COPYRIGHT IN BOOKS: AN INQUIRY INTO ITS ORIGIN, AND AN ACCOUNT OF THE PRESENT STATE OF THE LAW IN CANADA: A LECTURE

Published @ 2017 Trieste Publishing Pty Ltd

ISBN 9780649193660

Edited by Trieste Publishing Pty Ltd.
Cover @ 2017

www.triestepublishing.com

S. E. DAWSON

COPYRIGHT IN BOOKS: AN INQUIRY INTO ITS ORIGIN, AND AN ACCOUNT OF THE PRESENT STATE OF THE LAW IN CANADA: A LECTURE

Trieste

COPYRIGHT IN BOOKS

AN INQUIRY INTO ITS ORIGIN, AND AN ACCOUNT OF THE PRESENT STATE OF THE LAW IN CANADA

A Lecture

BEING ONE OF THE "OCCASIONAL LECTURES" DELIVERED BEFORE THE

LAW SCHOOL OF BISHOP'S COLLEGE

AT SHERBROOKE, P.Q.

THURSDAY, JANUARY 26TH, 1882

BY

S. E. DAWSON

MONTREAL
DAWSON BROTHERS, PUBLISHERS
1882

COPYRIGHT.

MR. CHAIRMAN AND GENTLEMEN,

I shall not apologise for the dryness of my subject to-day, nor for the dry manner in which it must be treated; because those whom I am now addressing, being students of law, know well that the goddess Themis is not one of the Muses, and that those who follow her find more thorns than flowers in her path; but I *do* apologise for the hasty manner in which I have been obliged to prepare this paper. I would gladly have spent more time over it if a contemplated absence in Europe had not pressed me.

Fortunately, the definition of the subject is easy. Copyright is the right of multiplying copies of literary or artistic works. It is primarily applied to Books, but extends also to Paintings, Drawings, and Statuary; and is held to embrace the cognate subjects of speeches, lectures, and of musical and dramatic representations. But copyright is *not* the property which the author has in his *unpublished* book or manuscript. That is a simple right of property, as in the case of any other moveable thing, and will be regulated by the civil or the common law. Copyright in all countries is regulated by statutes, and it commences at the instant of publication. Although the underlying principles which govern all these classes of copyright are the same, yet it is evident that the mode of applying them must vary much in the case of subjects so different as the representation of a drama, and the reprint of a book. I propose in this paper to confine myself mainly to the right of copy in books.

On this subject, as on most others, two distinct schools of thought exist; holding extreme views and fundamentally opposed to each other. The one party hold that the title in the copyright of a book is a *natural indefeasible right*, existing at the common law, and perpetual to the same extent as real property, such as lands and houses. The other party hold that it is a statutory right, granted by governments in the interests of literature, and for the benefit of society generally; and therefore existing only under statutory conditions which may at any time be enlarged or contracted. Some writers of the first, or author's school, go so far as to maintain that copyright existed under the Roman law. This view has never, however, been held in any country where the study of the Roman law has been cultivated. I have never met with more than one citation to support this statement, and that is given by Mr. James Appleton Morgan, of the New York Bar, a writer of two large volumes on the Law of Literature. He cites the "Institutes," Book 2, Title 1, chapter 33, as follows:—

> "Si in chartis membranisse tuis, carmen vel historiam, vel orationem Titius scripserit, hujus corporis non Titius, sed tu dominus esse videris."

Mr. Morgan writes *membranisse*, which is not Latin, for *membranisve*, besides altering the tense of the last verb. The passage correctly translated would read:

> If Titius has written a poem, a history, or a speech upon *your* paper or *your* parchment, it is *you*, and not Titius, who will be the owner of the thing.

It was a simple case of *accessio*, and had reference only to the labour of transcription, as is evident from the context. Titius had the right to transcribe any poem he chose. Any student at law is familiar with that principle, for it is elementary in the Civil Law of Quebec. The ownership according to Roman Law followed the paper and the parchment—a very singular method of establishing the right to copy of an author. Equally unfortunate are Mr. Morgan's citations from Juvenal and Martial. They merely establish the fact known to every-

body, that there were in Rome well-known booksellers, who kept stocks of books on hand which, by the way, they sold at very moderate prices.

It is a very common error to suppose that the ancient world was very badly supplied with books, to transfer to the times of Greek, Roman, and Egyptian civilisation, the darkness and dearth of mediæval Europe. The fact is that in those days every gentleman's house had its library, and every city had its *public* library. In every wealthy household was a servant to read aloud, and another to copy books. You all remember Tiro, Cicero's freedman and very dear friend. Atticus, Cicero's other friend, kept a large number of slaves transcribing, and made a good deal of money by the sale of the books so manufactured. In those days a publisher or bookseller kept a staff of skilled slaves. When a book was to be published, one of these read, and the others wrote; and in that manner, by the means of cheap slave labour, large editions of books were published. The literary activity of the countries around the Mediterranean was very great, and we under-estimate it. Horace has preserved for us the names of the booksellers in whose shop he used to lounge. Martial refers a shabby fellow called Lupercus (who wanted to borrow his epigrams) to his bookseller Atrectus. He tells him the shop is "opposite the forum of Cæsar, and placards are posted outside giving the names of poets," evidently as is the custom among booksellers to this day. The price of the volume—the first book of his epigrams—he says is five denarii, equivalent to 3*s.* 6*d.* sterling. Now this first book contains 119 epigrams, or over 700 verses. It appears elsewhere that cheaper copies were provided. Martial referred to copies well rubbed with pumice and adorned with purple. The cheaper copies could be had at half that price, but this was in the best style. So that, if we compare the price with the published price in England of "Maud," or any of the original small volumes of Tennyson's poems, which were issued at five or six shillings, the Roman publisher does not seem to be much dearer than the English one. I wish especially to call your attention

to this, not as a point of archæology, but as a *fact* germane to my subject; because if there had been anything answering to copyright in those days, in any of these countries, the Roman law would have noticed it; for Roman law did not "lie about loose" in scattered cases and reports, but was a definite body of scientific jurisprudence.

Copyright, the right of copy, or simply "copy"—for these are equivalent terms, used at different stages of the growth or definition of the right—is asserted by some to be a natural right founded on a law of Nature. It is, they say, a title in perpetuity —transmissible in the same manner and to the same extent as land or houses. They point to Denmark as a brilliant example of justice, for there copyright is perpetual; and they push their arguments to an absurdity, because, carried to a legitimate conclusion, these would give to the Jews, as the only surviving representatives of Moses, a right of injunction to restrain the Bible Society from printing the Pentateuch. It may be because I am a layman, but I must confess that I find it difficult to attach any precise meaning to the expression *Natural Law*. Austin says that the *Law natural* of the Moderns exactly corresponds to the *Jus Gentium* of the Romans. As we have seen, that law is utterly ignorant of the existence of such a right. It was not known in the Middle Ages, and emerged into existence only in very recent times. It is not even now adopted among all nations. It is not a right to a necessary thing like food, land, or clothing; and, in short, it appears to have none of those marks which seem to characterise that very vague and shifting conception called Natural Law. Nevertheless, as those who advocate this view must have some definite position in the science of law in which to place this right, they classify it under the head of *Occupancy*. By the aid of this bold metaphor, they apply to literary property every rule which is laid down concerning the other older and more tangible things which are found in the same class. This theory, like many other theories of natural rights, will not stand the historical method of investigation

In order to ascertain upon what ground the right of copy really rests, excluding all such vague expressions as "Natural Laws," it is necessary to inquire historically how and when this right first began to be exercised.

No record exists of authors' rights having been claimed for more than one hundred years after the invention of printing. There was no restriction in printing books, any more than there had been in copying manuscript books. Every printer printed what he chose without let or hindrance from any person. At the end of that period, however, the enormous power of the press became manifest. The stir of thought which produced the Reformation had been caused, and was kept up, by the art of printing; and when Philip and Mary came to the throne of England they set themselves to stem the tide of innovation. For that purpose they incorporated the Stationers' Company by Royal Charter for licensing and regulating the printing and sale of books, and they vested in this Company a monopoly of multiplying copies. The preamble to the Charter sets forth its object. It reads:

"Know ye, that we, considering and manifestly perceiving "that several seditious heretical books, both in verse and prose, "are daily published, stamped and printed, by divers scanda- "lous, schismatical, and heretical persons, not only exciting our "subjects and liege-men to sedition and disobedience against "us, our crown, and dignity; but also to the renewal and "propagating very great and detestable heresies against the "faith and sound Catholic doctrine of Holy Mother the "Church, and being willing to provide a remedy in this case." &c. &c.

For such objects the Stationers' Company, which, like all the other ancient trading guilds, had existed from the Middle Ages, received its charter; and powers were given to it "to search out and destroy" books printed in contravention of the monopoly, "or against the faith and sound doctrine." They could "seize, take away, have, burn, or convert to their own use "whatever *they might think* was contrary to the form of any "statute, act, or proclamation made *or to be* made." This

charter is still in existence, but the entry of all copyrights at Stationers' Hall is the only remaining right under it, which has not been abrogated or fallen into disuse. It was granted in the year 1555. But before that, in 1469, the Senate of Venice had commenced to issue privileges to printers. Henry VIII. had also issued them; and one sentence, in a privilege he issued in 1530, gives a clue to the origin of the right of copy. It was issued in favour of "Master Jehan Palsgrave, Angloys, "natyf de Londres et gradue de Paris," for a book which he is said "to have made with great and long continued dili- "gence; and in which besydes his great labours, payns, and "tyme thereabout employed, he hath also, at his proper cost and "charge, put in print; wherefore," continues the patent, "we, "greatly moved and stirred by due consideration of his said "long time and great diligence about this good and very "necessary purpose employed, and also, of his said great costs "and charges bestowed about the imprinting of the same, "have liberally and benignly granted, unto the said Master "Palsgrave, our favourable letters of privilege, concerning his "said book called 'Lesclarcissement de la langue françoise' "for the space and term of seven years next, and immediately "after the date hereof ensuing."

It must not be supposed that these royal privileges were always granted to authors because of their authors' rights. They were monopolies granted for various reasons, and generally to printers. Because if authors' rights were the moving causes of these patents, they would not have been granted for the works of Terence, Virgil, and other heathen writers. As the early printers enlarged their establishments they applied everywhere to the Royal authority for these privileges; and the more the ruling powers felt the power of the press, the more earnestly they endeavoured to regulate it by licences and privileges. Queen Elizabeth was much addicted to granting such monopolies. She granted to Richard Tottal a monopoly of printing law books, to Byrde, of music books, to Marsh, of school books, to Flower, of grammars, to Vautrollier, of Latin books, to Day, of Primers,