In addition, the book has in it a unique strain of idealistic democracy. Unique because the men who wrote it are practical men who have to deal with their neighbors, and who have a fine regard for the ability of the people to rule and govern themselves if given the opportunity.

The book begins with a general statement of the challenge confronting American citizens; reviews the work of the National Institute of Municipal Law Officers for 1943; states in summary form the war problems of cities in 1943; and passes on to reports concerning the problems confronting Canadian municipalities and the war problems of Honolulu. It then gets down to specific problems. The report on Chicago's legal problems reads like a fast-moving novel. A discussion of absentee voting by members of the armed forces in 1944 elections as viewed by the office of the Secretary of War is interesting and timely.

Specific problems that are discussed in various articles are in part as follows: city revenue and tax problems in the second year of the war; municipal taxation of federally-owned property; the Philadelphia income and wage tax (with copies of the ordinances and regulations issued thereunder); federal-city relations in the second year of the war; city-state relations; inter-municipal agreements (with copies of some agreements); officer and employee problems; airports during and after the war; ordinance enforcement in wartime; municipal tort liability; traffic courts; civil liberties in time of war; the public housing program for war and peace; zoning and planning; public utilities; cities and public power; the cities' fight for lower natural-gas rates; metropolitan utility districts; model ordinances; municipal regulation of business in wartime; municipal bonds; rehabilitation of blighted areas; post-war revenue funds (with copies of statutes and ordinances); contract problems. And last, a report of the general discussions on city problems, including such topics as the Philadelphia income wage tax, new taxes, race riots, home rule, personnel, priorities, zoning, and airports.

The reader is incidentally impressed with the prodigious amount of work that the Institute does. Its legal compilations are all "nail on the head" works.

There is a usable index.

ALBERT B. MARTIN*

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**Canadian Law of Copyright, The.** By Harold G. Fox. Toronto: University of Toronto Press, 1944. Pp. lxiv, 770. $18.50.

This is a good and useful book. The author, who is lecturer in the law of industrial property in the School of Law of the University of Toronto, has read the cases and has done a good job of classifying them under captions that make the law easy to find. His treatment of the subject matter of copyright in chapter iii will be helpful to anyone who must know whether a given work is copyrightable subject matter or not. The author says in his preface "My endeavor has been to discuss, or at least to refer to, all Canadian and English cases on the subject, together with a selection from the courts of other parts of the Empire and of the United States."

It will be a matter of regret to American lawyers that the author has not used cases decided south of the Canadian line more generally than he has. The book, even in its present intentionally limited scope, will be useful to the American Bar, and would be even more so if American cases were fully cited.

The discussion of the relations between authors and publishers in chapter xxiv and in Libel and Slander in chapter xxv is a useful adjunct to a book on copyright. The in-

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clusion of the statutes, the regulations, and the international conventions is a convenience. Also it has what so many law books lack—a good index.

Dr. Fox's treatment of the historical aspect of copyright is a little sketchy, probably with intention. It is a temptation for anyone writing about copyright to digress into the fascinating byways of its history. The idea that there was a right of reproduction of literary work after publication seems not to have occurred to anyone until after the invention of printing, when for the first time large numbers of copies could easily be made. Church and State, seeing the possibility of spreading heresy and sedition, at once moved against printing, and required all presses to be licensed. The Stationers Company was founded by Philip and Mary in 1556 and the licensing acts and Star Chamber decrees furnished the machinery for control. Each printer entered on the books of the Stationers Company the titles of books he was privileged to print.[1] These were called "copies." The custom arose for printers to respect each other's "copies." It was a sort of gentlemen's agreement among printers to let each other's "copies" alone. The author's rights in his work troubled them not at all. The recognition of the right of copy was a trade arrangement to limit competition. Then, on April 10, 1710, came the statute of 8 Anne, c. 19—the original Copyright Act, which traditionally was drafted by Addison and Dean Swift. Whatever its results, it was designed to protect copies. It set a time limit of seventeen years "and no longer." Nothing could happen until the seventeen years had elapsed, but then the battle began. The invasion of the London market by the Scottish publishers precipitated the trouble. They paid no attention to the trade conventions. The London booksellers asserted that the exclusive and perpetual right to make copies after publication was a common-law right, and that the Statute of Anne merely gave additional remedies. The anti-booksellers asserted that if there were a common-law right (which they denied), the statute took it away, and there was no right after publication except that which the statute gave. *Tonson* v. *Collins*[2] involved the Spectator. The case seems to have been contrived to

[1] Edw. Arber's Transcript of the Registers of the Company of Stationers in London 1554–1640; Rivington, A Short Account of the Worshipful Company of Stationers.

[2] 1 Wm Blackstone 301, 96 Eng. Reprint 169 (1761).

Jacob Tonson had been Dryden's publisher, and it seems they did not always get along well together. On one occasion, having declined to advance a sum of money, the poet forwarded the following triplet:

"With leering looks, bull-faced and freckled fair,
With two left legs, with Judas colored hair
And frowsy pores that taint the ambient air."

This billingsgate was accompanied with the significant message, "Tell the dog that he who wrote these lines can write more." The descriptive hint is said to have been successful. Curwen, History of the Booksellers 27. Tonson died in 1735. His epitaph is curious:

"The volume
of
his life being finished
here is the end of
JACOB TONSON
Weep authors and break your pens,
Your Tonson effaced from the book
is no more,
but print the last inscription on the title
page of death,
for fear that delivered to the press
of the grave

present the question squarely. But some busybody intimated this to the court, and that the plaintiff was paying all the expenses. The court thereupon declined to go on. There the matter rested until *Millar* v. *Taylor*,[3] which was an action at law brought in 1766 to recover for the unlicensed publication of Thomson's "The Seasons." The arguments of counsel in *Tonson* v. *Collins* and *Millar* v. *Taylor* are given in full in the reports. They can be read with profit by anyone who may be interested in seeing what a superlatively good job was done by Thurlow, Blackstone, Yates, Wedderburn, and others. This was followed by *Donaldson* v. *Beckett*[4] which came before the House of Lords in 1774 upon an appeal from a decree of the Court of Chancery founded on the judgment in *Millar* v. *Taylor*. The arguments of counsel before the House were not of the quality of the ones before the Court of King's Bench. Sir John Dalrymple opened the case for the appellants. The reporter of the proceedings apparently did not approve of Sir John's argument, for, after attempting to follow it for a while, he concludes, "Sir John, having thus combated the statute of Queen Anne, made a variety of miscellaneous observations rather foreign to the point, but introduced seemingly to level a stroke of sarcastic humor."

The literary and legal people took sides and thus was joined the "battle of the booksellers" which raged from 1731 to 1836. It rocked literary and legal England and America. It was the subject of table talk. Dr. Johnson expressed himself on the subject with his usual force. Boswell says "He was loud and violent against Mr. Donaldson. 'He is a fellow who takes advantage of the law to injure his brethren.' "

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the editor should want a title:
Here lies a book seller,
The leaf of his life being finished
Awaiting a new edition
Augmented and corrected."

(From Curious Epitaphs by William Andrews, London 1899.) This epigraph suggests a question of literary piracy, for the following is the epitaph which Benjamin Franklin proposed for himself:

"The body
of
BENJAMIN FRANKLIN
Printer
(Like the cover of an old book
its contents torn out
And stript of its lettering and gilding)
Lies here, food for worms.
But the work itself shall not be lost.
For it will, as he believed, appear once more,
In a new and more elegant edition,
Revised and corrected
by
The Author."

[3] 4 Burr. 2303, 98 Eng. Reprint 201 (1769). Boswell says that Millar was the publisher of Dr. Johnson's Dictionary. His patience was repeatedly tried and almost exhausted by Johnson's slowness in furnishing copy, particularly since Johnson had received his copy money a considerable time before he had finished the work. When the messenger who carried the last sheet to Millar returned, Johnson asked him, "Well, what did he say?" "Sir," answered the messenger, "he said, thank God I have done with him. "I am glad," replied Johnson, "that he thanks God for anything."

[4] 2 Brown PC 129, 1 Eng. Reprint 837 (1774).

The result of *Millar* v. *Taylor* and *Donaldson* v. *Beckett* was to establish the following propositions:

1. That at common law an author had the absolute property in his unpublished manuscript and the sole right first to print and publish.

2. That at common law this right was not lost by publication, but that after publication the author had a perpetual copyright.

3. But that by the enactment of the statute of 8 Anne, the previously existing common-law right was extinguished, and that, after publication, the author was precluded from every remedy not founded upon the statute.

The booksellers, relying on Lord Mansfield's opinion, had invested heavily in copies, assuming the existence of perpetual common law copyright. When the supposed right was held to be non-existent they petitioned Parliament for relief, but without success. Anyone who would like a few days' amusement and instruction might do worse than to read these decisions and debates.

The law remained in this position until 1854[5] when *Jefferys* v. *Boosey*[5] held that there never had been such a thing as common law copyright after publication.

In this country, in 1834, the Supreme Court, in *Wheaton* v. *Peters*,[6] held that no common law copyright existed after publication, and it may be regarded as settled that whatever rights an author has in the product of his brain exist, after publication, not by the common law, but solely by virtue of statute.

It must have taken a good deal of self-control for Dr. Fox to refrain from an entertaining excursion into literary history, but in a book designed primarily for use it was probably a wise decision.

Copyright is statutory and our statute is the Act of 1909, which, while an improvement over then-existing law, is pretty well out of date and needs revising. It was not until this act was passed that Congress exhausted its constitutional power and extended copyright to all the writings of an author. Previously there had been a limiting enumeration, e.g., books, maps, charts, dramatic or musical compositions, engravings, cuts, etc. The formalities required keep us out of the International Copyright Conventions. Every time it is tried to remove these barriers by a simple enactment, there is opposition, and the attempt is made an excuse to change everything, largely at the instance of interests with axes to grind. Then follow highly controversial committee hearings, and nothing is accomplished. A commission of experts acting under the Congressional committees could do a better job. But until our own statutes are intelligently revised, we must use the books written to expound foreign copyright acts to show the trend of modern laws on the subject and to avoid the few mistakes and ambiguities that foreign laws contain. Dr. Fox's book is useful in this respect.

The United States, in company with Russia, China, and some of the Latin American Republics, has failed to join the International Copyright Union to which other civilized nations adhere. Our failure is partly due to our domestic copyright law and policy, but, more fundamentally, I think, to a curiously hostile attitude toward literature and art long prevalent in this country, coupled with a fear of monopoly which plagues provincial minds. It is often forgotten, if it was ever realized, that the protec-

[5] 4 H. L. C. 815 (1854). It seems strange that the final settlement of the matter did not come until so late a date as 1854, but, as Mr. Birrell, in his lectures on the Law of Copyright has said, this is probably due to the fact that "after his first publication the British author usually disappeared, and if he reappeared it was in the pillory."

[6] 8 Peters (U.S.) 591 (1834).

tion given by copyright is what the word "copyright" suggests—the exclusive right to make copies. What is forbidden is copying an author's work. If there is no copying there is no infringement. Copyright is different from the right conferred by a patent. A patent gives an absolute monopoly, during its term, prohibiting the putting into use by others than the patentee of his patented invention. This is so whether the unlicensed maker, user, or seller has arrived at the result independently or by conscious imitation. The right under a copyright is quite different. The monopoly is limited to the right to prevent copying. There is no monopoly in the subject matter. The right of excursion extends to the intellectual effort expended on it—as Mr. Justice Holmes remarked of a portrait in *Bleistein* v. *Donaldson*:[7]

> But even if they had been drawn from the life, that fact would not deprive them of protection. The opposite proposition would mean that a portrait by Velasquez or Whistler was common property because others might try their hand on the same face. Others are free to copy the original. They are not free to copy the copy.

This, of course, is not monopoly in an offensive sense.

From the beginning, this country has had an illiberal attitude toward literary and artistic property, and an unwillingness to protect it. Protection has been made to depend, not on the creation of meritorious work, but on the literal compliance with irrelevant statutory formalities tending to discourage rather than encourage authorship, which the Constitution says is the reason for copyright.

By the statutes as they were before 1909, applicants for copyright were compelled to file a title page before publication, and, not later than the day of publication, two complete printed copies of the best edition of the work. A notice of copyright in precise form was required to be printed in every copy on the title page or the page immediately following. The work had to be printed and bound in the United States. A fee was charged. Copyright was thus made to depend upon the literal compliance with all of these formalities. Not one of them had anything to do with authorship or the encouragement of it, but quite the reverse. They were symptoms of a fear of literature and art by people who did not understand or appreciate them. It was not until 1909 that any of these requirements were relaxed and copyright made to depend not on paper work but on publication with the required notice of reservation. But the other formalities were retained and, in some respects, made more elaborate. They were made conditions precedent, not to the right, but to its enforcement by suit. The fear of monopoly still persisted.

Monopoly is an ugly word and has got a sinister connotation in the public mind. It is difficult to reclaim a word once it has a bad name. To call a thing a monopoly is like calling a person a convict. Of course copyright is a monopoly. So is all property—real and personal. They are monopolies because they involve the right of exclusion. But it is as illogical to apply the word monopoly to copyright as if it were a curse, as it is to apply it to the houses we live in or the clothes we wear. But this fear has possessed the public mind and is reflected in all our copyright legislation. It is this that has kept us, in company with Russia and China, out of the International Conventions.

The theory of copyright in every country but this is that people should be encouraged to produce intellectual work by giving an exclusive right for a limited time to profit from it. The idea is that, when a new work is produced, its producer has created something that did not exist before and by its creation has made his contribution to the public, and that he should then be protected. He has fulfilled his share of the

[7] 188 U.S. 239, 249 (1903).

bargain, and the people should do their part by securing him against unauthorized appropriation of it for a while—usually during his lifetime and for fifty years after his death. In short, he should be given a head start against competitors. But protection ought to depend on the creation of copyrightable subject matter—on authorship—not on filing a lot of forms. On this theory, when copyrightable subject matter—a book, a picture, or a piece of music—appears on the market, prima facie it belongs to someone and cannot be copied without his consent. If the author is alive or has been dead less than fifty years, the would-be copier must apply to him or his successors for permission to reproduce the work. This seems fair enough. The person who wishes to reprint a book, for example, which he did not write himself, must take the trouble to find out if the author is willing and to pay him what he asks for his permission. Copyrightable subject matter cannot be appropriated without authority. Copyright is treated like any other property. As Dennistoun, J., remarked in *Gribble* v. *Manitoba Free Press Co.*,[8]

> What "reasonable ground" can a direct copyist have for not suspecting that the work he copies to be the subject of copyright. . . . . The proper attitude of mind of a copyist toward a work that he copies is that copyright in the latter exists, unless he has evidence to the contrary.

Suppose that anyone who might fancy a house could move in without permission. The law assumes the house belongs to somebody. Naturally the would-be occupier must seek the owner, find out what the rent is, and give the owner a chance to look him over and decide for himself whether he would like him for a tenant. Recording of titles is a convenience for tracing owners, and there might be permissive recording of copyrights for the same reason. But to make ownership depend on recording, and not on creation, seems irrational, and to require printed notice of reservation, applied to personal property, seems quite absurd.

But our requirement is that a notice of copyright in a precise form and a certain place *must* appear on the copyright work or anyone can appropriate it. Copyrightable subject matter can be taken without liability, if it does not carry the magic words. It is our unwillingness to dispense with the requirements of notice that keeps us out of the International Copyright Union and deprives our citizens of the advantages of worldwide copyright automatically acquired by the creation of a work. The Conventions provide "The enjoyment and exercise of these rights shall not be subject to the performance of any formality."[9] We cannot ask countries who have modern laws to give to American citizens more liberal treatment than we are willing to accord to their nationals or for that matter to our own. This matter of notice as a condition to copyright is a survival of the old illiberal ideas that literature and art were somehow suspect and protection made as hard as possible and that it was meritorious and to the public interest to permit books, pictures, and music to be stolen, particularly when the author was so unfortunate as to be a foreigner. Also it was cheaper to steal the works of foreigners than to pay royalties to them or to Americans. In this way it was thought both might be encouraged to produce.

Every effort to correct the wrong has failed. It seems to me that the situation is discreditable and dishonest, and that we ought to be ashamed of ourselves.

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[8] [1931] 3 W. W. R. 570, at 580.

[9] Art. 4, Revised Berne Convention; art. 4, Rome Convention.

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