The Hon: Society of Lincolns Inn

ON from the Author.

THE LAWS

OF

ARTISTIC COPYRIGHT

AND THEIR DEFECTS.

For the use of Artists, Sculptors, Engravers, Printsellers, etc.

BY

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"The history of errors, properly managed, often shortens the road to truth."

Sir Joshua Reynolds's 2nd Discourse.

JOHN MURRAY, ALBEMARLE STREET.

1853.

PRINTED BY
JOHN EDWARD TAYLOR, LITTLE QUEEN STREET,
LINCOLN'S INN FIELDS.

PREFACE.

No treatise appears to have been hitherto published on the subject of Artistic Copyright alone. By "Artistic Copyright" is meant that protection for his works which the British artist, whether sculptor, painter, or engraver, is entitled to receive.

That such a treatise is wanted, in consequence of the importance of such rights, will, it is hoped, appear in the following pages, wherein it will be found that, either from ignorance or non-observance of the existing laws of artistic copyright, artists, printsellers, and other proprietors of such rights, are placed in the greatest jeopardy as to property of that description.

As this work is chiefly intended for the guidance and information of persons interested in artistic copyrights, the primary object has been to state the law as to such rights as it is conceived to exist, and in so plain a manner that all those persons may understand their rights, remedies, and the mode of transfer of their property.

And that at the same time the work may not be without its use for the legal profession, the views advanced

have in most instances been supported by reference to decided cases.

With regard to the defects of the existing laws of artistic copyright, some suggestions have been made for their remedy; an unusual plan, it may be said, in a work of this nature, and which has only been attempted after considerable hesitation, because it was felt that the necessity for an amendment of such defects is alike urgent and important to a large and meritorious class of artists, whose efforts in the cultivation of the Fine Arts appear destined to have a most important effect on the moral and material welfare of the British people.

1, Tanfield Court, Temple,
23rd October, 1853.

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ARTISTIC COPYRIGHT.

INTRODUCTION.

1. The Fine Arts a universal language. Report of Select Committee of the House of Commons on Arts and Manufactures.—2. Recommendations of the Committee.—3. The Ornamental Designs Acts were the result of their inquiry.—4. Neglect of the recommendation of the Committee to establish a Copyright Tribunal. Reasons in favour of its establishment. Great and rapidly increasing importance of Artistic Copyright.—5. Equitable Jurisdiction requisite to be given to Courts of Common Law as under the Patent Law Amendment Act.—6. Popular error as to Artistic Copyrights.—7. Ignorance of the Laws of Copyright no legal excuse for infringing them.—8. Objects of this Work.

1. The fine arts of sculpture, painting, and engraving, like music, are a universal language. Artistic works have also this additional and direct advantage, that, while they afford employment and support to those who produce them, they form a large and permanent addition to the material wealth of the people in whose possession they remain.

The revolutions on the European continent, and their reaction, have dealt a heavy blow to the artistic profession there, especially in Germany and France. In the British Islands and the United States, freedom and wealth—those elements so important to the tranquillity and encouragement of the artist—are to be found in the most eminent degree, and should they continue to progress, there can be little doubt that most of the finest artistic talent in Europe will gradually be attracted to London and New York as the great centres of commerce, for history furnishes various instances which prove the merchant to have been the pioneer of the artist—wealth being created by commerce, that wealth produces luxury, and luxury the perfection of the arts[1].

[1] See 'L'Esprit des Lois,' par Montesquieu, liv. 21, chap. 6.

The important bearing of the Fine Arts upon our manufactures has long been felt by those, whose efforts for the advancement of art in connection with manufactures have, to some extent, been crowned with success by inducing the Legislature to afford its valuable assistance in investigating and promoting the subject.

On the 10th of February, 1836, a Select Committee of the House of Commons was appointed to inquire into the best means of extending a knowledge of the arts, and of the principles of design, among the people (especially the manufacturing population) of this country; also to inquire into the constitution, management, and effects of institutions connected with the arts. The Committee divided the subject of their inquiry into the following parts,—1. The state of art in this and other countries, as manifested in their different manufactures.—2. The best means of extending among the people, especially the manufacturing classes, a knowledge of, and a taste for art.—3. The state of the higher branches of art, and the best mode of advancing them. The investigations of the Committee were chiefly confined to the first and second of these subdivisions of the subject; but several of the most eminent architects, painters, and engravers[1] were examined before the committee, and much interesting evidence elicited respecting the Royal Academy[2]. The

[1] Viz., the Baron Von Klenze (architect to H. M. the King of Bavaria) and Messrs. Cockerell, Donaldson, Wilkins,—Sir M. A. Shee, and Messrs. Hilton, Martin, Haydon, Howard, Hurlstone, Reinagle, R. T. Stothard, Clint,—Burnet, Landseer, Pye, and Wyon.

[2] See that especially of Sir M. A. Shee and other members of the Royal Academy, as well as documents produced by them and printed in the Appendix to the Report. The origin and institutions of the Royal Academy are not given in the evidence taken before the Committee. It appears that the Royal Academy is not a chartered Society, as it is generally supposed to be, but was and is a *private* unincorporated society, first established in 1768 under the patronage of George the Third, in opposition to "The Society of Artists of Great Britain," to which that sovereign had granted a charter in 1764, and which was speedily ruined by his patronage of the Royal Academy. See 'Patronage of British Art, by John Pye,' 1845, in which that celebrated engraver has collected a mass of interesting details connected with his subject, and especially the origin and history of the Royal Academy. See also, as to the institutions of the Academy, 'Abstract of the instrument of institution and laws of the Royal Academy of Arts in London, established 10 December, 1768.' This was published in 1797. Another, but very abbreviated and imperfect work of the same description, was published in 1815; both were printed by the printer to the Academy.

Committee made their Report to the House in August, 1836, in which they stated that, "to us, a peculiarly manufacturing nation, the connection between art and manufactures is most important; and for this merely economical reason, (were there no higher motive,) it equally imports us to encourage art in its loftier attributes, since it is admitted that the cultivation of the more exalted branches of design tends to advance the humblest pursuits of industry; while the connection of art with manufacture has often developed the genius of the greatest masters of design[1]." And after most justly noticing with regret the neglect of any general instruction, even in the history of art, at our Universities and Public Schools,—and the imperfect protection afforded by the Copyright Acts in favour of designs and sculpture, the Report then proceeds with this most important observation and suggestion: "Whatever be the legal latitude of these Acts, the expensiveness of a remedy through the courts of law or equity is a virtual bar to invention, and almost affords impunity to piracy in art. The most obvious principle of any measure enacted for the protection of invention appears to be the constitution of *a cheap and accessible tribunal.* The French have long possessed a court of this kind,"—the *Conseil des Prud'hommes*, the constitution of which is developed in the evidence given by a distinguished witness, who was also one of the members of the Committee[2]. These *Conseils* "form a kind of jury or board of arbitration composed of master-manufacturers and workmen, empowered to decide on priority of invention, as well as on any other subjects connected with the manufactures." In addition to cheapness, the greatest promptitude of decision is another obvious element in the constitution of such a tribunal. For this and for other reasons a *system of registration* appears to be indispensable[3]."

2. In presenting their Report to the House, the Committee[4] expressly recommended the resumption of the inquiry in the next

[1] See "Report of the Select Committee on Arts and their connection with Manufactures," p. iii., published at the Parliamentary Paper Office, Great Turnstile, Lincoln's Inn Fields.

[2] Dr. Bowring. See part 2, p. 7 et seq., of the Minutes of Evidence.

[3] See the Report, p. vii.

[4] The names of the members who were present at the meetings were Mr. Ewart, chairman; Dr. Bowring, The Lord Advocate, and Messrs. Brotherton, Davenport, Henry Thomas Hope, David Lewis, John Parker, Pusey, and Scholefield.

session of Parliament. This recommendation, if acted upon at all, has unfortunately not been productive of any additional Report.

3. But a very important result followed the investigations of the Committee. Two Acts were passed in 1839, which were repealed and the law on the subject consolidated and amended in 1842, giving considerable additional protection to designs for manufactures, and partially establishing the valuable system of *Registration* recommended by the Committee.

4. Their equally important suggestion of *a cheap, accessible tribunal*, for the benefit of persons interested in inventions, has not hitherto been carried into effect by the Legislature. It is true that to some extent the establishment of the County Courts has supplied a cheap and accessible tribunal to the proprietors of Copyrights, but these Courts are far from meeting the requirements of the case in most instances. "As to the state of the higher branches of art," which subject, as we have seen[1], was only partially investigated by the Committee, the following particulars, derived from the catalogues of the London Exhibitions during the present year 1853, will afford some evidence of the number of persons[2] engaged in the production of works of art, chiefly sculpture, paintings, and drawings; and the consequent importance of the subject of Artistic Copyright under the existing most defective Sculpture and Engraving Copyright Acts.

	Objects.	Artists.
1. Winter Exhibition of Artists' Sketches and Drawings	280	129
2. British Institution	589	388
3. Portland Gallery	410	115
4. Suffolk Street	750	349
5. Old Water Colour	309	48
6. New Water Colour	365	57
7. Royal Academy[3]	1465	866
Total	4168	1952

[1] Vide supra, p. 2.

[2] It should be observed that although some artists exhibit at more than one Exhibition, others do not exhibit at all; especially that most numerous body who are occupied in the various processes of engraving, and making designs for woodcuts and other engravings.

[3] Of these works 152 are the productions of members of the Royal Academy, exhibited by 47 of the Royal Academicians and Associates of that Institution.

Besides this large number of objects exhibited, there are hundreds of works annually refused at the various Exhibitions for want of sufficient space,—there are also annual exhibitions of pictures and other objects of art in many of the large towns in England as well as in Edinburgh and Dublin,—and yet the whole of the objects so exhibited form but a very small amount of those annually produced in the United Kingdom, of which engravings of all descriptions form a large proportion; and some idea may be formed of the extent to which thearts of sculpture, painting, and engraving are already cultivated and encouraged by the British people.

It should also be borne in mind how interwoven with, and dependent upon the proper cultivation of the fine arts, a very large class of our manufactures are become[1], and to a vast extent must in future depend, if we are not to be beaten by other nations in the race of manufacturing industry in all the markets of the world. The capital embarked in our manufactures is so great, and there are so many millions of souls dependent for their daily bread upon the improvement[2] and consumption of those manufactures, that it is scarcely possible to overrate the importance in connection with them of the fine arts of design and colour. The extent to which the manufacturing industry of this country has availed itself of the benefits in favour of useful and ornamental designs, is evidenced by the fact, that since the passing of the Acts of Parliament for the protection of such designs in 1839, and the establishment of a system of registration thereof, upwards of 95,000 designs have been registered under those Acts[3].

[1] "A just feeling in the fine arts is an elegant acquirement, and capable of cultivation. Drawing is necessary to many pursuits and useful arts: Locke has included it amongst the accomplishments becoming a gentleman; and we may add, it is much more useful to the artisan. Good taste and execution in design are necessary to manufactures, and consequently they contribute to the resources of a country. It is a happy characteristic of the present times that a love of the fine arts is becoming more and more prevalent among the affluent; but still rich furniture—mere ornamental painting and gilding, usurp the place of art properly so called. For the improvement of art there must be a feeling in the public in correspondence with the artists' aspirations."—The Anatomy and Philosophy of Expression as connected with the Fine Arts, by Sir Charles Bell, pp. 1, 3, 11.

[2] "L'effet du commerce sont les richesses; la suite des richesses, le luxe; celle de luxe, la perfection des arts." See L'Esprit des Lois, par Montesquieu, liv. 21, chap. 6.

[3] The numbers up to 20th August, 1853, have been 3499 Useful, and

It was the same Committee which, as before stated, in 1836 reported in favour of a system of registration of designs that also recommended the establishment of an efficient, cheap, and accessible tribunal for the protection of the proprietors of designs. The positive necessity of such a tribunal for designs of all descriptions, whether artistic or useful, and the wisdom of the Committee in recommending it, must surely be apparent from the facts above stated[1]. Is it not a denial of justice to compel the proprietor of a copyright, however trifling in value, to involve himself in the anxiety and expense of a Chancery suit in order to obtain effectual redress for an invasion of his right? He may sue the offender at law for damages or penalties, but the only efficient remedy at once to stay the injury—namely, an Injunction, is not to be obtained except by the costly aid of the Court of Chancery.

92,100 Ornamental designs. The small number of Useful designs registered is said to be attributable to the beneficial working of the Patent Law Amendment Act of 1852.

[1] And if such a tribunal be needed in favour of the proprietors of copyrights in artistic and useful designs, it certainly is equally requisite in favour of literary and musical copyrights. In support of this assertion the following circumstances may be stated, as being within the author's own knowledge. Mr. Boosey, the well-known publisher of foreign music, has, during the last eighteen years, been more or less constantly involved in litigation, and almost exclusively for the purpose of protecting his copyright in Bellini's celebrated opera 'La Sonnambula,' the only question of law in the case really being *whether under the statute of Anne an alien composing a work abroad could acquire or confer a copyright in it in this country if first published here.* Let any one imagine the cost and anxiety of being a party to numerous actions at law and Chancery suits to determine this question, and yet Mr. Boosey was placed in the position of either allowing others to deprive him of his profits derivable from the copyright in this opera, or to avail himself of the costly and cumbrous machinery open to him for protection. In two actions which Mr. Boosey tried in the Queen's Bench and Common Pleas, those Courts were of opinion that an alien could acquire a copyright under such circumstances as those above stated, and that consequently Mr. Boosey, as the assignee of the copyright in 'La Sonnambula,' was entitled to protection from the piracy of it. But in a third action which Mr. Boosey tried in the Exchequer, that Court differed in opinion from the Queen's Bench and Common Pleas. Their judgments were however confirmed on his appeal to the Exchequer Chamber, but from that judgment the defendant has appealed to the House of Lords, where the question will be finally set at rest when the appeal is heard. Messrs. Murray, Cocks, Chappell, and other large publishers, have also been heavy sufferers in the same way, and upon the same question. Assuredly the British law of copyright is

5. Until 1852 the proprietors of patents for inventions were placed in the same position; but by the 42nd section of the Patent Law Amendment Act, passed in that year, the judges of the superior courts of record at Westminster and in Dublin are empowered to make orders for injunction, inspection, and account,—to that extent consequently blending the equitable with the legal remedy of the proprietor of the patent. It is earnestly to be hoped that a like salutary enactment will be made in favour of the proprietors of all descriptions of copyrights, and that it will not be confined to the superior courts.

6. A very general but erroneous notion appears to prevail as to the purchase of copyrights of pictures for engraving. A custom[1] is said to have become usual as to such copyrights as between artists and the purchasers of their pictures, and it is supposed by such persons that the alleged custom in question is the law on the subject, and is to govern the artist's rights; nothing can be more incorrect. As the law stands, all copyrights are dependent on the various Acts of Parliament under which such rights exist, and consequently those statutes alone define the mode which is to be pursued in order to acquire and transfer a valid copyright. No custom of a profession or trade can be allowed to overrule an Act of Parliament[2]. The subject is of much importance, yet

an exception to the following observation upon the commercial spirit of the English:—"D'autres nations ont fait céder des intérêts du commerce à des intérêts politiques; celle-ci a toujours fait céder ses intérêts politiques aux intérêts de son commerce."—L'Esprit des Lois, par Montesquieu, liv. 20, chap. 7.

[1] As to this alleged custom see *infra*, pp. 39, 40.

[2] As illustrative of this may be mentioned the erroneous practice which formerly prevailed amongst the booksellers as to the purchase of literary copyrights. Prior to the Copyright Act of 8 Anne, c. 19, the copyright existing at common law was a perpetual right; but by the celebrated case of *Donaldson* v. *Beckett*, decided by the House of Lords in 1774, it was held that such common-law right was taken away by that statute. This created great alarm amongst the booksellers, who immediately presented a petition to the House of Commons, stating their previous belief that such statute did not interfere with their common-law right: that they had therefore for many years past continued to purchase and sell such copyrights in the same manner as if such Act had never been made; that large sums had been invested in the purchase of ancient copyrights not protected by the statute of Anne, so that the support of many families in a great measure depended on the same; *that the petitioners would be great sufferers through their involuntary misapprehension of the law*, and therefore praying the House to grant them relief. A Committee was accordingly obtained, and

the public, as well as most artists, appear to be unacquainted with the laws upon which the copyright in their works depends.

7. And here it should be observed, with reference to the several Acts of Parliament upon which artistic copyright is based, that "every man is presumed to be cognizant of the statute law of this realm, and to construe it aright; and if any individual should infringe it through *ignorance*, he must nevertheless abide by the consequences of his error. It will not be competent for him to aver, in a court of justice, that he has mistaken the law, this being a plea which no court of justice is at liberty to receive[1]."

8. The object of this work will therefore be—1. Slightly to trace the principles upon which it is conceived that artistic copyright should be based, and the existing British legislation as to such copyrights. 2. In a plain manner to state the law of copyright in designs, engravings, and sculpture, so that every artist may know his rights, remedies, and mode of transfer of such rights. 3. To point out the chief defects of the present Acts of Parliament known as the Engraving, and Sculpture Copyright Acts; and 4. to suggest some amendments in the laws of artistic copyright for the security of the proprietors of such rights and the consequent advancement of British art.

a Bill for the relief of the booksellers passed by the House of Commons, but it was thrown out in the House of Lords.—See 'Lowndes's Historical Sketch of the Law of Copyright,' pp. 58–59.

[1] Broom's 'Legal Maxims,' p. 201, 2nd edition, citing Sir W. Scott in *The Charlotta*, 1 Dods. R. 392, and Lord Hardwicke, C., in *Middleton* v. *Croft*, Stra. 1056; see also per Maule, J., in *Martindale* v. *Falkner*, 2 C.B. 706.

CHAPTER I.

OF THE PRINCIPLE UPON WHICH ARTISTIC COPYRIGHT SHOULD BE BASED; AND OF BRITISH LEGISLATION IN RESPECT OF SUCH COPYRIGHTS.

1. The definition of Artistic Copyright.—2. Principle upon which it should be based.—3. Observations as to British Legislation in respect of Artistic Copyrights.—4. The First Copyright Engraving Act. Obtained by Hogarth. His commemoration of the event.—5. Insufficiency of the Act.—6. Its Amendment in 1767.—7. And again in 1777. In 1836 Ireland was included in the Copyright Engraving Acts. And in 1852 those Acts were extended to "Prints taken by Lithography or any other Mechanical process."—8. These five Acts comprise the Painter and Engraver's only protection.—9. The Sculpture Copyright Acts.

1. The definition of the words "Artistic Copyright," as used in this pamphlet, is the sole and exclusive liberty of multiplying copies of any work which is the subject of copyright under the Engraving, and Sculpture Copyright Acts.

There is no authority which proves that such a right in works of that description exists by the common law; although, upon principle, there is the same ground as in the case of literary copyright[1] for contending that it does so exist, or at all events did, prior to the statutes on the subject.

2. The principle upon which it would seem all copyright should be based is that, so far as it may not be injurious to the public weal, the inventor of a work is entitled to all the benefits of his invention and the labour and cost he has bestowed upon it; and the question to be practically solved by the Legislature is, what period of exclusive enjoyment is adequate to secure such benefits to the author.

Every member of a community must necessarily sacrifice some portion of his abstract rights for the public good, and inasmuch

[1] See *Millar* v. *Taylor*, 4 Burr. 2303; *Donaldson* v. *Beckett*, ib. 2408; also the observations of Lord Campbell, C.J., in delivering judgment in *Boosey* v. *Jefferys*, 20 L. J. Ex. 354.

as a perpetuity in very many inventions would entail a serious obstruction to the progress of art or manufactures, it ought to be a question of deep importance for the Legislature to determine as between the inventor and the public, how far the interests of the latter can justly demand a surrender of the rights of the former. In every case "it is a mixed question of policy and justice, with regard to which no positive rule can be laid down[1]," beyond that above stated, and that the rights of the inventor should not be trenched upon by the Legislature beyond the limit which the just protection of the public interests demands.

3. Inventions being at length recognized as property—and a property, it may be said, which is entitled to the highest consideration, inasmuch as it is the creation of *intellectual* labour—the legal history of copyrights in this country affords a striking example of the following most truthful comment upon the peculiar genius of the English people, made by one of the most profound historians and statesmen of modern times:—"Quiconque observera un peu attentivement le génie Anglais sera frappé d'un double fait: d'une part, de la sûreté du bon sens, de l'habileté pratique; d'autre part, de l'absence d'idées générales et de hauteur d'esprit dans les questions théoriques. Soit qu'on ouvre un ouvrage Anglais d'histoire ou de jurisprudence, ou sur toute autre matière, il est rare qu'on y trouve la grande raison des choses, la raison fondamentale[2]." And thus we find the Legislature of this great country, in dealing with subjects of copyright of all descriptions, instead of recognizing as a fundamental principle the absolute right of persons to derive all the benefits they can obtain from their inventions and works, subject only to such limitations as the public welfare demands, absolutely reversing that principle by practically treating works of invention as public property, and granting the inventors most inadequate periods of copyright. Hence, in the case of literary copyrights, in which by the common law it has been said that the authors had a *perpetuity*[3], the statute of Anne cut down that perpetual right to the

[1] See Curtis on Copyright, 25.

[2] See M. Guizot's 'Histoire générale de la Civilisation en Europe,' p. 402, 5th edition.

[3] See opinion of Sir Samuel Romilly, cited in Lowndes on Copyright, p. 69; also the cases supra, p. 9.

short term of fourteen years, and since that time instalments of justice have with the greatest difficulty[1] been wrung from the Legislature. It would indeed be difficult to exaggerate the importance of fostering the arts of sculpture, painting, and engraving, especially in this great manufacturing country[2]—every one acquainted with the subject knows this; and yet it is not too much to say that the existing legislation for the professed protection of artists is, to use the mildest term, most inadequate. Let any one who doubts this compare the Acts printed in the Appendix to this Book, with that portion of the Code Napoléon comprised in the "Code de la propriété industrielle," and especially the first article, which is thus honestly, tersely and comprehensively worded: "Toute découverture ou nouvelle invention, dans tous les genres d'industrie, est la propriété de son auteur; en conséquence, la loi en garantit *la pleine et entière jouissance:*" that is, during the term for which the inventor takes out his patent.

4. In 1735 the first Act relating to copyright in the fine arts was passed; and it is a remarkable fact, that after the lapse of

[1] The passing of the last literary Copyright Act in 1842 was mainly attributable to the generous and unwearied exertions of one of the most distinguished authors of modern times, Sir Thomas Noon Talfourd; and several brilliant speeches he made in Parliament in favour of the measure may be ranked amongst the happiest efforts of his genius.

[2] "The estimation in which we stand in respect to our neighbours will be in proportion to the degree in which we excel or are inferior to them in the acquisition of intellectual excellence, of which trade and its consequential riches must be acknowledged to give the means; but a people whose whole attention is absorbed in those means, and who forget the end, can aspire but little above the rank of a *barbarous* nation. To him who has no rule of action but the gratification of the senses, plenty is always dangerous; it is therefore necessary to the happiness of individuals, and still more necessary to the security of society, that the mind should be elevated to the idea of general beauty, and the contemplation of general truth: by this pursuit the mind is always carried forward in search of something more excellent than it finds, and obtains its proper superiority over the common senses of life by learning to feel itself capable of higher aims and nobler enjoyments. In this gradual exaltation of human nature every art contributes its contingent towards the general supply of mental pleasure; whatever abstracts the thoughts from sensual gratifications, whatever teaches us to look for happiness within ourselves, must advance, in some measure, the dignity of our nature." *Vide* Sir Joshua Reynolds' 9th Discourse. Those who are desirous of seeing a grand school of British Art established will also do well to read 'The True Principles of Beauty in Art,' by James Fergusson.

nearly one hundred and twenty years the mode of obtaining an Act of Parliament and its preparation should remain in the same lamentable state in which it then was, that is, that the obtaining an Act to accomplish a measure of justice of great benefit to the public, and also the cost of such Act, may be thrown upon a private individual—and that the Government is still without a permanent and efficient staff at its command, whose duty it should be to prepare all public statutes.

William Hogarth was not only the father of British art, but to him also is the honour due of being the first protector of its artistic invention and industry. Coarse and vulgar as so many of his works are, yet they were admirably suited to the period in which they were produced; and their intense vigour, truth, and nationality at once spoke home to the public mind, and laid the foundation of that love for art which has been steadily increasing amongst us ever since.

Needy artists and printsellers soon fastened themselves upon the genius of Hogarth by pirating his *designs*; and for his own protection and that of other persons similarly situated, he at length employed a gentleman to draw an Act on the subject, which was ultimately passed by Parliament, the 8 Geo. II. c. 13.

On the Act being passed, Hogarth published a small print with emblematical devices and the following inscription:—"In humble and grateful acknowledgment of the grace and goodness of the Legislature, manifested in the Act of Parliament for the encouragement of the arts of designing, engraving, etc., *obtained by the endeavours, and almost at the sole expense, of the designer of this Print* in the year 1735; by which not only the professors of those arts were rescued from the tyranny, frauds, and piracies of monopolizing dealers, and legally entitled to the fruits of their own labours, but genius and industry were also prompted by the most noble and generous inducements to exert themselves; emulation was excited, ornamental compositions were better understood; and every manufacture where fancy has any concern was gradually raised to a pitch of perfection before unknown, insomuch that those of Great Britain are at present the most elegant and the most in esteem of any in Europe[1]."

5. But poor Hogarth lived to see the inefficiency of his Act of Parliament, which he had intended should protect not only

[1] Biographical Anecdotes of W. Hogarth, p. 39, 3rd ed.

the artist, but also his patron. A printseller employed an artist to make a design and engrave it. The print from that engraving being pirated, upon a Bill filed by the printseller for discovery and relief, the Lord Chancellor held that the plaintiff's engraving was not within the protection of the Engraving Copyright Act, it not being made from his, the printseller's *own* design, but from that of the artist whom he employed to make it[1].

6. In 1767, after the death of Hogarth[2], another Statute, the 7 Geo. III. c. 38, was passed to amend the previous Act and also to vest the Copyright of Hogarth's Engravings in his widow for an additional term of years. This concession to his relict was at least a tribute of national respect to the memory of the great artist, and as such may be hailed as a bright page in the records of the British Legislature, affecting the inventive talent of the people of this country—the brighter because it appears to be almost the only one where such an instance of justice and respect in favour of an artist is to be found in our Statute-book.

7. In 1777, by the 17 Geo. III. c. 57, the two previous Acts were further amended; and it was only so recently as 1836, that the English Engraving Copyright Acts were extended to Ireland by the 6 and 7 Will. IV. c. 59. Up to that time engravings published in England might be, and were, pirated in Ireland with perfect impunity; and those first published in Ireland were in the same manner subject to piracy in England. In consequence of doubts being entertained whether the provisions of these Copyright Engraving Acts extended "to lithographs and certain other impressions," in 1852 by the 15 Vic. c. 12, s. 14, it was declared that they were intended to include "prints taken by lithography, or any other mechanical process."

8. These five Acts form the only recognized protection which the British painters and engravers possess against the piracy of their works: they are printed in the Appendix hereto. Let any one read those Acts, and then say whether or not further Legislation is not required in favour of the arts of painting and engraving.

9. The same observations apply with nearly equal force to the

[1] By Lord Hardwicke, C., in *Jefferys* v. *Baldwin*, Amb. 164, 2nd ed. by Blunt.

[2] He died 26th October, 1764, aged 67, and is buried in the churchyard at Chiswick, where a monument is erected to his memory.

existing legislation in favour of sculpture. Assuming that the sculptor had no copyright at common law up to 1798, it appears that his works were unprotected from piracy. In that year the first Act was passed which protected the copyright in sculpture; this clumsy piece of legislation[1] was the 38 Geo. III. c. 71, and was amended in 1814 by the 54 Geo. III. c. 56. How practically inoperative these Statutes have been for the purpose intended by the Legislature, is best evidenced by the notorious piracy of the most celebrated works of sculpture; yet they formed the only shadow of protection the sculptor had to rely upon down to 1850, when, by the 13 and 14 Vic. c. 104. s. 6, his works may be brought within the operation of that Act by registering them amongst the ornamental and useful designs. These three Acts therefore comprise the legislation in favour of works of sculpture—a fine art of the highest order, and which from the dawn of civilization appears to have commanded the homage of mankind. As we look with admiration on the finest Greek marbles and bronzes, and are reluctantly compelled to admit their matchless superiority when compared with anything that has since been produced, how little do we pause to reflect on the circumstances under which Greek sculpture was carried to such perfection—when the highest honours and rewards attended the successful productions of the artist. "But the time is past when the people knelt down before the work of a sculptor's hands; when the Amphictyons, the council of all Greece, gave him solemn thanks, and assigned him a dwelling at the public expense in every city[2]." What a painful contrast this affords to the existing legislation in favour of the genius and industry of *British* sculptors!

[1] This Act called forth the following witticism from Lord Ellenborough, C.J., at the trial of an action for piracy of a bust, and where the plaintiff was nonsuited:—"These artists must again apply to Parliament for protection; and they had better not *model* the new Act themselves, as they appear to have done the former." See *Gahagan* v. *Cooper*, 3 Camp. 114, A. D. 1811. Sculptors appear to have considered the piracy of their works as the least of two evils, for this is the only reported case under the Sculpture Copyright Acts.

[2] See 'The Anatomy and Philosophy of Expression as connected with the Fine Arts,' by Sir Charles Bell, p. 9.

CHAPTER II.

AS TO COPYRIGHT IN DESIGNS, ETCHINGS, ENGRAVINGS, MAPS, CHARTS, AND PLANS, MADE AND FIRST PUBLISHED IN GREAT BRITAIN OR IRELAND.

1. As to the number and mode of interpreting the Engraving Copyright Acts. The definition of "Copyright."—2. The territorial extent of protection the Engraving Acts afford.—3. The works entitled to Copyright now include all prints or impressions, whether obtained by means of engraving, "lithography, or any other mechanical process." The extent of Copyright, or term of years for which it continues.—4. The *conditions* on which Copyright is granted by the Acts. Various cases decided as to such conditions.—5. Danger of publishing "proof impressions before letters."—6. The works not entitled to Copyright. Of claims to Copyright in pictures if not engraved. How to secure the Copyright in a picture. Danger in exhibiting pictures before they are engraved. Engravers not entitled to retain proofs for their own use. Death discharges their executors, etc., from their testators' contracts to engrave a work. The forgery of pictures.—7. The piracy of Copyright. Different descriptions of piracy. Copying the whole engraving. Copying a part of it. Copying the title. Cases as to the piracy of maps, etc. Liability of printsellers, etc., for selling pirated copies of prints.—8. Remedies of proprietors of Copyright in cases of piracy. Proceedings at law. Evidence for the plaintiff. Evidence for the defendant. Proceedings in equity: injunction.—9. The transfer of Copyright. Prevailing practice amongst artists as to Copyright in their pictures for purposes of engraving. Various modes of transfer of Copyrights. Practice amongst printsellers: its dangers.

1. *The number, and mode of interpreting, the Engraving Copyright Acts.*—Having previously stated[1] that there is no decision which proves copyright in the works of the designer and engraver to have existed by the common law, it follows that such right as it now exists has been the creation of the Legislature, and depends upon the *five* Acts of Parliament on the subject. The first four of those statutes are known as "The Engraving Copyright Acts," and in the construction of any one of these

[1] Vide supra, p. 9.

five Statutes the Court will give effect to the intention of the Legislature to be collected from all of them[1].

There may be, and usually are, two copyrights connected with every engraving—one in the work of the engraver—the other in the picture or design engraved; but copyright in the latter only exists for the purposes of engraving.

Copyright under the Engraving Copyright Acts therefore consists in the sole and exclusive liberty of multiplying copies of a picture or design by any process of engraving, lithography, etc., and to secure such right, certain important *conditions* must be performed, which will be hereafter stated.

2. *The territorial extent of protection afforded by the Engraving Acts* appears to be limited to Great Britain and Ireland[2], exclusive of the Colonial or any other portion of the British dominions; as that protection is expressly confined to such prints as have been "engraved, etched, drawn, or designed in any part of Great Britain[3]" or Ireland[4]. If so engraved, etc. out of the United Kingdom, it therefore appears that no copyright can be acquired under the Acts in question. Thus, where a Bill was filed in Chancery under the Engraving Acts, for the piracy of prints forming part of a *book*, which prints had been designed and engraved abroad, and only published with the book in England, it was held that the plain object of the Legislature was to protect those works only which were executed in Great Britain (and Ireland), and not those which were only published there[5]. When therefore engravings, or the designs for them, are made out of the United Kingdom, copyright in such works so made can only be acquired within the British dominions by virtue of the International Copyright Acts[6], which, as this book is devoted to works entitled to copyright under the British Engraving, and Sculpture Copyright Acts, will consequently not be further alluded to.

[1] See observations of Best, C. J., in delivering judgment of the court in *Newton* v. *Cowie*, 4 Bing. 245; also of Lord Denman, C. J., on the Literary Copyright Acts, in *Russell* v. *Smith*, 17 L. J., Q. B., 229.

[2] 8 Geo. II. c. 13; see Appendix, p. 61. Also 6 and 7 Will. IV. c. 59. s. 1.; ib., p. 68.

[3] 17 Geo. III. c. 57; ib. p. 67.

[4] 6 and 7 Will. IV. c. 59. s. 1; ib. p. 68.

[5] Per Shadwell, V. C., in *Page* v. *Townsend*, 5 Sim. 395.

[6] 1 and 2 Vic. c. 59; 7 Vic. c. 12; 15 and 16 Vic. c. 12; see also the able little work on International Copyright Law, by Peter Burke.

3. *The works entitled to protection for Copyright* under the Statutes in question are thereby declared to be—1. Such historical and other prints as any person shall invent *and*[1] design, engrave, etch, or work in mezzotinto or *chiaro-oscuro;* or from his own works and inventions shall cause to be designed and engraved, etched, or worked in mezzotinto or *chiaro-oscuro*[2]. 2. Any historical print or prints of any portrait, conversation, landscape, or architecture, *map, chart, or plan*[3], or any other print or prints whatsoever, which any person shall invent *or* design, engrave, etch, or work in mezzotinto or *chiaro-oscuro*, or from his own work, design, or invention, shall cause or procure to be designed, engraved, etched, or worked in mezzotinto or *chiaro-oscuro*[4]. 3. Any print taken from any *picture*, drawing, model, or sculpture, either ancient or modern, which any person shall engrave or cause to be engraved, etched, or worked in mezzotinto or *chiaro-oscuro*[5]. And such person so mentioned in each of the said Acts is to have the *sole right* of printing and reprinting the same. 4. In 1852 it was further declared by the Legislature that the provisions of the Copyright Engraving Acts "are intended to include prints taken by lithography, *or any other mechanical process* by which prints or impressions of drawings or designs are capable of being multiplied indefinitely[6]." It would therefore seem that this very important enactment includes all descriptions of impressions or prints taken from any plate or slab, upon which any drawing or design can by any means be engraved or drawn, and from which plate or slab, prints or impressions are capable of being multiplied indefinitely, as by the so-called "mechanical" process of lithography. It should however be stated that there has been no decision upon the construction of this enactment of 1852, which, from its peculiar language, appears open to much argument as to the intention of the Legislature in using the words "or any other *mechanical* process."

[1] It has been noticed, *supra*, p. 12, that it was chiefly by Hogarth's efforts this Act was obtained; and that he was alike the inventor, designer, *and* engraver of his works.

[2] 8 Geo. II. c. 13. s. 1; see Appendix, p. 61.

[3] "Maps, charts, or plans," separately published since 1st July, 1842, have the same protection as *literary* copyright; see 5 and 6 Vic. c. 45. s. 2, which Act must therefore be relied on, for such has have been so published since that time.

[4] 7 Geo. III. c. 38. s. 1; see Appendix, p. 64.

[5] Ibid. s. 2.

[6] 15 Vic. c. 12. s. 14.; ib. p. 69.

In any event, the *conditions* imposed by the original Engraving Act of 8 Geo. II. c. 13, must be performed in order to secure the copyright in lithographic and all other works to which this Act of 1852 applies.

The extent of Copyright under the Engraving Acts was originally limited to fourteen years from the first publication of the work[1], and was afterwards extended to twenty-eight years from such first publication[2], but upon the *conditions* therein specified, and which will be immediately noticed.

It has been held that the first[3] of these Acts protects not only such designs as are the pure invention of the designer, but also designs of flowers, and any other objects of nature, as well as those of art[4].

4. *The conditions upon which Copyright is granted* under the Engraving Acts are most important to observe, as the validity of the copyright depends on their performance. They are as follow:—1. That the day of first publication shall be truly stated on the plate. 2. Also the name of the proprietor of the copyright. 3. And that such name and date shall be printed on *every* print taken from the plate[5].

Several cases have been decided upon the subject of these conditions, and it will be found that such cases are in some respects conflicting.

It has been said by eminent judges, that the engraving of the name of the proprietor and the date is not merely directory or discretionary, but *imperative*, as making the engraving of them part of the thing to be protected[6].

And it has been decided that the date of the first publication of the engraving and name of the inventor of the design must always appear, so that the public may know who was the original owner of the copyright, and when it expires[7]. And in another case, where the plates in a monthly journal had been pirated,

[1] 8 Geo. II. c. 13. s. 1; see Appendix, p. 61.

[2] 7 Geo. III. c. 38. s. 7; *ib.* p. 66.

[3] 8 Geo. II. c. 13.

[4] By Lord Hardwicke, C., in *Blackwell* v. *Harper*, 2 Atk. 93; S.c. Barn. C. R. 210, where the Case is said to be more fully and better reported.

[5] 8 Geo. II. c. 13. s. 1; see Appendix, p. 62.

[6] Per Littledale, J., in *Brooks* v. *Cock*, 3 Ad. and E. 141; Acc. per Lord Denman, C. J., S.c. p. 140.

[7] *Thompson* v. *Symonds*, 5 T. R. 41; Acc. *Harrison* v. *Hogg*, 2 Ves. Jun. 323.

the court recognized the uniform practice, said to be followed by engravers, in not engraving on the plate the word "proprietor," as used in the Statute, but the names only of the designer and engraver, which, after reviewing all the authorities on the subject, was, together with the date of publication, held sufficient to satisfy the requirements of the Statute as to the name of the proprietor[1]. So also where the prints pirated formed part of a book, the *publisher's* name, with the date of publication, appeared on the prints, but the proprietor's was omitted, such name of the publisher, with the date, were held to be sufficient[2]. But the omission of the date only on the plate[3], or even the day of the month[4], has been held fatal to the existence of the copyright of those engravings where they were omitted.

The correct date is also material with reference to the validity of title to the copyright, to be proved by the proprietor. Thus, where A. employed B. to engrave a plate, which he did on the 1st June, and printed some impressions from it for A.'s use, and on the 2nd A. gave the plate to B., who then engraved on it, "drawn and engraved by J. B., published on the 1st June, 1778," the declaration stating that the plaintiff, B., was the proprietor on that day, he was nonsuited by Lord Mansfield, C. J., on the ground that B. had no title to the copyright on the *first* of June[5]: and there can be little doubt that where an engraving is published *before* the date is engraved on the plate, such prior publication is fatal to the copyright.

On the other hand, it has been said that the words of the Act as to the day of publication appearing on the print are merely directory or discretionary; that the copyright vests in the proprietor without it, and that it is only requisite to make the penalty incur which is imposed by the Act[6]. There is also a recent decision where the woodcuts in a book having been pirated, such *woodcuts being illustrative of the letter-press*, it was held that

[1] *Newton* v. *Cowie*, 4 Bing. 234; see also per Lord Hardwicke, C., in *Blackwell* v. *Harper*, 2 Atkyns, 93; S.c. Barn. C. R. 210.

[2] Per Lord Ellenborough, C. J., in *Roworth* v. *Wilkes*, 1 Camp. 94; his Lordship however reserved the point at the trial, but there is no report of the subsequent argument.

[3] *Brooks* v. *Cock*, 3 A. and E. 138; see also *Macmurdo* v. *Smith*, 7 T. R. 522, decided under the Calico Printing Acts.

[4] *Sayer* v. *Dicey*, 3 Wils. 60.

[5] *Bonner* v. *Field*, cited in Thompson v. Symonds, 5 T. R. 44.

[6] Per Lord Hardwicke, C., in *Blackwell* v. *Harper*, *supra*, n. 1.

they formed part of the "book" within the definition of the 5 and 6 Vic. c. 45. s. 2, and consequently did *not* require to have the date and proprietor's name upon them[1].

The first of these cases so directly conflicts with the several other and subsequent decisions on the point before stated, that it does not now appear entitled to much weight, notwithstanding the great authority of the noble Chancellor who is reported to have so ruled.

But the second case is not only of great interest and importance, as well from its being the first decided upon the point since the Act of 5 and 6 Vic. c. 45, was passed, as for the profound legal talent of the learned judge whose decision it was. His judgment is therefore only to be questioned with the greatest deference; but it does seem open to doubt upon these grounds.

As the law stands with respect to engravings generally, we have seen that the copyright in them depends alone upon the Engraving Acts, and it has therefore been said that it is impossible to suppose the Legislature intended that the public should not have the protection afforded them by the Act of 8 Geo. II. c. 13, against a fraudulent continuance of a monopoly beyond the term prescribed by that Act[2]. Whenever the point has been discussed, all the decisions prior to the passing of the Act of 5 and 6 Vic. c. 45, with the exception of *Blackwell* v. *Harper*, appear to agree as to the intention of the Legislature in directing the name and date to be engraved on the plate and printed on all the prints. It would therefore be contrary to that intention if the public have not the means of knowing from each print when the copyright in it expires. The 5 and 6 Vic. c. 45 does not in terms repeal any part of the Engraving Acts as to prints; and yet to hold that prints illustrative of a book and published with it form part of the book, so as to take them out of the operation of the Engraving Acts, is in effect deciding that the 5 and 6 Vic. c. 45 did repeal those Acts as to such prints (assuming from the cases on the subject that such Acts apply to prints in books), in which case the mischief intended to be guarded against by the Legisla-

[1] Per Parker, V.C., in *Bogue* v. *Houlston*, 21 L. J. Ch. 470.

[2] Per Best, C.J., in delivering the considered judgment of the Court in *Newton* v. *Cowie*, 4 Bing. 245. And for his lordship's admirable rules as to the authority of Cases upon any given point where they are consistent or conflicting, see *Ib.* p. 421.

fere would at once arise. This will be seen in a moment, when it is considered that prints illustrative of books, and which have been published with them, are to be purchased separate from the letter-press in most of the print-shops. If the name and date of publication be not upon them, how is the public to be protected against what has been called "the fraudulent continuance of a monopoly beyond the term prescribed by the Acts"? The public would be without the slightest means of knowing what book the prints had formed a part of, and consequently when the copyright commenced or expired—a mischief which all the Copyright Acts on all subjects have carefully guarded against.

5. *Danger of publishing "proof impressions before letters*[1]*."*—

[1] "*Proofs* were anciently a few impressions taken off in the course of an engraver's process. He *proved* a plate in different states that he might ascertain how far his labours had been successful, and when they were complete. The excellence of such early impressions, worked with care, and under the artist's eye, occasioning them to be greedily sought after, and liberally paid for, it has been customary among our modern printsellers to take off a number of them, amounting perhaps to hundreds, from every plate of considerable value, and yet their want of rareness has by no means abated their price. On retouching a plate it has been also usual among the same conscientious fraternity to cover the inscription, which was immediately added after the first proofs were obtained, with slips of paper, that a number of secondary proofs might also be obtained. This device is notorious, and too often practised without discovery on the unskilful purchaser. *Le faux pucelage* is disposed of many times over."—*See* 'Nichols's Biographical Anecdotes of Hogarth,' p. 311, n. 3rd edit. It should be stated the above was descriptive of the practice amongst printsellers so far back as 1785, but fraudulent practices of a somewhat similar description have continued to a much more recent period, and especially in the issue of an excessive number of artist's and other "proofs before letters," which was done to such an extent in some instances as to render the name of proofs "perfectly farcical." See 'The Print Collector,' p. 165 of edit. of 1844. This very able and artistic little book, written by an amateur collector of prints, also contains much useful and interesting information connected with the subject of engraving. It was with a view as far as possible to prevent the continuance of such disreputable practices that "The Printsellers' Society" was established some few years since, and of which most of the chief printsellers are members. Before any member publishes a print, in his prospectus announcing it he stipulates that only a fixed number of proofs will be taken from the plate. When printed, that number is sent to the Society, who stamp them. No subsequent impressions taken as proofs are allowed to be stamped, and without that certificate of honesty on the part of the publisher, they would be comparatively valueless as proofs. The president of this society is the well-known printseller, Mr. Dominic Colnaghi, who was also its founder; and it is only requisite to mention his name as

It may be well to notice a practice which has gradually arisen amongst the publishers of engravings since the passing the English Engraving Copyright Acts, but which practice, although become a usage amongst such publishers, appears to be quite opposed to the clear intention of the Legislature. We have seen[1] that one of the conditions imposed upon the proprietor of the copyright is not only that he shall cause his name and the date of the publication to be engraved upon the plate, but that *the same "shall be printed on every print"* taken therefrom. The intention of the Legislature in imposing this condition has been already stated; yet notwithstanding such intention, all the finest, and consequently most valuable, impressions taken from every plate, and which are called "artists' proofs" and "proofs before letters," are now always published without either name or date on them.

At present there appears to have been no decision upon the point, but it may well be doubted whether the publication of proof impressions without complying with the conditions of the Act of Parliament respecting them is not fatal to the copyright; because it is obvious that if the *usage* of the publishers is to be upheld, the intention of the Legislature might, and most probably would, be entirely defeated in those cases where, from interest, caprice, or any other motive, only artists' and other proof impressions before letters should be published, and the plate then destroyed or no further used.

Assuming, as before observed, that the Engraving Copyright Acts apply to prints in books, it may therefore also be doubted whether the copyright in any engraving, either published separately or forming part and even illustrative of a book, can be deemed perfectly secure unless the name of the proprietor and correct date of publication be engraved on the plate, and "printed on *every* print" taken from it for publication[2].

being thus connected with the Society to entitle it to perfect confidence in the artistic world, especially amongst amateur collectors of prints.

[1] *Supra*, p. 18. See also 8 Geo. II. c. 13. s. 1: Appendix, p. 62.

[2] Since the above was written, a Case has been reported which, by analogy, strongly confirms this construction of the Engraving Acts. The point arose under the Copyright of Designs Act, 5 and 6 Vic. c. 100. s. 4, which enacts, as one of the conditions of copyright being secured, that no person shall be entitled to the benefits of that Act unless, after publication

6. *The works not entitled to protection for copyright* are important to observe. In the first place they comprise all those in respect of which the above-mentioned statutory conditions have not been performed. In addition to these, no obscene[1], libellous, or other immoral prints or pictures are within the protection of the Engraving Copyright Acts; such prints and pictures have no legal value. Thus, where an order had been given by I. to F., who was a printseller, to send him, I., a collection "of all the caricature prints that had ever been published," and, when sent, I. refused to receive them on the ground that several were of obscene and immoral subjects, it was held, in an action by F.

of the design, *every article* to which the design is applied and published by the proprietor of the copyright hath thereon the letters "Rd." The plaintiffs were the registered proprietors of a design for paper-hangings, and manufactured the same, which were cut into lengths of twelve yards, each length being marked with the letters "Rd." Such lengths were then cut by the plaintiffs into smaller lengths of twenty-seven inches, as patterns for distribution to the trade, but such patterns were *not* marked "Rd." The plaintiffs sued the defendants for an infringement of this design, to which they pleaded that the paper-hangings in question had been published by the plaintiffs without the letters "Rd." upon them, contrary to the form of the statute. Upon the trial of the cause before Lord Campbell, C.J., a verdict was entered for the defendant upon the issue raised by the replication to this plea, with leave for the plaintiffs to move to enter a verdict thereon for them if the Court should be of opinion that the pattern-pieces "were not articles of manufacture" upon which the letters "Rd." should have been marked. And upon cause being shown against a rule *nisi* afterwards obtained for that purpose, Lord Campbell, C.J., and Wightman, J. (*dissentiente* Coleridge, J.), held that the verdict upon that issue must stand for the defendant; Lord Campbell observing in the course of the argument that if a pattern is displayed without the letters "Rd." it is an indication that it is not registered. His lordship was of opinion that *the plaintiff had not complied with the condition required by the statute;* and Wightman, J., said one of the main objects of the statute was that the publishers of a registered design should indicate to the world that it is protected. See *Heywood* v. *Potter*, 22 L. J. Q. B. 133. It should also be stated that neither Mr. Justice Coleridge nor either of the learned counsel engaged in the case appear to have doubted the necessity of the letters "Rd." being marked on the pieces of twelve yards each. The only question really was whether, after those pieces so duly marked had been cut into patterns by the plaintiffs, and before they were distributed as such by them, the letters should have also been marked on each of such patterns as being "an article of manufacture" within the meaning of the statute.

[1] Every person exposing to view in any street, shop, or other public place, any obscene print, picture, or other indecent exhibition, is liable to three months' imprisonment with hard labour. 5 Geo. IV. c. 83. s. 4; 1 and 2 Vic. c. 38. s. 2.