Chapter 1 – Australia’s first Act

The beginning

In 1905, Australia passed its first federal Copyright Act. The Act’s probable author, John Henry Keating, declared it to be superior to any other copyright legislation in the English-speaking world.\(^1\) It introduced regulatory innovations and it helped to precipitate the movement towards copyright legislative unity in the British Empire.

Most importantly, it marked the first and last time that Australian legislators made copyright law free from compulsion to accept the normative impositions of the Berne Convention of 1886 and other international agreements – or Britain itself. The Senate debate on the copyright term marked the last time that the issues raised in the greatest copyright controversies of the previous 200 years – the British debates over perpetual copyright and the posthumous term – were substantively aired in an English-speaking parliament.

As a result of the freedom they enjoyed to make copyright law as they, and not the members of the Berne Union,\(^2\) saw fit, Australian parliamentarians did something in 1905 that would be impossible today. Motivated by support for the creative and public interests and hostile to the idea of copyright becoming a commodity in the hands of producers, then principally represented by publishers, they said the term of copyright should not greatly exceed the life of the owner. They shortened the term offered in the Bill (life plus 30 years) and accepted a limited conception of copyright as the property of authors, not the third parties who might put the author’s work to various commercial uses.

\(^1\) “I think I am not far wrong in saying that in 1905 Australia led the way so far as legislation on the subject of copyright is concerned.” – Senator J H Keating quoted in *Hansard* 23 October 1912.

\(^2\) Australia became a member of the Berne Union in 1928. Until then Britain extended the benefits and obligations of the Convention to Australia under section 8(1) of the 1886 *International Copyright Act*. Though independent, Australian legislators were culturally influenced by Britain and generally sympathetic to the thinking of the imperial Government. Very few would choose to pass legislation inconsistent with treaties entered into by Britain.
Before Federation

In the 19th century, Australian colonies other than Tasmania, borrowing definitions and concepts from the 1842 British Copyright Act, passed copyright legislation that required the authors of books, dramatic or musical pieces, or works of fine art (drawings, paintings, photographs, engravings and works of sculpture), to register their creations with central registries in each colony. Ownership conferred the “sole and exclusive right and liberty of making, printing, writing, drawing, painting, photographing, or otherwise howsoever multiplying copies of any matter, thing to which the said word is herein applied”. A performing right applied to registered dramatic or musical pieces.

NSW passed copyright Acts in 1852 and 1879, Victoria in 1869, South Australia in 1878, Queensland in 1887 and Western Australia in 1895. Queensland passed separate Acts governing the registration of copyright in books and dramatic pieces and works of fine art. Colonial copyright provided incomplete protection to authors. A colonial author who published a copyright work in Britain obtained copyright in all British possessions by the operation of imperial copyright legislation. Until the imperial International Copyright Act 1886, publication in a colony brought protection only in the colony. After the federal Copyright Act of 1905 came into force in 1907, the States gradually devolved their copyright registration functions to the federal Attorney General’s Department in Melbourne.

In 1905, Australian legislators could draw little guidance from the parochial native statutes, which principally established rules of registration and administration. British law offered precedents and principles to draw upon, but the copyright law in the imperial centre, described in about 20 statutes, bemused politicians in Britain and her dominions. Australians trying to fashion a new federal copyright law from British principles were forced to navigate ancient British legislation dealing with copyright in printed material, engravings and sculptures, newer statutes dealing with dramatic, literary, musical, lecture and fine arts copyright, and international copyright Acts which applied rules throughout the Empire.3

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3 Print Copyright Act 1777, Engraving Copyright 1734, Sculpture Copyright Act 1798, Dramatic Copyright Act 1833, Copyright Act 1842, Lectures Copyright Act 1835, Fine Arts Copyright Act 1862, An Act to Amend the Law in relation to International Copyright 1844 and International Copyright Act 1886.
Origins of the Copyright Act 1905

In 1905, some members of Parliament doubted the necessity for a federal copyright law. In the Upper House, Senator Hugh De Largie⁴ said the case for legislation was weak: “I am in favour of the idea of having a Copyright Act, but at the same time it should have been made clear that there is a pressing necessity or call from the country for a law of this kind. I know of no such demand having been made … So far, the necessity for the introduction of this Bill has not been satisfactorily explained.”⁵

Another Senator, Staniforth Smith, said: “the British Acts are somewhat vague, and there is a multiplicity of them … This Bill can only be considered as a complement to the British Act.” As De Largie said, the country did not cry out for copyright legislation. If, as he implied, legislators should respond to national necessity, there were no grounds in 1905 to enact the Copyright Act. No-one suggested publicly the need for a new copyright law. Even Senator Josiah Symon,⁶ an advocate of the legislation, acknowledged the absence of “urgency for this measure”.

The new Act resulted from political enthusiasm. The agents of reform were politicians in a rush, to whom the heads of federal powers set out in section 51 of the Constitution were not distant abstractions but the source of a new creation. During the first decade of Federation, Parliament legislated under no less than 32 of the 39 heads of power conferred by section 51, a striking indication of a feeling among parliamentarians that they must justify as soon as possible the mandate for federal power conferred by the framers of the Constitution.

By 1905, Parliament had already exercised the copyright power⁷ to pass the Patents Act of 1903. It did stop with patents and by 1906 completed the portfolio of copyright and industrial property legislation: the Copyright and Trade Marks Acts were passed concurrently in 1905, followed a year later by the Designs Act. In each case, with the possible exception of the Patents Act, the country did not need a federal statute.

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⁵ Hansard, 29 August, p1634.
⁶ Sir Josiah Symon, 1846–1934, Senator SA, 1901-13 (Free Traders; Anti-Socialist), Attorney-General 1904–05.
⁷ Section 51 (xviii) of the Constitution conferring the power to legislate with respect to Copyrights, patents of inventions or designs, and trade marks.
The State laws could have sufficed for a few years more. Section 51 inspired evangelical zeal in federal parliamentarians setting out to make the new Australia, and the Copyright Act of 1905 came from this zeal.

**Imperial considerations**

John Henry Keating,\(^8\) addressing the Senate on the 1912 Bill for a Copyright Act, provided some insight into the reason for copyright legislation in 1905:

*Imperial legislation on the subject of copyright, looked for and desired so far back as the seventies, never became, and was not likely to become a substantial fact until some portion of the British Empire had led the way ... Australia led the way.*\(^9\)

Keating’s reference to the 1870s is to the 1875–1878 Royal Commission on Copyright in the Empire, called after a crisis sparked by rejection of a Canadian copyright bill. The imperial Government feared that the Canadian legislation might be ultra vires for derogating from the import rules in the imperial *Copyright Act 1842*. Resolution came in 1878 when the imperial government accepted that dominions could pass legislation imposing obligations additional to imperial laws. The Queen assented to the Canadian bill in accordance with a newly passed imperial statute empowering her to grant assent.

The Royal Commission reported in the same year, finding a copyright law “wholly destitute of any sort of arrangement, incomplete, often obscure, and even when it is intelligible upon long study ... in many parts so ill expressed that no-one who does not give such study can expect to understand it.”\(^10\) The report called for codification of the disparate British laws in a single comprehensive statute, but politicians, baulking at the demands of unifying the laws, put its recommendations to one side. The Government introduced a copyright bill into Parliament 20 years later but this fell into the hands of a House of Lords Select Committee and went no further. It was not until 1911 that Parliament finally passed a new Act, and repealed the conflicting legislation criticised by the Royal Commission.

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\(^8\) John Henry Keating 1872–1940, Senator Tasmania 1901–23 (Protectionist; Liberal; National).

\(^9\) *Hansard*, 23 October 1912. Keating neglected to mention the copyright Acts passed by Canada in 1875 and 1901, legislation which made Canada the chief legislative innovator among the self-governing dominions.

\(^10\) *Report of the Royal Commission on Copyright of 1878; 24 PP (C2306).*
Imperial inactivity may have resulted from the absence of necessity. Legislators throughout the Empire remembered as a cautionary tale the bitter debate over the bill that became the British Copyright Act of 1842. In 1905, Australian parliamentarians recalled with approval Thomas Macaulay’s attack, during the debate, on the proposed term of copyright protection, but no-one wanted to revive the animosities of 1842. In the intervening 60 years, British publishers, the principal commercial beneficiaries of protections provided by the Act, were troubled mainly by non-recognition of their copyright in the United States, a problem that could not be remedied by reform of the imperial law.

It would be a mistake to assume, however, that Britain lacked any motive for legislative action. After it ratified the Berne Convention in 1886, in company with powerful European rivals like France and Germany, considerations of mutual advantage and national prestige appeared to awaken in the imperial legislature a belated recognition of the fruitful possibilities of international uniformity. In 1886, the British Parliament passed the *International Copyright Act* to allow Britain to accede to the Convention, and enthusiasm for the universalistic sentiments of the first international copyright conference perhaps revived local interest in the Royal Commission’s report of 1878.

The universalistic aspirations of imperial legislators were not as far-reaching as those of the Berne delegates but many were eager to create an imperial zone (consisting of Britain and the white dominions) that could become federal in nature – a proto-European Community but with closer linguistic and historical ties. In this zone, legislation would need to uniform or closely tied.

Keating and many of his colleagues were enthusiasts for the imperial idea and they were happy to lead the way in implementing the Royal Commission’s report. Allowing for imperial feeling and the common desire for legislative uniformity, the fact that Australia and Canada had both introduced up-to-date copyright legislation may, after 1905, have encouraged Westminster to give priority to preparing copyright legislation. In 1907, the imperial government produced draft imperial copyright legislation, which it circulated to dominion governments, but they expressed unhappiness with the draft. The legislation was
abandoned and a new bill prepared for the imperial copyright conference held in London in 1910.\footnote{Britain held the first imperial conference in London in 1907. Imperial conferences replaced the old colonial conferences of the white possessions and reflected the new standing of the self-governing dominions, providing a forum for discussing matters of imperial unity. They were the forerunner of today’s meetings of the Commonwealth Group of Nations.}

When the new British Copyright Act finally arrived in 1911 it owed its appearance primarily to the eagerness of legislators to implement the principles enunciated at the 1908 Berlin Conference of the Berne Union. But international considerations did not exclude imperial. The Act followed directly from the imperial copyright conference, which provided the dominions with the opportunity to consider the draft imperial legislation. That Britain took the unusual step of consulting the dominions in conference suggests that it may have been the dominions’ enthusiasm for uniformity that precipitated imperial legislation 33 years after the Royal Commission’s report in 1878.

### The purpose of the legislation

The records of the federal Attorney General’s Department, the administrative custodian of copyright legislation from 1907 until the present, provide little information on the preparation of the 1905 Act. Groom, the Minister for Home Affairs, not Isaac Isaacs, the Attorney General, introduced the Bill in the House of Representatives, and Isaacs did not participate in the legislative debate. In the Senate, two dominating figures articulated different visions of the legislation’s purpose. John Henry Keating, Minister Without Portfolio in the ruling Protectionist party, oversaw preparation of the Copyright Bill, and though passionately interested in the legislation (he worked on the Bill “unduly late so interested I was”), was more interested in codifying principles than resolving questions of policy. By contrast, Sir Josiah Symon, Senate leader of the Free Traders, was interested in the philosophical implications of copyright regulation.

Symon made the more profound contribution to the debates that took place. A Scots immigrant to Adelaide, for two years federal Attorney General before the Free Trade party lost office, he was an outstanding lawyer, more willing than Keating to explore the premises for
legislation. In 1905, he supplied the clearest statement of the philosophical intent underlying the Act:12

The system of copyright rests upon a recognition of the duty of Parliament and Government to secure justice to authors and involves the recognition, on the part of Parliament and Government, of the justice of establishing a property in the fruit of a man’s reason, intellect and imagination.

Keating earlier put the case in more prosaic terms:

If honourable senators have regard to the condition of the present law – with the Imperial Act, the various State Acts, and the provisions of the Berne Convention in relation to international rights, all operating – they will see how necessary it is to have some clearly defined system of legislation for the whole of the Commonwealth [of Australia]. This Bill is intended to meet the situation, and in great part it follows very largely the lines laid down by the Imperial Commission, which bestowed a great deal of care, attention, research and thought to the whole subject. I think I can say with confidence that if the Bill be passed in its present – or anything like its present form – it will be regarded, not only in Australia, but in other parts of the Empire, as marking a distinct advance in legislation – perhaps the greatest advance that has been made on this subject, and one well in conformity with, and not behind, the necessities of the times.

Each man provided a distinct rationale for the Act. Symon expressed the 18th century view of copyright as the author’s natural privilege, an idea that the Labor Senator, Henry Givens,13 forcefully supported:

In common with most other persons, I am firmly convinced an author or inventor has as much, if not more, right to the product of his brains, ingenuity or industry than any individual has to any form of property. I think that he has a greater right, insasmuch as the product of his brains, ingenuity or industry is something of his own creation which cannot be said of a great deal of property the right to which is fully recognised by this and other Parliaments.14

12 This is not altogether surprising. Symon, de facto leader of the Free Trade party in the Senate, stated the legislation to be “a Bill of the late [Free Trade coalition] Government framed but not finally revised before they left office”. However, the evidence as to which Government substantively prepared the Bill is conflicting.


14 Hansard, 29 August 1905. Givens placed a caveat on his comments: “we should be exceedingly careful to see that any rights which we may give under this Bill shall not limit the rights of other people and shall not interfere with the welfare of the community.”
Keating’s most obvious motivation seems to have been to create order in the Australian law out of what the Royal Commission of 1875 saw as chaos in the British law. A Hobart barrister who later joined the Melbourne Bar, Keating entered the Federation Parliament its youngest member, aged 29. Special Counsel to the 1932 Royal Commission on Performing Rights, he never rose to the heights of politics but no-one doubted his principles or intellectual penetration. He played a role in some of the most significant debates of early Australian copyright history and must be judged one of the most significant figures in the development of the Australian law. But like many lawyers trained to search for precedents and formulas he did not think deeply about the deeper questions of policy.

As far as he was concerned, British legislative developments provided the prototype for an Australian law. A line of authority established, all that remained was to draft the statute. He did not seem interested in determining the deeper implications or premises of copyright legislation. For him, the path to the Copyright Act of 1905 began not in the philosophical arguments of the 18th century but with the 1878 Report of the Royal Commission on Copyright. He admired the modernising sentiments of the Commission’s Report and considered that it, together with the findings of the House of Lords Select Committee, and the principles of the Berne Convention and the Paris revision Conference of 1897, provided the appropriate sources of Australian legislation.

In the House of Representatives, Sir Littleton Groom, Minister for Home Affairs made a perfunctory statement of legislative purpose. “This”, he said, “is a Bill purely to regulate the administration of the copyright law within our own boundaries, and to take advantages of the Imperial Act, and the international agreement.” So much, then, for the purpose of copyright legislation in 1905. The unenlightening accounts given in the Australian Parliament for the purpose of this bill of uniformity (a bill that legislators agree will be passed) suggested that debate over its contents would be perfunctory. But the debates in 1905 produced more illuminating and informed discussion of issues than those preceding the enactment of copyright legislation in 1912 and 1968.

Structure and Content of the Copyright Act 1905

For the modern reader, flattened by the never-ending circumlocutions of today’s gargantuan enactments, the Copyright Act of 1905 justifies
Keating’s praise. It is concise and readable, well structured and annotated, the majority of its provisions set out in one or two paragraphs. The Act had a number of interesting features. It introduced the right to translate, abridge or convert a book,© copyright in photographs,© a lecturing right,© divisibility of copyrights,© a performing right in musical and dramatic works,© the concept of fair dealing,© limited moral rights,© provision for expedited enforcement of

15 Section 13 (1) — The copyright in a book means the exclusive right to do, or authorise another person to do, all or any of the following things in respect of it: –

(a) To make copies of it:
(b) To abridge it:
(c) To translate it:
(d) In the case of a dramatic work, to convert it into a novel or other non-dramatic work:
(e) In the case of a novel or other non-dramatic work, to convert it into a dramatic work: and
(f) In the case of a musical work, to make any new adaptation, transposition, arrangement, or setting of it, or any part of it, in any notation.

16 Section 4 — In this Act unless the contrary intention appears —
‘Artistic work’ includes —
(a) any painting, drawing, or sculpture; and
(b) any engraving, etching, print, lithograph, woodcut, photograph…’.

17 Section 15 (1) — The lecturing right in a lecture means the exclusive right to deliver it, or authorize its delivery, in public, and except as hereinafter provided, to report it.

18 Section 25 — The copyright in a book, and the performing right in a dramatic or musical work and the lecturing right in a lecture shall be deemed to be distinct properties for the purposes of ownership, assignment, licence, transmission, and all other purposes; also section 26.

19 Section 14 (1) — The performing right in a dramatic or musical work means the exclusive right to perform it, or authorize its performance, in public.

20 Section 28 — Copyright in a book shall not be infringed by a person making an abridgment or translation of the book for his private use (unless he uses it publicly or allows it to be used publicly by some other person), or by a person making fair extracts from or otherwise fairly dealing with the contents of the book for the purpose of a new work, or for the purposes of criticism, review, or refutation, or in the ordinary course of reporting scientific information.

21 Section 29 — Where the author has parted with the copyright in his book and a translation or abridgement of the book is made with the consent of the owner of the copyright by some person other than the author, notice shall be given in the title-page of every copy of the translation or abridgement that it has been made by some person other than the author.
rights and injunctions against infringing exercises of the performing right. It also codified the outcome of English cases on unpublished manuscripts and suggested the beginnings of the modern category of employers’ or commissioners’ copyright. Finally, it instituted a Copyright Office administering registration formalities designed primarily to assist the courts in determining copyright ownership.

The drafters made sure the bill conformed to the principles laid down by the Berne Convention of 1886 and the Paris Conference of 1897. The protection of photographs as artistic works, and the rights of abridgement and translation followed the Convention text as did provisions for seizure of imported pirated books and allowance for certain limitations on the owner’s right of reproduction. In addition, as laid down in the Berne text, the Act allowed for a person, upon completion of formalities, to translate a book if the owner of copyright had not exercised the translation right within ten years of publication. Copyright in the translation then subsisted in the translator.

The Berne text compelled members to reserve to the owner a performing right only in respect of translations but the Australian Act went further. It provided a performing right in all dramatic or musical works, although it also required that the right was to be reserved by notation in the title page or other conspicuous part of any dramatic or musical work published as a book. In respect of the adaptation right,

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22 Section 52 — permitting a Justice of the Peace to grant a search warrant for seizure of pirated works.
23 Section 54 (1) — The owner of the performing right in a musical or dramatic work ... may, by notice in writing in the prescribed form, forbid the performance of the musical or dramatic work in infringement of his right...
24 Section 7 — Subject to this and any other Acts of the Parliament, the Common Law of England relating to proprietary rights in unpublished literary compositions shall, after the commencement of this Act, apply throughout the Commonwealth.
25 Section 22 (2) — The proprietor of a periodical in which an article, which has been contributed for valuable consideration, is first published shall be entitled to copyright in the article, but so that —
   (a) he shall not be entitled to publish the article or authorize its publication except in the periodical in its original form of publication, and
   (b) his right shall not excluded the right of the author of the article, under this section.
26 Part VII — Registration of Copyrights.
28 Section 14
the Act also went further than the Convention text – the Berne Union experienced great difficulty in resolving its position on the issue – and rejected English law on the subject. The right to adapt a work, that is, to transform it from one form of work to another was set out explicitly in three parts.

The Act divided into eight parts, greatly improving on the haphazard organisation of enactments that was characteristic of Victorian times. Artistic copyright was dealt with under Part IV of the Act not Part III, which concerned ‘Literary, Musical, and Dramatic Copyright’. The reason for this division is not entirely clear. Possibly the Act’s drafters wanted to distinguish between the plastic nature of artistic works like sculptures and the print format of most literary, musical and dramatic copyright.

More likely, the framers saw copyright as applicable primarily to two types of physical production: books and artistic works. In the Act, musical and dramatic works, although defined, were evidently seen, for

(1) — The performing right in a dramatic or musical work means the exclusive right to perform it, or authorize its performance in public.
(2) — Performing right shall subsist in every dramatic or musical work, whether the author is a British subject or not, which has, after the commencement of this Act, been performed in public in Australia, before or simultaneously with its performance in public elsewhere.
Section 32 (1) — Where a dramatic or musical work is published as a book, and it is intended that the performing right be reserved, the owner of the copyright, whether he has parted with the performing right or not, shall cause notice of the reservation of the performing right to be printed on the title page or in a conspicuous part of every copy of the book.

The Berne text made implementation of the performing right in relation to musical and dramatic works – as opposed to translations of them – discretionary, i.e., a matter of ‘national treatment’.


Britain did not acknowledge the author’s right to control dramatisation of a work although it permitted adaptation of a play into a novel.

Section 13(d), (e) and (f). For text, see footnote 33.

Part I — Preliminary; Part II — Administration; Part III — Literary, Musical, and Dramatic Copyright; Part IV — Artistic Copyright; Part V — Infringement of Copyright; Part VI — International and State Copyright; Part VII — Registration of Copyrights; Part VIII — Miscellaneous.
conceptual purposes, as a sub-set of the category ‘Book’. The authors of a musical or dramatic works could take advantage of the definition of a musical or dramatic work as a ‘Book’ and claim the benefit of the rights granted to the owner of a book. But the only exclusive right conferred on them as holders of the copyright in musical or dramatic works was the right of public performance.

In the case of books and artistic works the only fundamental difference between the rights granted under each category in the Act was that the author of a book was entitled to certain additional rights – abridgment, translation, conversion – that had no application to sculptures, paintings and so on. Otherwise, the Act made little distinction between the two. Legislators adopted the term of copyright in the British Act – 42 years from publication or for the author’s life and seven years, whichever period was the longer. They made no change, either, to rules about artistic copyright, retaining the distinction between title and copyright – the owner of copyright in a painting, statue or bust sold retained copyright after sale of the item. Copyright in a photograph made to order, or in the course of employment, passed to the purchaser or employer.

So much for the owner’s positive rights. Equally important to the copyright owner are negative rights contained in the infringement provisions that set out the remedies available for breach of copyright. The 1905 Act devoted 18 clauses to the subject of infringement. Discussing the Act in Senate debates in 1912, Keating seemed

33 Section 4 — ‘Book’ includes any book or volume, and any part or division of a book or volume, and any article in a book or volume, and any pamphlet, periodical, sheet or letterpress, sheet of music, map, chart, diagram, or plan separately published, and any illustrations therein.
34 Section 14.
35 Sections 17 and 36.
36 Section 41(1) When the owner of the copyright in artistic work being a painting, or a statue, bust, or other like work, disposes of such work for valuable consideration, but does not assign the copyright therein, the owner of the copyright … may in the absence of any agreement in writing to the contrary make a replica of such work.
37 Section 39 (1) When a photograph is made to order for valuable consideration the person to whose order it is made shall be entitled to the copyright therein as if he were the author thereof.
(2) Subject to sub-section (1) of this section, when a photograph is made by an employee on behalf of his employer the employer shall be deemed to be the author of the photograph.
38 Part V — Infringement of Copyright clauses 45-63.
especially proud of the clauses dealing with injunctions, discussing them in some depth and stressing their novelty. 39 The provision for injunctions of infringing performances were new to copyright legislation but in other respects, the 1905 Act did not significantly enlarge the scope of actions set out in the British Copyright Act of 1842, the basis of the British law.

The Act of 1842 paid particular attention to copyright remedies, providing that works of piracy could be seized, damages awarded to the owner and the infringer subject to fines. 40 It placed on the defendant in an action the onus of proving – if the issue of ownership arose – that the plaintiff did not have good title 41 and dealt in detail with the requirements of entering title details in the Registry of Books. 42

The Australian Act of 1905 provided that the owner of the “copyright in a book, the performing right in dramatic or musical work, the lecturing right in a lecture, or the copyright in an artistic work … may maintain an action for damages or penalties or profits, and for an injunction, or for any of those remedies”. 43 Damages for infringement of the performing right in a dramatic or musical work or the lecturing right were to be calculated by reference to the infringer’s profit and actual damage incurred. 44

If the infringement occurred in a theatre, the proprietor or principal, as appropriate, faced a penalty of £5 and minimum damages of £10, increased to the amount of profit made from infringement if that amount exceeded £10. 45 Additionally, the owner of the performing right in a musical or dramatic work could restrain the performance of the work by notice in writing. 46 A failure to obey this notice incurred a penalty of £10. 47 The maximum penalty for dealing in pirated books or artistic works 48 was £50 49 and a defendant who could prove that “he did

39 See opening address, Hansard, 13 October 1912, pp 4410–11.
40 Sections XV and XVII.
41 Section XVI.
42 Sections XI-XIII and XXIV Part V — Infringement of Copyright.
43 Section 45.
44 Section 46.
45 Section 50.
46 Section 53.
47 Section 53.
48 Section 4 — ‘Pirated artistic work’ means a reproduction of an artistic work made in any manner without the authority of the owner of the copyright in the artistic work; ‘Pirated book’ means a reproduction of a book made in any manner without the authority of the owner of copyright in the book.
not know, and could not with reasonable care have ascertained, that the book was a pirated book or the work was a pirated artistic work” avoided liability.\textsuperscript{50}

The owner could require the infringer to deliver up pirated books and artistic works\textsuperscript{51} and search warrants could be issued for the purpose of seizure.\textsuperscript{52} More draconian, false representation of ownership of copyright in a book or artistic work or the performing right in a musical or dramatic work was designated an offence for which the penalty was two years’ imprisonment.\textsuperscript{53}

As a matter of passing curiosity, it is interesting to compare the approach to enforcement in 1842 with that of 1905. In the 1842 Act, the fine for dealing in pirated books was £10 and double the value of each pirated book seized\textsuperscript{54} while in the 1905 Act the fine was £5 for each copy seized and liability was capped at of £50 in total. Quite conceivably, an offender in 1842 would have paid considerably more in a total fine than his counterpart in 1905. On the other hand, the British Act, unlike its Australian cousin, contained no penal provisions. Section 55 of the 1905 Act, prescribing prison for false representation.

International developments soon reduced the Copyright Act of 1905 to irrelevance. Its precepts were still rooted in the 19th century idea of copyright as literary property. Yet read today it seems powerfully modern. The style of the principal British statute, written at the beginning of Victoria’s reign and in the early days of Dickens’s fame, is discursive, elliptical and repetitive. The style of the 1905 Act is direct and unadorned. With its enactment, copyright in the English-speaking world moved away from the vanished days of pen, ink and manuscripts and into the present age.

**Modern conceptions shunned**

*Mechanical reproduction*

The Copyright Bill contained an intriguing omission. It did not make provision for a mechanical reproduction right that, if enacted, would

\textsuperscript{49} Section 50.
\textsuperscript{50} Section 50.
\textsuperscript{51} Section 53.
\textsuperscript{52} Section 56.
\textsuperscript{53} Section 55.
\textsuperscript{54} Section XVII.
have placed the Australian statute at the forefront of the world’s copyright laws. Possibly in 1905, many parliamentarians were yet to hear the term “mechanical reproduction”. Coined to describe the mechanical performance of musical works by the operation of piano rolls in pianolas, from the end of the 19th century the phrase referred also to the recording of musical and vocal performances on rotating wax cylinders and later pressed records.

The Berne Union introduced the concept into copyright discourse when it declared in 1885 that a mechanical reproduction right would confer control of the manufacture and sale of instruments for the “mechanical reproduction” of “musical airs”. Strangely, though, considering its advocacy of authors’ rights, the Union then stipulated that mechanical reproduction did not infringe the author’s exclusive right of reproduction. It did so to avoid offending Switzerland, home of a substantial industry manufacturing music boxes. The Swiss, according to George Bernard Shaw, were “privileged by custom to steal their tunes”, a privilege that he claimed the Convention acknowledged when it exempted the manufacturers from the application of the reproduction right, “politely as a matter of course, like a vote of thanks”.55

The Union reversed its position in 1908, but in the meantime, the prototype of the modern music industry emerged in Britain, Western Europe and the United States. The manufacturers of pianola sheets, pianolas and gramophones (cylinders and drums were replaced early in the 20th century by pressed records) came to be known as the “phonographic industry”, the name coming into general use by 1911. The immense popularity of “the people’s music”,56 allied with the financial strength of the phonographic industry, created a powerful vested interest that strongly resisted any moves to granting the mechanical right.

By 1908, any astute observer could discern the phonographic industry’s future as an economic superpower. In that year, the Gramophone Company Limited, the forerunner of EMI Ltd, paid dividends of 68 per cent on investment. A correspondent writing to The Times in 1911 pointed out that in the previous year, “7½ million records (discs and

56 An article on ‘Musical Copyright’ in The Times of London, Saturday 29 June 1911 dealt with “the vexed question of mechanical contrivances” and “[t]he ‘people’s music’ as it has been rather grotesquely called.”
cylinders) were sold in the United Kingdom alone.” He went on to say that the “capital employed by these industries is extremely large. Over 2,000 persons are at present regularly employed by gramophone producers in this country; there are at least 10,000 dealers etc.”

The absence of debate among Australian legislators about the mechanical right illustrates powerfully how the Copyright Act of 1905 represented a bridge between the old and new worlds of copyright law. As indicated by Shaw’s protest about Swiss music box makers, composers and musical publishers were willing to tolerate the Swiss music box industry’s “theft” of music compositions. In 1905, Australian legislators no doubt knew of Swiss practice but they seemed oblivious to the explosive growth of the new phonographic industry – and the bitter resentment that the industry’s economic success aroused in composers and publishers. Seemingly ignorant of the leviathan casting its shadow (in the eyes authors at least) over the whole landscape of musical enterprise, Australian parliamentarians could congratulate themselves, that, in passing the 1905 Copyright Bill, they were, as Keating said, “creating precedents for the world”.

They perhaps felt constrained by common law precedent. In 1899, in *Boosey v Whight*, a case soon made infamous in the polemics of authors’ rights proponents, the High Court in London established a precedent blessed by the phonographic industry and hated by musical composers and publishers.

Justice Stirling ruled that perforated paper rolls fed into an *Aeolian*, a mechanical wind instrument resembling a piano, functioned as part of the instrument, and were not sheets of music within the 1842 Copyright Act. Thereafter, downcast composers reluctantly accepted that, according to the law, processes that enabled the mechanical performance of a musical work – such as the recording of a song on a phonograph or gramophone record – did not infringe copyright. Gramophone companies rushed to record more works.

**Compromise in Berlin**

By 1908, the authors’ resentment commanded the attention of delegates at the Berne Union’s Berlin Revision Conference. Authors demanded, though with only partial success, the exclusive right to control the mechanical reproduction of musical works. The

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57 [1899] 1 Ch 836.
phonographic industry sent representatives to the Conference, and they pressed their case furiously.

For the first time, the Union felt compelled to accommodate the needs of a powerful new industry built on a new technology for reproducing works. Delegates insisted that the exclusive right to control the mechanical reproduction of works must vest in authors but they allowed a qualification. Members were authorised to impose limitations and conditions on the mechanical right, with the result that within a few years various countries, including Britain and Australia, passed legislation allowing the compulsory licensing of musical recordings.

Union members could elect not to place any limitation on the mechanical reproduction right, and after the Berlin Conference, the advocates of authors’ rights in Britain entertained solid hopes of persuading the imperial legislature to reject arguments for the legislative qualification of the mechanical right. At stake for the opposed factions were economic rights that pertained to the whole Empire.

Australia did not become an independent member of the Berne Union until 1928 and Britain signed the Berlin Convention on behalf of the dominions and possessions of the Empire. The war over the mechanical right begun at the Berlin Conference continued between 1909 and 1911 in the committee rooms and legislative chambers of the British Parliament, and the final settlement applied to Australia equally as it did to Britain.

**Maintaining the 19th century nexus**

The 1905 Act’s silence on the question of mechanical reproduction may possibly be explained by inadvertent omission on the part of drafters and legislators. More likely, however, they chose to ignore the new conceptions in copyright policy enunciated in the Berne Convention. In doing so, they implicitly endorsed the ruling in *Boosey v Whight*, turning their backs on the extension of copyright beyond the parameters set out in the 19th century. In the 19th century schema, copyright applied primarily to literary property, and though it also protected dramatic, musical and artistic works it did so by prohibiting the unauthorised *multiplication* of the pages which embodied these works.

This much Justice Stirling implied in *Boosey*. He said that the 1842 Act conferred the right of “multiplying copies of something in the nature of a book”. Perforated music rolls were “used simply as parts of a machine for the purpose of the production of musical sounds, not for
the purpose of a book”. If the framers of the Act intended copyright to apply to mechanical processes, they could easily have declared that music boxes or barrel organs, already long in use by 1842, reproduced musical compositions. The fact that they did not, suggested Justice Stirling, showed that they wished to restrict copyright to the species of literary property.

The most curious feature of the 1905 Act is the definition of ‘Book’, which eschewed the concept of a literary work as an abstraction evidenced by the material form in which it is captured. In the 19th century, material form usually involved paper, but the idea of abstract works, introduced in the Berne Convention, implied that copyright subject matter could be embodied, and used, in formats not yet imagined.

By assimilating the concept of ‘literary work’ in the definition of ‘Book’ and relating the definitions of both dramatic and musical works to that of ‘Book’, the framers of the Act tied the concept of literary property (and where appropriate, dramatic and musical works) to the production of books. They did so even though the most recent British copyright legislation, the International Copyright Act of 1886, referred in the provisions dealing with application of British Copyright Acts to the colonies, to ‘literary or artistic work[s]’. It is mysterious, in these circumstances, that the Australian Bill did not adopt the category of ‘literary work’.

The non-adoptions, by the Bill’s drafters, of the category of ‘literary work’ therefore seems to have been deliberate, considering its provenance in the Berne Convention and use in the British legislation. They – and the parliamentarians debating the Bill – seem to have viewed the typesetting of books as the only type of mechanical reproduction to which copyright should extend because they considered preventing the piracy of books to be the fundamental purpose of copyright legislation. While aware of the growing possibilities of mechanical reproduction they rejected the idea of allowing literary property in anything other than books.

As a result, the Act was strongly biased towards the traditional notion of copyright as literary property – and the associated idea that the other forms of expression are protected only in the form of bound sheets or pages – when such a bias was by no means inevitable. The Berne Convention already treated literary property as an abstraction, like dramatic and musical works, that could be reproduced or adapted in the formats permitted by new technologies. The Copyright Act of 1905
therefore failed to break the historical nexus between literary property and copyright, and endorse the new reality of a world in which literary, dramatic and musical works were transformed into commodities produced en masse for the profit of giant industries.

An approach “in conformity with, and not behind, the necessities of the times” (the words of Keating introducing the Bill) would have been to recognise distinct property rights in ‘literary’, ‘dramatic and ‘musical’ works instead of concentrating the reproductive and transformative rights in books, and allowing dramatic and musical works only a right of performance. The decision to confine the scope of copyright was consistent with the view of Australian senators that copyright should protect writers, composers and artists from the predations of duplicators. Very soon, however, the 1905 Act’s limited conception of copyright became untenable as the creative interest demanded new rights and the phonographic industry reacted ferociously to some of those demands.

**Macaulay and the copyright term**

*The argument over perpetual copyright*

In 1905 Australian copyright legislators, for the first and last time, made law unconstrained by international regulatory norms. Not coincidentally, they were especially concerned with an issue that became non-negotiable after the Berlin Conference of 1908. This was the ancient sticking point of copyright lawmaking, the duration of protection. For centuries, publishers maintained an unshakeable interest in the length of their monopoly to print books. Historically, the publishers’ interest, the copyright term, and copyright regulation were inextricably linked.

Over the centuries, the British literary mind seemed to locate publishers in the same ambiguous moral universe as Shylock. Usurers in spirit, the publishers felt ill-used. They demanded their pound of flesh and hedged the field with restrictive practices and yet – they made possible the world of books. Like Shakespeare’s anti-hero, they were indispensable but unloved. The copyright debates of the early 20th century testify to the grim disrepute which came to accompany their activities.

Under Henry VIII, publishers printed books under royal patents. In 1557 a group of them formed the Stationers’ Company, which licensed
printing rights to members and controlled all production. In the Elizabethan and Stuart periods, the Stationers collaborated with the Star Chamber in the suppression of proscribed literature. Abolition of the Star Chamber in 1641 and the 15 year disappearance of the Crown hardly dented the continuing enlargement of the Company’s monopoly. In 1643, the Stationers petitioned for a renewal of their monopoly, arguing for copyright in strikingly modern terms.58

A 1643 ordinance, succeeded by an Act in 1662, entrenched their monopoly, allowing the Stationers’ to license the printing of books, and prohibit the printing of certain works. The Crown renewed the 1662 Act twice more and the legislation lapsed in 1694. In the ensuing period of instability, the members of the Stationers’ Company were threatened with competition from printers springing up around the nation. Now far less interested in censorship, the Crown showed no inclination to renew their privileges. To resolve their dilemma, the Stationers – principally London booksellers – travelled the time-honoured route followed since 1557. They lobbied the Government remorselessly, arguing stridently for perpetual copyright.

The Government only partly rewarded their boldness. In 1710 the Statute of Anne conferred copyright on authors, or their assigns, for a period of 14 years from publication (renewable for the same term by authors who were alive at expiration). It also established penalties for piracy. The Act seemed to follow the scheme established for patents in the 1623 Statute of Monopolies, and to embody a narrow conception of the scope of property in books. Although the legislature evidently wished to open the book trade to competition, and to confer bargaining power on authors, the Statute of Anne seems to have benefited the London booksellers. They were the assignees of most authorial copyright and the 14 year term conferred a significant economic benefit.

58 See Plant, “Economic Aspects of Copyright in Books”, supra. Plant enumerated the six parts of the Stationers’ argument. Their second part outlines a species of the incentive theory of copyright: “A well-regulated property of copies amongst stationers, makes printing flourish, and books more plentiful and cheap; whereas Community (though it seems not so, at first, to such as look less seriously, and intently upon it) brings in confusion, and many other disorders both to the damage of the State and the Company of Stationers also; and this will many ways be evidenced.”
The booksellers, used to 150 years of monopoly, were not satisfied. Although they knew that the economic utility of literary works usually vanished within three years of publication, they were psychologically accustomed to the prospect of indefinite privileges and could not countenance limitation. For three decades after the Statute of Anne, they struggled to contain their feelings but eventually the pressure of competition from Irish, Scottish and North American publishers printing cheap editions became unbearable.

Led first by the able and highly successful London bookseller, Andrew Millar, they sought from the middle of the 18th century to secure a common law decree that copyright lasted forever. Their efforts continued into the 19th century and prior to the enactment of the Copyright Act of 1842, some proponents of the bill claimed that literary property should, like real property, exist in perpetuity. They were rebuffed. In the earlier period, Millar and his fellow publishers met a mixed reception but ultimately their efforts ended in failure. The public, and authors, split in their position on the perpetual term. Opponents of the perpetual term, including Dr Johnson, while accepting the need to remunerate authors for their work, pointed out that literary property should become, after a time, the possession of the public.

The booksellers asserted the existence of perpetual common law copyright in a series of cases beginning in 1750 and leading to Donaldson v Becket in 1774. They maintained that this copyright overrode the restricted term of 28 years from publication granted in the Statute of Anne in 1710, but in Donaldson, the House of Lords rejected their arguments. In a vote of all peers, not just the Law Lords (who voted narrowly in favour of the booksellers), the Lords repudiated the idea of common law copyright.

59 Millar v Kinkaid (1750) 98 ER 210; Tonson v Walker (1752) 36 ER 1017; Tonson v Collins (1761) 96 ER 169; Millar v Donaldson (1765) 28 ER 924; Millar v Taylor (1769) 98 ER 201. On the cases, see Mark Rose, Authors and Owners, The Invention of Copyright, Harvard University Press, 1993, and Bently and Sherman, supra. Rose identified the case of Pope v Curll (1741) (the plaintiff was Alexander Pope), as the first instance in common law of a judge “severing the immaterial from the material aspect of literary property”. He also cited Pope as the second known user of the term “copyright”, in a letter to a bookseller in 1727 and identified Timothy Childe as the first, in the Stationers’ Register for 31 May 1701.

60 See Rose, ibid. In the 18th century legal issues although considered in substance by the Law Lords were actually voted upon by the Lords as a whole.
To reach this position, the Lords’ reversed their own judgment, reached five years earlier in *Millar v Taylor* (1769). In that case, the Law Lords, led by Lord Mansfield, found that the author’s copyright survived elapse of the term set out the Statute of Anne. The contrary ruling in *Donaldson*, however, did not entirely settle debate. Advocates of the perpetual term could point out that the Law Lords were closely tied on the vital question of whether statute extinguished the perpetual term of common law copyright, and it is even possible that they voted narrowly in favour of common law copyright.61

However, because dogmatists for the perpetual term could argue that *Donaldson v Becket* had not truly settled the argument about term, their opponents failed to inter the idea of perpetual common law copyright with the 18th century. Before 1842, polemicists, authors and publishers expended considerable effort promoting the idea that literary property should be treated in the same way as real and personal property – a personal possession with no limit placed on the term of ownership.

**Macaulay’s intervention**

Before 1842, the parliamentary petitions of authors such as the poet Wordsworth popularised the idea of a creative work as a personal possession belonging by natural right to the author. Writers as diverse as Robert Southey and Charles Dickens passionately accepted the argument of natural rights and they inspired Thomas Noon Talfourd, a parliamentarian and a friend of Wordsworth, to take up cudgels on behalf of the suffering population of authors. He introduced his first copyright bill in 1837 but his second bill of 1841 began again the great debate over term.

Although he stated that justice demanded perpetual copyright, Talfourd sought a copyright term of life of the author plus 60 years. This period approximated to the posthumous term of 50 years eventually accepted by the Berne Union at the Berlin Conference of 1908, and greatly outstripped the posthumous period of 30 years set out in the Australian Copyright Bill of 1905. It also commanded considerable support. Supposedly the possibility that the family of Sir Walter Scott would soon lose copyright in his works aroused the sympathy of the

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61 Rose discussed the possibility that the clerk of the House misattributed votes, and that the Law Lords voted by a majority of either 6–5 or 7–5 for common law copyright.
House of Commons. But the proposed term failed to win the final support of Parliament after the historian and poet Thomas Babington Macaulay persuaded the Commons of the viciousness of long publishing monopolies.

In 1831, Macaulay made his parliamentary reputation with a dazzling speech in support of the famous Reform Bill that remodelled the electoral system and extended the franchise. Ten years later, he was at the height of his literary success. But unlike Dickens, who in the same period was histrionic about the wickedness of copyright piracy, he regarded copyright as a necessary evil not a moral necessity. The legislature, he said, need only to look to the public interest, not the heavens or natural law, to determine how copyright should be constituted. Above all, the rights of the owner ought to be subordinate to the needs of the public.

With his attacks on the idea of lengthy posthumous copyright, Macaulay placed the public interest in optimum dissemination of information at the forefront of copyright policy. Coming from the English liberal tradition, and reacting to the illiberalism that is a dominant tendency of copyright law-making, he placed readers’ interests before those of authors or publishers. Macaulay’s career of copyright controversy lasted for little more than a year, from the introduction of a Copyright Bill in January 1841 until the appearance of its successor in March 1842. The Bill passed into law on 1 July 1842 but only after much agonised consideration of his and Talfourd’s passionate arguments in the previous year.

In the end, the parliamentarians accepted Macaulay’s arguments in favour of a reduced copyright term as well his formula of life plus seven years or 42 years from publication, whichever occurred later (according to a witness to the Gorrell Committee in 1909, Macaulay chose the period of 42 years simply because the debate over the second bill took place in 1842). The idea of posthumous copyright lasting 60 years – as proposed in Talfourd’s Bill introduced on 29 January 1841 – seems to have roused him to something like noble rage. An infrequent

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63 Evidence of Charles Whibley to Committee on the Law of Copyright 1909–Appendix of Statements of Evidence Submitted to the Committee (Cd 5051). According to Ricketson, supra, the influence of France, which chose the term arbitrarily, led to the adoption in the Berne Convention of the 50 year posthumous term.
parliamentary speaker, Macaulay rose on 5 February 1841, after hearing Talfourd speak in support of the Bill, to make the second of his two famous speeches in the Commons.

Some of his words may prove prophetic in the age of the internet:

Just as the absurd acts which prohibited the sale of game have been virtually repealed by the poacher, just as many absurd revenue acts have been virtually repealed by the smuggler, so will this law be virtually repealed by piratical booksellers … Every art will be employed to evade legal pursuit; and the whole nation will be in the plot. On which side indeed should the public sympathy be when the question is whether some book as popular as Robinson Crusoe, or the Pilgrim’s Progress, shall be in every cottage or whether it shall be confined to the libraries of the rich for advantage of the great-grandson of a bookseller who, a hundred years before, drove a hard bargain for the copyright with the author when in great distress?

Although his argument was long and rhetorically complex, Macaulay summarised the dangers of copyright in a few concise sentences:

For consider this; the evil effects of the [copyright] monopoly are proportioned to the length of its duration. A monopoly of 60 years produces twice as much evil as a monopoly of 30 years, and thrice as much evil as a monopoly of 20 years.

Macaulay considered the long posthumous term an evil rather than copyright in itself, which he thought a “necessity” to remunerate authors, although the “tax is an exceedingly bad one”. He accepted in principle that consanguinity provided sufficient reason to allow posthumous copyright. But, he said, reality often traduced the expectations of heirs. A posthumous term carried the promise of future profit and this promise attracted bidders. As often as not, the author would sell the heir’s copyright patrimony to the highest bidder.

Thus, at the time a book should be freely available to the public, production and price were fixed according to the prerogatives of monopoly. The longer the term of monopoly the worse the abuse of the public. The benefit to authors was not a primary consideration. “Considered as a boon to them,” he said, “it is a mere nullity, but considered as an impost on the public, it is no nullity but a very serious and pernicious reality.”

Turning to the other main argument for posthumous copyright, that it provides the author with an incentive to produce for the economic benefit of descendants, Macaulay again pointed out that theory did not describe reality. He declared that “an advantage that is to be enjoyed more than half a century after we are dead, by somebody, we know not
by whom, perhaps somebody unborn, by somebody utterly unconnected with us, is really no motive at all to action.”

Macaulay considered copyright the only productive alternative to a system of patronage but he rejected the idea of copyright as a commodity that might be traded in the distant future. It existed for one reason only, because “men whose profession is literature … must be remunerated for their literary labour.” He made fun of the natural law claims made for copyright. “Might not the pars rationabilis of our old law have a fair claim to be regarded as of celestial institution?” he asked. “Was the statute of distributions enacted in Heaven long before it was adopted by Parliament?”

Macaulay won the battles of 1841 and 1842. His ideas fell out of favour after 1905, when Australian legislators remembered his arguments with admiration. He established in public debate, however, a notion of the public interest and an understanding that rights awarded for a just cause may be subverted and abused. Macaulay rejected the idea of copyright as a quasi-sacred commodity voicing the scepticism that informed, but did not significantly influence, copyright debates in the 20th century.

The debate over the 1905 Copyright Act

The posthumous term and publishers

The Senate provided the forum for the deepest consideration of the 1905 Copyright Bill and the debate concentrated overwhelmingly on the duration of copyright, with only limited excursions outside that topic into matters of newspaper copyright, penalties, and the overlap of copyright and designs legislation. Sir Josiah Symon, who raised the question of term, in substance paraphrased Macaulay, whom he quoted generously. While copyright was necessary because we “cannot possibly have a supply of good books unless men of letters are liberally remunerated”, there were, he said, “great disadvantages in connexion with copyright, unless framed upon lines and within limits which are, as far as possible, just.” The greatest disadvantage was that “copyright is a monopoly, and like all monopolies, it is evil in essence.”

In advancing this argument, Symon lacked Macaulay’s subtlety for Macaulay attacked the long posthumous term without condemning copyright itself. Symon noted that the difficulty for legislators lay in fixing the term but he was certain that copyright ought to expire with the death of the owner – a position derived from Macaulay’s
proposition that a long posthumous term turns copyright into a commodity: “an evil, I venture to think, exists especially in giving posthumous monopoly … rather than a long fixed period dating from the publication of the book intended to be protected.”

Two factors relevant to contemporary copyright analysis determined Symon’s position: first, the inequality of bargaining power between the creator of copyright works and the producer of copyright material, such as a publisher, and second, the public interest. In regard to the first issue, Symon reflected a sentiment not especially evident in 1842 but prevalent among parliamentarians, Australian and British, in the early part of the 20th century: solid dislike of publishers.

Many politicians believed that publishers exploited authors ruthlessly. The Labor Senator, Henry Givens, declared that publishers were the main beneficiaries of copyright law. They, he said, “get a rich return, while the authors very often go hungry”, and made “handsome profits out of copyright bought at an exceedingly low figure”. Authors were “a struggling class and publishers have taken advantage of their position and shamefully sweated them”.

Symon’s statement captured the position aptly enough:

And after all, we must not forget that it is not the author who derives the greatest benefit from any system of copyright, and we must be careful not to place in the hands of others than the authors the benefit to be derived from such a system. It is the booksellers and publishers, who may drive a hard bargain with the author for the copyright of his work, and who may, after the author’s death, if you make the period of copyright too long, enjoy wealth … intended to be for the author and his descendants.

Here again the ghost of Macaulay stood at Symon’s side. Macaulay responded to Talfourd’s description of the poverty of Milton’s granddaughter with the observation that perpetual copyright in the hands of a publisher barred her from enjoying a share of her grandfather’s estate – not the limited statutory term against which Talfourd agitated. In doing so, he turned the argument in favour of a long term for authors on its head, showing how a statutory right of great longevity does not automatically work in favour of its intended beneficiaries.

As Macaulay pointed out, the creator, when presented with the immediate advantage of whatever reward is held out for assignment of the right, will often disregard future advantage in favour of present
benefit. Because the first owner of copyright typically relies on an intermediary to provide financial and other wherewithal to expose the subject matter of copyright to the market, the owner’s bargaining power is usually inferior to that of the intermediary. As a result, the owner often loses control – or ownership – of the right.

Senator Givens, who spoke loudest in the Senate against publishers, certainly took inequality of economic power between author and publisher for granted. Although silent on Symon’s strictures about posthumous copyright, he evidently felt strongly that copyright should function as a system of preferment for authors, not as an economic boon to the mediators between the author and market. By today’s standards, his solution, comprising a limited right of assignment (in short, no assignment to publishers) and compulsory royalties, was drastic. But what is more significant is that in 1905, Givens and Symon wished to limit the opportunity for assignees – like publishers – to secure, through superior bargaining power, the rights intended for creators.

**The public interest**

They were concerned about the danger that the posthumous term, in their opinion, posed to the public interest. Symon introduced to Australian debate the idea of the public interest in copyright. Speaking of the publisher’s willingness to “levy blackmail”, he said, “the public have an interest in this; the public are entitled to have at the earliest possible period the benefit of a man’s intellect thrown open to them at the cheapest possible rate”. The Labor Senator Hugh De Largie used similar language. Arguing that piracy should be condoned if produced a supply of cheap books, De Largie twice used the phrase “public interest”.

Givens took up the theme and also contributed another novel phrase bandied about in subsequent Australian political arguments. Australians should fear, he said “a tax on knowledge” that would result from the term proposed in the Copyright Bill of life plus 30 years. “That period,” said Givens, “is altogether too long.” Above all, he said, the rights of authors were paramount provided they “shall not interfere with the welfare of the community.”

Apart from a long and learned dissertation on the history of copyright when he introduced the Bill, Senator Keating remained mostly in the background of debate, apparently most interested in securing the
passage of the bill without significant alteration. Symon and Givens played the largest roles but they did not speak to an uninterested or hostile audience. Their fellow Senators accepted their recommendation on term and rejected the Bill’s proposed period of life plus 30 years, substituting Macaulay’s formula of seven years after death or 42 years from publication, whichever elapsed first. In doing so, they repudiated one of the most revered elements of modern copyright law – the lengthy posthumous term.

The momentous decision to choose a shorter copyright term amounted to rejection of the idea of copyright as a commodity and a declaration in favour of making copyright the property of the author alone. Givens took an even more radical view. He believed that the system of literary property impoverished the author and debased works. Copyright should function, he thought, simply as a boon to authors, not publishers. He proposed legislation that restricted the author’s power of assignment and allowed for payment of compulsory royalties.

Givens’ concern over equality of bargaining, and his willingness to disrupt accepted commercial practice, reflected his days as a trade union organiser in Queensland, but his proposals for establishing a copyright law that very largely benefited authors were too romantic even for the 1905 Senate. No-one would agree to limit the owner’s right of assignment, explicitly recognised in copyright law since 1842, and underpinned by contractual principles. Givens, though, recognised more clearly than his colleagues that the copyright system, based on authors’ rights, delivered primary economic power into the hands of the producers, not the originators, of copyright material.

Considering the irreducible character of modern copyright law, it is worth remembering the extent to which Givens considered the economic rights conferred by copyright law to be negotiable. He viewed copyright as a plastic creation that could be moulded by principles of fairness and equality, and in applying those principles, he looked to the previous half century of political resistance to the claims of property and capital. But he could not alter the reality that copyright was a thing to be traded to the most successful bidder. Once the Statue of Anne replaced the old licensing system and assimilated the concept of exclusive possession – which confers ownership and the right of disposal – there could be no turning back. Once adopted, principles of property usually endure.
Even so, in 1905, the elaboration of secondary rules remained up for grabs. It was still possible to argue about the copyright term and to link it, as Symon did, to justice for author and public. Symon won the argument on term in 1905 (against Keating’s wishes) but this victory for limitation of exclusive rights lasted for only six years. The Berne Convention released a tide that swept away the arguments of Symon, Givens and others in the Australian Parliament, and drowned the prophetic voice of Macaulay.

By 1912, when a new statute replaced the legislative innovation of 1905, most copyright legislators seemed scarcely to understand arguments about the public interest. That in 1905 parliamentarians considered themselves at liberty to pillory publishers, and condemn the long posthumous term as a public abuse, illustrates how completely Australia came to surrender legislative independence to the law makers of the Berne Union and, later, other international bodies. Later politicians accepted norms that would have made many men of the 1905 generation turn in their graves.

A bridge to the modern

The Copyright Act of 1905 seems, in style and arrangement, strikingly modern, its provisions departing gracefully from the outdated formulations of the existing British statutes. Its drafters preserved the old conception of books instead of introducing the concept of literary works and ignored the reality of mechanical reproduction. On the other hand, they effected innovations in the sum of rights conferred on copyright owners and the remedies available to them. In this light, the Act appears both modern and pre-modern.

It is modern in style, structure, and the new flexibility displayed towards the categories of copyright, and their application – seen, for example, in the provision for divisibility of copyright and transformation of works. It is pre-modern in the sense that drafters and legislators did not consider themselves bound to implement the Berne Convention, or even to follow British precedents (though parliamentarians were careful not to enact legislation that offended the provisions of British legislation). They retained a limited view of the scope of copyright law and adhered to 19th century conceptions about literary property and the other categories of subject matter protected by copyright.

The generation of 1905 took account of the Berne Convention and legislated in general (though not always direct) conformity with its
edicts of 1886 and 1897. They did so not because they felt a compulsion to follow international developments. Rather, they supported the principle of international copyright reciprocity, and in any case, before 1908 nothing in the Convention texts offended the sensibilities of a legislature that supported authors’ rights. This kind of independence soon became impossible. Britain’s response to the Berne Union’s Berlin Revision Conference established the Convention’s primacy over imperial legislatures. Australians accepted the axiom that the Berne Union led and national parliaments followed.

The premises accepted by Australian legislators in 1905 thus differed radically from those of 1912. In 1905, the legislators did as they saw fit, while in 1912 they accepted without demur the Convention’s authority to prescribe binding rules. The distance between the world of copyright in 1905 and that in 1912 is best illustrated by the different approaches of legislators to the question of mechanical reproduction. In 1905, they seemed uninterested in the phonographic industry. By 1912, following heated debate in Britain about the industry’s claims for legal preferment, few politicians doubted that its demands must in some way be accommodated.

The 1905 Act, despite its appearance of modernity, is characterised by a possibly wilful absence of foresight about the new way in which copyright material could be reproduced and performed. Its primitive division of copyright into literary and artistic property and the failure (or refusal) to grasp the idea of property in mechanical reproductions would soon become untenable. With the emergence of the mechanical reproduction right, copyright ceased to be the sole province of authors, and in time became an instrument of industrial power utilised with ferocity and relentless premeditation.

In sum, the 1905 Act marked the beginning of the modern era of copyright. From this time, legal privilege that had its beginnings in the control of books, the Stationers’ monopoly, the emergence of publishers, and the idea of the author’s moral entitlement would be transformed into a legal device for protecting and enlarging the giant industrial revenues of the music, film, publishing, broadcasting and software industries.