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Our Archaic Copyright Laws

An address by

SAMUEL J. ELDER

of the Boston Bar.

Delivered before the

Maine State Bar Association

at the State House, Augusta

February eleventh, 1903.

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OUR ARCHAIC COPYRIGHT LAWS.

Mr. President and Gentlemen:

The law of copyright is a somewhat special and restricted branch of our profession, and perhaps an apology is due for bringing it before you on this occasion. My excuse, if one is needed, is that I believe, and am anxious that you should agree with me in the belief, that there is need of the revision and simplification of the law of literary and artistic property. The time and occasion will not permit an examination in detail of the changes which seem desirable. There have been eleven Acts since the Revised Statutes of 1873. The proper connection between these and the original Act, and their relation to each other, leave much to be desired in the way of text revision. The administration and powers of the copyright office, the term of protection and provision for renewal, the advisability of a High Court of Patents, Trade-Marks and Copyright, the desirability, or not, of entering the International Copyright Union, the protection of lectures, sermons, and new articles and methods of artistic and musical expression, call for consideration. They cannot, however, be dealt with now.

It is possible to take up some matters which are fundamental to our system and of practical importance. Under our law, copyright protection cannot be had by an author, no matter how meritorious and laborious his work may have been—no matter how great his service to Science or Education may be,—unless he, or his publisher or his publisher's clerk, conforms to certain Statutory requirements. (Rev. Stat. U. S., title 60, Chap. 3.)

First. That the title of his work shall, on or before the day of publication, be delivered at the office of the

Librarian of Congress at Washington, or deposited in the mail addressed to the Librarian.

Second. That not later than the day of publication two copies of his work shall be delivered or deposited as above stated.

Third. That the two copies so to be deposited shall be printed from type set within the limits of the United States, or from plates made therefrom.[1]

It is further provided that he shall not "maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title page or the page immediately following if it be a book" or on some visible portion if it be a map or other article, the following words, viz:—"Entered according to the Act of Congress in the year by A. B. in the office of the Librarian of Congress at Washington," or the word "Copyright," with the year and his name.[2]

Copyright protection can be had only by a strict compliance with these conditions. The Court cannot aid a person who has failed to comply.[3] The Court has no power to aid an author.[4] There is no possible room for construction.[5] I am quoting from various cases. These provisions are so many traps for the feet of the unwary. I am going to call your attention later to the ways in which many without fault have fallen therein and lost their toil and labor.

I want in the first place to ask you how such a system could have grown up? An author or artist is entitled to

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[1] U. S. Rev. Stat., Sec. 4956, as amended by Act of March 3, 1891.

[2] Rev. Stat, Sec. 4962.

[3] Callaghan v. Myers, 128 U. S., 617.

[4] Merrill v. Tice, 104 U. S., 557-560.

[5] Parkinson v. Luselle, 3 Sawyer, 330-332.

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the fruit of his labor, as much as any other laborer. He is the owner of his book or painting. The Statute is not conferring something upon him which he did not previously possess. The reason of the thing is that in consideration of his giving his work to the public—that is publishing it—the Statute secures to him its exclusive use for a specified period. How comes it then that under our Statute the person entitled to be secured may be deprived of all protection by the most trifling slip for which he may not be, and usually is not in any degree, responsible? In England an author by publishing his work becomes by that very act vested with copyright. It is true he must give some copies to the great Universities, and before bringing suit he must register his title at Stationers' Hall,[6] but these are details, and not vital requirements for the ownership of his own work.[7]

To understand how our law came to stand as it does, it is necessary to go back a hundred and twenty years. Before 1783 there were no copyright statutes in this country. In that year Noah Webster, being about to bring out his now famous "Speller," went to the legislature of Connecticut and asked for protection for his work, and the first American Copyright Statute was passed in 1783. Going from State to State he induced twelve of the thirteen States, all except Delaware, to enact similar Statutes. All of these Acts were modelled upon the Statute of Anne. That Statute, passed in 1710, provided for registration of the title of literary works at Stationers' Hall before publication. This provision was not a condition precedent to the vesting of copyright, but precedent to the enforcement of the penalties prescribed in the Act against infringers. The Act further provided for the

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6 Scrutton, Law of Copyright, p. 139.

7 5 and 6 Vict., Ch. 45, Sect. 6-10. Low *v.* Routledge, L. R., 1 Ch. 42.

delivery of nine copies at Stationers' Hall before publication for the benefit of various University Libraries.

The provision of the Statute of Anne with regard to the registration of title was adopted by practically all of the Colonies. Owing to some influence, which it is now difficult or impossible to trace, the Connecticut Statute provided that no one "*should be entitled to take the benefit of this Act*" unless the title of the book had been registered with the Secretary of State.[8] But the registration was not required to be "before publication." New Jersey, Pennsylvania, Virginia, North Carolina, Georgia and New York followed this identical language. Maryland first provided that registration should be made "*before publication.*" North Carolina and South Carolina copied this provision. New Hampshire and Rhode Island did not provide for registration at all, and Massachusetts blazing a trail for herself, or more clearly understanding the spirit of the English law, provided that two copies of the work sought to be protected should be deposited with the Librarian of the University at Cambridge, and that the production of his receipt therefor should be the condition of maintaining a suit against infringement. In this, the draftsman was evidently following the Statute of Anne, but with this difference—the failure to deposit copies under that Statute did not deprive the author of his copyright, but merely rendered him liable to a penalty. Under the Massachusetts Statute the deposit of copies was a condition precedent to the bringing of suit, but the deposit need not be made before publication.

It has been pointed out that Rev. Timothy Dwight of Northampton, then a member of the Massachusetts Legis-

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[8] Conn. Stat. 1783. Jan. Sess. First Proviso.

lature, and after President of Yale College from which Noah Webster came, took a prominent part in the shaping and enactment of this Statute. Pennsylvania alone provided that, for the protection of unwary pirates, notice of the existence of copyright should be given by publishing in every copy of the work a copy of the certificate that the title had been deposited.

It remained for North Carolina to unite the two requisites—of deposit of title and deposit of copies of the work before publication, as prerequisites to the vesting of copyright One copy of every book, map or chart was required to be deposited with the Secretary of State for the use of the Executive, and from this the similar provisions in the United States Statute were apparently taken.

It will thus be seen that several States had made provision for the deposit of title before being "entitled to the benefit of the Act;" three provided that the deposit must be "before publication," two States had provided for deposit of copies, and one only for printed notice of copyright.

It is interesting to note that nearly all of these statutes provided that the benefits should enure only to the citizens of the State by which it was passed and not to the citizens of other States "until the State or States of which such authors are subjects shall have passed similar laws for securing to authors the exclusive right and benefit of publishing their literary productions."

When the framers of the Constitution assembled, the situation was that an author seeking to protect his work must comply with the varying requirements of twelve different States in order to secure his work throughout the country. This was burdensome and unsatisfactory, and the States readily delegated to the Federal Congress the power to legislate upon both copyright and patents:—(Const. Art. 1, §8,) "Congress shall have power . . . . To promote the progress of science and useful arts by se-

curing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

This was in exact accord with the law as it stood in England. Donaldson *v.* Becket,[9] decided by the House of Lords in 1774, determined that the Statute of Anne[10] limited to twenty-one years the perpetual right of copy which had previously existed at common law. There was no denial that literary property existed at common law. The Judges of the three great courts were assembled to advise the Lords. Lord Mansfield, who had decided five years earlier in Millar *v.* Taylor[11] not only that the common law right existed and was perpetual but that the Statute of Anne did not limit it, declined from motives of delicacy to pass upon his own decision. The eleven judges then decided almost unanimously that an author at common law had the sole right of first printing and publishing his work—one judge only dissenting. Eight to three they decided that the common law did not take away this right on publication. Seven to four they decided that there was perpetual copyright at common law after publication. This decision was never reversed. The point on which the case went off was that the Statute of Anne took away this perpetual right on publication and that an author was confined to his remedies under that Act for a limited term. This decision was reached six to five. If Lord Mansfield had voted, the vote would have been a tie. Thus narrowly, so far as judicial determination went, was perpetual right in literary property defeated.

The decision, however, in no way affects the basis on which the right of literary property rests, and neither did the American Constitution. Adopting the idea of

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[9] 2 Bro. P. C., 129.

[10] (1710) 8 Anne, Ch. 19.

[11] (1769) 4 Burr., 2303.

"limited times" it provides for "*securing* to authors and inventors the exclusive right to their respective writings and discoveries." It is the "*securing*" of an existing right and not the creation of a new one for which it makes provision. A corollary to this proposition is that the law shall liberally protect and not fetter, hamper, or by possibility defeat, the right. The framers of the Constitution were fully conversant with the English interpretation. This is merely saying what Mr. Justice Miller said in Lithograph Co. *v.* Sarony,[12] one hundred years later: "Nor is it to be supposed that the framers of the Constitution did not understand the nature of copyright and the objects to which it was commonly applied, for copyright, as the exclusive right of a man to the production of his own genius or intellect existed in England at that time, and the contest in the English Courts, finally decided by a very close vote in the House of Lords whether the Statute of Anne which authorized copyright for a limited time was a restraint to that extent on the common law or not, was then recent. It had attracted much attention as the judgment of the King's Bench, as delivered by Lord Mansfield, holding it was not such a restraint in Millar *v.* Taylor, decided in 1769, was overruled on appeal in the House of Lords in 1774. In this and other cases the whole question of the exclusive right to literary and intellectual productions had been freely discussed.

Congress had hardly assembled under the new constitution when petitions for copyright protection began to pour in. Mr. Jedidiah Morse of Massachusetts, prayed for protection for his Geography, and especially for two original maps which had been especially prepared therefor, and Daniel Ramsey of South Carolina, sought to protect his "History of the American Revolution." A bill was re-

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[12] 111 U. S., 53.

ported at the First Session, but no final action taken upon it, and at the Second Session in 1790 the matter was taken up afresh, and the first copyright act of the United States was passed.[13] Undoubtedly the two committees through which this bill went had before them the various State statutes, as well as the Statute of Anne. They followed the provision in most of the States in providing that no one should "be entitled to the benefit of this Act" unless deposit of the title of the work for which copyright was sought was made in the clerk's office of the District Court of the United States where the author or proprietor resided. And they also adopted the words "before publication" with reference to *new* publications. *This* was the only condition for the vesting of copyright in this original Act.

The Act further made provision that a copy of the record of registration should be published in some newspaper printed in the United States, for the space of four weeks, and that a copy of the copyrighted work should be deposited with the Secretary of State, but these provisions were merely directory, and the copyright itself was not invalidated by a failure to comply with them.[14]

In 1802 the statute which up to that time applied to books, maps, and charts, was extended to "arts of designing, engraving, and etching, historical and other prints."[15] In the first section of the Act it was provided that in order "to be entitled to the benefit of the Act," the record of deposit of title page should be printed in full on the title page or the page immediately following. This was apparently adopted from the English Statute of 8 Geo. II, Chap. 13, which protected engravings, and on which the Act of 1802 was modelled. The draftsman seems also to have

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[13] First Congress, Second Session, Chap. 15, May 31, 1790.
[14] (1790) Chap. 15, Sec. 4.
[15] Act of April 29, 1802.

had the Pennsylvania Act before him. Apparently by accident rather than design, the draftsman in making this provision for the printing of the record used the words "in addition to the requisites enjoined by the third and fourth sections of said Act" (meaning the Act of 1790). The fourth section of the act of 1790 provided for the deposit of a copy of the copyrighted book, but the provision was directory only, and a slip, or failure to comply, did not forfeit the copyright itself. It is not probable that in the use of the word "requisites" the draftsman or Congress intended to make deposit of a copy of the book a condition precedent to an author's having any sort of protection, but such was the effect.[16] The gift of a book for use of the Executive as provided in the North Carolina Statute,—or of two copies for Harvard College, as provided by Massachusetts, or of nine copies for the English Universities, is a graceful and proper act, and serves to identify the subject matter, but it ought never to have been placed as a stumbling block in the high road of copyright. A penalty for not furnishing the copies is entirely sufficient, and by the way, that penalty also exists in the present statute and may be enforced in any District Court by the Librarian of Congress.[17]

It is to be noted that six months from publication was allowed by the Act of 1790 for depositing copies. The period of grace has been obliterated, and now the deposit must be made "not later than the day of publication."

The provision of the Act of 1802 for printing notice of copyright in all copies of the work was no doubt justified by then existing conditions. Travel and communication between the thirteen States was slow and expensive. In order to ascertain whether a given book, map, chart,

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[16] Ewer v. Coxe, 4 Wash. C. C., 487.

[17] Rev. Stat., Sec. 4960.

print, or cut was copyrighted, search would have to be made in all the District Courts of the country—if the author or designer were not known—and must be made in the district of his residence, wherever that might be, if he were known. Notice of copyright was therefore then properly required. But the conditions have now utterly changed. All deposits are to be made at Washington. A telegram to the copyright office will usually bring a reply on the same or the succeeding day. While the giving of notice is still serviceable and should be retained, it is absurd and wicked that a slip of a clerk or binder, or a mistake of the author, publisher, or printer, in the form of notice, should utterly destroy all copyright protection. Thus we see how three things became necessary before an author could be "secured" in the product of his own genius and ingenuity.

Nothing further was added in the way of conditions precedent to the vesting of copyright until 1891, when, in the International Copyright Act, it was further provided that the copies to be deposited "shall be printed from type set within the limits of the United States, or from plates made therefrom," etc.

Some interesting questions have arisen with regard to the correctness of the title deposited as compared with the title of the books deposited. Years ago Mr. Daly deposited the title of a play called "Under the Gas-Light, A Romantic Panorama of the Streets and Homes of New York." He placed it on the stage under the name of "Under the Gaslight, A Drama of Life and Love in These Times." When this was before the courts for the first and second times it was held that the variance was fatal,[16] but later these decisions were reversed, and the court rejected the descrip-

[16] Daly v. Brady, 39 Fed. Rep. 265. Daly v. Webster, 47 Fed. Rep. 903.

tive words, holding the title to be merely the words "Under the Gas-Light," and sustained copyright.[19]

The courts have been concerned with such questions as these: Is the title "Pianoforte Arrangement of the Comic Opera 'The Mikado or the Town of Titipu, by W. S. Gilbert and Sir Arthur Sullivan," a variance from the title "Vocal Score of 'The Mikado, or the Town of Titipu?"[20] Is "the Lakeside Cook Book No. 1, A Complete Manual of Practical, Economical, Palatable, and Healthful Cookery," a variance from "Over One Thousand Receipts, Lakeside Cook Book, A Complete Manual of Practical, Economical, Palatable, and Healthful Cookery?"[21] These questions were resolved in favor of the copyright, but the fact remains that an author is entirely at the mercy of a mailing clerk in some publisher's office, so that if a title page is overlooked and does not reach the copyright office before publication, the work of years may lose protection. Again, the second requisite, the delivery of copies. The same things are to be said with reference to this. The failure of a shipping clerk to see that the copies go seasonably forward to Washington may destroy a publishing right of great value. Dr. Holmes' work, "The Autocrat of the Breakfast Table" was entered for copyright, but the copies of the Atlantic Monthly, in which it first appeared, were not deposited in the District Court Clerk's office until after publication and thereby the copyright on the work was lost.[22] The case of Gottsberger *v.* The Aldine Publishing Company is illustrative of the severity with which the rule may work. Mr. Gottsberger was about to issue an edition of "Ebers' Gallery,"

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[19] Daly v. Webster, 56 Fed. Rep. 483.
[20] Carte v. Evans, 27 Fed. Rep., 861.
[21] Donnelley v. Ivers, 20 Blatch. 381.
[22] Holmes v. Hurst, 174 U. S., 82.

which sold at about sixty dollars a copy. He sent two copies of the work to Washington, but did not prepay the expressage, and the copyright office, having no appropriation for such a purpose, declined to pay the amount, and the books were returned to the express office until Mr. Gottsberger could be communicated with, and lay there for several days. In the meantime, sample copies of the book had been sent to various booksellers, and several books were sold. This constituted a publication a few days more than ten days prior to the time when the deposits were actually received at the copyright office, and the copyright was lost.[23] The Statute at that time allowed ten days from publication for the deposit.

Congress seems to have had a spasm of conscience on this subject, for March 3, 1893, an act was passed that if any author or proprietor had failed seasonably to comply with this provision of the Act, but had deposited two copies prior to the first day of March, 1893, and if he had complied with all other provisions, he should be entitled to the protection of the Act.[24] I do not know how this particular piece of legislation came about. There is no more reason why the author should be excused from seasonably depositing copies than from seasonably depositing the title, but the act is a commentary on the entire system. If it really is essential that copies of a copyrighted book should be deposited at Washington not later than the day of publication, why should Congress excuse authors who have failed for a year, or ten or twenty, or twenty-seven years to make the deposit.

The third requisite, that which is known as the Typographical Clause, was inserted in the International Copyright Act because the Act could not be passed without it.

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[23] Gottsberger v. Aldine Pub. Co., 33 Fed. Rep., 381.
[24] 27 Stat. at *Large*, p. 743.

The opposition of the typographical unions throughout the country, which feared that the International Copyright Act might transfer the setting up and printing of many books to foreign countries, would have been fatal to the passage of the Act. The agitation for international copyright had lasted fifty years without success, and it was thought best by nearly all friends of the measure to yield the point rather than lose the measure. Much severe criticism has been made abroad upon this part of the Act. A recent publication which had been set up and printed in England, entailed an expense of upwards of forty thousand dollars for resetting and electrotyping here. The American market, however, is so vast and so profitable that the expense is not prohibitive. It is too late, at all events, to consider any change in that branch of the Statute.

The fourth condition, namely, that suit can not be maintained unless notice of copyright has been printed in every copy of every edition of a book, etc., has brought more copyrights to grief than any other. The Statute, as I have said, prescribes substantially what language must be used in order to protect the copyright. If any copy of any edition published by, or with the authority of, the proprietor of the copyright, gets out without the copyright notice, the whole copyright is lost. If the words of the notice do not pretty literally comply with one or the other of the statutory forms the notice is bad. For instance, a notice which read "Entered according to Act of Congress in the year 1878, by A. J. Jackson," was held to be insufficient as not complying with either one of the forms, although containing very nearly the language of both. The word "copyright" in the shorter notice was omitted, and the words "in the office of the Librarian of

Congress at Washington," were omitted from the longer one.[25]

The courts have done what could be done to sustain notices. It has been held that '93,[26] or '94,[27] instead of 1893, etc., is sufficient, the year being sufficiently indicated. Notice of copyright in 1866, although 1867 was the true date, was held to be good, because a shorter term of copyright than the real one was indicated,[28] but on the other hand, where the error was the other way it is probably fatal, because it claimed too long a term.[29] Initials, as "N. Sarony," may be used instead of the full Christian name. The courts have many times been in doubt, and much has been spent in litigation. Frequently the first decision has been one way and the second decision the opposite. A decision that the copyright notice need not appear upon an original painting but only upon the copies of it offered for sale, was overruled and the copyright lost.[30]

Mrs. Harriet Beecher Stowe's book, "The Minister's Wooing," appeared in the Atlantic Monthly during the year 1859. The title of each number of the magazine was duly entered, but apparently only the December number was filed within the prescribed limit of time. Prior to the appearance of the last chapters in the December number the book was published as a whole, and entered for copyright by Mrs. Stowe, and was published with the copyright notice in her name. The December number of the Atlantic Monthly containing the last chapters of the story was duly copyrighted, but the copyright notice

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[25] Jackson *v.* Walkie, 29 Fed. Rep., 15.

[26] Snow *v.* Mast, 65 Fed. Rep., 995.

[27] Bolles *v.* Outing Co., 77 Fed. Rep., 966.

[28] Callaghan *v.* Myers, 128 U. S., 617.

[29] Schumacher *v.* Wogram, 35 Fed. Rep., 210.

[30] Werckmeister *v* Pierce & Bushnell, 63 Fed. Rep., 145, overruled by Pierce *v.* Werckmeister, 72 Fed. Rep., 57.

was in the name of the publishers, and this was held to be a fatal defect.[31]

The reverse of the proposition turned out as badly. Dr. Oliver Wendell Holmes', "The Professor at the Breakfast Table," appeared in the same magazine for the same year. Ofcourse copyright on the earlier chapters was lost by failure to deposit copies, and only copyright on the chapters in the December number could be saved. The book appeared with copyright notice in his name, after the December number copyrighted by the publishers was issued. The use of his name in the copyright notice on the book was held to be fatal. In other words, notice in the *name* of the *principal* is *not* a *good notice* where the work is copyrighted by the agent, and vice versa.[32]

It may be said that the Statute has not worked great hardship because the number of adjudicated cases against copyright is not very large, but this is not the real test. Every lawyer dealing with such matters is compelled over and over again to decide against bringing suits because of defects which he discovers, and which are irremediable. In a recent conference of counsel with reference to the bringing of suits upon a series of copyrights or copyrighted articles, all agreed that nearly half of the copyrights for one technicality or another were bad, and this too, by counsel whose interest it was to assert that they were good.

In a recent number of an illustrated paper there were brought together leading illustrations of certain artists through a number of years. No copyright notice was given on any of them and there seems little reason to doubt that copyright on all of them was lost. The notice on the title page of this particular number was wrong as to year; and the old decision saving miniature reproduc-

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[31] Mifflin v. Dutton, 107 Fed. Rep., 708.

[32] Mifflin v. White Co., same case.

tions used only as a sales list[33] could hardly save these reprints, which faithfully reproduced the effect of the originals.

I have gone thus into detail with reference to these prerequisites of copyright or of suit thereon, because it seems to me that the basis on which our copyright provisions rest is erroneous. It being true that the author's right of property results from his labor, genius and ingenuity, and that protection was intended to be secured to him because of his dedication of his work to the public,[34] there is no reason why the security itself should be imperiled by a variety of technicalities, or why the value of the work should be frittered away in litigation over questions which have nothing to do with the real work or ownership. I have heard it asserted that nine copyrights out of ten might be defeated under the law if the questions were throughly litigated. Of course this is an exaggerated and inaccurate statement, but it illustrates the point I am making. What difference does it really make whether the title of a book reaches Washington on or before the day of publication, or whether the copies of the work are on the shelves of the Library of Congress on the day, or before the day, on which they appear on the shelves of the bookseller? And why should a person proposing to use the work of another, knowing that he himself is not the author of it or entitled to it in any manner, be relieved from all liability for piracy because some copy of some edition of the work, which very likely he has never seen, or has sought out only as a means of justifying his piracy, does not contain a copyright notice, or contains one defective in some particular? Honest merchantmen travers-ing the seas have never been compelled to fly at the mast head notice that they mounted six or a dozen guns to pro-

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[33] Falk v. Gast, 54 Fed. Rep., 890.

[34] Grant v. Raymond, 6 Peters, 218, at 242. Maxwell v. Hogg, L. R. 2 Ch. 307.

tect some pirate of less armament from the danger of attempting to capture them.

The English copyright law contains no such difficulties. The publication of a work vests copyright in the author or his assignee.[35] The title even need not be registered until it is proposed to bring suit against infringment. A failure to deposit copies at Stationers' Hall for the benefit of the universities is not fatal to the copyright itself, and ought not to be. It may be rectified at any time, and at the utmost, the failure is only visited with a penalty.

It is not desirable that our system should be fundamentally changed or that the course to which our publishers have become accustomed should be altered, but it is important that there should be such changes in the Statute as to secure copyright in the real author, unless some omission of his can be shown to have *misled* a defendant into the innocent use of his work. The courts in a few instances where they did not come in direct conflict with the language of the Statute, have made decisions favorable to copyright upon the ground that no one had been misled, and this furnishes the true basis upon which these provisions ought to stand.

I have devoted so much time to these questions that I must deal rather more summarily with other defects which seem to me to exist. Our term of copyright is for twenty-eight years, with the privilege to the author, his widow or children, of a renewal upon certain terms for fourteen years more. It is difficult to understand why any such cumbersome method should exist. If protection is to be granted for forty-two years, why not comply once for all with such conditions as it seems necessary to impose? The danger may not be serious, but it is entirely conceivable that the author, his widow or children, may overlook the six

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[35] Macgillivray Law of Copyright, p. 38. Scrutton, p. 139. 5 and 3 Vict. Ch. 45, Sec. 10.

months period at the end of twenty-eight years within which the renewal must be had, and if the author be a woman no right of renewal is given her husband. An unnecessary complication between the author and the person to whom he may have sold the copyright exists. Suppose, for the purpose of argument, that an assignee of the right of renewal may use the author's name or even that of his family to secure the renewal, why should either of them be compelled to record "the title of the work or description of the article so secured a second time," and to comply "with all other regulations in regard to original copyrights?" Why should they be compelled to take these steps "within six months before the expiration of the first term," and why should he, or they, be required "within two months of the date of said renewal to cause a copy of the record thereof to be published in one or more newspapers printed in the United States for the space of four weeks?"[36] Historically this last is only a repetition of the provision in the Pennsylvania statute prior to the adoption of the constitution. It has been carried foward for a century and nearly a quarter after all reason for its existence had ceased.

It may be said that the term of forty-two years for copyright is sufficient, but it frequently happens that an author's earliest works have lost copyright protection while he is still alive. Edward Everett Hale's earlier works are out of copyright, and so of other authors. James Russell Lowell's earliest copyrights expired during his lifetime. The English law, giving copyright for the life of the author and seven years after, or for the period of forty-two years, which ever is the longer term, would seem to be more in accordance with justice.

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[36] Rev. Stat. U. S., Sec. 4954.

Our provision with regard to plays and musical compositions is substantially the same as with regard to books. No separate provision is made to meet their special requirements. To obtain valid copyright, a play must be printed, deposited at Washington, and published after the manner of a book. As a matter of fact, there are few valuable plays which are ever printed. They remain in manuscript, each part, with the preceding ones, being distributed from time to time to the acting company. It being our law that presentation on the stage is not a publication of the play,[37] protection can be had perpetually at common law. But this is foreign to our system of copyright for a limited term. There is no reason why a play should be perpetually protected, and a map or chart should not. Special provision for this class of property might well be had upon deposit of typewritten copies of the play. Production on the stage might be considered equivalent to publication, and thus dramas brought into unison with the rest of our copyright system.

Newspapers, if copyrighted at all, must conform to the provisions for the copyrighting of more permanent forms of literature, and the term of copyright is the same. The sending of a title and two copies of a paper every night or morning to the copyright office is a cumbersome procedure, and the term granted is wholly disproportionate to the transitory character of much matter contained in newspapers.

The deposit at Washington of newspapers from all over the country, which must necessarily arrive after the value of their information has largely disappeared, cannot be considered of much importance. There would seem to be no reason why copyright protection should not be secured on newspapers, at least, by the mere fact of publi-

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[37] Tompkins *v.* Halleck, 133 Mass., 32.

cation, and the protection ought to be temporarily extended beyond the mere language in which the news is stated. Many papers, and the Press Association, go to enormous expense in procuring news for the public. The news itself, the facts stated, should be protected, and not merely the literary vehicle in which it is conveyed. This protection, however, need not be, and ought not to be, for a long period. The public is entitled shortly after publication to the full use everywhere of all news material, and the purpose of the newspaper will be fully subserved by a brief protection of the news matter which it has in one way or another secured.

These illustrations are doubtless sufficient to indicate some of the lines along which copyright revision might proceed.

I cannot refrain, however, from taking up as briefly as may be the various and conflicting provisions with regard to penalties. Nothing better illustrates the archaic condition of the law.

The penalty of one hundred dollars for falsely inserting the notice of copyright in an uncopyrighted work is treated as a public offence.[38] But in procedure the idea that the offence is against the public is not carried out by making it punishable by the public prosecutor. The duty is left to some litigious volunteer who is encouraged by the offer of one-half of the penalty for his pains; the other half going to the use of the United States.

This section is practically inoperative. The inducement to carry on such litigation is not apparently sufficient, and the Courts have not shown a disposition to aid it. Justice Brewer said in Taft *v.* Stephens Lithographic and Engraving Co., 38 Fed. Rep. 28, where one million

[38] Rev. Stat. U. S., Sec. 4963.

dollars was sought to be recovered under this section, viz., $100 penalty on each of 10,000 chromos:—

> "Plaintiff is not suing for the value of his services, or for injury to his property, but simply to make profit to himself out of the wrongs of others: and when a man comes in as an informer, and in that attitude alone asks to have a half million dollars put into his pocket, the courts will never strain a point to make his labors light, or his recovery easy."

If the unwarranted use of the word "copyright" is an offence, the offender should be prosecuted by the government, and not by an "informer."

In the case of the unauthorized publication of a manuscript of any kind, the statute, Sec. 4967, merely gives the owner of the manuscript his actual damages for the invasion of his rights. Although this section is placed with the sections imposing a penalty, it is not itself penal, but a declaration of the common law, giving a remedy in the United States Courts in addition to the existing remedy in the State Courts.

The provisions with reference to infringement of the copyright upon a book (section 4964) are based on the idea of compensation to the owner of the copyright. It will be observed that the forfeitures under this section go wholly to the proprietor of the copyright; that they cannot be recovered until not only the title has been recorded, but also two copies of the book have been deposited as required by statute; that the damages to be recovered in money are the damages actually sustained, and not an arbitrary sum; that they are measured by the infringer's entire conduct, and not by the chance number of infringing copies found in his hands at the beginning of the suit.

In the case of a map, chart, musical or dramatic composition, (section 4965) the statute is inconceivably drawn. The penalty is to be divided between the "proprietors of

the copyright" and the United States; no copyright need actually exist, but the recording of the title of such a work is sufficient to base proceedings upon; the plates on which the infringing work is printed are forfeited, as well as the sheets printed, and a fixed penalty of one dollar per sheet in certain cases, and of ten dollars per copy in others, is established. The liability to the money penalty is limited to the number of sheets "*found in his possession*," meaning the infringer's possession, irrespective of the number which he may have circulated.

This section has given rise to much litigation. Suits for amounts beyond the dreams of avarice have been brought. One of the Boston newspapers was recently sued for $150,000, for printing the song "Daddy Wouldn't Buy Me a Bow Wow," in its Sunday issue. It was a severe test, but the paper admitted the extent of the circulation. The suit, however, came to an untimely end. All the copies had been circulated as soon as printed, and none were "found" in the defendant's "possession."

What will constitute a finding, has been much considered by the Courts. The things that the word found does not mean would fill a volume, and more. It does not mean "found" by a jury to have been in the defendant's possession.[39] In an action against a principal, it does not mean a finding in the hands of an agent because the Statute is penal.[40] Nor in an action against the agent is a finding in his hands sufficient because his possession is that of his principal.[41] Finding does not mean merely seeing them. A seizure by the marshal in the suit to enforce the penalty is not a sufficient finding because the finding must preceed the date of the writ in order to create

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[39] Sarony *v.* Ehrich, 28 Fed. Rep., 79.

[40] Schreiber *v.* Sharpless, 6 Fed. Rep.,, 715. Taylor *v.* Gilman, 24 Fed. Rep. 632.

[41] Thornton *v.* Schreiber, 124 U. S 612. Bolles *v.* Outing Co., 77 Fed. Rep., 966.

the cause of action.[42] The cases in which the penalty has been enforced are few, but the amounts involved are frequently alarming.

You have noticed perhaps how uncertain the Statute is as to what is a sufficient consent by the owner of the copyright to save a publisher from the penalty. In the case of a manuscript any consent is sufficient. But in the case of a book, map, chart, dramatic or musical composition, a consent in writing signed in the presence of two witnesses is necessary. Why? You can pass the title to a million dollars of property by the simplest writing. You can contract for a mine or a railroad or a ton of coal without a witness. But the most trashy song or a book or play or poem cannot be transferred without nearly the formality of a will.

It remained for the theatrical trust to add a new feature to copyright penalties. In 1897, Congress enacted that an unlawful presentation of a play or musical composition should be visited with certain money penalties, and that if the performance was wilful and for profit it should be a misdemeanor punishable by imprisonment not exceeding one year. The consent of the owner of the copyright to the performance, however, need not be in writing.

The lack of harmony in these provisions is apparent, and the whole system, in the light of its interpretation by the Courts, calls for revision.

You have borne with me thus far in this review of the law. I hope you will agree with me that it requires comprehensive revision. In the old days when the publication of books was a profession with high ideals, matters might be well left to themselves In the case of many firms, even before the International Copyright Act, the works of foreign writers were not stolen but liberal royal-

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[42] Thornton *v.* Schreiber, *supra.*

ty was paid. It is gratifying to know that many such publishing houses still exist. But it is also painful to consider that there are others with no sense of honor or high principle. Their idea of their calling is merely that of manufacture and merchandising. A book to them is merely a brick, a box,or a chair, to be made at the lowest cost and sold at the highest price, no matter whence the material comes. The courts are more and more called upon to consider these questions. And besides this, the reproduction of the various things which are the subject of copyright has enormousiy increased. The wealth and business of the country and the methods and means of duplication have increased immensurably. The law requires adaptation to these modern conditions. It is no longer possible to summarize it in a few sections covering everything copyrightable. It should be revised so that protection to the honest literary worker, artist, or designer shall be simple and certain.