follows:

“every original literary, dramatic, musical and artistic work” includes every original production in the literary, scientific or artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets, and other writings, lectures, dramatic or dramatico-musical works, musical works or compositions with or without words, illustrations, sketches, and plastic works relative to geography, topography, architecture or science.

We recommend that our new legislation be drafted in such a way that a speech delivered in public be treated as a literary work even if it is not delivered from notes provided it is, simultaneously with delivery, reduced to writing or some other material form.

What should be said in the fair dealing provisions about speeches? Our present Act has two provisions concerning speeches which are as follows:

17. (2) The following acts do not constitute an infringement of copyright:

(e) the publication in a newspaper of a report of a lecture delivered in public, unless the report is prohibited by conspicuous written or printed notice affixed before and maintained during the lecture at or about the main entrance of the building in which the lecture is given, and, except whilst the building is being used for public worship, in a position near the lecturer; but nothing in this paragraph affects the provisions in paragraph (a) as to newspaper summaries;

18. Notwithstanding anything in this Act, it shall not be an infringement of copyright in an address of a political nature delivered at a public meeting to publish a report thereof in a newspaper.



We think that following a provision enacting the substance of Section 6 (3) of the United Kingdom Act it should be provided that, without limiting the generality of such provision, if a speech is publicly delivered by broadcast or otherwise it shall not be an infringement of copyright in that speech to publish a report of it currently—that is for the purpose of reporting current events—in a newspaper, magazine or similar periodical or to broadcast a report of it currently. (It should be provided that copyright should not subsist in the report, to the extent that it purports to be a verbatim report.)

Minor infringements of copyright which are universally disregarded come to mind—as for instance, the recording of or filming of broadcasts for private use. Perhaps such acts should be declared not to be infringements but the delimitation of the permissible might, we think, be difficult and an expansion of the fair dealing provisions to deal with such cases would be of no practical importance.

As to works reproduced for the purposes of judicial proceedings or of reports of judicial proceedings, Canadian legislation should we think provide that the copyright in a literary, dramatic or musical work is not infringed by reproducing it for the purposes of such proceedings or the report thereof, judicial proceedings to be defined in sufficiently broad terms to include patent proceedings as well as quasi-judicial proceedings generally.

We think also that the reading or recitation in public by one person of a reasonable extract from a published literary or dramatic work, if accompanied by a sufficient acknowledgment should not constitute an infringement of the copyright in the work. In other words, we recommend the enactment of a provision to the effect of Section 17 (2) (f) of our Copyright Act with the addition of the requirement of acknowledgment. This section is as follows:

17. (2) (f)—the reading or recitation in public by one person of any reasonable extract from any published work;

We also recommend the enactment of a provision partly to the effect of Section 6 (6) of the new United Kingdom Act which is as follows:

6. (6) The copyright in a published literary or dramatic work is not infringed by the inclusion of a short passage therefrom in a collection intended for the use of schools, if—

- (a) the collection is described in its title, and in any advertisements thereof issued by or on behalf of the publisher, as being so intended, and
- (b) the work in question was not published for the use of schools, and
- (c) the collection consists mainly of material in which no copyright subsists, and
- (d) the inclusion of the passage is accompanied by a sufficient acknowledgment:

Provided that this subsection shall not apply in relation to the copyright in a work, if, in addition to the passage in question two or more other excerpts from works by the author thereof (being works in which copyright subsists at the time when the collection is published) are contained in that collection, or are contained in that collection taken together with every similar collection (if any) published by the same publisher within the period of five years immediately preceding the publication of that collection.

This is largely to the same effect as Section 17 (2) (d) of our present Act but with minor changes which we think improve it.

We can see little advantage to anyone of Section 6 (6) (c) of the United Kingdom Act. If a publisher wishes to publish a collection of short passages, all or most of them from works in copyright, for school use—for use, for example, in studying modern literature—and is limited to two short passages from the works of any one author as set out in the proviso, what harm does the author suffer if most or all of the rest of the collection consists of short passages from works

in copyright? We recommend the enactment of legislation to the effect of Section 6 (6) of the United Kingdom Act with (c) omitted. We also recommend that the words "or by the author in collaboration or jointly with one or more authors" be inserted immediately before the first parenthesis in the proviso.

Another matter which it is convenient to consider at this point has to do with the making of so-called ephemeral records or films by persons authorized to broadcast copyright works. Such recordings may serve a number of purposes in the hands of the broadcaster and may greatly facilitate his authorized use of the copyright material contained therein, for example, the performance of the program may be recorded at a time and place convenient to the performers and subsequently be broadcast at the appointed times and places. Additionally, by committing the program to a recording, a broadcasting authority with a number of stations may make a single performance serve the various stations in his network and at times which are suitable to each. In a country like Canada, where there are several time zones, this is obviously desirable.

It is our understanding that broadcasting bodies (e.g., the CBC) presently make such ephemeral recordings by way of discs, films or like devices without consulting the owners of the appropriate right. Technically, as the law stands, these ephemeral recordings are infringements.

However, such recordings, provided they are used purely to facilitate the broadcasting of copyright material, are merely tools in the hand of the broadcaster which assist him to do what the author or his assignee has authorized him to do. It ought not to be presumed that, having authorized a broadcast, presumably for suitable remuneration, the author wishes to place a road block in the way of a person so authorized with a view to getting another fee for its removal.

Accordingly we recommend that authorization to broadcast a copyright work should be deemed to include the right to make ephemeral recordings of the work solely for the purposes of broadcasting, or, in the alternative, that such recordings are not infringements.

A recording should be deemed to be an ephemeral recording if it or copies of it are used solely for the purpose of the authorized broadcasting within a period of thirty days after the day when it or a copy of it was first broadcast and if thereafter it or they are used for no purpose other than research or study.

Section 6 (8) of the United Kingdom Act deals with adaptations and there should be a similar Canadian provision. This section is as follows:

6. (8) The preceding provisions of this section shall apply to the doing of any act in relation to an adaptation of a work as they apply in relation to the doing of that act in relation to the work itself.

## **Section 2—Special Exceptions; Copying by Librarians**

We now come to a question which received much consideration by the Gregory Committee and in the United Kingdom Parliament. This is the question of the rights which librarians, etc., should have, without infringing copyright, to microfilm articles, books and parts of books in copyright for persons requiring them for purposes of research or private study, and for other librarians.

At the present time there is some demand by students and others carrying on research for the microfilming of works in copyright by librarians. This demand may be expected to increase as time goes on. To the extent that this kind of copying merely takes the place of the copying which the student or person carrying on the research would have the right to do himself, there would seem

to be a case for permitting it as fair dealing. At the same time the ease with which microfilmed copies can be made might lead to a serious impairment of the author's copyright unless this form of activity is carefully restricted.

Subsections (1) and (2) of Section 7 of the new United Kingdom Act are as follows:

7. (1) The copyright in an article contained in a periodical publication is not infringed by the making or supplying of a copy of the article, if the copy is made or supplied by or on behalf of the librarian of a library of a class prescribed by regulations made under this subsection by the Board of Trade, and the conditions prescribed by those regulations are complied with.

(2) In making any regulations for the purposes of the preceding subsection the Board of Trade shall make such provision as the Board may consider appropriate for securing—

- (a) that the libraries to which the regulations apply are not established or conducted for profit;
- (b) that the copies in question are supplied only to persons satisfying the librarian, or a person acting on his behalf, that they require them for purposes of research or private study and will not use them for any other purpose;
- (c) that no person is furnished under the regulations with two or more copies of the same article;
- (d) that no copy extends to more than one article contained in any one publication; and
- (e) that persons to whom copies are supplied under the regulations are required to pay for them a sum not less than the cost (including a contribution to the general expenses of the library) attributable to their production, and may impose such other requirements (if any) as may appear to the Board to be expedient.

We are of opinion that provisions to the same effect should be enacted in Canada (with a reference to the Governor in Council instead of the Board of Trade) but with a change in Section 7 (2) (d) and with the deletion of paragraph (e). The effect of the substitution for paragraph (d) which we recommend is "that no copy extends to more than one article, or if to more than one, then only to articles relating to the same subject matter".

Subsections (3) and (4) of Section 7 of the new United Kingdom Act are as follows:

7. (3) The copyright in a published literary, dramatic or musical work, other than an article contained in a periodical publication, is not infringed by the making or supplying of a copy of part of the work, if the copy is made or supplied by or on behalf of the librarian of a library of a class prescribed by regulations made under this subsection by the Board of Trade, and the conditions prescribed by those regulations are complied with:

Provided that this subsection shall not apply if, at the time when the copy is made, the librarian knows the name and address of a person entitled to authorise the making of the copy, or could by reasonable inquiry ascertain the name and address of such a person.

(4) The provisions of subsection (2) of this section shall apply for the purposes of the last preceding subsection:

Provided that paragraph (d) of the said subsection (2) shall not apply for those purposes, but any regulations made under the last preceding subsection shall include such provision as the Board of Trade may consider appropriate for securing that no copy to which the regulations apply extends to more than a reasonable proportion of the work in question.

We are of opinion that provisions to the same effect should be enacted in Canada (with a reference to the Governor in Council instead of to the Board

of Trade) but with the deletion of the proviso of Section 7 (3). We think, having in mind the cost of making copies, the restriction on the class of libraries to which the section applies, and on the purposes for which the copies may be supplied, the restriction to one copy and the restriction to a reasonable proportion of the work, there would be little prejudice to the copyright owner by the deletion of this proviso. If it is not deleted, delays in communication with copyright owners might be so serious as to eliminate the advantage of Section 7 (3) in many cases, and the application of the proviso would be discriminatory as between copyright owners.

Section 7 (5) of the new United Kingdom Act deals with one librarian making a copy of a work in copyright for supply to another librarian. It will be noted that this subsection extends to complete works. The subsection is as follows:

7. (5) The copyright in a published literary, dramatic or musical work is not infringed by the making or supplying of a copy of the work, or of part of it, by or on behalf of the librarian of a library of a class prescribed by regulations made under this subsection by the Board of Trade, if—

- (a) the copy is supplied to the librarian of any library of a class so prescribed;
- (b) at the time when the copy is made, the librarian by or on whose behalf it is supplied does not know the name and address of any person entitled to authorise the making of the copy, and could not by reasonable inquiry ascertain the name and address of such a person; and
- (c) any other conditions prescribed by the regulations are complied with:

Provided that the condition specified in paragraph (b) of this subsection shall not apply in the case of an article contained in a periodical publication.

We recommend that legislation be enacted to the effect of this subsection (with a reference to the Governor in Council instead of to the Board of Trade).

Subsections (9) (a), (b) and (c) of Section 7 of the new United Kingdom Act are as follows:

7. (9) In relation to an article or other work which is accompanied by one or more artistic works provided for explaining or illustrating it (in this subsection referred to as "illustrations"), the preceding provisions of this section shall apply as if—

- (a) wherever they provide that the copyright in the article or work is not infringed, the reference to that copyright included a reference to any copy-right in any of the illustrations;
- (b) in subsections (1) and (2), references to a copy of the article included references to a copy of the article together with a copy of the illustrations or any of them;
- (c) in subsections (3) to (5), references to a copy of the work included references to a copy of the work together with a copy of the illustrations or any of them, and references to a copy of part of the work included references to a copy of that part of the work together with a copy of any of the illustrations which were provided for explaining or illustrating that part;

There should be enactments in Canada to the same effect.

Perhaps a word should be added as to the libraries in Canada likely to be affected by implementation of the foregoing recommendations. The determination by the Governor in Council as to whether a library or a class of libraries is or is not conducted for profit may present some difficulties. The Canadian Library Association at our request kindly supplied us with a memorandum and supporting material indicating the number and kinds of libraries which are operating in Canada. From this memorandum it would appear that libraries not conducted for profit should probably be described as those supported by public taxation, membership dues or philanthropy. These would include (a) free and association public libraries; (b) libraries of educational institutions recognized

by provincial Ministers of Education, such as those of school commissions, schools (elementary and secondary) and colleges and universities; (c) libraries of government agencies (municipal, provincial and federal) and of Crown corporations; (d) libraries of non-profit organizations such as professional and learned societies, museums and art galleries; and (e) libraries of charitable organizations. In addition, of course, there are libraries which are conducted for profit. Among these would be the lending libraries of department stores, drug stores, cigar stores, book stores and stationers. Among libraries conducted for profit should probably also be included libraries maintained by commercial corporations.

### **Section 3—Special Exceptions; Agricultural Fairs and Religious, Charitable and Fraternal Organizations**

#### **A—FAIRS**

Section 17 (2) (g) of our Act reads as follows:

The following acts do not constitute an infringement of copyright . . .

- (g) the performance without motive of gain of any musical work at any agricultural, agricultural-industrial exhibition or fair which receives a grant from or is held under Dominion, provincial or municipal authority, by the directors thereof.

This subsection was judicially interpreted by the Supreme Court of Canada in *Composers, Authors and Publishers Association of Canada Ltd. v. Western Fair Association (1951) S.C.R. 596*. From the judgments it is apparent that the Supreme Court was of opinion that for performance of musical works at exhibitions or fairs of the kind described in the subsection not to be infringement there must be no motive of gain on the part of the performers or on the part of those holding the exhibition or fair. It was agreed in the case that the motive of the directors holding the fair "in causing the defendant to employ the said performers and bands and in having them play the said musical works was to provide entertainment for and to please those attending the Western Fair and to make the Western Fair one which would be largely attended by the public". On these agreed facts Kerwin J. was of opinion that even considering the "gain" as indicating financial advantage it was clear that the defendant intended, or had as one object, that financial profit would accrue. The other members of the Court found it unnecessary to determine whether there was motive of gain on the part of the directors as the actual performers were deriving private profit.

As it is in the highest degree probable that some of the music performed at every exhibition or fair of the foregoing descriptions will be music in respect to which the actual performers are paid, subsection 17 (2) (g) is of little practical significance. And if it were amended so that the performance would only be an infringement if it were authorized by the directors with motive of gain, more litigation could reasonably be expected the purpose of which would be to obtain judicial determination of what circumstances do or do not indicate that there was a motive of gain on the part of the directors.

The Canadian Association of Exhibitions whose members consist of upwards of three hundred agricultural fairs and exhibitions in Canada submit that Section 17 (2) (g) should be changed so as to read as follows:

The performance of any musical work at any agricultural, agricultural-industrial exhibition or fair which receives a grant from or is held under Dominion, provincial or municipal authority.

The Association based its submission on a presumption that Parliament must have intended in enacting Section 17 (2) (g) to enact legislation which can have some effect. It is, we think, clear that the subsection may as well be repealed as to remain on the statute books in its present form.

The initial question, therefore, is whether there should be any exemption of fairs and exhibitions at all. We received strong representations that there should not be. "Why", it was asked, "should composers and authors be expected to contribute their property to an exhibition association free of charge when no one else does?" On the other hand, it was submitted that the normal uses to which music is put in public are money making uses and that agricultural exhibitions and fairs are not conducted, at least primarily, for money making purposes. Their purposes are primarily the promotion of improvement in the quality of livestock, poultry and agricultural products and may thus, in one sense, be said to be educational. The agricultural-industrial exhibitions also provide facilities for industrial exhibits.

The statistical information given us by the Canadian Association of Exhibitions reveals that in 1953 the total operating receipts of all members of the Association were \$10,541,355.32 and the total operating costs \$9,359,611.38. We have no information as to whether the operating costs include such items as depreciation, etc., and it may be that none, or very few, of the exhibitions make profits. However, they are held for the purpose of enabling others to make profits or to save them from incurring losses.

On the whole we can see very little ground in principle for the exemption. There is, however, an historical ground. Ever since 1931 Parliament has been trying to exempt these exhibitions and fairs. The first attempt was made in that year by the exemption of the "performance without profit of any musical work at any agricultural exhibition or fair which is held under Dominion, provincial or municipal authority". This provision proving ineffectual after litigation, it was succeeded in 1936 by the following: "the performance without private profit of any musical work at any agricultural, agricultural-industrial exhibition or fair which receives a grant from or is held under Dominion, provincial or municipal authority provided that such performance shall be deemed to be given without private profit if the only fees which are paid are paid to the individual performers or their agents; and provided further that such fees are not dependent upon the attendance at the exhibition or fair". A case having been lost by the Canadian National Exhibition Association under this amendment, the present provision was enacted in 1938. The Western Fair Association case shows this provision to be quite ineffective. If the exemption were confined to fairs receiving government grants it could be argued that the fact that they receive grants shows that they are not really profit making bodies and that this fact when considered along with their educational character makes them roughly comparable with organizations which receive exemptions from performing right fees in many countries of the Berne Union.

Section 17 (2) (g) should not be permitted to remain as it is now. As between amendment (so as to give it some effect) and repeal, we recommend the former in spite of our difficulty in finding a completely satisfactory principle on which to found our recommendation. We recommend that it be amended so as to apply to all agricultural and agricultural-industrial exhibitions and fairs which receive grants from the Government of Canada, a province, or a municipality, and that the exemption apply to every musical work performed at the fair except

works which are performed in a place fees for admission to which are charged other than the fee payable for admission to the fair itself, and works which are performed for the purpose of advertising or attracting customers to places fees for admission to which are charged other than the fee payable for admission to the fair itself. This will have the effect of leaving musical works performed by concession holders and the like (and by the fair authorities themselves if a separate admission fee is charged) subject to performing right fees but exempting the rest.

We also received a submission from the Canadian Federation of Mayors and Municipalities that the exemption contained in Section 17 (2) (g) should be extended to musical works performed in municipal parks and buildings without motive of gain. It was argued that the principle of Section 17 (2) (g) is that the performance of musical works performed at functions which are "publicly sponsored" without motive of private profit should not constitute infringement. But in our view Section 17 (2) (g) is not based upon any principle except that the promotion of the best agricultural methods and practices is so important a public interest in this country that those holding fairs and exhibitions engaged in such promotion should be exempt from the additional expense of paying performing right fees. To extend the exemption to governments holding band concerts and the like where no admission is charged would be to invite pressures for other exemptions of which we can see no end. The adoption of the American principle that there is no infringement unless there is a public performance for profit would not, we assume, meet the demands of the municipalities for doubtless in most cases the actual performers are paid. In cases where none of the actual performers are paid and there is no admission fee, we think that governments, Canadian, provincial and municipal, might reasonably be granted exemption. However, we do not think that there would be any cases of this kind or at least they would be so rare that a statutory provision dealing with them would not be warranted.

#### B—RELIGIOUS, CHARITABLE AND FRATERNAL ORGANIZATIONS

We now come to Section 17 (3) of the Act which is as follows:

17. (3) No church, college or school and no religious, charitable or fraternal organization shall be held liable to pay any compensation to the owner of any musical work or to any person claiming through him by reason of the public performance of any musical work in furtherance of a religious, educational or charitable object.

This Section was judicially interpreted by the Supreme Court of Canada in the case of *Composers, Authors and Publishers Association of Canada Ltd. v. Kiwanis Club of West Toronto* (1953) 2 S.C.R. 111. The following is taken from the judgment of the Court delivered by Rand J:

It is the "public performance" that is to further the object. Now undoubtedly there can be an immediate charitable object in connection with and as part of which a performance can be given. Singing or performing music in and as part of a church service is directly furthering that service, itself a charitable object; an educational meeting with musical interpolations is carried on in a charitable sense and is itself such an object; and in the relief or amelioration of poverty, the accompaniment of the music of an orchestra at a Christmas dinner given to the poor through the means of voluntary contributions is equally so. Since, then, the proviso can be satisfied by a performance in the furtherance of a charitable activity of which it furnishes one of the functions, are we justified in attributing to the proviso the intention to embrace also an ultimate, possible and remote result following a series of disjointed business transactions.

And also the following from the same judgment:

The performance, to be "in furtherance of", must, I should say, be a participating factor in the charitable object itself or in an activity incidental to it, for the purpose of which the object may consist of component parts of cognate character; but it could not be said to be so associated with the object here by its role in the ordinary business entertainment of a dance: there is neither a participation in the object nor in anything incidental to it.

A submission that Section 17 (3) should be amended was made to us by the Rotary Club of Toronto. This club has for years been engaged in promoting public performance of various kinds, the net proceeds of which have been devoted to the charitable and educational objects of the club. For instance, at least three performances of the Metropolitan Opera Society of New York have been so promoted. The club is interested in the following three classes of fees to performing rights societies:

(1) fees which may be payable on the performance of musical works in copyright at meetings of the club, whether for group singing of members or whether performed by individual artists, choirs, or orchestras for the entertainment of the members at their meetings.

(2) fees payable with respect to music performed at Music Festivals or at functions put on by the club for elderly people, crippled children, etc.

(3) fees payable with respect to music performed as part of the entertainment provided to the public for which an admission fee is paid but where the net proceeds after paying expenses go into the club's charitable funds.

The present provisions of Section 17 (3) are satisfactory to the club as far as the fees in (2) are concerned but not so far as the fees in (1) and (3) are concerned.

As to the fees in (1), the club submits that Section 17 (3) should be amended in such a way as to make it clear that no compensation shall be paid by reason of the performance of a musical work at any regular meeting of a religious, charitable or fraternal organization called for the furtherance of the religious, educational or charitable objects of the organization. Such an amendment is unnecessary unless it alters the law as determined by the Supreme Court of Canada. We are not convinced that there are sufficient reasons for making such an alteration. The purposes of regular meetings of Rotary clubs, we think, are charitable only in part and it is impossible to say how large that part is. We do not think a case has been made for statutory exemption. But as will be seen we are recommending that the Copyright Appeal Board be empowered, in determining the fees collectable by performing rights societies, to fix such fees as the Board may determine and we think it would be desirable for the legislation to provide that in the case of any club, society or other organization which is not established or conducted for profit and whose main objects are charitable or otherwise concerned with the advancement of religion, education or social welfare, this is a circumstance which may be taken into account in determining the reasonableness of the fees to be authorized and the Board may in its discretion reduce such fees below those which it would otherwise regard as reasonable. If this recommendation is accepted such organizations as the Rotary Club of Toronto may be able to satisfy the Board that their main objects are charitable and that the fees collectable in respect of their regular meetings should be on a special scale.



As to the fees mentioned in (3) above, the club submits that there should be an amendment to provide that no compensation shall be paid to the owner of the performing rights in any musical work by reason of the public performance thereof in furtherance of a religious, educational or charitable object, if the net proceeds are used only for a recognized religious, educational or charitable object after deducting only the ordinary and reasonable fees and expenses incurred by the organization in connection with the performance, provided that this shall not apply where the organization's returns are purely a percentage or proportional share of the proceeds from the performance. The amendment proposed is a carefully and moderately drafted one but we are not prepared to go further in our recommendations than we have in what we have said about (2). We are not disposed to recommend a legislative alteration of Section 17 (3) which would have the effect of watering down or legislating away the effects of the Supreme Court decision in the *Kiwanis* case except to the extent that the recommended enlargement of the powers of the Board would do so.

Section 17 (3) is unsatisfactory in certain respects. It does not provide that the public performance of musical works by a religious, charitable or fraternal organization (if it is in furtherance of a religious, educational or charitable object) is not an infringement. It merely provides that no compensation is to be paid. It, therefore, leaves these organizations liable to injunction proceedings. Moreover the benefit of the exception does not extend to the performers but only to the organizations. We recommend that subsection (3) of Section 17 be replaced by a provision to the effect that the public performance of any musical work in furtherance of a religious, educational or charitable object, which is authorized by a church, college, school or religious, charitable or fraternal organization, shall not be an infringement.

#### **Section 4—Special Exception Considered; Digests and Abridgements**

It was represented to us by Modern Medicine of Canada that the following should be included among those acts which do not constitute an infringement of copyright:

the publication of any digest, abridgement, summary or review of an article or report of a scientific, technical, educational or cultural nature previously published in any magazine, journal, newspaper or periodical, the contents of which are mainly devoted to matters of scientific, technical, educational or cultural nature.

Modern Medicine of Canada is a monthly Canadian publication in the form of a digest or abridgement of articles and reports of interest to physicians and surgeons which appear from time to time in medical periodical literature. It was founded in Canada in October 1946. At the time its representations were made to us, about 1,900 copies were printed each month and had a wide circulation among physicians and surgeons. We gather that it has great usefulness to the public in keeping its subscribers up to date in their professional knowledge, just as other digests and abridgements or periodical literature of scientific, technical or educational nature have in other fields of professional activity. The publication of these digests and abridgements now constitutes an infringement of copyright where the articles and reports digested or abridged are, as they all or nearly all must be, in copyright. It is obviously possible—we think probable—that the circulation of such digests and abridgements lessens the demand for the original articles or reports and the periodicals in which they first appear. To this extent the creation of the exemption requested would impair the value of the copyright

to the copyright owner. We were glad to learn in the course of the representation that the great majority of publishers of original articles (who apparently own the copyright in most cases) are usually quite willing to have the articles digested or abridged and circulated and the authors themselves are usually delighted. It appears to be for the purpose of enabling Modern Medicine of Canada to cope with the unwilling minority of original publishers that the amendment is desired.

We find it impossible to draw any satisfactory line between digests and abridgements which should be treated by the law as infringements and those which should not. Having in mind the serious inroads which the proposed amendment would make upon the copyright owner's present rights, the probability that most producers of digests and abridgements could advance public interest arguments in favour of relaxation of their present obligations hardly less persuasive than those which have been advanced in this instance, and the fact that the publishers of this particular publication are not having much difficulty now in obtaining the consent of the copyright owners, we do not feel that we should recommend enactment of the amendment proposed.

### **Section 5—Special Exception in Respect of Records**

By virtue of Article 13 of the Rome Convention, authors of musical works must have the exclusive right of authorizing (1) the adaptation of those works to instruments which can reproduce them mechanically; (2) the public performance of these works by means of these instruments; but reservations and conditions relating to the application of this article may be determined by the country applying it.

Canada now protects authors against the unauthorized recording of their works and should (and, as to musical works, must) continue to do so. Our legislation does, however, provide for what is in effect compulsory licensing of record manufacturers by a copyright owner if records of the work sought to be recorded have previously been made by or with the consent or acquiescence of the owner of the copyright in the work. These provisions apply not only to the recording of musical works but also to the recording of literary and dramatic works. There appears to be nothing in the Rome Convention to compel Canada to protect literary and dramatic works against unauthorized recording so Canada is free to make the compulsory licensing provisions apply to them as well as to musical works as it does at present, if it wishes to do so.

By virtue of these provisions it is not an infringement of copyright in any musical, literary or dramatic work for any person to make in Canada a record of that work if (a) records of the work have previously been made with the consent or acquiescence of the owner of the copyright in the work, and (b) such person has given the prescribed notice and paid the statutory royalties.

The provisions are contained in Section 19 of our Act which contains much matter additional to that just mentioned and provides that the Governor in Council may make regulations for the purposes of the section. Representations were made with respect to the regulations as well as with respect to the section. Before we deal with the main questions relating to the section and the regulations, a brief description of the record manufacturing industry and its activities in Canada should be given.

There are a number of companies manufacturing, that is "pressing", records in Canada. Most of them import some records and press some. Two or three

companies or organizations which are selling records obtain their total requirements by importation. The Market Research Department of one of the manufacturing companies estimates that in 1955 about 12,500,000 records were sold in Canada and that approximately 15% of these were imported. In the opinion of this company 95% of the records manufactured in Canada are made from imported masters. Under Section 10 of our Act the person who was the owner of the original plate (i.e., the master) at the time when such plate was made is deemed to be the author of the record. There is very little or no assignment of copyright in the records sold in Canada. It will thus be seen that in the overwhelming number of cases the copyright in records is owned abroad and doubtless the great bulk of works recorded are works the copyright in which is owned abroad. There is very little export of records from Canada. The trend in the number of records made in Canada from original Canadian recordings is said to be upward. A substantial proportion of this number originates in the Province of Quebec. Even though most of the recording in Canada is from imported masters, the Canadian manufacturers so recording are liable for the statutory royalties set out in the Act. It may be added that the representative of an important record manufacturing company who appeared before us stated, in answer to the suggestion that the greater part of the records sold in Canada contained music that was in the public domain, that in his company's experience at least 70% and probably 75% of all records sold in Canada are of musical works in which copyright subsists.

One of the largest record manufacturing companies submitted that the previous manufacture of records with the consent or acquiescence of the owner of the copyright in a work should not be a condition precedent to a person's right to make a record of the work, as it is at present, and that records of works should be made freely available to the public provided always that the copyright owner is properly compensated. This submission seems to be based on the assumption that practically every author of a work is only too glad to have records made of his work if he is assured of adequate compensation. Whether the submission should be acceded to on its merits it is unnecessary to decide, because Article 13 of the Rome Convention (as we understand it) precludes Canada from giving effect to it.

On the other hand, it was submitted on behalf of the copyright owners that there should be no compulsory licensing and no statutory royalties with reference to the reproduction of mechanical devices using music. But compulsory licensing provisions have been in our legislation for a long time, similar provisions have been for many years in the legislation of the United Kingdom and of the United States, all interested persons have become accustomed to them and have adapted themselves to them, and we are not disposed to recommend their abolition.

There are, however, some changes in the present provisions of our Act which we think should be made. In our opinion the Canadian law should contain provisions to the following effect:

(1) The copyright in a musical, literary or dramatic work is not infringed by a person (to be referred to as "the manufacturer") who makes a record of the work or of an adaptation of the work in Canada if—

(a) records of the work or, as the case may be, of a similar adaptation of the work have previously been made for the purpose of sale or hire by or with the consent or acquiescence of the owner of the copyright in the work; and

(b) before making the record the manufacturer gave to the owner of the copyright the prescribed notice of his intention to make it; and

(c) the manufacturer intends to sell the record or let it for hire or to supply it for the purposes of its being sold or let for hire by another person or intends to use it for making other records which are to be sold or let for hire; and

(d) in the case of a record which is sold or let for hire the manufacturer pays to the owner of the copyright in the prescribed manner and at the prescribed time a royalty of an amount ascertained as set out below.

(2) "The owner of the copyright" as used in (1) (a) means the owner of the copyright (that is the mechanical right) for the country in which the records previously made were made. If the records previously made were made in a country other than Canada and the making of them in that country, without authorization, would not be an infringement of copyright either because no mechanical right existed there or for any other reason, the making of the records there should not be taken as having been made with the copyright owner's consent or acquiescence. In our present Act the owner of the copyright, as used in this connection, means the owner of the Canadian copyright. We see no reason, however, why if a person who has an exclusive right to authorize the making of records of a work in any country authorized the making of records in that country a manufacturer in Canada should not have the right to make the records of that work in Canada. It is true that the owner of the Canadian copyright may not be the same person as the owner of the copyright who authorizes the making of records abroad but the position is either that one is the author and the other is claiming under the author or both are claiming under the author. The purpose of requiring the consent of the owner of the copyright to the making of records is to protect an author who does not wish his work to be recorded at all. If he or someone claiming under him permits it to be recorded anywhere then he and those claiming under him can have no reasonable complaint, we think, if the work is recorded on a royalty basis in Canada.

We suspect that the practice under our present Act has been to treat consent or acquiescence of the owner of the copyright in a foreign country as having the same effect as consent or acquiescence of the owner of the Canadian copyright. In a copyright handbook prepared by a prominent Canadian copyright counsel in 1924 which has been brought to our attention, he says:

"'Owner of the copyright' as used in this section undoubtedly means the owner in Canada of the copyright covering mechanical reproduction. Nevertheless the owner of the Canadian copyright cannot successfully refuse to allow records of a composition to be made in Canada if consent has been legally granted elsewhere. If a composer X sells United States copyright to A and Canadian copyright to B and A permits the making of records, B cannot prevent like action. Copyright is a monopoly but the Act clearly intends that the monopoly shall continue only while retained by the original owner, that is by the author. On these grounds it is contended that proof of legal making is not curtailed to Canada. Proof of legal making of records in any country where mechanical reproduction copyright subsists in the composition is all that is necessary."

This is not cited as good law but as evidence of how the law was understood.

(3) The royalties will be determined as follows:

We received representations from one of the largest manufacturers that the most desirable principle to apply would be to base the royalty on the playing time of the record, with a fixed minimum. Under our present Act the royalty is 2¢ for each playing surface of each record and 2¢ for each perforated roll

or other contrivance. Other contrivances for recording exist and others may yet be invented. These other contrivances as well as many records make possible the playing of musical or other works for long periods of time. The present provision is therefore inappropriate and should be changed. Should the principle of any new provision be that the royalty be based on the sale price? The new United Kingdom Act provides that the royalty shall be 6½ per cent of the ordinary retail selling price of the record. It would, we think, be impracticable to base the Canadian royalty on the ordinary retail selling price, although it would not be impracticable to base it on the manufacturer's price. But would this be desirable? We think not. The contribution of the author or composer is the same whether the record of his work is low-priced or high-priced. What makes the record high-priced rather than low-priced is likely to be some other factor, such as manufacturing standards, the eminence of the artists who perform the work or the quality of their performance. We recommend therefore that the basis be playing time rather than selling price.

How much per minute of playing time should the royalty be? One of the largest manufacturers supplied us with a memorandum from which the following is quoted:

The rates in effect at present in Canada and which, in the case of records of extended works on a single playing surface, have been reached by negotiations between copyright owner and record manufacturer, are as follows:—

For records, wire or tape recordings or other devices reproducing a musical work, the royalty for each copy sold is ½¢ per minute of playing time, but not less than 2¢ for any single work.

In the case of a medley made up of more than one musical work, the total playing time of which does not exceed four (4) minutes, such medley is considered to be a single musical work.

In the case of new arrangements (in which copyright subsists) of musical works which are otherwise in the public domain, one half of the above mentioned rates are paid for the said arrangements.

The necessity of the words "the total playing time of which does not exceed four (4) minutes" as applied to medleys is not appreciated by us but otherwise we think the rates mentioned in the foregoing quotation coupled with the minimum to be mentioned in the next paragraph but one could appropriately be taken and should be adopted as the statutory rates. If they prove inequitable in any respect the provision recommended below making possible a review of them two years after they come into effect may be invoked.

It is possible to think of many arguments for and against the rates of royalty which we have proposed as the statutory rates. For the copyright owners it might be said that the provision of 2¢ per playing surface in our present Act was at the time of enactment practically equivalent to a 2¢ per selection and that a rate which was fair in 1921 is unfair today. For the record manufacturers it might be replied that the sale of records has enormously increased in the meantime and that changes in the price of records between 1921 and today must be taken into account. The copyright interests might make a comparison between the percentage which the 2¢ per selection minimum bears to the retail selling price of the average record and the United Kingdom statutory rate of 6½ per cent of the retail selling price. But the manufacturers might reply by pointing out that the statutory royalty in the United States is "2 cents on each such part manufactured". The argument could go on indefinitely. We are content to rest our recommendation on the prevailing negotiated royalties (which we were given to understand are approximately the same as those negotiated in the United States).

It was submitted by the copyright interests that these were negotiated within an antiquated statutory strait jacket; but they are obviously outside of and beyond that strait jacket and we are not satisfied that they are unfair.

It was represented to us that there is a class of records known in the trade as commercial transcriptions. A commercial transcription is used for advertising purposes in broadcasting and the number of copies seldom exceeds thirty. Unless a minimum is fixed the mechanical right fees in such case would be negligible and we think it fair, having this class of records in mind, but not confining our recommendation to this class of records, that it be provided that no matter how few or how many records are sold or let on hire, the minimum royalty for each selection recorded on records made for sale or hire be \$2.00.

It should be provided, we think, that the Secretary of State shall on the application of any interested person at any time after two years after the new rates come into effect appoint a committee of one or more persons to hold an inquiry in the prescribed manner for the purpose of ascertaining whether the royalties provided for have ceased to be equitable; and that if in consequence of such an inquiry the Governor in Council is satisfied of the need to do so, the Governor in Council may make an order prescribing such different rate or amount either generally or in relation to any one or more classes of records as the Governor in Council may consider just; provided that where an order comprising a class of records (that is to say, either a general order or an order relating specifically to that class, or to that class together with one or more other classes of records) has been made, no further order comprising that class of records shall be made less than five years after the date on which the previous order was made.

(4) Where a selection on a record includes more than one work in copyright and the copyright owners are different persons—as might for example happen in the case of a medley or in the case of a song where the author of the words and the composer of the music have separate copyrights—not more than one royalty computed on the foregoing basis shall be payable, but the royalty computed on the foregoing basis shall be apportioned between the different copyright owners as they may agree or as in default of agreement may be determined by some appropriate tribunal. We can think of no more appropriate tribunal than a Judge of the Exchequer Court, although we would not suggest that a Judge of the Exchequer Court be burdened with a matter of this kind if we thought that cases of disagreement would be otherwise than extremely rare.

There would not, of course, be any royalty payable with respect to a selection on a record where it consists wholly of a work or works in the public domain. Where, however, a selection includes both copyright and non-copyright material the proportion of the statutory fee payable with respect to the copyright material should, in the absence of agreement between the copyright proprietor or proprietors and the record manufacturer be determined by a Judge of the Exchequer Court upon the same footing as that on which he would apportion the fee between two or more copyright proprietors.

(5) Where for the purposes of paragraph (a) of provision (1) above the manufacturer requires to know whether such previous records as are mentioned in that paragraph were made as therein mentioned, the manufacturer may make the prescribed inquiries and if the owner of the copyright fails to reply to those inquiries within the prescribed period the previous records shall be taken to have been made by or with the consent or acquiescence of the owner of the copyright.

(6) The provisions recommended above shall apply in relation to records of part of a work or adaptation as they apply to records of the whole of it, provided that provision (1) above shall not apply to a record of the whole of a work or adaptation unless the previous records referred to in paragraph (a) of provision (1) were records of the whole of the work or of a similar adaptation and shall not apply to a record of part of a work or adaptation unless those previous records were records of or comprising that part of the work or of a similar adaptation.

(7) For the purposes of any provisions of the Act relating to imported articles where the question arises whether the making of a record made outside of Canada would have constituted an infringement of copyright if the record had been made in Canada, that question shall be determined as if provision (1) above had not been enacted; but it should be provided that a prospective importer of a record made outside of Canada which would have constituted an infringement of copyright if the record had been made in Canada may import the record if it is a record which it would have been lawful for him to manufacture in Canada had he complied with provision (1) above and if he gives the notice and pays the royalties which are prescribed in reference to the manufacture of a record in Canada.

(8) The Governor in Council is empowered to make all necessary regulations including regulations prescribing anything that must be prescribed and regulations providing that the taking of such steps as may be specified in the regulations shall be treated as constituting payment of royalties to the owner of the copyright.

(9) Records should be broadly defined. The definition in the new United Kingdom Act is "any disc, tape, perforated roll or other device in which sounds are embodied so as to be capable (with or without the aid of some other instrument) of being automatically reproduced therefrom".

## **Section 6—General Exceptions from Protection of Artistic Works**

The foregoing recommendations relating to fair dealing and allied matters pertain for the most part to literary, dramatic and musical works. As to artistic works, the new United Kingdom Act contains the following provisions:

9. (1) No fair dealing with an artistic work for purposes of research or private study shall constitute an infringement of the copyright in the work.

(2) No fair dealing with an artistic work shall constitute an infringement of the copyright in the work if it is for purposes of criticism or review, whether of that work or of another work, and is accompanied by a sufficient acknowledgment.

(3) The copyright in a work to which this subsection applies which is permanently situated in a public place, or in premises open to the public, is not infringed by the making of a painting, drawing, engraving or photograph of the work, or the inclusion of the work in a cinematograph film or in a television broadcast.

This subsection applies to sculptures, and to such works of artistic craftsmanship as are mentioned in paragraph (c) of subsection (1) of section three of this Act.

(4) The copyright in a work of architecture is not infringed by the making of a painting, drawing, engraving or photograph of the work, or the inclusion of the work in a cinematograph film or in a television broadcast.

(5) Without prejudice to the two last preceding subsections, the copyright in an artistic work is not infringed by the inclusion of the work in a cinematograph film (or in a television broadcast), if its inclusion therein is only by way of background or is otherwise only incidental to the principal matters represented in the film or broadcast.

(6) The copyright in an artistic work is not infringed by the publication of a painting, drawing, engraving, photograph or cinematograph film, if by virtue of any of the last three preceding subsections the making of that painting, drawing, engraving, photograph or film did not constitute an infringement of the copyright.

(7) The copyright in an artistic work is not infringed by reproducing it for the purposes of a judicial proceeding or for the purposes of a report of a judicial proceeding.

(8) The making of an object of any description which is in three dimensions shall not be taken to infringe the copyright in an artistic work in two dimensions, if the object would not appear, to persons who are not experts in relation to objects of that description, to be a reproduction of the artistic work.

(9) The copyright in an artistic work is not infringed by the making of a subsequent artistic work by the same author, notwithstanding that part of the earlier work—

(a) is reproduced in the subsequent work, and

(b) is so reproduced by the use of a mold, cast, sketch, plan, model or study made for the purposes of the earlier work, if in making the subsequent work the author does not repeat or imitate the main design of the earlier work.

(10) Where copyright subsists in a building as a work of architecture, the copyright is not infringed by any reconstruction of that building; and where a building has been constructed in accordance with architectural drawings or plans in which copyright subsists, and has been so constructed by, or with the licence of, the owner of that copyright, any subsequent reconstruction of the building by reference to those drawings or plans shall not constitute an infringement of that copyright.

(11) The provisions of this section shall apply in relation to a television programme which is caused to be transmitted to subscribers to a diffusion service as they apply in relation to a television broadcast.

Provisions to the same effect as subsections (1), (2), (6), (7), (8), (9) and (10) should we think be enacted in Canada. If our recommendation as to the limitation of restricted acts (artistic works) is accepted, subsection (11) and the references to broadcasts in subsections (3), (4) and (5) are inapplicable, but otherwise the substance of subsections (4) and (5) should be enacted. For the purposes of subsection (7) "judicial proceeding" should be broadly defined as suggested in Section 1 of this Part.

## **Section 7—Special Exception in Respect of Industrial Designs**

Section 46 of our Copyright Act is as follows:

46. (1) This Act does not apply to designs capable of being registered under the Industrial Design and Union Label Act, except designs that, though capable of being so registered, are not used or intended to be used as models or patterns to be multiplied by any industrial process.

(2) General rules, under the provisions of the Industrial Design and Union Label Act may be made for determining the conditions under which a design shall be deemed to be used for such purposes as aforesaid.

Section 19 (1) of our Industrial Design and Union Label Act is as follows:

19. (1) The Minister may, from time to time, subject to the approval of the Governor in Council, make rules and regulations and adopt forms for the purposes of this Act respecting industrial designs; and such rules, regulations and forms circulated in print for the use of the public shall be deemed to be correct for the purposes of this Act.

By virtue of Section 46 (2) of the Copyright Act and Section 19 (1) of the Industrial Design and Union Label Act the Minister made and the Governor in Council approved by Order in Council 1954-1853 a Rule (Rule 11) reading as follows:

11. (1) A design shall be deemed to be used as a model or pattern to be multiplied by any industrial process within the meaning of Section 46 of the Copyright Act,



- (a) where the design is reproduced or is intended to be reproduced in more than 50 single articles, unless all the articles in which the design is reproduced or is intended to be reproduced together form only a single set as defined in this rule; and
- (b) where the design is to be applied to
  - (i) printed paper hangings,
  - (ii) carpets, floor cloths, or oil cloths manufactured or sold in lengths or pieces,
  - (iii) textile piece goods, or textile goods manufactured or sold in lengths or pieces, and
  - (iv) lace, not made by hand.

(2) For the purposes of this rule, "set means a number of articles of the same general character ordinarily on sale together, or intended to be used together, all bearing the same design with or without modification not sufficient to alter the character or not substantially affecting the identity thereof.

(3) Where there is any doubt whether given articles do or do not constitute a set, the doubt shall be determined by the Commissioner of Patents.

The result is that an author who has artistic copyright in a work but who at the time he made the work intended it to be used as a model or pattern to be multiplied by an industrial process is taken to have created an industrial design and his artistic copyright is not infringed by the use of that design by anyone else although the author may have the right to protect himself by registration under the Industrial Design and Union Label Act to the extent that that Act gives protection.

Authors of "artistic works", which include "drawings", and "works of artistic craftsmanship", naturally prefer full copyright protection to protection under acts for the protection of industrial designs because the former is for a much longer period and is not dependent upon compliance with any formality. It was represented to the Gregory Committee that whether an artistic work loses its full copyright protection when used as an industrial design should not depend, as now, upon the author's intention at the time he created the work but upon what he actually does or authorizes to be done with the work. An example of these representations was that of the Chartered Institute of Patent Agents of the United Kingdom who suggested that Section 22 of the Imperial Act of 1911 which is practically a counterpart of Section 46 of our Act quoted above should be replaced by the following:

22. (1) This Act shall not apply to designs registered under the Registered Designs Act, 1949.

(2) Copyright in designs which, although they would, if new or original, be capable of registration under the Registered Designs Act, 1949, have not been so registered shall cease as soon as any article to which the design has been applied, has been reproduced more than 50 times by an industrial process by the owner of the copyright or with his consent.

The Gregory Committee in reference to this suggestion said (paragraph 242, page 88):

We realize, of course, that such a proposal would not be so attractive as is the present law to certain interests concerned with strip cartoons or cartoon films and like works and with their subsequent application as designs for industrial articles, but we do not think that it would be unfair to require these interests to register their designs for industrial articles as a condition of continued protection in this field, just as others concerned with designs intended from the beginning for industrial articles are required to register.

The Committee after dealing with the suggestion further in paragraphs 243 to 249 summarized its recommendation in paragraph 250 (page 92) which is as follows:

We therefore recommend that Section 22 be repealed and replaced by provisions on lines indicated in paragraphs 241 and 243 to 248. Our recommendation may be summarized as follows:

(1) artistic copyright should subsist and continue to subsist in all works which are original artistic works, irrespective of whether the intention of the author at the time he creates it is to use the work as an industrial design or to apply it thereto, and irrespective of whether the work is so used or applied;

(2) the copyright, as now, should continue to protect such works against copying, as, for example, by prints of an original drawing, and also, with the qualifications stated below, against reproduction in any other "material form whatsoever";

(3) the protection against others reproducing the author's work should give the author protection against unauthorized industrial designs copying his work, subject to (4) and (5) below;

(4) the copyright proprietor should be relieved of the disabling effects of prior publication of the work if he wishes to apply it industrially and applies for registration. On such registration, the protection of the Copyright Act should cease for the designs of the articles as registered. On the expiry of a registration, the registered design and "associated" designs should go into the public domain;

(5) if the proprietor applies the work as an industrial design and does not register the design before doing so, then the protection of the Copyright Act ceases as regards articles made to that particular design and "associated" designs. The original work would continue to enjoy protection against direct copying under the Copyright Act.

This recommendation was embodied with minor changes in the new United Kingdom Copyright Act, Section 10. This is a long and complicated section and we append, as Appendix "E", a copy of it and of the First Schedule of the Act, to which it refers.

Able representations were made to us by Dr. Harold G. Fox, Q.C., representing Walt Disney Productions that Section 46 of our Copyright Act should be amended so as to read as follows:

This Act shall not apply to designs registered under the Industrial Designs and Union Label Act nor to designs capable of being so registered which are made for the purpose of reproduction more than 50 times by an industrial process.

Dr. Fox submitted, inter alia, that the correct method of approach is for copyright or design protection to subsist according to the purpose for which a work comes into being, that if it comes into being as an industrial design it should be protected under the appropriate design legislation but that if it comes into being as an artistic work it should be subject to copyright protection. He argued that to suggest trimming down the term of copyright to which an artistic work is entitled because it becomes so popular as to be usable by reproduction in the applied or commercial field is similar to suggesting that musical works should receive a lesser term of protection when they are mechanized, i.e., when they are placed on gramophone records, or that the term of copyright in literary or dramatic works should be diminished when they are mechanized by presentation on moving picture or television screens.

The law of the United States as stated by the Supreme Court in *Mazer v. Stein* (1954) 347 U.S., 201, was referred to, where, as we understand it, it was held that an artistic work, intended when made to be industrially reproduced, retains its copyright protection despite its industrial reproduction in quantity.

There was no submission that Canada should go as far as this in its legislation but it was argued, as stated above, that we should not depart from the principle of Section 46 of our present legislation.

We are convinced, however, that the weight of argument is in favour of making partial loss of copyright, suffered by artistic work when it becomes used as an industrial design, depend on what is done with the work rather than what was intended to be done with it at the moment of creation. This was obviously the opinion of the United Kingdom Departmental Committee on Patents (Swan

Committee) whose references to the matter are set out in paragraph 237 of the Gregory Report. The Gregory Committee itself set out several reasons for coming to the same conclusion.

Dealing with the question of artistic works applied as industrial designs and registered as such, the Gregory Committee considered the following arguments against the present position of the law:

- (a) it is inequitable, and intention is in any event an unsatisfactory basis for defining the border-line;
- (b) it encourages subterfuge on the part of the artist or others as to his original intention;
- (c) if the artist did not intend his work at the moment of its creation to be applied as a design the work will have double protection if registered—protection under copyright legislation and protection under design legislation and an infringer will be liable to proceedings
  - (i) by the owner of the copyright and
  - (ii) by the registered proprietor of the design;
- (d) at the conclusion of the period of design protection the work, if it has had this double protection, will not be in the public domain and the public might be misled;
- (e) it would be anomalous if at the expiration of the design protection members of the public would not be able to avail themselves of the design;
- (f) manufacturers should not be encouraged to seek for designs in artistic works already in copyright rather than to employ artists to create new designs.

We are impressed with these arguments. In a case where copyright subsists in an artistic work, and a corresponding design, that is a design which when applied to an article results in a reproduction of that work, is registered under industrial design legislation, it should not, we think, be an infringement of the copyright in that work to do anything during the subsistence of the design protection which would be an infringement of the rights accorded by the design protection. Nor do we think that it should be an infringement of the copyright in the work to apply to design to any article after the design protection comes to an end. In other words, we would adopt Section 10 (1) (a) and (b) of the United Kingdom Act.

As to the proviso at the end of Section 10 (1) referring to the First Schedule of the United Kingdom Act, we think that the principle of the proviso should be adopted.

Now as to cases where copyright subsists in an artistic work and

- (i) a corresponding design is applied industrially by or with the license of the owner of the copyright in the work, and
  - (ii) articles to which the design has been so applied are sold, let for hire, or offered for sale or hire, and
  - (iii) at the time when those articles are sold, let for hire, or offered for sale or hire, they are not articles in respect of which the design has been registered under design protection legislation,
- what, if any, provision should apply?

If in such cases the owner of the copyright in the artistic work, even though he has licensed the industrial application of the work, can retain his full artistic copyright therein why would he ever apply for design protection? As drawings are artistic works there would doubtless be widespread reliance on copyright in drawings although the extent of that protection may be to some extent in doubt. Our present Act, Section 46, is based on the principle that where an artist produces a work intending it to be used industrially he cannot retain full, perhaps

any, copyright protection of his work because the law supplies him with an alternative method of securing protection. We think we must recommend that in the cases mentioned in the preceding paragraph there must be some loss of copyright protection from the date when the articles to which the design is applied industrially are first sold, let for hire, or offered for sale or hire. And we recommend that thereafter it shall not be an infringement of the copyright in the work to do anything which at the time it was done would if the design had been registered immediately before that time, have been within the scope of the design protection as extended to all associated designs and articles. References to the scope of the design protection as extended to all associated designs and articles should be defined, as in Section 10 (6) of the United Kingdom Act, as references to the aggregate of the things which, by virtue of the design legislation the registered proprietor would have had the exclusive right to do if (a) when that design was registered, there had at the same time been registered every possible design consisting of that design with modifications or variations not sufficient to alter the character or substantially to affect the identity thereof, and the said proprietor had been registered as the proprietor of every such design, and (b) the design in question, and every other design such as is mentioned in the preceding paragraph, had been registered in respect of all the articles to which it was capable of being applied.

We do not think that there should be any reference to all relevant articles as there is in Section 10 (3) of the United Kingdom Act.

The principle of Section 10 (4) should, we think, be adopted.

The principle of Section 10 (5) should also be adopted. And we recommend that one of the rules be to the following effect which is to the effect of Rule 11, quoted above, *mutatis mutandis*:

11. (1) A design shall be taken to be applied industrially within the meaning of Section        of the Copyright Act,

(a) where the design is reproduced in more than 50 single articles, unless all the articles in which the design is reproduced together form only a single set as defined in this rule; or

(b) where the design is applied to—

(i) printed paper hangings,

(ii) carpets, floor cloths, or oil cloths manufactured or sold in lengths or pieces,

(iii) textile piece goods, or textile goods manufactured or sold in lengths or pieces, and

(iv) lace, not made by hand.

(2) For the purposes of this rule, "set" means a number of articles of the same general character ordinarily on sale together, or intended to be used together, all bearing the same design with or without modification not sufficient to alter the character or not substantially affecting the identity thereof.

(3) Where there is any doubt whether given articles do not constitute a set, the doubt shall be determined by the Commissioner of Patents.

## **PART XI**

### **COPYRIGHT IN SOUND RECORDINGS, MOTION PICTURE FILMS AND BROADCASTS**

#### **Section 1—Copyright in Sound Recordings**

Neither the Rome Convention nor the Universal Copyright Convention imposes any obligation on member countries to give copyright protection to records. However, the Imperial Copyright Act of 1911 contained a section providing that copyright shall subsist in records, in like manner as if they were musical works but with the term limited to fifty years from the making of the original plate, and it was provided that the person who is the owner of the original plate at the time when the plate was made should be deemed to be the author of the work. Similar provisions were enacted in our Copyright Act of 1921 and are to be found in our present Act (Section 4 (3)). However, our Act provides that copyright shall subsist in records as if they were musical, literary or dramatic works. As the Gregory Committee points out, while a record "has called forth in its production a measure of artistic skill, there is always a great measure of what is only technical and industrial in its manufacture". While our Copyright Act provides that copyright shall subsist in records as if they were musical, literary or dramatic works, they are nowhere described as original works in the Act, and we think it desirable not to describe them as works in any new legislation. We think, however, that they should be the subject of copyright protection and our recommendations with regard to them follow.

In the recommendations in this section of the report, we use the term "sound recording" as meaning the aggregate of the sounds embodied in and capable of being reproduced by means of a record of any description other than a sound track associated with a motion picture film, and we use the word "publication" in relation to a sound recording as meaning the issue to the public of records embodying the recording or any part of it.

In our opinion copyright should subsist in every sound recording of which the maker was a Canadian citizen or domiciled or resident in Canada or if a body corporate was a body incorporated under the laws of Canada or a Province of Canada at the time when the recording was made. Moreover, copyright should subsist in every sound recording which has been published if the first publication of the recording took place in Canada.

The Governor in Council should have the power to extend copyright protection to other sound recordings for the same reason that the Governor in Council should have power, as recommended above, to make extensions in relation to literary, dramatic, musical and artistic works. Copyright subsisting in a sound recording should, we think, continue to subsist until the end of the period of forty years from the first publication of the recording and should then expire.

The present protection afforded is under Section 10 of our Act for fifty years from the making of the original plate from which the record is derived. In our view this is somewhat too long a period for a copyright of this kind. The Gregory Committee recommended that the term of protection be reduced from fifty years to twenty-five years (see paragraphs 85 to 91 inclusive). We had strong representations from two large record manufacturing companies in Canada

against reducing the term of protection below fifty years. One of these supplied us with a list of musical artists who recorded works on records now listed in that company's current catalogue from twenty-five to forty-nine years ago and which consists of the names of Caruso, Patti, Sembrich, Melba, Scotti, Calve, Matzenauer, Amato, Clement, McCormack, Ruffo and Slezak, none of whom was alive at the time of the submission of the information, and the names of Farrar, Gigli, Garden, Martinelli, Pinza, Ponselle, Chaliapin, Galli-Curci, Schipa and Pons, all alive at the time of the submission of the information. We were informed that a demand often arises or exists for copies of records made by such artists up to fifty years from the time of the making of the original record and that it would be unfair to permit competitors who had none of the expense or risk of manufacturing the original record and do not have to pay royalties to the artists or their heirs, to copy or "dub" these valuable records after the expiration of, say, twenty-five years, the term recommended by the Gregory Committee. It is represented that if they are allowed to do so, the artists or their heirs are deprived of royalties which they otherwise would receive if the original manufacturer either sold the old records himself or made and sold copies of them; and it is argued also that the original manufacturer is deprived of a legitimate return on his investment. It was submitted that the original record manufacturer would not reproduce the record after his copyright expired or within some time before it would expire, as he would be at too great a disadvantage as compared with his relatively expense-free competitors and that this would be to the disadvantage of the public. These arguments have considerable appeal. The United Kingdom Parliament restored the twenty-five year term, proposed in the bill as introduced, to fifty years. However, it may be noted that in so far as the arguments mentioned relate to initial risk and expense, they are arguments much the same as a patent holder could urge against limiting the term of his patent protection to seventeen years. In so far as they relate to the interest of the performers, we think it unlikely that any musical artist would be deterred from performing by the possibility that his royalties might cease before fifty years, and in so far as the rest of the public is concerned, taking the records out of copyright at the end of a period shorter than fifty years should normally result in wider and less expensive availability of the records. All things considered, we have come to the conclusion, as indicated above, that fifty years is too long a period of protection for records, a kind of protection which the international copyright conventions do not presently assure at all.

We consider that the person to be entitled to copyright subsisting in a recording as the first owner of the copyright should be the maker of the sound recording, provided, however, that where a person commissions the making of a sound recording and pays or agrees to pay for it in money or money's worth and the recording is made in pursuance of that commission, that person, in the absence of any agreement to the contrary, should be the first owner of the copyright in the recording.

The act restricted by the copyright in a sound recording should be the making of a record embodying the recording. At the present time it would appear that an unauthorized public performance of a recording embodied in a record is an infringement of the copyright in the record. Probably the broadcasting of a recording embodied in a record is also an infringement. We recommend the abolition of a record manufacturer's performing right and broadcasting right in records or in the recording embodied in the record. These rights are

not exercised at the present time and if they were exercised it would probably be through some association or society. This is the way in which the public performing right in records is exercised in the United Kingdom. The existence and exercise of the right there have caused difficulties which are set out in the report of the Gregory Committee and we would not like to see a development of this kind in Canada. We have only one reservation with regard to the abolition of the performing and broadcasting rights of record manufacturers and that is in respect of performance in public or broadcasting by persons who have wrongfully reproduced a copyright record or by persons who publicly perform or broadcast a copyright record knowing that the record is an infringing copy. However, under the infringement provisions which we propose to recommend, the copyright owner will be able to recover possession of infringing copies from any such person, and this remedy together with the copyright owner's remedy for damages against the person who wrongfully made the record should probably be sufficient.

The new United Kingdom Act provides, in effect, that no action for infringement will lie in relation to a record if the owner of the copyright in the record has issued it without causing it or its container to bear a label or other mark indicating the year in which the recording was first published or taking all reasonable steps to that end. (See Section 12 (6).) Should the manufacturer of a record be compelled to mark it by label or otherwise with the year in which it was issued to the public so that persons desiring to copy the record will know whether it is in or out of copyright? Under the new United Kingdom Act the owner of the copyright in a sound recording embodied in a record is to have the right to prevent the recording from being caused to be heard in public or broadcast. If our recommendations are accepted, he will have no such right here. We do not think that the mere right to copy a record as soon as it is out of copyright is so important that its exercise should be legislatively facilitated.

## **Section 2—Copyright in Motion Picture Films**

Article 14 (2) of the Rome Convention provides that cinematographic productions shall be protected as literary or artistic works if the author has given the work an original character. The Universal Copyright Convention, Article I, provides that each contracting state undertakes to provide for the adequate and effective protection of the rights of authors and other copyright proprietors in, among other things, cinematographic works. (It may be noted also that the Brussels Convention includes cinematographic works in the term "literary and artistic works".) Motion picture films could therefore properly be described as works in our legislation. However, we think it would be convenient not so to describe them but rather to deal with them separately simply as motion picture films. Our recommendations with regard to them are as follows:

Copyright should subsist in every motion picture film of which the maker was a Canadian citizen or domiciled or resident in Canada for the whole or a substantial part of the period during which the film was made, or, if a body corporate, was a body incorporated under the laws of Canada or a province of Canada when the film was made. Moreover, copyright should subsist in every motion picture film which has been published if the first publication of the film took place in Canada.

The recommended provisions regarding extension of protection by Order in Council would enable Canada to discharge its convention obligations. Copyright should subsist in a motion picture film from the time it is made until the film is first exhibited in public and thereafter until the end of the period of forty years and should then expire. The Gregory Committee recommended a term of twenty-five years, but this was raised to fifty years in the new United Kingdom Act for reasons somewhat similar to those we have given for recommending a term of forty years rather than twenty-five years for records. We think that forty years for films is adequate.

The person in whom the copyright should first vest should be the maker of the film, and the maker should be defined as the person by whom the arrangements necessary for the making of the film are undertaken.

There should, of course, be definitions of "motion picture film", of "publication", and of "copy" (in relation to a film) and definitions to the effect of the following to be found in the new United Kingdom Act (Section 13 (9) and (10)) would, we think, be adequate:

"cinematograph film" means any sequence of visual images recorded on material of any description (whether translucent or not) so as to be capable, by the use of that material—

(a) of being shown as a moving picture, or

(b) of being recorded on other material (whether translucent or not) by the use of which it can be so shown.

"publication", in relation to a cinematograph film, means the sale, letting on hire, or offer for sale or hire, of copies of the film to the public;

"copy", in relation to a cinematograph film, means any print, negative, tape or other article on which the film or part of it is recorded;

for the purposes of this Act a cinematograph film shall be taken to include the sounds embodied in any sound-track associated with the film, and references to a copy of a cinematograph film shall be construed accordingly.

The acts to be restricted by the copyright in a motion picture film should be (a) making a copy of the film; (b) causing the film in so far as it consists of visual images, to be seen in public, or, in so far as it consists of sounds, to be heard in public; (c) broadcasting the film; (d) causing the film to be transmitted to subscribers to a diffusion service (but this should not extend to rediffusion).

As a qualification of (b), it should be provided that it is not an infringement of the copyright in the film to receive a broadcast, a diffusion or a rediffusion of the film and cause it to be heard or seen in public as and when it is broadcast, diffused or rediffused, as the case may be. If, however, the broadcast (when there is no rediffusion), the diffusion, or the broadcast rediffused was not authorized by the owner of the copyright in the film, any causing to be heard or seen in public at the receiving end should be taken into account in assessing damages in any proceedings against the broadcaster or person diffusing as the case may be in respect of that copyright in so far as that copyright was infringed by him in making the broadcast or diffusion; and there should be a provision to that effect. There should also be a provision applying the same principle to rediffusions of broadcasts of films just as it applies to causing broadcast films to be heard or seen in public as and when the broadcast is received.

Where copyright has subsisted in a motion picture film a person, who after the copyright has expired makes a copy of the film, or causes it to be seen or to be seen and heard in public, or broadcasts it, or causes it to be transmitted to subscribers to a diffusion service, should not thereby infringe any copyright subsisting in a literary, dramatic, musical or artistic work. In other words, this



should not be an infringement of the copyright of the author or other head-copyright owner.

It will be noted that our recommendations relating to films relate not only to films to which the author of the film has given an original character. Canada must extend the protection to news reels and other films if we are to comply with our obligations under the Universal Copyright Convention.

The question as to whether the recommended term complies with the Rome Convention has presented itself. Under that Convention we are obliged to give protection to motion picture films as *literary or artistic works*, if the author has given the work an original character. Our view is that as a result of Article 7 a literary or artistic work, at least when it is the product of joint authors, must receive protection until the death of the author who dies last. However, as noted above, under the Brussels Convention, Article 2 (1), cinematographic works are included in the term "literary and artistic works" and the Brussels Convention imposes an obligation to protect those works for the life of the author and fifty years after his death. Yet the United Kingdom Parliament, taking no doubt the very sensible view that provisions which involve the ascertaining of the individual authorship of a motion picture film are not, generally speaking, capable of practical application, fixed a term of fifty years from the registration or publication of a motion picture film as the term of protection and, as a consequence, deprived head-copyright owners of their performing rights in the works embodied in the film, in so far as they are so embodied, at the end of the term of fifty years. If the Rome and Brussels Conventions are to be construed with reference to actual exigencies and conditions, a technical breach of the conventions must take place in so far as motion picture films are concerned.

There should also be a provision that the copyright in a motion picture film is not infringed by making a copy of it for judicial proceedings or by causing it to be seen or heard in public for the purposes of such a proceeding.

### **Section 3—Copyright in Television Broadcasts and Sound Broadcasts**

This subject was somewhat fully discussed in that part of our report which dealt with new right-holders and new rights. Our recommendations are that copyright should subsist in every broadcast made in Canada.

The person to be entitled as first copyright owner to any copyright subsisting in a broadcast should be the broadcasting person or body. The term of protection should be forty years from the time when the broadcast was made. We suggest this period principally for the purpose of making it uniform with the term of copyright in records, films and photographs.

The acts restricted by the copyright in a television broadcast or sound broadcast should be:

- (a) the recording by a film, record or any other device of the images or the sounds of the broadcast or both;
- (b) the use of such a recording for broadcasting or diffusing;
- (c) the use of such a recording for causing the broadcast to be seen or heard in public;
- (d) rebroadcasting the broadcast.

For the reasons given earlier in this report rediffusion (as distinguished from diffusion) of a broadcast should not be an infringement of the broadcaster's right.

Notwithstanding (a) above the mere recording should not be deemed to be a restricted act when it is effected for private purposes only.

The new United Kingdom Act goes further and provides that a restricted act shall be, in the case of a television broadcast, causing it, in so far as it consists of visual images, to be seen in public, or, in so far as it consists of sounds, to be heard in public, if it is seen or heard by a paying audience. We are not in favour of making this a restricted act for the reasons already given in dealing with head-copyrights and the copyrights in films.

As a minor matter, there should also be a provision that the copyright in a broadcast is not infringed by anything done in relation to the broadcast for the purposes of a judicial proceeding.

#### **Section 4—Supplementary Recommendations for the Purposes of this Part**

In relation to articles which infringe copyright in sound recordings, in motion picture films, and in television or sound broadcasts, there should be provisions in reference to importing, selling, letting for hire, offering or exposing for sale or hire by way of trade, exhibiting by way of trade in public, distribution for purposes of trade, etc., similar to those which we have recommended in Part IX in respect of literary, dramatic, musical and artistic works.

## **PART XII**

### **REMEDIES FOR INFRINGEMENT**

Remedies in our Act are dealt with under the headings "Civil Remedies" and "Summary Remedies". The provisions in respect of civil remedies are contained in Sections 20 to 24 inclusive and are almost identical with the provisions of Sections 6 to 10 inclusive of the Imperial Copyright Act of 1911.

Experience under the 1911 Act has apparently convinced those responsible for copyright legislation in the United Kingdom that these provisions require considerable modification as evidenced by the provisions of the new United Kingdom Act. In our view they require modification in Canada although the changes we suggest are in many respects different from those that have been made in the United Kingdom. The most convenient way, however, of considering what the changes should be is, we think, to examine the provisions of the new United Kingdom Act rather than those of our present Act.

#### **Section 1—Action by Owner of Copyright for Infringement**

Section 17 (1) of the new United Kingdom Act is as follows:

17. (1) Subject to the provisions of this Act, infringements of copyright shall be actionable at the suit of the owner of the copyright; and in any action for such an infringement all such relief, by way of damages, injunction, accounts or otherwise, shall be available to the plaintiff as is available in any corresponding proceedings in respect of infringements of other proprietary rights.

A provision to the same effect should be enacted here. The section in the bill as introduced in and passed by the House of Lords contained another subsection as follows:

17. (2) No action for infringement of copyright shall be begun after the end of the period of three years beginning with the date on which the infringement occurred.

This was deleted in the House of Commons, and we understand that the effect of the deletion was to make the period of limitation six years under general legislation. There should be some limitation period in our Act. Limitation periods for actions for torts are not uniform throughout Canada and it can hardly be said that there is a natural or obvious period of limitation for such a tort as infringement of copyright. We see no reason for altering the three year period in our Act. There would be substantial grounds for objection to the lapse of many years between an alleged infringement and the trial of the action. This would be particularly true, we think, in actions for damages for infringement of performing rights. We recommend a three year period of limitation as Canada has now.

Section 17 (2) of the new United Kingdom Act which deals with the same subject-matter as Section 22 of our Act is as follows:

17. (2) Where in an action for infringement of copyright it is proved or admitted—

- (a) that an infringement was committed, but
- (b) that at the time of the infringement the defendant was not aware, and had no reasonable grounds for suspecting, that copyright subsisted in the work or other subject-matter to which the action relates,

the plaintiff shall not be entitled under this section to any damages against the defendant in respect of the infringement, but shall be entitled to an account of profits in respect of the infringement whether any other relief is granted under this section or not.

We recommend an enactment substantially altering the effect of this section. The changes we recommend are as follows:

(i) We think that paragraph (b) should be "that at the time of the infringement the defendant was not aware, and had no reasonable grounds for supposing that it was an infringement of copyright."

Take the case of a person who wishes to perform a musical work in public. There are two performing rights societies in Canada. We were told that each society in some instances claims to be the owner of the performing rights in the same work. Unless we have a register from which the person performing the work can ascertain which society is the owner of the performing right he may find himself liable to an action by Society A even though he has license from Society B and has no reasonable grounds for supposing that Society A owned the rights. He knew that copyright subsisted. Under the present law he is liable in damages to Society A because he knew that copyright subsisted. A similar situation may arise in relation to a literary work the copyright in which is assigned first to A and later to B. B knows that copyright subsists but, having no reason to suspect that A had an assignment, infringes A's copyright. Surely the licensee is in all respects an "innocent" infringer and should not be liable in damages. The situation would of course be different if we had a system of compulsory registration of assignments. We have suggested the word "supposing" rather than the word "suspecting" as a slightly fairer word to use. "Supposing" is the word used in the innocent infringement section of the United Kingdom Patent Act. (We have no innocent infringement section in our Patent Act.)

(ii) We think that the words "but shall be entitled to an account of profits in respect of the infringement whether any other relief is granted under this section or not" should be omitted and that the word "damages" should be changed to "pecuniary remedy". Under our Act (Section 22) the plaintiff in proceedings taken in respect of infringement is not entitled to any remedy other than an injunction against an innocent infringer. This, we think, is the correct principle.

Section 17 (3) of the new United Kingdom Act is as follows:

17. (3) Where in an action under this section an infringement of copyright is proved or admitted, and the court, having regard (in addition to all other material considerations) to—

(a) the flagrancy of the infringement, and

(b) any benefit shown to have accrued to the defendant by reason of the infringement,

is satisfied that effective relief would not otherwise be available to the plaintiff, the court, in assessing damages for the infringement, shall have power to award such additional damages by virtue of this subsection as the court may consider appropriate in the circumstances.

This section deals with the case of the "guilty" infringer as distinguished from the "innocent" infringer. It relates only to cases where damages are assessed. It appears to us that in the case of a guilty infringer (by which we mean an infringer as to whom it is not proved or admitted that at the time of the infringement he was not aware and had no reasonable grounds for supposing that it was an infringement of copyright) the plaintiff sues for and recovers damages, the court in assessing damages for the infringement should have power to award such exemplary damages if any as the court may think fit, having regard to the flagrancy of the infringement, and the plaintiff in an action for damages should,

if damages are recoverable, have the right also to an account of profits, as incidental to the assessment of damages, the damages recovered to be at least the amount found to be the amount of profits. (This incidental remedy should not be confused with the plaintiff's right to sue for an account of profits,—which he would have, at least in the common law provinces—which is a separate remedy. The plaintiff if he pursues this separate remedy and thereby obtains an account of profits (and we see no reason why he should ever wish to do so) should not be able to obtain damages, assessed as above or otherwise. See Copinger and Skone James on Copyright 8th Edit. p. 169.)

In addition to the remedies mentioned in the last paragraph and to the remedy of injunction the guilty infringer should, subject to the provisions of Section 2 below, be liable to deliver up all infringing copies and plates used or intended to be used for making infringing copies. In assessing exemplary damages the court should be empowered to take into account the value of infringing copies and plates ordered to be delivered up.

The effect of Section 17 (3) of the new United Kingdom Act should be accordingly modified.

Subsections (4) and (5) of Section 17 of the new United Kingdom Act which are to the same effect as subsection (1) of Section 23 of our Act are as follows:

17. (4) In an action for infringement of copyright in respect of the construction of a building, no injunction or other order shall be made—

- (a) after the construction of the building has been begun, so as to prevent it from being completed, or
- (b) so as to require the building, in so far as it has been constructed, to be demolished.

(5) In this Part of this Act "action" includes a counterclaim, and references to the plaintiff and to the defendant in an action shall be construed accordingly.

Canada should enact these in effect.

## **Section 2—Other Rights of Owner of Copyright in Respect of Infringing Copies**

Section 18 (3) of the new United Kingdom Act is as follows:

18. (3) In this Part of this Act "infringing copy"—

- (a) in relation to a literary, dramatic, musical or artistic work, or to such a published edition as is mentioned in section fifteen of this Act, means a reproduction otherwise than in the form of a cinematograph film,
- (b) in relation to a sound recording, means a record embodying that recording,
- (c) in relation to a cinematograph film, means a copy of the film, and
- (d) in relation to a television broadcast or a sound broadcast, means a copy of a cinematograph film of it or a record embodying a sound recording of it, being (in any such case) an article the making of which constituted an infringement of the copyright in the work, edition, recording, film or broadcast, or, in the case of an imported article, would have constituted an infringement of that copyright if the article had been made in the place into which it was imported; and "plate" includes any stereotype, stone, block, mould, matrix, transfer, negative or other appliance.

A provision to the effect of Section 18 (3) should be enacted, omitting the reference to published editions.

We have already recommended in dealing with Section 17 of the new United Kingdom Act that a guilty infringer should be liable, in addition to certain other remedies and subject to the provisions of this Section, to deliver up all infringing copies and plates used or intended to be used for making infringing copies (to be

referred to as infringing plates). This remedy should be extended to the case of a defendant who, whether he is an infringer or not, has in his possession infringing copies of infringing plates, unless he establishes that at the time they came into his possession, he was not aware and had no reasonable grounds for supposing that they were infringing copies or infringing plates. If, however, he establishes this, the plaintiff's only remedy in respect of delivery up should be that mentioned in the next paragraph.

There should we think be a special provision in respect of delivery up by a person whether an infringer or not who has in his possession infringing copies or plates and who is "innocent" in the sense used in the last paragraph. As such a person will have no means of obtaining any authentic information from an official source as to the subsistence of copyright or the identity of the owner of the copyright we think it unfair that he should be penalized with financial losses which would fall upon him if he were ordered to deliver up infringing copies in his possession, but we would not apply the same principle to plates. What we propose in this connection in regard to infringing copies is that the copyright owner should have the option of taking the infringing copies off the person's hands at cost or of leaving them in his hands, to be disposed of by him, in which latter event the person would be obliged to account to the copyright owner for the profits. So long as the copyright owner exercises neither option the person should be free to dispose of the infringing copies, accounting for the profits (earned after he receives notice they are infringing copies). This option should be exercisable by the copyright owner not only at the beginning of or in an infringement action but before or in the absence of an action. A notice of exercise of the option at any time should result in the person being liable to deliver up the infringing copies forthwith (being compensated for the cost) or to account for profits thereafter as the case may be.

In all cases a person whether innocent or otherwise should be liable to deliver up infringing plates on notice without compensation, or for damages if he retains them.

In this way, the only profits an innocent infringer could make out of an infringement would be those which he would make before notice or action, whichever is earlier, and the only loss he could sustain would be that on the plates.

Provisions to this effect should be enacted rather than provisions to the effect of Section 21 of our Act which is as follows:

21. All infringing copies of any work in which copyright subsists, or of any substantial part thereof, and all plates used or intended to be used for the production of such infringing copies, shall be deemed to be the property of the owner of the copyright, who accordingly may take proceedings for the recovery of the possession thereof or in respect of the conversion thereof.

### **Section 3—Right of Exclusive Licensee to Sue for Infringement**

Section 19 of the new United Kingdom Act is a long and detailed section apparently designed to give statutory effect to the recommendation of the Gregory Committee in paragraph 276 of that Committee's report, which includes the following:

We have come to the conclusion that it is desirable to make clear that an exclusive licensee is entitled to sue for an infringement of the right comprised in his license though without prejudice to the right of the defendant to set up any defence which he could have raised against the copyright owner.

We recommend to the same effect and that a section corresponding to Section 19 of the new United Kingdom Act (unnecessary, we think, to quote here) be enacted with such variations as may be appropriate in the light of other relevant sections of any new Canadian Act, (which will, if our recommendations are accepted, be different from the provisions of Sections 17 and 18 of the new United Kingdom Act).

#### Section 4—Presumptions in Copyright Actions

We now come to Section 20 of the new United Kingdom Act which is as follows:

20. (1) In any action brought by virtue of this Part of this Act—
- (a) copyright shall be presumed to subsist in the work or other subject-matter to which the action relates, if the defendant does not put in issue the question whether copyright subsists therein, and
  - (b) where the subsistence of the copyright is proved or admitted, or is presumed in pursuance of the preceding paragraph, the plaintiff shall be presumed to be the owner of the copyright if he claims to be the owner of the copyright and if the defendant does not put in issue the question of his ownership thereof.
- (2) Subject to the preceding subsection, where in the case of a literary, dramatic, musical or artistic work, a name purporting to be that of the author appeared on copies of the work as published, or, in the case of an artistic work, appeared on the work when it was made, the person whose name so appeared (if it was his true name or a name by which he was commonly known) shall, in any action brought by virtue of this Part of this Act, be presumed, unless the contrary is proved,—
- (a) to be the author of the work, and
  - (b) to have made the work in circumstances not falling within subsection (2), subsection (3) or subsection (4) of Section 4 of this Act.
- (3) In the case of a work alleged to be a work of joint authorship, the last preceding subsection shall apply in relation to each person alleged to be one of the authors of the work, as if references in that subsection to the author were references to one of the authors.
- (4) Where, in an action brought by virtue of this Part of this Act with respect to a literary, dramatic, musical or artistic work, subsection (2) of this section does not apply, but it is established—
- (a) that the work was first published in the United Kingdom, or in another country to which section two, or, as the case may be, section three, of this Act extends, and was so published within the period of fifty years ending with the beginning of the calendar year in which the action was brought, and
  - (b) that a name purporting to be that of the publisher appeared on copies of the work as first published,
- then, unless the contrary is shown, copyright shall be presumed to subsist in the work and the person whose name so appeared shall be presumed to have been the owner of that copyright at the time of the publication.
- For the purposes of this subsection a fact shall be taken to be established if it is proved or admitted, or if it is presumed in pursuance of the following provisions of this section.
- (5) Where in an action brought by virtue of this Part of this Act with respect to a literary, dramatic, musical or artistic work it is proved or admitted that the author of the work is dead,—
- (a) the work shall be presumed to be an original work unless the contrary is proved, and
  - (b) if it is alleged by the plaintiff that a publication specified in the allegation was the first publication of the work, and that it took place in a country and on a date so specified, that publication shall be presumed, unless the contrary is proved, to have been the first publication of the work, and to have taken place in that country and on that date.
- (6) Paragraphs (a) and (b) of the last preceding subsection shall apply where a work has been published, and—

- (a) the publication was anonymous, or was under a name alleged by the plaintiff to have been a pseudonym, and
- (b) it is not shown that the work has ever been published under the true name of the author, or under a name by which he was commonly known, or that it is possible for a person without previous knowledge of the facts to ascertain the identity of the author by reasonable inquiry,

as those paragraphs apply in a case where it is proved that the author is dead.

(7) In any action brought by virtue of this Part of this Act with respect to copyright in a sound recording, if records embodying that recording or part thereof have been issued to the public, and at the time when those records were so issued they bore a label or other mark comprising any one or more of the following statements, that is to say—

- (a) that a person named on the label or mark was the maker of the sound recording;
  - (b) that the recording was first published in a year specified on the label or mark;
  - (c) that the recording was first published in a country specified on the label or mark;
- that label or mark shall be sufficient evidence of the facts so stated except in so far as the contrary is proved.

We recommend the enactment of provisions to the same effect as subsections (1), (2) and (3) but with appropriate changes in subsection (2) (b) to accord with the changes we recommend in Section 3 of Part VIII in respect of the provisions of Section 4 of the new United Kingdom Act. It is debatable whether paragraph (2) (b) should be enacted. Take the case of an action brought by the assignee of the person whose name appears on a work as the author. There should be a presumption that he was the author but should there be any presumption that he did not produce the work in the course of his employment by someone else and that he was not commissioned by someone else to produce it? If both the author and the person who might have employed him or commissioned the work are dead, the validity of the assignees' title may depend on where the presumption lies. Ordinarily a plaintiff must prove his case. But the plaintiff assignee in the case supposed, although there was no doubt about his assignment from the author, might be defeated by a defendant who is admittedly an infringer because of the difficulty of proof of a negative. In most cases we think there probably would not have been an employment or commissioning and we would therefore leave the presumption where the United Kingdom Act, Section 20 (2) (b) places it. True, defendants who would have good defences might in some cases fail for the lack of evidence. But on balance we would place the burden on the defendant to prove the affirmative rather than on the plaintiff to prove the negative.

It may be noted that the adoption of Section 20 (1) shifts the burden of proof in cases where subsistence of copyright or title to the copyright is in issue from the defendant where it is today under our Act to the plaintiff where it was under the Imperial Copyright Act of 1911 and where it remains under the new United Kingdom Act. The Gregory Committee had representations that they should recommend shifting the burden from the plaintiff to the defendant but they declined to make such recommendations for the reasons given in paragraph 286 of their report.

As to the provisions of Section 20 (4) two Commissioners are of the opinion that they should be enacted (in effect) only with the following substantial changes:

For (a) the following should be substituted:

- (a) that copyright in the work subsists

and the words following shortly after (b), "copyright shall be presumed to subsist in the work and" should be deleted.



These Commissioners felt that the subsection then, while still complying with Article 15 (2) of the Rome Convention, would not create, in the case of a work published anonymously or pseudonymously, what they would consider an undue presumption of subsistence of copyright. The third Commissioner is of opinion that the provisions of Section 20 (4) should be adopted (in effect) with "fifty-six" substituted for "fifty", considering among other things that the presumption of subsistence of copyright thereby created is more consistent with the intent of Article 15 (2) of the Rome Convention than its absence would be, part at least of this intent being in his opinion the protection of the anonymity of the author in infringement proceedings.

We recommend the adoption also of subsection (5) but with the paragraph (b) changed to read in substance as follows:

- (b) if it is alleged by the plaintiff that a publication specified in the allegation was the first publication of the work and that it took place in a country and in a year specified, and a copy of the work is produced to the court which bears an indication that the copy was published in the country and in the year so specified and bears no indication that the work had first been published in some previous year, the publication alleged shall be presumed unless the contrary is proved to have been the first publication of the work and to have taken place in the country and year alleged.

We think also that subsection (6) should be adopted.

We recommend also the adoption of subsection (7). It will not be as important here as in the United Kingdom because (a) record manufacturers will have no performing rights here and (b) the new United Kingdom Act requires as a condition of copyright in records that they or their containers bear a label or mark indicating the year in which the recording was first published. Nevertheless it may be of value and its principle accords with that of a new provision which we recommend for insertion in our Act. This provision is that the date which any work bears as its date of publication be presumed unless the contrary is proved to be its date of publication but by this we do not mean the date of its first publication.

## Section 5—Summary Remedies

These are dealt with in our Act, by Sections 25 and 26 and in the new United Kingdom Act by Section 21 which is as follows:

21. (1) Any person who, at the time when copyright subsists in a work,—
- (a) makes for sale or hire, or
  - (b) sells or lets for hire, or by way of trade offers or exposes for sale or hire, or
  - (c) by way of trade exhibits in public, or
  - (d) imports into the United Kingdom, otherwise than for his private and domestic use, any article which he knows to be an infringing copy of the work, shall be guilty of an offence under this subsection.
- (2) Any person who, at the time when copyright subsists in a work, distributes, either—
- (a) for purposes of trade, or
  - (b) for other purposes, but to such an extent as to affect prejudicially the owner of the copyright,
- articles which he knows to be infringing copies of the work, shall be guilty of an offence under this subsection.
- (3) Any person who, at the time when copyright subsists in a work, makes or has in his possession a plate, knowing that it is to be used for making infringing copies of the work, shall be guilty of an offence under this subsection.

(4) The preceding subsections shall apply in relation to copyright subsisting in any subject-matter by virtue of Part II of this Act, as they apply in relation to copyright subsisting by virtue of Part I of this Act.

(5) Any person who causes a literary, dramatic or musical work to be performed in public, knowing that copyright subsists in the work and that the performance constitutes an infringement of the copyright, shall be guilty of an offence under this subsection.

(6) The preceding provisions of this section apply only in respect of acts done in the United Kingdom.

(7) A person guilty of an offence under subsection (1) or subsection (2) of this section shall on summary conviction—

- (a) if it is his first conviction of an offence under this section, be liable to a fine not exceeding forty shillings for each article to which the offence relates;
- (b) in any other case, be liable to such a fine, or to imprisonment for a term not exceeding two months:

Provided that a fine imposed by virtue of this subsection shall not exceed fifty pounds in respect of articles comprised in the same transaction.

(8) A person guilty of an offence under subsection (3) or subsection (5) of this section shall on summary conviction—

- (a) if it is his first conviction of an offence under this section, be liable to a fine not exceeding fifty pounds;
- (b) in any other case, be liable to such a fine, or to imprisonment for a term not exceeding two months.

(9) The court before which a person is charged with an offence under this section may, whether he is convicted of the offence or not, order that any article in his possession which appears to the court to be an infringing copy, or to be a plate used or intended to be used for making infringing copies, shall be destroyed or delivered up to the owner of the copyright in question or otherwise dealt with as the court may think fit.

(10) An appeal shall lie to a court of quarter sessions from any order made under the last preceding subsection by a court of summary jurisdiction; and where such an order is made by the sheriff there shall be a like right of appeal against the order as if it were a conviction.

Subsection (1) should be adopted *mutatis mutandis* but with appropriate changes if our recommendation with regard to public libraries and institutions of learning is accepted. The words "and domestic" should be omitted.

Subsection (2) should be adopted but with similar changes.

Subsection (3) should be adopted.

The substance of subsection (4) should be adopted. The significance of including Part II is that that part deals with copyright in sound recordings, cinematograph films, broadcasts, etc.

Subsection (5) should be adopted.

As to subsection (6) a similar provision referring to Canada would probably be unnecessary.

Subsections (7) and (8) should be adopted with, we think, 40 shillings changed to \$10.00 and £50 changed to \$200.00, the amounts in our present Act (except that mentioned in Section 26 (1) which is \$250.00). True, the value of money has decreased since the enactment of our Copyright Act and it could be argued that *prima facie* the amounts of the penalties should be increased. Moreover it was represented to us that the present penalties are entirely inadequate. It was proposed that in addition to the \$10.00 or \$200.00, as the case may be, a fine equal to the gain to the offender would be appropriate. It was also submitted that the penalty for a second or subsequent offence should not be, as now, only a fine or imprisonment but a fine or imprisonment or both. It was also submitted that for the purpose of summary (as well as civil) remedies an infringement by a resident of Canada resulting in further reproduction outside Canada

should be deemed to be an infringement in Canada with respect to the total number of copies resulting. We are not satisfied either that the general scheme of the summary remedy proceedings of our Act and of the new United Kingdom Act is ill-considered, or that any defensible increase in the present penalties would act as a greater deterrent to infringement.

Subsection (9) should, in our opinion, be changed so as to provide to the following effect:

(9) The court by which a person is convicted under this section may order that any article in his possession which appears to the court to be an infringing copy or to be a plate used, or intended to be used, for making infringing copies shall be delivered up to the owner of the copyright in question or otherwise dealt with as the court may think fit.

This change is necessary to make the subsection consistent with our recommendations with regard to civil remedies against innocent infringers. Moreover, summary proceedings are quasi-criminal in nature and it would seem anomalous to empower a magistrate in cases where no guilt is proved to proceed nevertheless to make an adjudication of a civil character.

As to subsection (10), an appeal to some appropriate court should be provided for in our legislation.

## **Section 6—Special Remedy for Importation of Infringing Printed Copies**

Section 27 of our Act is as follows:

Copies made out of Canada of any work in which copyright subsists that if made in Canada would infringe copyright and as to which the owner of the copyright gives notice in writing to the Department of National Revenue that he is desirous that such copies should not be so imported into Canada, shall not be so imported, and shall be deemed to be included in Schedule C to the Customs Tariff, and that Schedule shall apply accordingly.

The part of the Imperial Act of 1911 from which this section was substantially copied in Section 14 (1) which is as follows:

Copies made out of the United Kingdom of any work in which copyright subsists which if made in the United Kingdom would infringe copyright, and as to which the owner of the copyright gives notice in writing by himself or his agent to the Commissioners of Customs and Excise, that he is desirous that such copies should not be imported into the United Kingdom, shall not be so imported, and shall, subject to the provisions of this section, be deemed to be included in the table of prohibitions and restrictions contained in section forty-two of the Customs Consolidation Act, 1876, and that section shall apply accordingly.

Dealing with this subsection of the Imperial Act of 1911, Copinger and Skone James on Copyright 8th Edit., say at page 180:

Obviously, the Customs authorities are not in a position to determine nice points of copyright law, and it is not intended that they should have power summarily to seize any works, except those that are flagrant piracies. In other cases, the proprietor of the copyright must pursue his other remedies. In fact, the great protection given by Section 14 is against the flooding of the English markets with cheap foreign reprints, which are frequently issued with the licence of the proprietor of the copyright upon the understanding that these reprints are not to compete with him in the home market. Such reprints are, of course, liable to be seized if imported into England for they would infringe the copyright "if made in the United Kingdom".

The great advantage of this remedy over the civil right and the summary remedies is that it is not necessary to prove that the importer knew that the copies would, if made in this country, have infringed copyright; as has been pointed out, copies which are imported without such knowledge are not "infringing copies" and do not become the property of the owner of the copyright.

It will be noted that under our Section 27 the importation of copies of a work is not prohibited unless these copies if made in Canada would infringe copyright. The words "if made in Canada" must mean, we think, "if made in Canada by the person who made them". If, for example, the owner of the Canadian copyright in Canada and in country A had authorized the making of them in country A by X but had not authorized them to be made in Canada by X, the section would prohibit the importation of copies made by X into Canada by anybody after the appropriate notice was given. If anyone attempted to import such copies he might find them stopped at the border. He would not be an infringer unless his importation was for sale or hire and he knew that the work would infringe copyright if it had been made in Canada. But he nevertheless would not be able to import the copies.

Section 27 was the subject of sustained and vigorous representations by a number of book publishers and organizations representing book publishers. Their concern was not only to have the section retained but to have it immensely strengthened from their point of view. The book publishing companies of Canada are, generally speaking, mainly importers of books. They print or procure the printing of some books in Canada but this is not the profitable end of their business. They say that if they are to remain in financial position to carry on the original publishing of Canadian books and thus assist in the development of Canadian literature they must not be unduly hampered in carrying on their importing and distribution activities. For the most part they are not the owners of the Canadian copyright in the books they import, but are exclusive selling or distributing agents of the copyright owners. The great bulk of the books they handle are imported by them from publishers in Great Britain, the United States and France. Until fairly recently they or some of them have been giving notices in writing to the Department of National Revenue that they were desirous that certain books should not be imported into Canada except by them. The following opinion of the Department of Justice indicates the nature of the practice which has developed:

Ottawa, March 12, 1953.

Dear Sir:

165606

*Re: Copyright and Exclusive Agency  
Arrangements in the Book Trade*

I acknowledge your letter of January 23rd last with enclosure wherein you request an opinion as to the legality of certain practices which have arisen under Section 27 of the Copyright Act.

As I understand it, the practice to which you refer is as follows:

The owner of copyright in a certain book in both Canada and the United States has copies of the book printed in the United States and distributed for retail there. He appoints a sales representative in Canada as his exclusive selling Agent here. Through his selling Agent in Canada, he notifies the Department of National Revenue under Section 27 of the Copyright Act that he desires to have copies of the book

prohibited from import into Canada. The book is then included in Schedule "C" of the Customs Tariff, and is excluded from Canada to all others except the exclusive agent.

I have considered this practice, and I am of opinion that it is not supported by the relevant legislation. Section 27 of the Copyright Act provides that copies made out of Canada of any work in which copyright subsists, which, if made in Canada, would infringe copyright may be excluded by the procedure outlined above. Since the copies in question made out of Canada were made by the holder of the copyright, the same, if made in Canada, would not infringe copyright. That being the case, section 27 is not applicable.

There is, of course, the further objection to the practice outlined above that even if Section 27 were available, the placing of the book in Schedule "C" of the Customs Tariff would bar it from importation into Canada even to the American publishers' own sales representative.

Yours truly,

(Signed) F. P. VARCOE,  
Deputy Attorney General of Canada.

Director of Investigation and Research,  
Combines Investigation Act,  
Ottawa.

The publishers would like us to recommend legislation providing that if a Canadian agent of a foreign publisher who is the owner of the Canadian copyright gives on behalf of his principal an appropriate notice in writing to the Department of National Revenue with respect to a book published abroad by his principal or anyone else, importation of that book into Canada by any person except the Canadian agent will be prohibited and the book stopped on arrival by the customs officials. As the case was put to us, "the section ought to be made clear so as to act as a prohibition of any copies of a work in which copyright subsists and which are made in a foreign country, whether made there legally or otherwise, and to permit importation at will of any and all copies by the owner of the Canadian copyright". It was argued on behalf of the importing Canadian agent-publishers that a principle of the patent law should apply, namely, that the control of the making, using and vending of articles patented in Canada is completely within the control of the Canadian patent holder, who therefore has power in effect to prevent importation for sale or use in Canada of such articles. By his control over sale and use in Canada he may in effect allow such inventions to be imported or not as he thinks fit and by whom he thinks fit. We think, however, that the difference between the established patent principle and the established copyright principle is clear. The sale in Canada of an imported article enjoying Canadian copyright protection is not an infringement if the article was made by a person having the right to make it in Canada. Once the article is made, anywhere in the world, by a person who had the right to make it in Canada, the sale of the article in Canada, whether or not the seller had full knowledge of the facts, is not an infringement and is not restrainable by the Canadian copyright owner. If the sale cannot be restrained, why should the importation be restrained, either under such a provision as that contained in Section 27 or otherwise? Unless we recommend a change in concept of the nature of infringement by sale we should not recommend the change requested by the publishers.

Should there be any special remedy for importation of infringing copies? Unfortunately, the members of the Commission are not agreed on the answer to this question.

One Commissioner is of opinion that Section 27 should be repealed and nothing put in its place. He feels that the other remedies to be provided in the Act are adequate for all reasonable purposes. If infringing copies are imported without the licence of the owner of the copyright (not for the importer's private use, etc.) by an importer who knows the copies to be infringing copies an action lies in the courts against the importer for damages for infringement, an injunction against further importations may be obtained, and the infringing copies imported are subject to delivery up by order of the court. If it be considered that the burden on the copyright owner of proving guilty knowledge is too great, the Canadian copyright owner can, this Commissioner thinks, in most if not all cases protect himself by circularizing the importing trade notifying persons in that trade that certain copies or certain editions of certain works published abroad are infringing copies and that the owner of the Canadian copyright would treat any importation of such copies, or editions, as infringements. If a person receiving such a notice thereafter imported such copies or editions he could, with assurance, be proceeded against by the Canadian copyright owner for infringement. This Commissioner feels that as no defensible amendment of Section 27 could go any measurable distance in solving the specific problem of the Canadian publishers, and that even if it could, it is not the function of the customs authorities to exercise policing duties in the enforcement of private rights, the section should be repealed.

Another Commissioner is of opinion that in the case of imported works there should be facilities for constructive notice to possible importers of infringing copies that certain copies or certain editions of certain works would if imported into Canada be infringing copies and he would favour as a substitute for Section 27 a provision which would enable Canadian copyright owners to give notice to some central agency—perhaps the Department of the Secretary of State—that the making of certain copies or certain editions of certain works would have constituted infringement of Canadian copyright if they had been made in Canada. The list kept by the central agency would be deemed constructive notice to all persons importing that the copies are infringing copies. This Commissioner would not, however, place these works upon a list of prohibited imports and would not bring to the aid of the Canadian copyright owner the services of the customs authorities in enforcing the Canadian copyright owner's rights, believing that this is not a function of a government department but rather the function of the courts.

The third Commissioner would favour the enactment of amendments to Section 27 providing:

- (1) that it shall not apply to importation by a person for his private use;
- (2) that, if our recommendation above with respect to institutions of learning and public libraries is accepted, it shall not apply to importations by them;
- (3) that the notice be limited as to period and may not be renewed. The reason that the notice should be for a limited period only is to prevent the growth of unmanageably long lists in the hands of Customs, which would eventually contain mostly dead wood. The reason that a notice once given should be not renewable is that otherwise a Canadian copyright owner could by repeated notices and withdrawals (the notices given to keep books out and the withdrawals made to let him import) keep importers in a state of uncertainty as to whether they were free to import or not, or would be free when a particular shipment arrived;

(4) that the notice shall contain statements that the person giving it (and he should be enabled to give it through an agent) is the owner of the Canadian copyright and that the copies to which it relates would have infringed Canadian copyright if they had been made (by the persons who made them) in Canada;

(5) that statements in the notice shall be verified by statutory declaration to accompany the notice;

(6) that the Minister of National Revenue may make regulations prescribing forms and requiring supporting evidence, payment of fees, indemnification of officers, etc.;

(7) for appropriate penalties or damages, to be recoverable at the instance of persons prejudiced from persons making untrue statements in notices, whether knowingly or not.

This Commissioner considers that if these amendments were made the owner of the Canadian copyright would have a defensible and, on the whole, desirable, remedy against an importer who, without the license of the owner of the Canadian copyright, imported a copy otherwise than for his private use, etc., into Canada if, to his knowledge the making of that copy would have constituted an infringement of the Canadian copyright if the copy had been made in Canada. His giving of the notice would save him the trouble of proving that the importer knew that the making of the copy would constitute an infringement of Canadian copyright if it had taken place in Canada. It would, in effect, constitute constructive notice. All an importer would need to do before placing an order for the copies abroad would be to apply to a customs collector where he could ascertain whether the copies were claimed by the owner of the Canadian copyright to be copies which would have infringed Canadian copyright if made in Canada. The owner of the Canadian copyright would not have to pursue his remedies in the courts. As the price of these advantages he would be charged with the obligation of making sure, at his peril, that the statements made by him in the notice were correct. He would have an easy and workable way of keeping out of Canada any copies of a book made by a person who had no right to make them in Canada. The Canadian copyright owner after giving the prescribed notice and during its currency would not himself be permitted to import the copies of the work to which the notice related. This result would seem to flow necessarily from placing a copy of a work on the prohibited list. It would appear that Section 22 of the new United Kingdom Act has a similar result. This result is probably not a serious one in the United Kingdom because, as we assume, most publishers there giving notice to Customs, print in the United Kingdom. Their desire is to keep out foreign editions altogether where the person printing these editions could not have printed them in the United Kingdom. Schedule "C" is a schedule of prohibited imports. It would be an undesirable innovation, this Commissioner thinks, to add to that Schedule works only conditionally prohibited—prohibited on the condition that the person importing is not the person giving the notice or his agent. For these reasons this Commissioner would go no further with the amendment of Section 27 than to the extent indicated above.

We regret that the Commission cannot agree on a unanimous recommendation regarding Section 27, a section with reference to which extended representations were made.