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INTERNATIONAL COPYRIGHT.¹

The proposed copyright treaty between England and this country, will, it is understood, be soon brought before the Senate. The question agitated, is one of no less interest to lawyers than to the body of men of letters at large. The literature of jurisprudence is extensive and valuable; it is besides, to its special class of readers, one of necessity. Any change which affects it, cannot be viewed with indifference by the profession. But there are higher grounds which claim our attention to the expected discussion. There appear to have become involved in it, principles of law, of honesty, and of right; principles which are among the foundation stones of that temple of justice, of which our profession are said, in the noble language of Ulpian, to be not the mere hired servants, but the very ministers and priests. Every lawyer has his own special task in the redress of private wrongs; but the dishonesty of a nation, its deliberate denial of an elemental principle of right, when such occurs, ought to call forth from the whole body of the bar, a free and energetic vindication, as of an attack upon a sacred trust committed to their charge. In our imperfect way, an exponent of this

¹ Letters on International Copyright, by H. C. Carey, Philadelphia, A. Hart, late Carey & Hart.

feeling, however foreign the subject might otherwise be to these pages, we claim the liberty of expressing here a total and emphatic dissent from the doctrines recently advanced by some who resist the adoption of the treaty in question, and in particular from those which will be found in the ingenious and able pamphlet, whose title is at the bottom of the preceding page.

We had hitherto supposed that this resistance to the claims of foreign authors, was founded rather in the antagonism of private interest, aided by the want of some special stimulus to call into action the moral sentiment of the country, than based upon any alleged grounds of reason or right. It has had, indeed, occasional justifications through a misapplication of the doctrines of free trade; as if the abolition of a tax on an imported article, were the same as the abolition of property in the article itself. And some who call themselves social reformers, have insisted on the duty of authors to labor without pay, on grand principles of fraternity; with about as much propriety as they could call on men to become fraternal butchers, and bakers, and tailors. But such reasoning could have had no weight with any intelligent body of legislators. Mr. Carey, with the adroitness of a veteran polemic, has now attempted to convert desultory opposition into a disciplined attack. As his pamphlet is addressed to a Senator of the United States, in reply to a request for information on the subject, and is the work of one of the first politico-economists of the age, it certainly demands serious and respectful consideration, whatever opinion we may have of its conclusions.

Let us consider, then, briefly, the objections which are urged to the treaty, in their order. The first of these is to its form. We must confess our inability to appreciate the grounds on which the authority of the executive to negotiate such a treaty is denied. A country can legislate, in the proper sense of the word, upon the rights of person or property of its own citizens alone. Those of the subjects of another power, it can neither confer nor curtail. Concurrent legislation on the same subject, is insufficient to authorize the reciprocal interference of the Courts of the two countries, as was established on the occasion of the separate abolition of the slave

trade by England and the United States. It is true that in matters of commerce, statutes of reciprocity have been occasionally passed, but these are open to the vital objection that there is nothing to bind either party to the bargain when made. The universal and well settled practice of nations in analogous matters, and, what is more, in this very case of copyright, has therefore been to make them the subject of treaty stipulation. Nor is the interference of our House of Representatives in any way needed, as seems to be supposed. Even were rights of our own citizens affected, even if an appropriation were needed, it is long settled, that if the matter be a proper subject of executive action, the House is limited in its assistance to carrying into effect the naked provisions of the treaty. But there is nothing of the kind here. It is no more than the case of the ordinary commercial treaty, which guarantees to the subjects of each contracting party, equal rights with those of the other. The want of publicity of the future discussion might be regretted under other circumstances, but it is on the present occasion of little importance. The subject has been so frequently before the public, in such a variety of shapes, that it may be considered now as thoroughly ventilated. And we may willingly intrust the rights of our country, in so simple a matter as the details of this negotiation, to the hands of the President and Senate, as we are obliged to do in matters of much more vital importance.

Dismissing this objection therefore, we proceed to consider Mr. Carey's grounds of opposition to the general purpose of the treaty. The most important of them is certainly a very broad one:—that the principle of copyright itself is ill-founded, and therefore not to be extended. A denial of the propriety of an exclusive right of an author in his works, is one which cannot now be admitted, since the question has long been settled by the legislation of England and of the United States. But though the plea of justification, to use a legal metaphor, is too late, the evidence may be admissible in mitigation. Let us see how far it is so.

Though the world has been long agreed upon the definition of property and the rights ensuing therefrom, what shall be con-

sidered as such, has varied considerably at different times. The Roman had his peculiar or Quiritarian ownership, as contradistinguished from that which was common to all men, or *juris gentium*. The shores of the sea, wild animals, a thousand other things, land itself, have in their turn been asserted or denied to be the subjects of property. But in the progress of civilization, one general and wise tendency is observable, which is to confer upon every thing, upon which human labor or thought has been exercised the characteristics of property, so far as it is capable of receiving them. Nature provides for all a vast mass of raw material. Whatever of useful or beautiful any man can shape out of it, by his brain, or his hands, he can rightfully claim as his own. The common sense of mankind has long seen, that the results of authorship must stand high in this list. Mental-toil, the labor of research, the creative power of genius, are too obviously a part of the great manufacture of society, to be neglected in the estimation of its products. It would be absurd, indeed, to claim for the savage a right of property in the fruit, which he carelessly plucks off the forest tree, and to deny it to the civilized man in the book, which has been the product of a life-time of labor and patient thought. In some shapes, certainly, the right of property in literary composition has always been recognized. The actor, the lecturer, the advocate, and the schoolmaster, have never had their claims to compensation denied. Even the minister, who preaches to all mankind the free message of mercy, has been said by the Apostle to "be worthy of his hire."

But the author, who amuses or instructs on a wider scale, and with a larger audience, has not always been so happy. How shall he find his ticket taker, where his box office? Society, while recognizing his abstract rights, has been unable to discover any more convenient or practical mode of protection for them, than by authorizing him to collect a sort of toll, as it were, on the multiplication of the copies of his work; just as itself can find no better way of compelling compensation for its governmental labors for the benefit of commerce, than by light house or port charges.

To this, Mr. Carey's answer is somewhat as follows:—Every book is composed of two parts, the ideas and facts which it contains, which form the body, and the language in which they are conveyed, which may be called the clothing. In the former, no copyright can be claimed, as they are the common property of mankind, the accumulation of ages of thinkers and observers, or the necessary result of their thoughts and observations. The latter is in its nature partial and temporary, and can confer only limited rights. Those who contribute the ideas and facts, cannot, it is said, in the nature of things, be paid for their labors. Those on the other hand, who collect and shape these accumulated labors for the benefit of society, stand in the light of middlemen, between producer and consumer. Now, as it is a law of social statics, that with the increase of production and consumption, the wages of the middleman must diminish, so at the present day, when readers are numbered by millions, and the domain of knowledge is so vastly extended, the office of the author has become of less economic importance. The legislation, for his benefit, should therefore be contracted and not expanded.

This ingenious and refined argument, is open to two serious objections—the premises are unsound, and the reasoning fallacious. In the first place, we cannot agree that the discoverer of a new idea or fact, has not any such property in his discovery, as to entitle him to payment for its use by others. The philosopher, who has found out a new law or fact in nature; the traveller, who in his journeyings has come upon an undescribed country, is not obliged to divulge the knowledge he has thus acquired, any more than a man who picks up a diamond by the wayside, can be compelled to throw it into the public treasury. He may make his terms with mankind, for the communication of the discovery to them, if they are willing to pay him his price for it. And if society has provided no adequate means for the enforcement of his right, it is only an evidence of the present imperfection of its machinery, and can with no propriety be urged as a reason for depriving him of such little compensation, as he may now get. But it will be said, another man might discover the same law, visit the same country.

True, but it would scarcely be considered a valid answer to the baker, who asked his wages from a customer, to say that a dozen others could have baked as good bread. Neither science nor bread making, certainly, is the property of any one man, but its products can very justly be so. Again, it is urged that no means are possible to prevent the communication of ideas and facts to the whole world, with or without pay, if they are once made public. Let us look at this practically. Mr. Dunn, in a long stay in China, collects a large museum, illustrative of the manners and habits of the Chinese, containing a great variety of objects, just as might have been done by any other resident in Canton. He exhibits it in this country, and charges a certain sum for admission to examine it. But he cannot prevent those who have visited it, from carrying away with them the new ideas and facts which they have acquired, nor from communicating them to others. Perhaps they might even be entitled to publish descriptive and illustrated catalogues of the exhibition itself,—though from this, it was said in the recent case of *Prince Albert vs. Strange*, they could be prevented by injunction. But would this be a ground for denying to Mr. Dunn, the right to enforce payment of the visitors at his museum? To take a ruder illustration, a lumber merchant sells his planks to persons who make from them a variety of articles, which they in their turn sell to others, and so on down a long series. Again, he is unfortunate enough not to be able to fence in his board yard, so as to guard it sufficiently from depredation, and a large quantity gets stolen from time to time. Is the variety of uses to which these same boards may be put, on the one hand, or their liability to theft on the other, a reason for refusing their owner the right to such pay as he can get for them, however inadequate? Certainly not. Then why, to take the lowest grade of authorship, should the man who has collected and put into the form of a book, a number of important facts which had been previously left unappropriated, be denied the right to receive pay for his book, because some who buy may use the same facts for another purpose, and others who do not buy, may steal. Finally, what matters it, that the domain of facts and ideas, from which in

some way every book must be made, is the common property of the human race. Yes, and so is the earth, the sea, the sky, but their products once in human hands, become individual property. Every artizan works with the accumulated skill of centuries. The sculptor, who digs his block of marble from the quarry, and carves from it a statue, claims no property in the laws of gravitation, attraction, and repulsion, or the chemical combinations which make the stone what it is; and he has learnt his art from Phidias. Even the very paper of this page is the slow deposit of five hundred years of toil, and in the brain and hand of those who cover its surface with these words, are working, unseen, the skill and thought of Guttenberg, and the thousand generations of his forgotten followers.

But setting all this aside, the argument itself has an inherent vice. The fallacy of division, to use the language of the logician, or the assumption that what is true of the separate parts of a compound notion, is true of the notion itself, is easy to fall into, though not always easy to detect. In the present instance, we disembarass ourselves of much liability to error, when we remember that in any real book, the form and the substance, "the body and clothing," are inseparable; or rather, that language is not the loose garment of thought, but its living and self-grown flesh and tissue. To answer one metaphysical argument by another, whatever may be the truth about the world of nature or of mind, we know of no pure or absolute facts or ideas. They all come to us embodied in speech, or in thoughts, which are words unspoken. They are, in short, only the product of the human organism acting upon the external world, as the rays of light owe their existence as such, to the atmosphere through which they pass. Were mankind in a normal state, this product doubtless would be the same in all. Every man would weep or smile at the changes of the drama acting around him, as his fellow did; the same aspirations, the same poetic thoughts, the same scientific deductions, could flash with equal brilliancy and power through the minds of all. In the primitive state, of which economists are fond of talking, each man was every trade in himself; he was his own butcher, baker, tailor, and

even priest. But the times of division of labor came, and it was found expedient and necessary to confine every one to some special craft. How is it with the economy of the mind? I am a lawyer, and obliged to devote myself to my trade. Poetry, philosophy, and religion, nevertheless, are necessary to the elevation and expansion of my being. I have no time to write a *Paradise Lost*, or a *Novum Organum*, or to interpret the sacred Oracles, if I could. I must therefore get some persons to do these things for me, whom, if I am happy enough to find, I must pay, as I do the baker, who saves me the necessity of making my bread at home. Providence, too, works with the progress of humanity; along with this need of developed society, minds become more and more diversely constituted, and special in their action. One man has an extraordinary aptitude for the discovery and collection of facts, which are useful to his fellows; the comprehensive reason of another, deduces from these facts wide reaching laws; a third has peculiar powers of observation, and can make the world laugh or weep over the follies or sorrows of life; the genius of a fourth, with deep insight into the truth of nature, can reproduce it in a harmonious form. In some, the faculty is self-made, in all it is useless without long and patient cultivation. Each brings into the common market, something which his fellows did not or could not produce.

A good book is, then, the fruit raised by the labor of the author's mind upon the soil of thought or fact. Is there any great difficulty in distinguishing the special menticulture of one man, to coin a word, from that of all others? Is it harder to discriminate between *Paradise Lost* and Robert Montgomery's *Satan*, or between *Macbeth* and *Spartacus*, than between the vegetables grown on adjoining farms? Rather less, we imagine, for turnips are not usually grown with title pages. If then this product of a man's thought is something peculiarly his own, created by his own labor, and specially distinguishable from every other thing of the same kind, if he can label and follow it, why cannot he vend it out to such of his neighbors as need the article, just as though it were a loaf of bread or a leg of mutton? There certainly can be nothing in the fact, that instead of one single book, the author has

a crop of some thousands of books for sale. To go back to the turnip, it would certainly be very absurd in the purchaser of one of these useful vegetables to claim the whole product of the field on which it was grown; much more for society at large to do so. Yet society, if it refused the author his exclusive right to sell his whole edition, because he has given one volume to the public, would not be a whit more just or wise.

We might carry this view much farther, if we had space. We can take only one illustration more. The author is a labor-saving machine; he offers to mankind trains of reasoning, and inductions of fact, ready done to hand. This is peculiarly so in our profession. The law writer, in years of labor and thought, collects the myriad decisions on some branch of the law, arranges them in a philosophic order, harmonizes their inconsistencies, deduces from them the principles which lie at their bottom, and by the hydraulic press of his mind, reduces the whole, like the preserved meats of the traveller, into a compact and portable form. What has been done by one, is done for all. The lawyer preparing for his argument, or in the hurry of a trial, instead of being obliged to spend precious time over unconnected volumes of reports, or to pay some other to do it for him, can turn at once to the text writer; and his materials for reasoning, his reasoning itself, is there fit for instant use. If we must call, with Mr. Carey, language the mere garment of thought, the good law-book is a sort of ready-made clothing store, where, on an emergency, the lawyer may find arguments and principles cut out and made up for every size and shape.

Take, then, the author in either light, as a producer or creator, the one who raises the raw material; or as the manufacturer or artizan who shapes it for more immediate use. There are labor, skill, and time employed, in either case; the stock and capital of the world are increased thereby, and it passes our comprehension to understand on what ground he is to be denied property in the article thus produced or shaped.

And let us remark here, on the very unfair application of the word "monopoly" to the rights of literary property, in Mr. Carey's

pamphlet. It is always easy and safe to fling invidious epithets at what we do not like. *Semper aliquid hæret.* But the phrase, however odious, is misapplied here. A monopoly is the exclusive privilege to use or sell what every one else has a just right to use or sell. But any man may make books, as any man may kill oxen, according to his capacity; and the competition in the former, is perhaps greater than in the latter trade. The right of property in the beef or books, when killed or written, is no monopoly. The author, indeed, has had, since the world began, the "exclusive privilege" of teaching mankind, of opening to them the treasures of science and philosophy, of enlarging the mind and improving the heart, and, in return, has been left to starve in some obscure corner—the object, too often, of contempt or dislike—and his children turned out beggars upon the world. This privilege is hardly a valuable one. The only monopoly of authorship, hitherto, seems to have been that of poverty and ridicule.

So, too, the objection that the greatest authors and those who have deserved best of the world, have been the poorest compensated, is an ungracious argument against the continuance of such rights as they do possess. The relations of capital and labor, however beautiful in the eyes of the economist the demand and supply law may be, do not now give such wages as are exactly just to the laborer. Must we make the laborer a slave? A vendor of quack medicines amasses a princely fortune—the man of real science languishes in obscurity. Must we abolish the compensation of both? No doubt if copyright were abolished to-morrow, vanity would still urge many into authorship; and the golden gifts of genius would still be scattered with lavish hand before a thankless world. But if the talent were wrapped in a napkin and hidden in the earth, who could complain? A just and liberal minded country, whose prosperity and happiness are so deeply owing to education, and to the labors of the ill-paid class of authors, instead of abolishing the laws of copyright because of their defective working, should rather seek now to widen and perfect the system, so that its wages shall henceforth be more righteously allotted, or at least, if all cannot

be paid just according to the burthen and heat which they have borne, that at the close of the day each man shall get his penny.

There is a very simple analogy which may place the matter in the clear light of common sense. Let us suppose some stranger to this planet, ignorant of the complicated system of civilized society, to be taken into the heart of a large city, and shown a vacant lot of ground of some few hundred feet square. He is told that, though its owner bought it for a song, and has since spent on it not an hour's labor—perhaps has never seen it; though a blade of corn could not be grown, nor a grasshopper find pasture on its surface, it has nevertheless become of enormous value, from the mere growth of the town and the necessities of a crowded population. He is informed, too, that this dormant owner can exercise over it the most absolute rights of property. It is his for ever, and he can give or sell it to whom he pleases. The stranger would probably exclaim in surprise: "That lot was once part of the common domain of the citizens, and has acquired all its value from their independent exertions. There are no fences to keep out intruders; any man can enter and occupy it as he likes. And how can that mere segment of ground be given from hand to hand? Every principle of political economy is against such a claim. The earth, its body, is common to all; the shape into which it is cut, its clothing, is temporary and subject to change." He would be answered, that whatever it might have been at first, land, from the necessities of society, had become an article of property, and an artificial system of law had been elaborated by human reason for its protection, by which all the difficulties which he had supposed were obviated in practice.

This illustration is a perfectly just and fair one. Habit has so long accustomed us to the complicated mechanism, but easy working of the law of real estate, that we have forgotten its origin and growth. There was a time when property in land was as difficult to understand and protect as property in literary compositions. And there are still social philosophers who deny the one as well as the other. The law of copyright is certainly not yet perfect, and perhaps needs half a century of alteration and improvement, before

it can be got to work with accuracy and freedom. What it will be then, we can as little predict, as Lord Coke could have foretold the simplicity of modern conveyancing. The wisdom of his age left with confidence the crude and misshapen jurisprudence of England to the plastic hand of time. Let us trust the law of literary property to the same great improver, and the world will soon rid itself of the disgrace of securing to the indolent landowner the ground which he has neither created nor improved, while it leaves almost unprotected those who spend their lives in the production of that which is the best and noblest triumph of human industry.

If then, as we think is clear to a demonstration, the products of literary labor constitute property of the most unmistakable character, and the trade of authorship is in no manner deserving of repression, the question of international copyright becomes one of naked right and wrong. Its policy is as little open to discussion, as that of the law of larceny. The day when a nation could claim to seize at its pleasure, the goods of such strangers as trade or accident brought to its shores, is long past. The right of the citizens of friendly powers to protection in person and property, has become a part of the law of nations, enforced, indeed, by no country more vigorously than our own. It might be a question, perhaps, were it not for the Statute of Anne, and the Acts of Congress, which have made copyright a matter of municipal regulation alone, whether an author's property, like that of any other citizen, were not already protected by the treaties subsisting between the countries.¹ At any rate there is but a narrow gulf between

¹ Mr. Carey states broadly, that the common law did not recognize property in copyright. The famous case of *Miller vs. Taylor*, decided otherwise, and if the House of Lords, in *Donaldson vs. Beckett* inclined to the contrary opinion, the point not being decided, a more liberal and enlightened view is now taken by the English Courts, and the doctrine of Lord Mansfield has been re-established. See *Boosey vs. Jefferey*, in the Exchequer Chamber, 6 Exch. Rep., 580. The case of *Wheaton vs. Peters*, in the Supreme Court of the United States, was an unfortunate decision, and has commanded but little adhesion. It can be regarded as an authority, only for the point actually in controversy. The argument that the absence of any legislative provision for the enforcement of a right, is a conclusive proof of the non-

their codes, and honesty and justice demand that this should be now bridged over. If there are slight discrepancies in the details, of the two, they are no greater than exist between their commercial or land laws, which are nevertheless reciprocally administered when occasion requires, by the tribunals of each. Literary piracy can be as easily abolished by the joint action of nations, as the slave trade, and books, if they choose it, be no longer made an exception to the eighth commandment.

Upon the subject of the present working of the law of copyright, Mr. Carey's letters contain many interesting facts, and much ingenious and forcible reasoning. But though his battery is heavy, and worked with much dialectic skill, it is not in range with the positions we have taken. That authors are prospering in the United States, in spite of the unfair competition of a literature, stolen, like the brooms of the old jest, "ready made," we are glad to be informed. Our readers, in particular, will learn with gratification, that the families of Judge Story and Chancellor Kent, derive a respectable income from the sale of their works; as a great many others do from the use of them. To be sure, by the side of these distinguished jurists, there were many merchants of New York and Boston, accumulating millions, with a considerably inferior exercise of mind, skill and labor. Yet such as it is, let us accept this improvement as a good omen, the *auspicium melioris aevi*. Nor as citizens, should we refuse to recognize the good which the country has derived from cheap knowledge, though dear honesty may consort better with our private consciences. Foreign authors will hint, perhaps, that the wholesale piracy of their works, is not the most reputable proof of our "wide spread intelligence;" as Drake might have relied on better evidence of piety, than his appropriating

existence of the right itself, hardly needs refutation. Contracts between authors and publishers, were in existence and enforced long before the Statute of Anne; but, if there was no property to be transferred, there was no consideration for the bargain, and it must have been void. There is no doubt, too, that there may be property in a mere fact or law, independently of the statute. Thus, the receipt for the composition of a medicine may be the subject of a trust. *Green vs. Folgham*, 1 Simons and Stuart, 398.

for home use the communion plate of half the churches of South America. But we must content ourselves with a fair summing up of our side of the account, without enquiring too curiously into the items of the other.

There is one practical argument urged in the pamphlet with some earnestness, which requires notice. It is this. Our own literary men, who it is assumed are well paid, do not need protection; and the treaty will do no real good to the English authors. The meagre compensation of the latter, says Mr. Carey, is owing to the small and diminishing class of readers in England, and the necessary or unnecessary expenses and profits of the booksellers. This unfortunate state of things is, it seems, to be referred entirely to centralization and free trade—two pet monsters of the author, with which, after very needlessly calling them out of their dens, he has a little parenthetical contest on his own account. Neither of these subjects we have time or desire to discuss. Protection has been so long defunct, that even a brief anatomical investigation of its principles would be unpleasant. But we may perhaps be permitted to suggest that the ignorance of England lies in her agricultural, and not in her manufacturing districts; and, next, that this ignorance is due in a great measure to the high price of books produced by the present restrictive system; for the absence of an international copyright amounts to protection to British publishers. Give England true free trade in literature, and we will supply her peasantry with cheap school books, as we do her manufacturers with cheap corn. The general evils of centralization, we are fully prepared to admit. Still it must not be forgotten, that it has made French literature what it is; nor, on the other hand, that England is becoming gradually de-centralized, by the growth of towns like Manchester, Liverpool and Birmingham. But, be this as it may, we are unable to perceive how the addition of the twenty publication centres of this country, to the two or three of Great Britain, can exaggerate the existing evils. Rather, it would seem, unless there be some hidden principle of political economy, to annul the conclusions of common sense, this is just the remedy which the disease must need.

It appears to us, indeed, that the results of the copyright treaty will be directly the reverse of Mr. Carey's apprehensions. Its effect must be to produce a competition between the booksellers of the two countries; and they who pay the most for the best article, and sell it cheapest, will get the market. The very economic argument of Mr. Carey, which we have before stated, tells fatally against him. The real middleman of literature is the publisher, who retails the productions of the author to the public at large. Increase the number of books, enlarge that of the consumers, and the profits of the middleman on individual sales will be diminished, and he must be compensated by larger operations. This, on the author's own showing, is the exact result of the vast increase of the reading public in this country. Such is the demand for books, and the competition of publishers, that it is they who seek the author, not he them, and his wages are proportionately higher. Now, it is easy to see that if we add the readers, writers, and booksellers of America to those of England, under an international copyright, the monopoly of the great publishing houses of the latter country must be broken down. They will be compelled to publish more cheaply, and to pay their authors better, under the penalty of having their business transferred to this country. As to the effect of the treaty upon our own authors, we may safely guess what their sentiments are. The small class who are employed in the editing of foreign books, as Mr. Carey supposes, to give the American publisher a copyright in them, though the subterfuge is ineffectual in law or fact, are the only ones who will not gain immediately by the change. But, though they exhaust his sympathy, to the entire exclusion of those who really suffer by the present state of things, they will soon find more profitable engagements, and be no longer heard to complain.

We have but one more remark to offer on this subject, for we fear we have already taxed our readers' patience, as well as our own space, too far. We submit that it is a disgrace to the moral sense of England and the United States, that the justice of an international copyright should have remained so long unrecognized, and a double disgrace, that when the national conscience has