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DURATION OF COPYRIGHT.

The term of copyright in the United States is twenty-eight years, with a right of renewal by the author, or his widow or children if he be dead, for a further term of fourteen years. This renewal right does not extend to a husband or to grandchildren if children be dead, or even to parents, so that the death of an unmarried author ends a copyright at the end of twenty-eight years, no matter what its value may be, or how many people may be dependent upon the life of the author.

The statute, too, is silent on the question of the renewal of copyrights in encyclopedias, or other books where the literary work is the result of a combination of effort. Under the law as it stands, it would seem that it is the duty of the publisher of any of our large encyclopedias at the end of the twenty-eight-year term, to seek out each individual author, or his widow or children, if he left any, and secure the application for a renewal.

The renewed term is to be obtained by "recording the title of the work a second time and complying with all other regulations in regard to original copyrights within six months before the expiration of the first term, and within two months of the date of the renewal causing 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."

This is a cumbersome and unsatisfactory arrangement. If forty-two years is a proper term for literary protection it should be granted once for all, upon such conditions as Con-

gress sees fit to impose. Nothing is gained at the present time by requiring a notice of the renewal to be published. The records of the copyright office at Washington are so complete and full that no publisher would look through the files of the newspapers of the United States to learn of a renewal, but would ascertain it by a telegram to Washington.

There is frequently confusion as to the right of an assignee of copyright to take out the renewal and litigation results therefrom. If it was originally supposed that authors were like sailors—the wards of the nation—and provision should be made to protect them against their own improvidence, even that object is not accomplished, because in practically all assignments of copyright, rights of extension and renewal are included. It is often very burdensome for an assignee to ascertain in the names of what persons renewals should be taken out. This frequently occurs in the case of writers of music who have entirely disappeared from sight before the lapse of twenty-eight years, leaving no trace behind. It has been said of one music publisher in Boston that he must constantly constitute himself a court of divorce and legitimacy, making world-wide inquiries.

It is not clear that the assignee is entitled to such renewal even though he paid the author a full price for all rights in his literary work. The statute gives the renewal right directly to the widow or children, and the question has never been brought before the courts whether an assignee could compel them to assign the renewal right.

But the most serious objection to the present term is that the renewed term frequently expires during the life-time of the author. The copyrights of several of Edward Everett Hale's works have expired, and Mr. Howells and Mr. Clemens will have the same experience at no distant day. Certainly an author should have the right to the earnings of his works during his life-time and for a limited period his family should have the same after his death.

The provision of the English law is much more intelligent, giving copyright for a term of "forty-two years from publication, or until seven years from the death of the author, whichever shall be longest."

It is interesting to note how the term of copyright, both in England and the United States, has been gradually extended. The first copyright act in England, the Statute of Anne, gave a term of twenty-one years from the tenth day of April, 1710,

to all works already printed, and a term of fourteen years to all works thereafter printed, with a right of renewal, if the author was living, for another term of fourteen years.

This is the famous statute which destroyed common law rights in literary property. Up to the Statute of Anne, literary property, even in published works, had existed at common law in perpetuity, and even after the Statute of Anne and the expiration of the term therein provided, injunctions were issued in favor of various works, such as Milton's "Paradise Lost," Pope's and Swift's "Miscellanies," "The Whole Duty of Man," and Thompson's "Seasons," on the supposition that the act was intended only to give additional remedies and penalties during the specified term, and not to limit copyright itself to that term.

In 1774 *Donaldson v. Beckett* was decided by the House of Lords, determining that copyright itself was limited to the statutory term.

In 1775 an act was passed giving to the universities of Oxford and Cambridge perpetual copyright in books given or bequeathed to them, although in 1878 it appeared that Oxford owned only six copyrights and Cambridge none.

In 1814 the term of copyright was extended to twenty-eight year, or if the author were living at its expiration, for his life.

In 1842 the term was extended to a period of forty-two years, or seven years beyond the life of the author, whichever term was the longer. The passage of this act was the result of protracted and brilliant debate in which Disraeli, Lord Houghton, Hume, Grote and Lord Macauley participated.

The bill which was introduced in 1838 proposed a term of sixty years, which, largely through Lord Macauley's opposition, was cut down to forty-two years, or the life of the author. An amendment giving an additional seven years after the author's death was adopted in spite of Lord Macauley's opposition.

In most countries the term is longer than either in England or the United States. In Germany, Japan, Austria and Switzerland it extends for thirty years after the death of the author; in France, Belgium, Portugal and eleven other countries, for fifty years after the author's death, and in Spain the term is for eighty years and the life of the author.

In the United States the term of copyright has been extended from time to time up to its present limit. Five of the colonial statutes, prior to the constitution, gave a term of fourteen

years, and three of them a term of twenty-one years. The first act passed by Congress, 1790, provided for an original term of fourteen years, with a right of renewal for fourteen, practically following the English statute.

In 1831 the term was extended to its present length of twenty-eight years, with a right of renewal for fourteen years.

It is generally conceded that a single term, without renewal, should be established, but the utmost variety of opinion exists with regard to its proper length.

The Constitution of the United States gives to Congress the power to grant copyright for a limited time, so that copyright in perpetuity is not possible in this country without a change of constitution.

It is not to be supposed that any evasion of the constitution, such as the term once proposed of a thousand years, would be sustained by the court. The framers of the constitution had before them the existing copyright terms in the various colonies, as well as the English term, and cannot be conceived to have intended a term marked by centuries rather than by years. Exactly how long a term would come within the meaning of the constitution none can predict, but undoubtedly any such term as now exists abroad would be upheld.

Mr. Clemens has contributed a very interesting suggestion to this discussion through the pages of the *North American Review*. He proposes that beginning with the forty-second year of any copyright the owner shall be required to keep a cheap edition upon the market sold at twenty-five cents per one hundred thousand words, or less, and that so long as he does this his copyright shall continue. This meets the requisite that the public is entitled to cheap editions of all works after the expiration of the statutory period, and also retains for the author and his family the control of his works and gives them a small revenue from cheap works and a large return from such high priced editions as can be sold.

This plan, by possibility, might result in perpetual copyright, and in many cases would result in prolonged terms. It may be questioned whether such a provision would come within the constitutional power to grant "for limited times to authors and inventors the exclusive right to their respective writings and discoveries." A term of protection which is longer for one work than for another and a term liable to be defeated by a three months' failure to keep a cheap edition on sale would be a novelty and a radical departure from precedent. The suggestion indeed has the double charm of novelty and of justice in a field marked by much injustice and

prosaic following of precedent. It is perhaps too much to hope that it can or will be adopted.

If the proposed revision of the entire copyright system is undertaken by the next Congress and a bill is reported to that end by the Committee on Patents no single question will probably receive more consideration than that of the duration of copyright protection.

Two things seem fairly clear. The term ought, in any event, to include the life of the author. So long as he lives an author ought to control the form in which his works shall be presented to the public, and he ought to receive such income as comes from them. Every sense of fair dealing is outraged by the idea of taking his property from a man in his old age. The world is not in accord with Lord Camden that "it would be unworthy such men (authors) to traffic with a dirty bookseller for so much a sheet of letterpress" or when his Lordship said, speaking of Milton "He knew that the real price of his work was immortality and that posterity would pay it." Posterity is a poor paymaster and immortality a small compensation for present penury.

Such ideas arose when literary men were forced to seek a noble patron and a gratuity. The profession of letters did not exist. The patron to-day is the public and royalties have taken the place of gratuities. And the patron is a generous one. It is not too much to say that every reader of a book that is worth while would prefer that a part of the price paid should go to the author so long as he lived and would be indignant if told that publishers had entered into the author's right.

It is equally clear that an author should be able to leave his family the usufruct of his work for a reasonable time after his death.

There is no abstract reason why men should not have the right to leave to their offspring the work of their brain. Everything that can be said in favor of absolute ownership of the work of a man's hands can be said of the product of his mind, and more. But society steps in at this point and says that the right of all is greater than the right of any one, and that it is necessary at some time that contributions to knowledge and literature should become public property. This is what *Donaldson v. Beckett* means. There was no necessity for deciding that the Statute of Anne took away the common law right. Lord Mansfield's decision five years earlier in *Millar v. Taylor* that it did not take it away is a more satisfactory discussion of the Statute than the opinions over-ruling it. The discussion in the House of Lords after the coming in of the six to five opinion of judges, shows that the case was determined upon grounds

of public policy and not upon the somewhat accidental language of the Statute. The failure after a century and a quarter to re-enact the perpetual right shows that more than the words "*and no longer*" in the Statute stood between authors and the perpetual "right of copy."

The same is clear in our own decision of *Wheaton v. Peters*, and in the words "for limited times" in our constitution.

So that the question to be decided is, at what time does the public need require that private copyright shall cease? No help is to be had from the term of patents. The industrial world needs the right to use inventions speedily. Progress in mechanical and electrical arts is constantly stayed by prior patents, to which tribute must be paid. The daily life and work of the people is affected. And besides there is no such thing as "fair use" of a patent. An author's work may be quoted, criticised, made the basis of discussion up to the point of reducing its salability. No other writer is hampered by it. So that he does original work, he may reach, write and publish the same result as the original author and may use the latter's work to help him do so. Not so the patent. It is an absolute barrier and its existence should be short.

Where, then, does public necessity require that the author's right should give way. There was no need that "Uncle Tom's Cabin" should belong to the public while Mrs. Stowe or her children lived. The book did its great work while it was protected. The public lost none of its dynamic force because royalty was paid on it by its publishers. It would not now. Nor is the public mulcted in high prices for such works. As books get older and the demand falls off, every publisher meets the market with a cheaper edition. It cannot be shown that prices are kept up for forty-two years and ought then to be lowered. Good business judgment takes care of the question.

I have cited Uncle Tom's Cabin, which is Mr. Clemens' illustration, but others might be taken. The public necessity did not require that "A Man Without A Country" should go out of copyright or that Mr. Hale should be deprived of the revenue from it. The law in its operation in this case is nothing short of robbery. And so of Lowell's and Prescott's and Howells' work and Mr. Clemens' himself. What jury that ever sat would find in *Clemens v. The People* that The People were entitled to a single "Mark Twain" while Mr. Clemens or any of his family lived?

Of course the question when it arises will settle itself by compromise, and what that will be no one can predict. But it can fairly be said that seven years beyond an author's life is not adequate recognition of an author's claim.

The English Royal Commission in 1878 recommended a term of thirty years beyond the life of the author. Though this recommendation fell with the rest of the report, the term recommended is the one adopted by four countries of high attainments. Fifteen countries have settled upon the term of fifty years beyond the author's life.

Though this country is apt to strike out trails of its own, the blazing is pretty clear if we choose to follow it.

There seems to be no reason under our decisions why the term, if extended, should not be made applicable to existing copyrights. Congress has gone far, especially in the early part of the last century in extending patents and copyrights already existing, and in granting new terms where the original had expired. Similar patent enactments were sustained by the courts. More recently (Act of March 3, 1893) Congress granted full terms of copyright protection to work already published and fallen into the public domain by reason of a failure to comply with one of the conditions of obtaining copyright.

Samuel J. Elder.