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The
Copyright Question

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A LETTER TO THE
CANADIAN SOCIETY OF AUTHORS

By
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TORONTO, APRIL 12, 1902.

The Secretary,
The Canadian Society of Authors.

SIR—

A circular letter has been shown to me written to the members of the Society, assuring them that a Bill, such as the Hall Caine Bill, which contains a licensing clause, would not place Canada outside the Berne Convention. In support of this view, the writer quotes a statement made by Mr. Hall Caine during the Ottawa Conference on the Copyright Question in 1895.

Mr. Hall Caine did not profess to be an authority upon the subject, as is evident from the following further quotation from the official report of the proceedings of the Conference:—

“SIR CHARLES HIBBERT TUPPER: ‘Has any gentleman present given attention to the point in connection with the Berne Convention? For instance, the exclusion of the colonial edition, supposing that edition to be one lawfully published in England. Might not the point be raised that this is inconsistent with the Treaty of Berne as excluding a copyrighted book from one of the countries included in the convention?’

“MR. ROSE: ‘I may say that in our discussion at Toronto with Mr. Hall Caine, we stated to him that we did not claim to be posted on constitutional or law questions. Mr. Hall Caine, I think, will

agree that he has given us to understand that the Bill as expressed here will not necessitate our retiring from the Berne Convention.'

"MR. HALL CAINE: 'That is my general view. At the same time, I do not wish to express any legal opinion. It is for the law officers to speak on that point.'"

It is quite clear to anyone who has investigated the copyright question, that under the Berne Convention and the laws of the different countries of the Copyright Union made in accordance with it, a Canadian author of a book first published in Canada has copyright in every country of the Union for the term allowed by the British Copyright Act, or any less term allowed by the law of the foreign country for copyright under that law.

It is also clear that the legal effect of the Convention and of the foreign copyright laws is, that the obligations and advantages under the Convention are strictly reciprocal, and therefore any country which imposes an obligation to reprint locally as a condition of obtaining copyright for that country in a book first published in any country of the Union must withdraw from the Union, such a condition being inconsistent with the terms of the Convention.

Great Britain in acceding to the Convention reserved to the Crown the power of denouncing the Convention for Canada or any other of the self-governing colonies. Such a denunciation is not to take effect until after the expiration of twelve months from its date.

The Berne Convention could not be carried into effect in the Empire without the authority of Parliament, and to enable Great Britain to accede to the Convention, a Bill was intro-

duced into the Imperial Parliament. This Bill and the documents relating to the Berne Convention were submitted to the Canadian Government which formally expressed its willingness to enter into the Convention, and thereupon the Bill became the "International Copyright Act 1886."

On the 28th of November, 1887, an Imperial Order-in-Council was made adopting the Berne Convention with respect to the countries of the Copyright Union and the Order came into force on the sixth of December, 1887.

In 1889, a Canadian Copyright Act was passed which, however, has never as yet received the Royal assent. This Act provided that

(a) Any person domiciled in Canada or in any part of the British possessions (an expression which presumably includes the United Kingdom); or

(b) Any citizen of any country which had an international copyright Treaty with the United Kingdom, in which Canada was included (an expression which would, under the existing circumstances, include France, but not the United States, and would cease to include France or any other foreign country if Canada ceased to be a party to the Berne Convention);

might obtain exclusive copyright for his book in Canada for twenty-eight years subject to the following conditions :

1. That the book was before, or simultaneously with, first publication, registered in Canada ; and
2. That it was printed and published or reprinted and republished, in Canada, within one month after first publication elsewhere.

The Act went on to provide that if a person entitled to obtain copyright in a book under these provisions did not

avail himself of them, any person domiciled in Canada might obtain from the Minister of Agriculture a license (which was not to be exclusive), to publish the book in Canada on paying a royalty of ten per cent. on the retail price of each book published under the license.

Where a license was so issued for a book, and the Governor in Council was satisfied that the book was being published under the license in such a manner as to meet the Canadian demand for it, the Governor-General might by proclamation prohibit the importation of copies of the book while the author's copyright was in force.

But the Act—

(a) Was not to prohibit the importation from the United Kingdom of books copyrighted there or lawfully printed and published there; and

(b) Was not to apply to any book in which before the date at which the Act came into force copyright had been obtained in the United Kingdom, or in any country of the Copyright Union.

The object of saving (a) was apparently to let in books published in England whilst keeping out books published in the United States. The object of saving (b) was to protect existing rights.

The Canadian Act of 1889 was to come into force on a day to be named by a proclamation of the Governor-General. Such a proclamation has not yet been made.

The feature of the proposal of the Toronto Board of Trade, now under discussion, is also the establishment of a licensing system, under which the Government may license a Canadian Publisher to print a book in Canada, unless the author prints and binds in this country and continues to do so.

When the question of giving the Royal assent to the Canadian Act of 1889 was under discussion between the Imperial and Canadian Governments, Sir John Thompson, then Minister of Justice, did not contend that the Canadian Act would be consistent with the Berne Convention, in fact he admitted that before the proclamation bringing the Act into force could be issued the Home Government must be asked to denounce the Convention on behalf of Canada, and that the obtaining of an Imperial Order-in-Council was necessary for releasing Canada from the operation of the International Copyright Act of 1886, which made the Berne Convention operative throughout the Empire.

The effect in Canada of our withdrawal from the Convention would be as follows:—"The author of a book first published in London would still by virtue of the Imperial Acts before 1886 have copyright in Canada. But the author of a book first published in Canada would cease to have copyright in the United Kingdom or in Australia, or in any country belonging to the Copyright Union. And the author of a book first published in Australia or in any other British possession except Canada or in France or in any other foreign country belonging to the Copyright Union would cease to have copyright in Canada."

The Imperial authorities were opposed to the Canadian Act of 1889 becoming law upon the grounds that:

"It would involve abandonment of the policy of International and Imperial copyright which Her Majesty's Government had adopted, and to which Canada had assented in 1886.

"It would be at least open to the charge of being inconsistent with the declaration as to the law of the United

Kingdom and the British possessions which was made to the United States in 1891 and on the faith of which the United States admitted British authors to the benefit of their copyright law.

“It would be inconsistent with the policy of making copyright independent of the place of printing which the Imperial Government had for many years been urging the United States to adopt.

“It would impair the rights in Canada of British authors by whom the Canadian market was principally supplied.”

When the Hall Caine Bill was presented to the Canadian Government of the day in 1896, it received the support of publishers such as Mr. G. M. Rose and Mr. Irving, but their support was based upon the complaint against the then existing law which was, that the Canadian publisher had then no protection in the Canadian market after he had bought and paid for it. Their complaint is, I believe, summarized in the letter I addressed to the Board of Trade on the 19th February, as follows:—

“When the Canadian publisher made an arrangement with an author or copyright owner to bring out a Canadian edition—a speculation involving considerable pecuniary risk—he had to pay for the right to do it as the English publisher had, but his market was likely to be interfered with by an influx of copies of a cheap edition from the Old Country, not sold to the public in the United Kingdom, but prepared expressly for exportation to Canada and other possessions and styled a ‘Colonial Edition.’ A Canadian publisher might have purchased from an English author the right to reproduce a Canadian edition; he might have gone to large

expense in advertising and popularizing his purchase, yet, before his books could be placed on the counters of Canadian retail dealers, he, as a rule, found in the market the cheap Colonial Edition imported to compete with and undersell his own even although he had contracted as effectually as he could with the English author and publisher for the Canadian market."

The Fisher Act of 1900 has remedied the evil under which publishers laboured at the time the Hall Caine Bill was first under discussion, and of which Mr. Rose and Mr. Irving justly complained.

It is clear that any legislation establishing a licensing system cannot be distinguished from the licensing provisions of the Canadian Act of 1889, which as stated by Sir John Thompson was inconsistent with the Berne Convention, and that Canada's withdrawal from the Convention is a necessary precedent condition to such legislation becoming law.

I believe it is almost universally admitted that the withdrawal or exclusion of Canada from the Copyright Union created by the Berne Convention would be lamentable so far as the interests of Canadian publishers and authors are concerned, and it is for this reason principally that I so strongly opposed the ill-considered action of the Board of Trade in advocating the adoption of the legislation which is now proposed by that body.

In conclusion, I desire to refer to another matter. It is continually being asserted that the custom still exists under which "in the arrangement by authors with United States

publishers, Canada is thrown in as an inducement to complete the deal." Everyone with any knowledge of Canadian publishing knows that this custom has ceased to exist, that all English authors now deal with Canada as a separate market, and contract directly with Canadian publishers, and that more books are now directly offered to Canadian publishers by English authors than can be safely taken, having regard to the present state of the market.

Yours truly,

GEORGE N. MORANG.

