COMPULSORY LICENCE FOR THE REPUBLICATION OF A WORK OF A DECESASED AUTHOR SOME COMMENTS ON REPEALED SECTION 15 OF THE CANADIAN *COPYRIGHT ACT*

by
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REPEALED

COMPULSORY LICENCES

WHERE OWNER OF COPYRIGHT COMPELLED TO GRANT LICENCE TO REPRODUCE

15. 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 if 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 that 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.

ABROGÉ

LICENCES OBLIGATOIRES

LORSQUE LE TITULAIRE DU DROIT D'AUTEUR EST SOMMÉ D'AUTORISER LA REPRODUCTION

15. Lorsque, à un moment quelconque après la mort de l'auteur d'une œuvre littéraire, dramatique ou musicale, déjà publiée ou exécutée ou représentée publiquement, il est présenté au gouverneur en conseil une plainte portant que le titulaire du droit d'auteur sur l'œuvre a refusé de la publier à nouveau, ou d'en permettre une nouvelle publication, ou bien qu'il a refusé d'en permettre l'exécution ou la représentation publique, en sorte que le public en est privé, le titulaire du droit d'auteur peut être sommé d'accorder une licence de reproduire l'oeuvre, de l'exécuter ou de la représenter en public, selon le cas, aux conditions jugées convenables par le gouverneur en conseil.

R.S.C. 1985, c. C-42, s. 15; repealed by S.C. 1993, c. 44, s. 61

§1.0 Related Sections

Section 2—Definitions: "dramatic work", "literary work", "musical work", "performance"; section 3—Definition of "copyright"; section 4—Definition of "publication"; section 13—Ownership of copyright; section 14—Limitation where author is the first owner of copyright; section 25—Licence deemed as contract; section 26—Fees paid to Minister; section 62—Rules and regulations.

§2.0 Related Regulations

None.

§3.0 Prior Legislation

§3.1 Corresponding Section in Prior Legislation

Section 12 from 1924.01.01 to 1928.01.31; section 13 from 1928.02.01 to 1988.12.11; section 15 from 1988.12.12 to 1993.12.31.

§3.2 Legislative History

§3.2.1 S.C. 1921, c. 24, s. 12.

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12. If, at any time after the death of the author of a literary, dramatic, or musical work which 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 license 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.

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§3.2.2 R.S.C. 1927, c. 32, s. 13.

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§3.2.3 R.S.C. 1952, c. 55, s. 13.

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§3.2.4 R.S.C. 1970, c. C-30, s. 13.

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§3.3 Transitional

None.

§3.4 Proposed Legislation

None.

§4.0 Purpose

This section 15 establishes the conditions under which a compulsory licence may be ordered for the republication of a work of a deceased author when the copyright owner fails to do so.

§5.0 Commentary

§5.1 History

Section 15 has its roots in section 4 of the United Kingdom *Copyright Act, 1911* which itself originates from section 5 of the Untied Kingdom *Copyright Act, 1842.* The judicial Committee of the Privy Council was then entitled to license the republication of books which the copyright owner refused to republish after the death of the author. In the United Kingdom, this section was introduced since it was found "expedient to provide against the suppression of books of importance to the public". This section was probably enacted to avoid the withholdings of books such as "The Broad Stone of Honour or Rules

for the Gentlemen of England" (1822) of Sir Kenelm Henry Digby. See United Kingdom *House of Commons Debates* of 1841.02.06, Talfourd M.P., at pp. 354-355 and United Kingdom *House of Commons Debates* of 1842.04.06, Lord Mahon, at pp. 1353-1354. However, since the introduction of this section in the Untied Kingdom, there is no record of any licence granted thereunder.

Section 5 of the British *Copyright Act, 1842* only aimed at "books", while section 4 of the United Kingdom *Copyright Act, 1911* was enlarged so as to encompass "literary, dramatic or musical work", which wording was imported in section 12 of the Canadian *Copyright Act, 1921* (now section 15).

In 1948, the United Kingdom became party to the Brussels Revision (1948) of the Berne Convention which, by a new wording of its Article 7, obliges the United Kingdom to give to protected works a minimum duration of protection of 50 years after the death of the author. Since a compulsory licence under section 4 of the United Kingdom *Copyright Act, 1911* could be issued *at any time* after the death of an author, the aforesaid section 4 was deemed in conflict with the provisions of Article 7 of the Brussels Revision (1948) of the Berne Convention and, as a consequence, section 4 was repealed by the United Kingdom *Copyright Act, 1956*. However, Canada is not party to the Brussels Revision (1948) of the Berne Convention but only to the Rome Revision (1928) and, therefore, no such modification was necessary.

§5.2 Construction

Since compulsory licences are exceptions to the general rule of freedom to dispose of the ownership of copyright, they must be strictly interpreted. As to the construction of the British counterpart to this section, Skone James wrote, at p. 87 of the Eighth Edition of his *Copinger and Skone James on the Law of Copyright* (London, Sweet & Maxwell, 1948): "A section which in effect expropriates the property of another, it is thought, to receive a strict construction".

§5.3 Conditions

§5.3.1 General

For this section to come into operation, several conditions are to be met with respect to a) the author, b) the nature of the work, c) the diffusion of the work, d) the attitude of the copyright owner, e) the consequences of the refusal to make available the work.

§5.3.2 Author

The time when an application under section 15 may be asked for is determined by the death of the author of the copyrighted work and not of the copyright owner. A request for such compulsory licence can be made *at any time* after the death of the author and there is no waiting period in that regard.

The nationality or residence of the author has no bearing under this section, nor the fact that the deceased author might be a national of a country of the Union or with which Canada has entered into an international agreement for reciprocal copyright protection. Of course, if the work is not protected — or no longer protected — under the Canadian *Copyright Act*, section 15 does not have to come into operation since the work would already be in the public domain.

§5.3.3 Work

A compulsory licence can only be granted with respect to three specific categories of works, namely: (a) literary works, (b) dramatic works, or (c) musical works.

It does not cover artistic works. It might not cover works which are both literary *and* artistic (for instance, "comic strips" or "art books"). As to "cinematograph work", it would depend on the qualification given to the work, namely dramatic or artistic: see subsections 2(10) and 3(2).

§5.3.4 Initial diffusion of the work

This section comes into operation if, with the consent of the copyright owner, copies of the work have been released at least once to the public or if the work has been performed in public. The works which were never published or performed in public (i.e., outside the family circle) are not covered by this section, nor are those which were published or performed without the consent of the copyright owner since it would not constitute a publication or performance under subsection 4 (2) of the Act.

The place of initial printing or public performance of the work is not relevant under this section. The work of the deceased author may never have been printed, published or performed in Canada.

§5.3.5 Attitude of the copyright owner

There must be a refusal by the copyright owner (and not by the author) to permit the diffusion of the work. The refusals aimed by section 15 are:

(a) the refusal to republish (by the copyright owner),

(b) the refusal to allow the republication (presumably by someone else), and

(c) the refusal to allow the performance in public of the work.

It would appear that section 15 sanctions the refusal to republish or to allow a public performance, and not the situation where a copyright owner subjects its consent to exacting conditions. There is no case law to assist in determining whether a disguised refusal by the copyright owner should be considered as a refusal triggering off the application of section 15. Exorbitant claims for royalties to be paid for the republication of the work, ludicrous or preposterous requests as to the format of the work, or unrealistic demands as to the casting of a public performance may very well conceal a refusal and, in fact, have the same effect as a refusal to make the work available to the public.

The compulsory licence under section 15 would apparently not come into operation when a work is printed but kept in stock, undistributed; nor when the copies of the work are available but at an out-of-reach price.

Conversely, the copyright owner could not escape the application of this section by making available a revised or updated edition of the work, or by permitting an adaptation of the work. It is the literary, dramatic or musical work, in its (or one of its) published form, which is aimed at and not a substitution thereof.

§5.3.6 Deprivation of the public

The refusal by the copyright owner to allow the publication or the public performance of its work should have the work withheld from the public as a consequence. It is interesting to note that the word "withhold" is defined in the 1984 Third Revised Edition of *The Shorter Oxford English Dictionary* as "to keep back; to keep in one's possession (what belongs to, is due to, or is desired by another); to refrain from granting or giving; to detain; to keep in bondage, in custody, or under control", which appears to be very much in

line with the purpose of this section, namely "to provide against the Suppression of Books of Importance to the Public".

The "public" is the public at large, and not restricted to Canadians or the public in Canada. There is no need to prove any special harm to the public but simply that, *because* of the refusal of the copyright owner, the work is not available. Compare, for instance, with section 32 of the *Competition Act* (R.S.C. 1985, c. C-34; am. R.S.C. 1985 (4th Supp.), c. 10, s. 18; S.C. 1990, c. 37 s. 29):

> In any case where use has been made of the exclusive rights and privileges conferred by a copyright so as (…)
>
> (b) to restrain or injure, unduly, trade or commerce in relation to any such article or commodity,
>
> (c) to prevent, limit or lessen, unduly, the manufacture or production of any such article or commodity or unreasonably to enhance the price thereof (…).

§5.4 Mechanics

The conciseness of this section, which is not accompanied by any rules of application, is to be contrasted with the detailed procedures laid down for other compulsory licences in the Act. It is suggested that, by analogy, reference be made to the general requirements found in the Copyright Royalty System Rules.

§5.4.1 "A complaint"

The complaint is to be made to the Governor in Council. As provided for by section 13 of the *Constitution Act, 1982*, provisions in Acts of Parliament referring to the Governor General in Council shall be construed as referring to the Governor General acting for and with the advice and consent of, and in conjunction with, the Queen's Privy Council for Canada: see section 35 of the *Interpretation Act* (R.S.C. 1985, c. I-21) and *Governor General's Act* (R.S.C. 1985, c. G-9).

A complaint of this nature should be sent to the Clerk of the Privy Council (who is also Secretary to the Cabinet), whose address is 85 Sparks Street, Blackburn Building, Ottawa, Ontario K1A 0A3.

The complaint may be made by anyone including a Canadian, a citizen of a member country of the Berne Convention, a member of a country with which Canada has a reciprocal agreement, or even someone who is not protected under the Canadian *Copyright Act*. The complainant could be an association or a corporation, not only an individual. The complainant does not have to be a person aggrieved by the refusal of the copyright owner nor does the complainant have to justify any special interest, commercial (e.g., the re-publisher-to-be) or sentimental (e.g., heirs of the author).

§5.4.2 Timing

The request for a compulsory licence can only be made after the death of the author. A request aimed at the work of a dying author would appear to be premature.

Furthermore, for such a compulsory licence to be requested and granted in the case of a literary, dramatic or musical work of joint authorship, all authors should be deceased.

§5.4.3 "May be ordered"

There is apparently no obligation for the Governor in Council to grant a compulsory licence. Section 15, as drafted, is permissive. The grant of such a licence is done by way of an order of the Governor in Council to the copyright owner.

§5.4.4 Terms

There are no guidelines as to the conditions under which such a compulsory licence would be granted. However, reference to section 26 should be made as to some of the terms and conditions that the Governor in Council "may think fit", namely, any royalties to be paid to the Minister of Consumer and Corporate Affairs; repayment by the Minister to the copyright owner; and marking of the licensed book.

§5.4.5 A contract

The ordered licence is deemed to be a contract between the re-publisher and the copyright owner: see subsection 25(1). If the conditions of the licence are not fulfilled, it would appear that the copyright owner will have a right of

action against the licensee for copyright infringement and/or payment of royalties, and be entitled to ask for the revocation of the compulsory licence: see subsection 25(3).

In the event of infringement of the copyright by a third party, the licensee may take legal proceedings in the same manner as the copyright owner: see subsection 25(2).

Since the particulars of a cancellation of a compulsory licence may be entered on the Register of Copyrights (see subsection 25(4)), it would follow that a compulsory licence can also be entered on the said Register. (Note section 25 was repealed on 1997-08-31.

§5.5 Appeal

There is no provision as to an appeal from or a revision of a decision made by the Governor in Council pursuant to section 15 of the C*opyright Act*. The only recourse open against a decision or omission of the Governor in Council lies in the extraordinary remedies provided for by section 18 of the *Federal Court Act* (R.S.C. 1985, c. F-7; as amended by S.C. 1990, c. 8, s. 4) for the general review, by the Trial Division of the Federal Court, of the actions of "federal boards": see *Thorne's Hardware Limited v. R.,* (1983) 1 S.C.R. 106.

Under subsection 2(8) of the *Federal Court Act,*

> "federal board, commission or other tribunal" means any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867.*

To the extent that the "Governor in Council", when acting pursuant to section 15 of the C*opyright Act,* makes an administrative decision or exercises a discretionary power, the "Governor in Council" then appears to fall within this definition of a "federal board" and would be subject to the general review jurisdiction conferred by section 18 of the *Federal Court Act* to the Trial Division of the Federal Court of Canada: see *Saskatchewan Wheat Pool v. Canada (Attorney General)* (1994), 107 D.L.R. (4th) 190 (F.C.T.D.) and *National Anti-Poverty Organization v. Canada (Attorney General)* (1988), (1989) 1 F.C. 208 (F.C.T.D.); rev'd (1989) 3 F.C. 684 (F.C.A.).

In view of subsection 28(6) of the *Federal Court Act*, the supervisory jurisdiction of the Appeal Division of the Federal Court is excluded in respect of an order or a decision of the Governor in Council.

§6.0 Case Law

§6.1 Canada

1. *Le Nordet Inc. v. 82558 Canada Ltée,* (1978) C.S. 904, Dugas J. (Que. Sup. Ct.).

   > Cette procédure d'acquisition des licences mécaniques opère une exception au principe général de la propriété intellectuelle. Il faut donc exiger de celui qui veut faire une seconde publication de l'œuvre qu'il se conforme aux exigences de la Loi des droits d'auteur et des règlements d'application. (at p. 906)

2. *Roncarelli v. Duplessis,* (1959) S.C.R. 121, Rand J. (S.C.C.).

   > "Discretion" necessarily implies good faith in discharging public duty, there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as actionable as fraud or corruption. (at p. 140)

3. *Inuit Tapirisat of Canada v. Canada (Attorney General),* (1980) 2 S.C.R. 735, Estey J. (S.C.C.).

   > Let it be said at the outset that the mere fact that a statutory power is vested in the Governor in Council does not mean that it is beyond review. If that body has failed to observe a condition precedent to the exercise of that power, the court can declare that such purported exercise is a nullity. In *Wilson v. Esquimalt and Nanaimo Railway Company* ((1922) 1 A.C. 202), for example, the Privy Council considered the position of the Lieutenant-Governor of British Columbia under the *Vancouver Island Settlers' Rights Act, 1904, Amendment Act, 1917,* S.B.C. 1917, c. 71. The effectiveness of a Crown land grant issued by order of the Lieutenant-Governor in Council was contested on the grounds that the Lieutenant-Governor in Council had no "reasonable proof" before them that the grantees had improved the lands in question or occupied them with an intention to reside thereon. The Court of Appeal found that there was no such evidence and hence declared the Order in Council to be void. The Privy Council proceeded on the basis that before the Lieutenant-Governor in Council could make the grant in question, it must determine that the statutorily prescribed conditions had been met by the applicant for the grant. As here, the allegation was made that the owners did not have "an adequate opportunity" to show that there was no factual foundation for the grant made by the Lieutenant-Governor in Council. The Privy Council found against this submission stating at p. 213 through Duff J., sitting as a member of the Board:

> The respondents were given the fullest opportunity to present before the Lieutenant-Governor in Council everything they might to urge against the view that the depositions produced in themselves constituted "reasonable proof," and they had the fullest opportunity also of supporting their contention that the depositions alone, in the absence of cross-examination, ought not to be considered sufficient, and that further time should be allowed to enable them to prepare their case. The appointed authority for dealing with the matter, it must be remembered, was the Executive Government of the Province directly answerable to the Legislature, and their Lordships agree without hesitation with the majority of the Court of Appeal in holding as they explicitly decided upon the same facts in Dunlop's case, that the Lieutenant-Governor in Council was not bound to govern himself by the rules of procedure regulating proceedings in a Court of justice.
>
> It cannot be suggested that he proceeded without any regard to the rights of the respondents and the procedure followed must be presumed, in the absence of some conclusive reason to the contrary, to have been adopted in exercise of his discretion under the statute as a proper mode of discharging the duty entrusted to him. His decisions taken in the exercise of that discretion are, in their Lordships' opinion, final and not reviewable in legal proceedings.
>
> The Privy Council also determined in the case that factual issues, including the "reasonableness" or "sufficiency" of the evidence, were exclusively for the Lieutenant-Governor whose decision would not be reviewable by a court if there was "some evidence in support of the application" (*per* Duff J. at p. 213). (at pp. 748-749)

4. *Re Williams and Attorney General for Canada* (1983), 45 O.R. (2d) 291, Osler J. (Ont. H.C.J. — Div. Ct.).

> In our view, the Governor in Council falls within the definition of "federal board" in s. 2 of the *Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.), but for the reasons given, the jurisdiction of the Federal Court to make a declaration respecting the Council is not exclusive. (at p. 294)

5. *Thorne's Hardware Limited v. R.,* (1983) 1 S.C.R. 106, Dickson J. (S.C.C.).

> Decisions made by the Governor in Council *in matters of public convenience and general policy* are final and not reviewable in legal proceedings. Although, as I have indicated, the possibility of striking down an order in council on jurisdictional or other compelling grounds remains open, it would take an egregious case to warrant such an action. This is not such a case. (at p. 111.) (Emphasis added.)

6. *National Anti-Poverty Organization v. Canada (Attorney General),* (1989) 3 F.C. 684, Stone J. (F.C.A.).

The nature of the decision and of the decision-maker is not to be overlooked. It is well to remind ourselves of the distinction that is apparent in *Inuit Tapirisat (Inuit Tapirisat of Canada v. Attorney General of Canada*, (1980) 2 S.C.R. 735 (S.C.C.)) between the Governor in Council acting within the statutory mandate conferred by Parliament and the various policy concerns that might lead him to do so. That he may take into account of such concerns is made clear in that case. They are also identified, and bear repeating. At page 753, Estey J. said:

> The executive branch cannot be deprived of the right to resort to its staff, to departmental personnel concerned with the subject matter, and above all to the comments and advice of ministerial members of the Council who are by virtue of their office concerned with policy issues arising by reason of the petition whether those policies be economic, political, commercial or of some other nature.

The international competitive position of BCI (Bell Canada International Inc.) was obviously a policy matter which the Governor in Council could and did take into account. (at pp. 706-707)

§6.2 France

1. *Gallimard v. Sipriot* (1982), 115 R.I.D.A. 164 (T.G.I. Paris).

Attendu que le contrôle aménagé par l'article 20 a pour but d'écarter les déviations qui auraient pour effet de substituer à la volonté du défunt concernant la divulgation *post mortem* de son œuvre les préférences de ses ayants-cause, lesquels ne doivent être que les agents d'exécution de cette volonté.

Attendu que ces déviations auxquelles le législateur entend mettre obstacle doivent s'apprécier par référence à une volonté clairement exprimée par l'auteur de s'opposer à une divulgation *post mortem;* que c'est en ce sens que l'article 20 ne retient que l'abus «notoire», la notoriété s'entendant d'un fait évident, dont la réalité échappe à toute discussion.

Qu'il s'ensuit que si la volonté de l'auteur n'est pas incontestable mais laisse place au doute, l'article 20 ne peut être mis en œuvre. (at pp. 168-169)

§7.0 List of Cases

§7.1 Canada

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2. Le Nordet Inc. v. 82558 Canada Ltée, (1978) C.S. 904 (Que. Sup. Ct.—Interlocutory); judgment by consent on the merit 1979.10.25 (Que. Sup. Ct.).

3. Inuit Tapirisat of Canada v. Canada (Attorney General) (1978), (1979) 1 F.C. 213 (sub nom. Inuit Tapirisat v. Leger), 87 D.L.R. (3d) 86 (F.C.T.D.); rev'd (1978), 95 D.L.R. (3d) 665 (F.C.A.); rev'd (1980), 115 D.L.R. (3d) 1, 33 N.R. 304 (S.C.C.).

4. Thorne's Hardware Ltd. v. R. (1980), 109 D.L.R. (3d) 94 (F.C.T.D.); rev'd (1980), 124 D.L.R. (3d) 622 (F.C.A.); aff'd (1983), 143 D.L.R. (3d) 577 (S.C.C.).

5. Landreville v. R. (No. 3) (1980), 111 D.L.R. (3d) 36 (F.C.T.D.)

6. Operation Dismantle Inc. v. R. (1983), 39 C.P.C. 120 (F.C.T.D.); rev'd (1983), 3 D.L.R. (4th) 193 (F.C.A.); aff'd (1985), 18 D.L.R. (4th) 481 (S.C.C.).

7. Re Williams & Attorney General for Canada (1983), 45 O.R. (2d) 291 (Ont. H.C.J. — Div. Ct.).

8. National Anti-Poverty Organization v. Canada (Attorney General) (1988), 21 C.P.R. (3d) 305 (F.C.T.D.); rev'd (1989), 26 C.P.R. (3d) 440 (F.C.A.); leave to appeal to S.C.C. refused (1989), 28 C.P.R. (3d) vi (S.C.C.).

9. Saskatchewan Wheat Pool v. Canada (Attorney General) (1994), 107 D.L.R. (4th) 190 (F.C.T.D.).

§7.2 France

1. Gallimard v. Sipriot (1982), 115 R.I.D.A. 164, D. 1983.I.R.95 (T.G.I. Paris).

2. Foujita v. Art Conception Réalisation (1986), 131 R.I.D.A. 265 (T.G.I. Nanterre); (1987) D. 1987, 382 (C.A. Versailles); (1989), 145 R.I.D.A. 145 (Cass. Civ.); (1990), 148 R.I.D.A. 168 (C.A. Rennes).

3. Éditions de la manufacture v. Ville de Nantes (1991), 150 R.I.D.A. 154 (C.A. Paris).

4. de Leusse v. Grosclaude (1966), 53 R.I.D.A. 19 (C.A. Paris — 1re chambre, 1966.04.25); (1969), 61 R.I.D.A. 81, (1969) D.S. 476 (Cassation — 1re chambre, 1969.01.15).

5. Salzedo v. Levy (1991), 151 R.I.D.A. 340 (T.G.I. Paris — 1re chambre, 1991.11.20); (1992), 155 R.I.D.A. 191 (C.A. Paris — 1re chambre, 1922.11.24).

§8.0 Authors

§8.1 Canada

§8.1.1 Copyright issues

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§8.3 France

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§8.5 Varia

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§9.0 Comparative Legislation

§9.1 Comparative Legislation - United Kingdom

§9.1.1 *Literary Copyright Act, 1842*, section 5:

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL MAY LICENSE THE REPUBLICATION OF BOOKS WHICH THE PROPRIETOR REFUSES TO REPUBLISH AFTER DEATH OF THE AUTHOr

V. And whereas it is expedient to provide against the Suppression of Books of Importance to the Public: be it enacted, That it shall be lawful for the judicail Committee of Her Majesty's Privy Council, on Compalint made to them that the Proprietor of the Copyright in any Book after the death of the Author has refused to republish or to allow the Republication of the same, and that by reason of such refusal such book may be witheld from the Public, to grant a Licence to such Complainant to publish such Book, in such manner and subject to such conditions as they may think fit, and it shall be lawful for such Complainant to publish such Book according to such Licence.

§9.1.2 *Copyright Act, 1911*, section 4:

COMPULSORY LICENCES

4. If at any time after the death of the author of a literary, dramatic or musical work which has been published or performed in public, a complaint is made to the Judicial Committee of the Privy 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 to perform the work in public, as the case may be, on such terms and subject to such conditions as the Judicial Committee may think fit.

§9.2 Comparative Legislation - France

§9.2.1 *Copyright Act, 1957*, section 20:

20. En cas d'abus notoire dans l'usage ou le non-usage du droit de divulgation ou des droits d'exploitation de la part des représentants de l'auteur décédé visés à l'article précédent, le tribunal civil peut ordonner toute mesure appropriée. (...)

§9.2.2 Code de la propriété intellectuelle, 1992, section, L. 121-3:

En cas d'abus notoire dans l'usage ou le non-usage du droit de divulgation ou des droits d'exploitation de la part des représentants de l'auteur décédé visés à l'article L.121-2, le tribunal de grande instance peut ordonner toute mesure appropriée. (...)

§9.3 Comparative Legislation - India

§9.3.1 *Copyright Act, 1957*, section 31

31. Compulsory licence in works witheld from public.
(1) If at any time during the term of copyright in any Indian work which has been published or performed in public, a complaint is made to the Copyright Board that the owner of the copyright in the work --

(a) has refused to republish or allow the republication of the work or has refused the performance in public of the work, and by reason of such refusal the work is witheld from the public; or

(b) has refused to allow communication to the public by radio-diffusion of such work, or in the case of a record the work recorded in such record, on terms which the complainant considers reasonable;

the Copyright Board, after giving to the owner of the copyright in the work a reasonable opportunity of being heard and after holding such inquiry as it may deem necessary, may, if it is satisfied that the grounds for such refusal are not reasonable, direct the Registrar of Copyrights to grant to the complainant a licence to republish the work, to perform the work in public or communicate the work to the public by radio-diffusion, as the case may be, subject to payment to the owner of copyright of such compensation and subject to such other terms as the Copyright Board may determine; thereupon, the Registrar of Copyrights shall grant the licence to the complainant in accordance with the directions of the Copyright Board, on payment of such fee as may be prescribed.

Explanation. - In this sub-section, the expression "Indian work", includes--
(i) an artistic work, the author of which is a citizen of India; and
(ii) a cinematograph film or a record made or manufactured in India.

(2) Where two or more persons have made a complaint under sub-section (1), the licence shall be granted to the complainant who in the opinion of the Copyright Board would best serve the interests of the general public.

§10.0 Varia

§10.1 Houses of Commons Debates — United Kingdom (1910.07.26) Sydney Buxton M.P. (President of the Board of Trade), at p. 1949:

> But in order that the public may be protected from any possible abuse, the Bill will provide that after the death of the author, if the work is withheld from the public, or too high a price is charged for copies or for the right to perform, so that the reasonable requirements of the public are not satisfied, a licence may be granted to publish or perform the work.

§10.2 M.P. (President of the Board of Trade) at pp. 2602-2603:

> There is one point to which public attention has been drawn by a distinguished publisher and author, and that is a new Clause which was inserted with the view that if the lengthened period of copyright was likely to lead to abuse there ought to be some method, with proper safeguards, by which public rights ought to be preserved if a book were unduly withheld from the public. That is the Clause to which reference has been made outside. Under that proposal the Comptroller-General of Patents and Designs can be moved to consider the matter, and if he is satisfied under strict conditions that the book is being withheld from the public then he would have the power to issue a licence on representations made to him; but not unless twenty-five years had elapsed from the date of publication after death. (…)
>
> At all events, in my opinion, a clause of this kind ought to be inserted in the Bill, so that if a work is unduly and unjustly withheld from the public, there should be an opportunity to issue a licence for its publication.

§10.3 Houses of Commons Debates — United Kingdom (1911.04.07) Augustine Birrell M.P., at pp. 2648-2649:

> The next point is about Clause 4. It has been subjected to a good deal of criticism as regards the compulsory licence. I was glad the hon. Member, who has just sat down, referred — because I was going to do so if he had not — to the provisions of the Act of 5th and 6th Victoria, which says: "Whereas it is expedient to provide against the suppression of books of importance to the public, be it enacted, that it shall be lawful for the Judicial Committee of Her Majesty's Privy Council, on complaint made to them that the proprietor of the copyright in any book after the death of its author has refused to republish or allow the republication of the same, and that by reason of such refusal such book may be withheld from the public, to grant a licence to such complainant to publish such book", and so on.
>
> That was only following on earlier provisions. There was an opportunity to the public to appeal to the Archbishop of Canterbury and to the learned men of Universities of Oxford and Cambridge, who are always men of great literary knowledge, and that allowed to them the power to determine what was the price of the book. I speak myself in this matter without great

consideration, but I do ask whether there is really any such great need for a Clause of this kind, as has been supposed. At the same time there are people, of whom I have lately made the acquaintance, who attach great importance to it, and it is certainly a subject which might receive full consideration after the evidence before the Committee upstairs, one way or the other. There may be more in it than appears to be at this moment. I confess I think there is a lot of stuff talked about price; I do not think there is anything in it, I believe the whole thing so far as that Act of 1842 is concerned is based upon Lord Macaulay's motion, or rather the example he gives about Boswell's life of Dr. Johnson. He mentioned the case of Alexander, who was Boswell's son and who hated and abhorred the memory of Johnson. He thought it has played too great a part in the life of the laird of Auchinleck, and so great was that hatred that Lord Macaulay believed that if he had had the chance he would have suppressed absolutely that, "Life of Dr. Johnson," or, being a bibliophile, he might have put it up to a price of ten guineas, and so suppressed it for the mass of the people, such a high price that people would not be prepared to give it for a book, although they are prepared to give that much for a motor car or anything of that kind. That was the notion anyhow, such a price as the price of a motor car, or ten guineas for a book.

It is just possible there may be a risk of the suppression of a book. I do not know whether the House would care to go into such nice considerations as might occur with regard to that point. I can imagine a case in which a book of great merit would be suppressed owing to the feelings of the heir-at-law or widow of the man who wrote the book, which might be of a religious character or an irreligious character in the estimation of the widow, or it might be heretical as to Free Trade or Tariff Reform in such a manner as to shock the susceptibilities of the family or the time in which it was produced. It is quite within the bounds of possibility that it might be necessary to retain such a Clause so as to secure that the public should not be deprived of the benefit of a book by reason of its suppression in such circumstances.

§10.4 Houses of Commons Debates — United Kingdom (1911.04.07) Arthur J. Balfour M.P., at pp. 2653-55:

Clause 4, if abused, might evidently be a source of infinite injustice. I quite hope that it will never be abused, but I do not much like this growing practice, I was going to say, of this Government, the growing practice of this House, of handling over to a Government official unchecked and without appeal to any court the fortunes and interests of any class of His Majesty's subjects. It is contrary to all our oldest and best traditions. I am sure it is full of danger. I beg the Government to pause before they take any other step on this rather dangerous path. And for what ends are we running these risks? For what object are you really diminishing the security which every great man desires to experience, that some of those who come after him will enjoy some of the fruits of his labours and his fame? You are doing it apparently because it occurred to Lord Macaulay that someone sometimes here and there may find that a book has been written by a member of a family so rich that they are quite indifferent or relatively indifferent at all events, to the profits of the work, and so indignant at the

character of the work, as reflecting upon their own family fame, that they are prepared to forego the profits of that work rather than that the public should enjoy it. How many of such books are there? It has never happened. Sir Alexander Boswell was prematurely killed in a duel, and Lord Macaulay thought it might have happened if he had lived. It never has happened. Why should we anticipate a case so very rare? But what strange coincidences and unexpected combinations of circumstances would be necessary, for the Privy Council under the existing law, or the Board of Trade under the law that is proposed, to intervene and say that the public shall enjoy a book which it is decided to suppress.

However, if you leave it merely to deal with suppression, I personally so far as I have considered the matter shall have no objection. I do not say it would be better, but I have no objection. I have never heard of a book being suppressed that ought to be published, though I have heard of some books being published that ought to be suppressed, and in any case I think the actual stoppage of publication of a book for which there is by hypothesis a great demand, is so arbitrary an action on the part of the heirs of a man of letters that I confess I should regard, without any very great alarm, the power even of a Government Department, and certainly of a court of law or a body like the Privy Council, to say that this embargo shall be withdrawn, and that this book shall be published, and that people shall not be deprived of the advantages of reading it. But when you go further, when you take the whole provisions, when you say that an official in a public Department is not merely to say that a book shall be done by this man and at this price, then I must say that all reasonable precedents are violated, and it seems to me you give a power of an unheard-of description to a Government Department. You throw an air of insecurity over a kind of property which we all, within reasonable limits desire to secure; and therefore I most earnestly trust that when this Bill comes to be discussed in Grand Committee the Government of the day will see to it that Clause 4, if it remains in the Bill, does so in a very much safer and simpler form than that in which it is at present.

ROBIC + LAW + BUSINESS + SCIENCE + ART

ROBIC + DROIT + AFFAIRES + SCIENCES + ARTS