Chapter 2 – International developments

Transition to the modern era

1905 marked the high tide of Australian independence in making copyright policy. The tide then ran out. Between 1908 and 1910, the Berne Convention’s Berlin Revision, the British Board of Trade’s inquiry into the law of copyright, and the Imperial Copyright Conference, created new policy for the British Empire. Australia responded promptly to developments, enacting copyright legislation in 1912 that incorporated the British Copyright Act of 1911.

The new legislation unambiguously recognised property in abstractions and made clear that copyright was not subject specific: it did not apply in distinct ways to literary property – books – or musical or dramatic ‘pieces’ or the manifestations of ‘fine arts’. It applied to mental formulations designated ‘works’ and the physical configuration that allowed a work to be fixed, multiplied and distributed. In short, distinct copyrights could apply to the work and the physical format that embodied it. Legal protection lasted for 50 years after the death of the author or, in the case of the product embodying a work, 50 years from the date of production.

The consequences of these changes were momentous. Once nations agreed that the physical format embodying copyright works was mutable – not restricted to a fixed category such as books – and that each format attracted copyright protection, they opened the way for the industries that fixed works in records or film to control the multiplication of copies. Authors, the intended beneficiaries of copyright legislation, would now share its benefits with the film and music industries. The industries did not consider copyright protection a necessary condition for economic success. But the aggressive drive for authors’ rights forced them into a game of brinkmanship that secured new forms of analogous copyright undreamt of a few years earlier. The fledgling bird released in 1905 now truly took wing.

The half dozen years following the Act of 1905 marked an end and a beginning. All vestiges of copyright literalism, the idea that property in abstractions is impossible, were swept from legal discourse,
and Macaulay’s arguments for a narrow reading of copyright’s scope rejected.

Copyright modernism

The London booksellers’ agitation for perpetual copyright failed in 1774, but their efforts marked the beginning of a campaign that, nearly 140 years later, secured legislative recognition of intangible property. Their arguments, sustained by moral certitude, continue to be reprised in favour of extending the reach of the law. Great names of English law, including Lord Mansfield and William Blackstone,\(^1\) asserted the natural right of authors to property in their work and, consistent with John Locke’s appropriation theory, a right to own the product of their labour.

Inevitably, the 18th century debate settled around the question of whether an abstraction could be owned. The booksellers had no doubt. So long as the author’s work could be realised in physical form, they said, the requirements of property were substantively satisfied. This modernist thesis – modern because the rationale is still commonly advanced today – said that as a matter of justice, the object of protection must be the mental composite given shape by the author of a work.

By contrast, the argument against literary property asserted that mental formulations could not be owned. However real, they, unlike realty or chattels, could not be possessed, occupied, disposed of, or destroyed. A book could be owned but not its contents. In the words of Attorney General Thurlow in Donaldson v Becket (1774), a literary work was “beyond the comprehension of man’s understanding and hardly capable of being defined”. As Justice Yates said in Millar v Taylor (1769), the property alleged by the booksellers “is in the mind alone; incapable of other modes of acquisition or enjoyment, than by mental possession … these are the phantoms which the author would grasp and confine to himself.”\(^2\)

The argument over literary property thus raised, at an early stage in copyright history, the problem of applying to abstractions rules designed for the physical world. If property in a work arises on material

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1 William Murray (later Lord Mansfield) in Millar v Kinkaid and Tonson v Walker, and Blackstone in Tonson v Collins.
2 Bently and Sherman, supra.
fixation, materiality determines ownership and the work itself can only be said to be possessed nominally. Undefined according to the canons of physical measurement, existing in the spirit realm, the “phantom” to which Justice Yates referred cannot be said to conform to the ordinary rules governing property subsistence.

Literary property advocates, however, maintained that a book was simply the physical means for realising the work. The book – a chattel – and the work – literary property – were conceptually distinct but physically indivisible. Justice Aston made this point in *Millar v Taylor*. He asserted that “when … communicated to the sight and understanding of every man by the medium of printing, the work becomes a distinguishable subject of property.”

It was enough, so far as property rules were concerned, for mental work to be reduced to physical form. The work could then be enjoyed by possession of the thing in which it was embodied. No title was claimed in the ideas expressed – the author owned the expression of the ideas. For literalists such as Thurlow, this point of view was untenable. It was not sufficient to say that realisation in material form of an abstract work satisfied the absolute legal requirement that property must be definable. The law recognised property in certain incorporeal subject matter, such as the right to sue to recover a debt, but in such an instance, the property consisted of something readily definable – a legal right. The idea of literary property, however, required acceptance of the concept that while material form defined the protected subject matter, copyright actually vested in something distinct, intangible, intrinsically indefinable. For the literalists, such a formula stretched the idea of property too far.

Though the literalists won the argument in *Donaldson v Becket*, the extended litigation over common law copyright began the march of copyright modernism. Perhaps because of the intensity of controversy,

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4 Supporters of literary property drew a clear distinction between the book and its literary contents. As Rose, *supra*, noted, Blackstone’s *Commentaries* popularised the idea of property in immaterial works, making clear that the subject of legal protection was the invisible literary work. “The paper and print are merely accidents, which serve as vehicles to convey [the author’s] style and sentiment to a distance. Every duplicate therefore of a work … is the same identical work, which was produced by the author’s invention and labour.” However, the drafters of the 1842 Act did not explicitly distinguish between works and the material form to which they were reduced.
and closeness of the final vote among the Law Lords, the interested public could accept the idea of property in the invisible. Sympathetic legislators, however, continued to work in a conceptual fog, making no distinction between property in a ‘book’ and the expressive contents of the book.

In the British Empire, the fog did not lift until 1911, when the new British Act adopted the scheme of works enunciated in the Berne Convention. Perhaps the absence of conceptual clarity evident in the Copyright Act of 1842, and to a lesser extent, the Australian Act of 1905, pointed to uneasiness over the doctrine of abstract property. The drafting of the latter Act, in particular, seemed consciously to avoid recognising a flexible category of works that could extend copyright much beyond the world of literary and musical publishing.

Literal arguments against copyright seemed to fall out of favour almost as soon as the Lords handed down their decision in *Donaldson v Becket*. Why this was so is not hard to understand. A century before the literary property debates, the philosopher John Locke asserted that labour supplied the basis for the creation of property, and his older contemporary, Thomas Hobbes, stated that within the boundaries created by the social contract, individuals could construct the world as they saw fit. Taken together, these principles provided the basis for a permissive view of property rights that by the late 18th century would take for granted the right of individuals to own the fruits of their intellects.

Thus the victory of the literalists in *Donaldson v Becket* proved anomalous. Copyright literalism dissolved in thin air and the modernist argument infiltrated the legislative consciousness. When, in 1886, the Berne Convention created international consensus in favour of property in works, it was only a matter of time before Britain enacted copyright rules that reflected the new understanding.

The influence of the Convention, and the political activity of the phonographic industry, defending itself against the assertion of the mechanical reproduction right, emerge as the twin determinants of copyright policy-making in the years 1905–1912. The British and Australian Copyright Acts of 1911 and 1912 showed no traces of the literalism discernible in the statutes they replaced. By the end of the first decade of the 20th century, copyright was no longer explicitly tied to books or any other format. The modern era had truly begun.
The Berlin Conference of 1908

The scope of authors’ rights

The Berlin Conference called to discuss revisions to the Convention texts adopted in 1886 (in Berne) and 1897 (in Paris), spread the copyright gospel to the world. Britain promptly ratified the Conference text on behalf of the Empire and set about giving legal effect to the agreed principles. Soon came the 1911 Copyright Act, adopted the following year in the Australian Copyright Act.

The Berlin delegates systematically enlarged the scope of authors’ rights. Translations, adaptations, arrangements of music and other transformative reproductions of literary and artistic works were now to be protected as original works. Delegates confirmed the principle of national treatment. Union members were forbidden from making the grant of copyright dependent on formalities such as registration. The Convention permitted the author of a work to control its translation and prohibited reproduction of a journal article without the writer’s consent. Newspaper articles could, in the absence of explicit prohibition, be reproduced in other newspapers. Indirect appropriations, or adaptations – including dramatisations and abridgements – made without consent of the author were also prohibited.

The delegates also agreed to a copyright term of life plus fifty years or fifty years from the date of making a mechanical reproduction, making clear that copyright had a life of its own distinct from that of the author. Copyright in a work could, in theory, be disposed of as a commodity by persons unknown to, and unconnected with, the author. Most significantly, the Conference text declared that authors should have the right to authorise mechanical recording of musical works and the public performance of those works. With this proposition, they

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5 The decisions of the Conference affected a large proportion of the world’s population. Membership had grown slowly since 1897 to 16 nations (France Belgium, Spain, Italy, Monaco, Germany, Sweden, Norway, Denmark, Switzerland, Luxembourg, Britain, Haiti, Honduras, Tunisia and Japan) but 21 non-Union members attended as observers (including the United States and most of the Latin American States) and the membership included, by default, the imperial possessions of Britain (including Australia) and France. The US and Latin American countries established parallel conventions.

6 Members were not obliged to introduce the 50 year term into domestic law but most did.
started a battle that began the transformation of the copyright system into the instrument of industrial power.

Until now, statesmen, politicians, and no doubt the interested public, could happily assent to the message of authorial entitlement spread by Victor Hugo, Bernard Shaw and others. It symbolised, seemingly, a benign and useful aspiration. But if justice for authors meant the right to control, and possibly disrupt, the production of phonograms, on which a new industry relied for profit, and the music-loving public for pleasure, the deserving author suddenly became a more sinister figure.

**The fatal concession**

Now, for the first time, the Berne Union overreached itself. The advocates of authors’ rights ran into opposition. For the first time in the history of international copyright law-making, the creative interest found it must bend to the industrial if conflict arose. In one sense, the authors’ rights movement caused its own downfall, though the influence of the Convention testifies to the Union’s remarkable success in realising its program. From the beginning, the admixture of mercenary motives hopelessly contaminated the ideal of moral justice for creators. Berlin delegates now discovered that if authors wanted the right to control “indirect appropriations” of musical works by mechanical reproduction, they would have to deal with a ruthless industry not inclined to give much weight to considerations of moral rights or natural justice.

At Berlin, the phonographic industry fought the battle for the producer interest and won a defensive victory. The amending text laid down that members could make the grant of the mechanical right subject to “reservations and conditions”, meaning that a country could introduce a compulsory licensing scheme that allowed reproduction without consent. Countries could even grant manufacturers a parallel copyright in mechanical reproductions. It is not certain that the industry would have involved itself in copyright regulation had the Berne Union not recognised the author’s mechanical copyright. In any event, in securing provision in the Berlin text for countries to impose reservations and conditions on the right, the industry’s representatives established a pattern of active persuasion imitated by different industries in the future.

They also ensured that their industry and the fledgling film industry could expect, over time, to receive the benefits of property rights. And
what could in principle extend to these industries could extend also to the broadcasting industry and any other industry reproducing or disseminating works. The final decision of the Conference, to recognise a new category of *cinematographic works*, went largely unnoticed, but it also symbolised the delegates’ expansive conception of copyright as a mode of regulation that could extend flexibly to encompass new technological means of utilising and disseminating works.

After 1908, authors saw the apparent boon of a mechanical reproduction right undone by the fatal concession allowing countries to limit the scope of the new right. For all their appeals to a moral authority derived from the founding principles of the Union, they discovered that sentiment is no safeguard against the cold calculations of commerce.

**The Gorrell Committee**

Soon after the Berlin Conference ended, the British Board of Trade appointed a copyright committee, chaired by Lord Gorrell, to examine the amended Berne Convention. The Gorrell Committee reported in December 1909, recommending that Britain ratify the Convention. Then in 1910 the Government produced a copyright bill and called an imperial copyright conference to consider the bill. A new bill, introduced in 1911, passed into law as the imperial Copyright Act. The following year, Australia adopted the legislation in its new Copyright Act.

*The Times* described the Gorrell Committee as “very strong and impartial”. It consisted of literary and music publishers, Oxford University’s first professor of English, an artist, a playwright and two lawyers, including Sir Thomas Scrutton, an advisor to the Government and author of a famous late 19th century text, *The Law of Copyright*. Scrutton also appeared for the plaintiff in *Boosey v Whight* and could be expected to firmly endorse the author’s right to unfettered control of mechanical reproduction.

So constituted, the Committee stood firmly for authors’ rights and could be expected to endorse implementation of the Berne Convention.

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7 The British delegates informed the Berlin Conference that any opposition of Britain’s self-governing dominions would present a serious obstacle to Britain’s accession. The dominions gave assent in 1910 at the Imperial Conference of 1910. All the parties accepted the provisions of the draft British Copyright Bill prepared by the Board of Trade, and agreed to adopt substantially similar legislation.
in British law, which it duly did. But without a single member who understood the driving commercial necessity that created animosity to proposals for an unqualified mechanical reproduction right, the Committee struggled to answer the main question placed before it.

**The mechanical reproduction right**

Its members did not doubt that Britain should implement the revised Berne Convention but they faced a difficult choice. Should they recommend qualification of the mechanical reproduction and allied performance rights prescribed by the revised Convention, or insist that the rights vest absolutely in authors? Article 13(1) of the revised Convention stated:

*The authors of musical works shall have the exclusive right of authorising (1) the adaptation of those works to instruments which can produce them mechanically; (2) the public performance of the said works by means of these instruments.*

If enacted, these rights would give British music composers and publishers unprecedented power to dictate commercial terms to the manufacturers of records. Qualification, permitted by the Article 13(2),

*Reservations and conditions relating to the application of this article may be determined by the domestic legislation of each country in so far as it is concerned; but the effect of any such reservations and conditions will be strictly limited to the country which has put them in force.*

would return bargaining power to the manufacturers. As the Gorrell Committee heard, the recording industry grew wealthy from the 1880s by recording musical works without consent.

After 1899, *Boosey v Whight* stood as authority for the principle that mechanical processes that facilitated the mechanical performance of musical works did not infringe copyright. From the distance of more than a century, the judgment of Justice Stirling can be seen as the last gasp of copyright literalism. He saw clearly that the creators of the 1842 Act intended that copyright apply to books, in a broad sense that comprehended dramatic, musical and fine art compositions.

They did not intend that definitions of copyright be stretched to include mechanical operations, or indeed abstractions that could not be rendered on a page. An interesting aspect of the judgment in *Boosey v Whight* is that Justice Stirling’s reasons for denying copyright in the perforations in a music roll in some ways prefigure the arguments given by some common law judges in the 1980s for not

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8 “Reservations and conditions relating to the application of this article may be determined by the domestic legislation of each country in so far as it is concerned; but the effect of any such reservations and conditions will be strictly limited to the country which has put them in force.”

9 An interesting aspect of the judgment in *Boosey v Whight* is that Justice Stirling’s reasons for denying copyright in the perforations in a music roll in some ways prefigure the arguments given by some common law judges in the 1980s for not
posited limitation. Advocates insisted that authors must control mechanical processes that allowed for the performance or dissemination of works. The profit motive silenced dissent. Thus Article 13(2) stoked controversy. Authors and publishers on one hand, and the recording industry on the other, prepared to battle before Parliament for the right to control the manufacturing process.

The Committee received 25 submissions from artists, architects, musicians and writers, four from publishers, four from newspapers and printers, and 14 from the phonographic industry. Authors, the creators of literary, dramatic, artistic and musical works, comprised an active faction that pursued its interests independently from the literary and musical publishers. George Bernard Shaw gave evidence to the Committee on behalf of the Society of Authors and Georges Maillard spoke for the International Literary and Artistic Association, the principal instigator of the Berne Convention.

Amazingly, however, only one music publisher gave evidence to the Committee, even though the recording industry was, according to the publishers, destroying the sales of sheet music. On the other hand, the Copyright Association and the Publishers’ Association ably represented literary publishers. The Publishers’ Association cunningly sought to enlarge the author’s reproductive right to include methods of reproduction not yet discovered, proposing that legislation refer to reproduction by “mechanical and other means”.

The Columbia Phonograph Company pointed out that the phonographic industry had become more than an economic phenomenon:

_During the present generation, there has sprung up an industry in instruments that mechanically reproduce music, so vast and far-reaching that in every civilised country on the globe talking machines and piano players are influencing the lives and temper of the masses of the people, bring into the homes of the rich and the poor, but especially to the humbler classes of the community, the elevating and educational advantages of the purest and most beneficent of the arts._

recognising copyright in the object code of computer programs. Justice Stirling considered that copyright vested in the literary notation of musical symbols on a page but not perforations “for the production of musical sounds”. 

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Compulsory licence

What is most noticeable in the statements of evidence is the phonographic industry’s determined pressing of the case for a compulsory licence to record musical works. For the spokesmen of the recording companies, 20 years of effort and investment were at stake and they pushed their message relentlessly. John Drummond Robertson, the manager of the Gramophone Company (the forerunner of EMI), and later prominent in public debate over the 1911 Copyright Bill, drew the Committee’s attention to the industry’s economic contribution:

How great are the interests involved in the case of a company like our own with its branches and agencies and affiliated companies extending over Europe, Asia, Africa, and Australasia requires little demonstration. In illustration we only adduce that during the last year, we, ourselves, paid no less than £150,000, in wages and salaries, and that the tangible assets of our company, as shown in its last Report, amounted to £757,000.

The spokesmen of the record companies based their arguments on principles of fairness. Why, they asked, should a legitimate industry contributing to employment and satisfying public demand, now be forced to surrender its autonomy to creators? Why should justice for authors mean that the industry must cede control of a practice which the law, and previously the Berne Union itself, considered acceptable? For Drummond Robertson, the novelty of the proposed mechanical right compounded the unfairness. The right must:

At any rate in British law, be regarded not as the extension of an existing right, but as the creation of a new one. This new right can only be put into effect at the expense of somebody, and in this case the burden is to be placed on our trade … it must not be forgotten that our industry has grown up under the aegis of the Berne Convention internationally, and at home under domestic law, and that vast interests have been created under conditions which specifically denied to the composer any right in phonographic publication.

According to Robertson, having consented for so long to the practice, the legislature had no reasonable basis for arbitrarily depriving the industry of the power to record, without the author’s consent, performances of works:

It is in our opinion, a case for equitable adjustment as between the claims of those who acquire a new right in virtue of statute, and of those who are called upon to surrender interests, created under existing international and domestic law. We hold
that legislation should not create an unrestricted right in phonographic publication, but should strike a fair bargain as between conflicting interests.

The creative interest, on the other hand, asserted, in the words of the Gorrell Report, that they “should have the exclusive right of authorising the adaptation of their work to such instruments [phonograms] – that it is in reality part of the literary property which they have in the products of their own brains.” Composers also objected to the compulsory licence on they grounds of integrity, alleging that unless they controlled the process of reproduction, they would be unable to prevent the production of degraded versions of their work.

The Committee members agreed unequivocally that as a matter of justice, composers should be granted the power to control mechanical reproduction of their works. As they pointed out in the report, most “of the witnesses who advocated a compulsory licence did not deny the justice of the author’s claim”. On this question, the Gorrell Committee saw no difficulty and recommended adoption of the first paragraph of Article 13. But the Committee frankly admitted that in determining the “reservations and conditions” that should apply to the right it confronted “certain very difficult questions”.

The question of investment

The report discussed the question of the compulsory licence at much greater length than any other topic. As the Committee said, it considered the arguments “very carefully” and “thought it right to state the two views somewhat fully”. In the end, in the time-honoured tradition of government inquiries, it decided on a compromise that it perhaps hoped would create Drummond Robertson’s “fair bargain” between “competing interests”.

It rejected the compulsory licence, and in particular the argument that in the hands of authors the manufacturing right would “produce a monopoly which would ruin the businesses of a large number of manufacturers”. Given the large number of composers and the “enormous” demand for phonographs, “it seems probable that the views of the witnesses are exaggerated.” The Committee based its decision on the principle of freedom of contract, which, in Britain, “has generally been considered … most beneficial to the development of all kinds of industries”. Composers were a diffuse class, with differing
priorities, and no single manufacturer was likely to secure licences from even the majority of them. Monopoly was therefore unlikely.

The Committee did, however, accept the argument that the law should recognised or protect the investment of the industry over many years. As its report said, “discs and other records are only produced at considerable expenditure.” More significantly, the manufacturers also displayed “a considerable amount of art and ingenuity in the making up of these records”. The manufacturers were “producing works which are to a certain extent new and original, and into which the reproduction of the author’s part has only entered to the extent of giving the original basis of production”. For these reasons, the Committee members considered records as “one of the things which can be the subject of copyright and further recommend that public performances by means of pirated copies of these records should also be treated as an infringement of the rights of the manufacturer.”

**Phonogram and performance copyright**

The Gramophone Company and the Columbia Phonograph Company (on behalf of a large group of smaller manufacturers) both proposed a manufacturer’s copyright in recordings and their public performance. The Columbia Phonograph Company argued that if the law protected the owner of a musical work against piracy, it should equally protect the manufacturer of a record against counterfeit production. But once again, Drummond Robertson, on behalf of the Gramophone Company, presented the most persuasive arguments.

He stated that “a twofold copyright protection should be accorded to the phonogram, and on precisely the same lines as the Convention affords protection to the cinematograph.” Quoting from the Report of the Berlin Conference, he pointed out that the Convention provided for copyright not only in cinematographs but translations and musical arrangements, if they could be regarded as original in character. “If this view is correct,” he said, “a phonogram is to be regarded as a mode of multiplication coming within the scope of Intellectual Ownership.”

Drummond Robertson did not stop at requesting copyright in the phonogram. He claimed that phonographic companies should be granted the right to control performances of the sound recording. The public performance of a record was “merely a mechanical reproduction of the artiste’s original rendering, postulating no skill.” He advanced a
straightforward reason for granting the right: it represented “part return for the emoluments which the composer is to receive”.

**The Committee’s compromise**

*The Times*, a firm advocate of the creative interest[^10] gave vent to its feelings in two columns. The proposal to introduce copyright in records, and an allied public performance right, it declared “a really remarkable application of the doctrine of vested interests”. According to the newspaper, while it “would seem to be equitable that some concession should be made for the existing property of manufacturers”, only composers and authors deserved copyright protection.

Though *The Times* might not admit it, the Berne Union and its advocates were no less a vested interest than the record manufacturers. Faced with two distinct economic factions that both engaged politicians’ sympathy, the Committee wrestled with a dilemma. The owners of works could make a persuasive claim for political preferment on moral grounds, and the producers of records could point to the economic and social benefits that their industry delivered to Britain. To solve the problem, the Committee gave with one hand, and took with the other.

In doing so, it accelerated the trend, begun in Berlin the year before, to accommodating the claims of the industries that produced products embodying copyright works. The members of the Berne Union and the Gorrell Committee knew that few governments would pass legislation that might – according to the phonographic industry – endanger years of investment and production. Their willingness to contemplate allied rights for producers marched hand in hand with the growing realisation that the business of musical copyright had become big business.

[^10]: *The Times* covered the issue of copyright reform very closely, endorsing the Gorrell Report in a lengthy article on the first Copyright Bill introduced in 1910. The newspaper was, through its editorial and correspondence pages, the principal medium for public debate over the 1911 Copyright Bill. On its pages, authors, publishers, record manufacturers and interested individuals argued over the terms of the Bill. George Bernard Shaw and John Drummond Robertson engaged in an antagonistic controversy over compulsory licensing. In Australia, *The Sydney Morning Herald*, a very different newspaper, also discussed copyright. It made its sympathies clear when it said of Dickens that “His case is certainly proof that the time has come for some alteration of the copyright law, which will protect the property of a writer as well as the public interest.” (15 April 1911).
The Berlin Conference and Gorrell Committee did not agree on how copyright legislation should benefit producers, though both implicitly recognised in principle that producers were entitled to some benefit. The Berlin Revision formula of "reservations and conditions" contemplated a system of compulsory licensing but it did not recognise a manufacturers’ copyright in recordings. However the final Conference document did provide that cinematographic works could be protected separately as literary or artistic works if they displayed original character derived from "arrangement of the acting form or the combination of the incidents represented".

The Gorrell Committee took a different view. Drummond Robertson argued that if the Berlin Union could accept copyright in cinematographic works, the Gorrell Committee could equally recognise copyright in records. The Committee members accepted his argument and they recommended legislation to create copyright in recordings. Unlike the delegates at the Berlin Conference, they rejected the idea of compulsory licensing, and also refused to support the proposal for manufacturers to receive a performing right in records.

**Weaknesses of Committee’s reasoning**

The Committee thus baulked at endorsing what the recording industry really wanted. Its unwillingness to support the compulsory licence pointed to intellectual confusion in copyright policy-making. The proponents of authors’ rights spoke of moral necessity but they wanted exclusive control of productive processes to which they contributed neither capital nor expertise. Claiming moral right, they did not admit mercenary motives. Nor were they asked to. Policymakers accepted moral arguments for copyright protection without examining the economic rationales underlying the demands for legislation.

Their naïveté, deliberate or unwitting, provoked the angry assault of the industry threatened by the authors’ grab for power. The record companies, alarmed at the possibility that authors or publishers could dictate the terms on which records were made, furiously rejected what they considered a grab for economic power disguised in the language of

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11 The compulsory licensing system allowed manufacturers to make, subject to paying the owner a royalty, a recording of any work already recorded with the owner's authorisation. In developed form it originated in Germany (though France introduced a system of compulsory licensing in the 19th century) and had lately been introduced to the United States by the Copyright Act of 1909.
moral entitlement. On what basis, men like Drummond Robertson demanded to know, did the creative interest claim property in works? If they aimed to secure moral rights for authors, said Robertson, they had no need to demand control over the production and distribution of products embodying works.

All they needed were equitable rights to restrain non-attribution or interference with the integrity of works. If they sought the exclusive right to control production, they were asking for something that bore no necessary relationship to the author’s moral rights. If securing economic return for the author’s labour and originality became a rationale for copyright protection then why should such protection not also protect the investment of industries that produced copyright material and thereby generated the returns that accrued to authors?

Whether or not the Gorrell Committee members were alive to these considerations, logical doubts hang over its report and they apply to modern copyright policy-making. Considering its membership, a bookish gathering of lawyers, publishers and various authors’ representatives, it is not surprising that the Committee declined to take the bold step of recommending a compulsory licence. Two years later, British parliamentarians comfortable with the phonographic industry’s language of investment and profit expectations, proved much less tentative.

They recognised that if the mechanical rights of authors were too extensive and those of manufacturers too limited, soon enough government might face a political problem it did not want: monopoly. As the industry itself argued, if the bargaining power of authors outweighed that of manufacturers, over time the most commercially powerful producer would probably succeed in outbidding its rivals to secure rights to the majority of works.

Monopoly and the claims of industry

The industry argued that if the legislature conferred on authors the power to exclude from the production process the majority of producers, it would create monopoly or oligopoly. The Gorrell Committee, though not blind to this possibility did not accept that the disaggregated mass of authors would license a single producer to make records. The Reported canvassed the issue of monopoly in some detail and quoted the first section of the 1909 US Copyright Act, which provided for compulsory licensing. But in the Committee’s view, the
“large number of composers” and “enormous production of, and demand for, these mechanical instruments” meant fears of monopoly were “exaggerated”.

Committee members were not swayed by the evidence of the Columbia Phonograph Company, which referred to comments of the US House of Representatives’ Committee on Patents. The US House Committee declared that compulsory licensing prevented “the establishment of a mechanical-music trust” and further pointed out that without it, “the progress of science and useful arts would not be promoted, but rather hindered, and … powerful and dangerous monopolies might be fostered”.

In a utilitarian political environment, no tenable policy could give new rights to authors and ignore the claims of the manufacturers who made the mechanical rights possible. But even though compulsory licensing seemed to offer a solution to the problem of reconciling the interests of creators and producers, the Gorrell Committee held back, hamstrung by its allegiance to authors’ rights. The Gorrell Committee presented its Report in 1909. In the 1911 parliamentary debates over the Copyright Bill, it would be apparent that to politicians, output, jobs and revenue counted for more than sentiment. They might speak platitudes about the moral rights of authors and purchase Dickens Stamps, but they would also legislate in favour of industries that were economically productive.

Like the members of the Gorell Committee, the politicians of 1911 seemed unwilling to face, or even utter, the difficult questions that called into doubt the logical integrity of copyright policy. In relation to musical recordings, for example, who played the more important role in making a recording a commercial success? Composer,

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12 Owners of works were, in theory, compensated for the loss of bargaining power by a remuneration formula based on a fixed royalty paid on each sale. The method of remuneration remains the greatest source of contention in compulsory licensing schemes.

13 A philanthropic scheme instituted in 1911 encouraged owners of copies of Dickens’s novels to purchase an ornamental stamp to be affixed in their books. The proceeds were to be held in trust and distributed to Dickens’s descendants. Supported by Lord Roseberry, Augustine Birrell and Sir Arthur Conan Doyle, among others, and launched at a grand mayoral meeting in the City of London, nothing very much seems to have come of it. In Australia, the Sydney Morning Herald supported the scheme, stating “Many of [Dickens’s] readers will be glad to take part in a truly democratic testimonial even if they do not agree … as to the excellence of the stamp.”
performer or manufacturer? The first expended the most intellectual effort, the second provided the vital human interpolation, the third took the financial risk. On what basis should any or all be granted rights of property? Was copyright regulation anything more than a system for extracting revenue from the public and distributing it to vested interests?

Such questions were not asked in 1909, 1911 or 1912. The commercial users of music in Australia in the interwar years, grappling with claims for public performance payments, demanded to know the rationale that sanctioned mass remuneration under copyright legislation. Slowly, little by little, government responded to these difficult questions with legislation and policy justification. Whether the answers supplied in laws and official documents constitute an adequate response to the problems of conflicting interest remains an open question.

The Imperial Copyright Conference

A quest for uniformity

Two months before sending delegates to the Berlin Revision Conference, the British Government began planning for an imperial conference to consider how the Berne Convention could be assimilated into the copyright laws of Britain and the self-governing dominions – Canada, South Africa, Australia and New Zealand. In early September 1908, Lord Crewe, the Colonial Secretary, advised the gubernatorial authorities that “an amendment of the existing law is urgently needed” and proposed discussion by a “subsidiary Conference with a view to concurrent legislation, if agreement can be arrived.”

Crewe, jarred by the dominions’ negative response to draft imperial copyright legislation circulated in 1907, hoped that a conference to discuss the updated Berne Convention would lead to unanimity. For reasons of convenience, the Colonial Office abandoned Ottawa as the chosen venue for the conference, and selected London in its place. It proposed that the copyright conference would be held as a subsidiary meeting of the imperial conference scheduled for 1910. This decision illustrated both the practical significance of the proposed copyright legislation, and the emphasis placed by Whitehall on imperial unity. Imperial conferences, the first of which Britain hosted in 1907, replaced the old colonial conferences of the white colonies and reflected the new standing of the self-governing dominions.
They provided a forum for discussing matters of imperial unity and were the forerunner of today’s meetings of the Commonwealth Group of Nations. Britain’s readiness to add copyright to the list of primary matters to be discussed at the 1910 Conference indicated clearly the importance it attached to common legislative implementation of the revised Berne Convention. In the end, the imperial conference took place in 1911, but the subsidiary copyright conference went ahead as planned, in May 1910.

Crewe had a particular reason for not rushing to convene a copyright meeting. By scheduling the Copyright Conference for 1910, he gave the Board of Trade time to digest the findings of the Gorrell Committee and prepare draft legislation for consideration. When the delegates of the self-governing dominions joined their British counterparts in London in 1910, they would have digested the recommendations of the Gorrell Report, and the Colonial Office could present them with the Bill to Amend and Consolidate the Law Relating to Copyright (1910).

The President of the Board of Trade, Sydney Buxton, opened the Copyright Conference on 18 May 1910. He called ratification of the amended Berne Convention, recommended by the Gorrell Committee, “an imperial as well as a United Kingdom question”. For that reason “it was necessary … to take into consultation those representing the self-governing Dominions over the seas.” Buxton stressed the need, arising from considerations of “efficiency” and “the Imperial connection”, for uniform copyright legislation throughout the Empire. “His Majesty’s Government,” he said, “consider it highly important to attain as great a degree of uniformity as is reasonably practicable among the principal Nations of the world with regard to international copyright.”

While the British Government, according to Buxton, considered ratification “desirable”, it was “not committed in any sense” to “the detailed provisions of the Convention”. The provisions would be “fully open to discussion by the Conference”. For the British Government in 1910, securing imperial unity on any legislation with international dimensions was a matter of real importance. Britain stood at the head of what might loosely be called a federated system of international government, and for reasons of trade and politics, needed to ensure that legislation passed in the dominions did not have the effect of damaging interests governed by British legislation.

In copyright matters, for instance, British copyright owners would be furious if a country such as Australia passed legislation allowing for a
shorter term for protection of copyright works or the import into Australia, without consent of the copyright owner, of remaindered copies of British books. As Britain, and none of the dominions, was a member of the Berne Union, it could, if it chose, ratify the Berlin Revision without dominion assent. But if it did so, it put at risk the probability of all the dominions legislating to implement the Convention on uniform lines.

**Friendly and unanimous feeling**

Invited to remember “the Imperial connection” the Conference delegates showed, in words of Australia’s delegate, Lord Tennyson, “friendly and unanimous feeling” and the desire “as far as possible to get legislation on uniform lines”. The Conference began at the Foreign Office and, according to the memorandum of proceedings, “resolved itself into Committee for discussion of the subject in detail”. Delegates held seven meetings but their work attracted little public attention. *The Times* reported only that an imperial copyright conference “was held at the Foreign Office yesterday” and explained that it was “private” and “lasted for five hours”.

The friendly and unanimous feeling of the delegates is scarcely surprising. The period immediately before the Great War perhaps represented the high point of imperial sentiment in Britain and the self-governing dominions. In the Australian Senate debates on copyright in 1905 and 1912, parliamentarians often referred to Britain as “Home”, not in the authentic sense of a place of belonging or return, but as an abstraction denoting the source of legislative unity in the Empire. John Keating, a Catholic of Irish descent schooled at Riverview, the Jesuit boarding school in Sydney, referred to “Home” twice in the copyright debates of 1912.

In the early 20th century, many individuals embraced the idea of a union of equality and brotherhood between Britain and the self-governing dominions. Public figures in favour of the imperial ideal

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14 Cable, Tennyson to Prime Minister, 4 December 1911, National Archives of Australia.
15 Where he was a schoolmate of the brilliant and tragic poet Christopher Brennan.
16 An article *The Times* on 1 November 1911, reported the meeting of the Imperial Mission concerning ‘Imperial Unity’: “The Duke of Marlborough, who presided, said that the cardinal principles upon which the Imperial Mission laid stress were (1) Imperial Preference; (2) Imperial defence; and (3) emigration … If the Empire could hold together and could organise itself for cooperation in common purposes
were keen to create a collective of certain English-speaking nations that, united by common trade and social aims, could become federal in nature – an early prototype of the European Community, though with closer linguistic and historical ties binding members. Naturally, within this collective, legislation would need to be uniform or closely tied.

For many Australian politicians, accepting a common imperial law incorporating an international copyright convention seemed a desirable, even necessary, act. However, it was not inevitable that the dominion representatives would assent to all the propositions that their hosts put to them at the Copyright Conference. Australian governments after 1905, for example, consistently stated their hostility to the 50 year posthumous term proposed in the Berne Convention. But the death of King Edward VII 12 days before the Conference opened may have put an end to any thoughts of dissension. As London made sorrowful preparations for the royal funeral, the delegates breathed an atmosphere of patriotism and imperial sentiment that swirled through the city.

When they first met on 18 May, it is unlikely that any intended to buck the trend towards uniformity. By the time the grandees of the Empire farewelled the King at Westminster Abbey on 22 May, the delegates had reached agreement after, according to the memorandum of proceedings, “full discussion”. They accepted 12 resolutions that supported, among other things, Britain’s ratification of the Berlin Convention “with as few reservations as possible”, the passing of new imperial legislation that would form the basis for uniform copyright codes, the adoption in legislation of the 50 year posthumous term, and the banning of importation of “pirated” copyright works into Britain or the Empire.

To what extent King Edward’s death contributed to the uniformity of opinion at the Copyright Conference is a matter for speculation. No hint of fractiousness invaded proceedings and the British authorities secured the outcome they hoped for. They were helped greatly by the actions of Lord Tennyson, Australia’s delegate, who deliberately disobeyed instructions from the Australian Prime Minister concerning the 50 year posthumous term. Had Tennyson listened to orders from Melbourne, The Times would undoubtedly have detected an atmosphere of hostility in the corridors of the Foreign Office.

then the status of the people of the Empire as a whole would be equal to that of any of the great foreign nations.”
Lord Tennyson and the copyright term

After receiving Lord Crewe’s proposal in September 1908 for a copyright conference, the Australian Government adopted a casual approach to preparations. 18 months remained until the scheduled date for the conference and the Government seemed lulled by the time available for planning. Dilatoriness crept into preparations. No-one in Melbourne appeared to attach much importance to securing the services of an appropriate representative to protect Australian interests. John Keating, a government minister, or Sir Josiah Symon, an Independent at the time of the Conference, were two potential candidates for the role, and it was not impossible for either to absent himself from parliamentary duties to go to London.

Instead, the Government appointed Lord Tennyson as its representative in November 1908. In doing so, it showed either carelessness regarding Australia’s interests or unblinking willingness to consent to whatever Britain might propose in copyright matters. By contrast, the other dominions appointed native representatives. Canada sent both its Minister for Agriculture and Registrar of Copyrights, New Zealand its High Commissioner and South Africa the Agent General for the Transvaal.

The Government should have been in no doubt that Tennyson would support propositions put forward by his own nation, even if they conflicted with Australian wishes. The eldest son of the poet laureate Alfred Tennyson, Hallam Tennyson was the former Governor of South Australia (1899–1902) and Governor General of Australia (1903–04). Popular and hardworking in both roles, he felt deep loyalty to his country, and the tenor of his correspondence with Australian officials leaves no doubt that he expected Australia to adopt a subordinate role in its dealings with Britain. Tennyson qualified as a barrister, but did not practise, and it is unlikely that he knew much about copyright law. His qualification appeared to be his years of high office in Australia. On the one topic raised at the copyright conference about which the Australian Government stated a firm preference, he maintained a contrary view, in keeping with British wishes. The topic was the 50 year posthumous term.

It is clear from the record that after appointing Tennyson and supplying him with copies of the Australian Copyright Act and related memoranda in January 1909, the Government took little interest in his doings, even though he consistently flouted stated policy. From the
start, Tennyson seemed interested in only one topic, that of the posthumous term. At his request, Captain Collins, the Commonwealth Representative in London, cabled Melbourne to seek directions on the question, and received an unequivocal reply from the Department of External Affairs: “Tennyson should be instructed not to favour extended term on part of Australia.”

The department’s memorandum included an official statement of instructions from the Attorney General, Billy Hughes. Hughes declared the Government’s opposition to the 50 year term and provided reasons for its policy. The legislators of 1905, he said, evinced “considerable opposition” to the 30 year posthumous term and “there has been nothing to indicate a change of opinion since”. As he pointed out, the copyright interests of Australia and Britain were not always identical. “The number of works published, the authors of which would be benefited by the extended term, is small in Great Britain and probably nil in Australia. Consequently the matter is of greater relative importance in Great Britain than it is in Australia.”

Tennyson had no reason for doubt about the Government’s position. Collins passed the memorandum, marked “Instructions to Commonwealth Representative”, to him directly. But he would not rest, and continued to pester Collins on the subject of copyright duration. He never explained why the question of term was important to him.

He no doubt identified strongly with the cause of authors. Tennyson’s tastes, not surprisingly, were literary, he published two books, and he was his father’s companion and biographer. Unlike Dickens, the elder Tennyson, who benefited from government sinecures from 1845, is not reported to have complained about copyright piracy or the term of copyright protection. His son, however, may have been distressed when, after copyright in the incomplete first edition of *In Memoriam* lapsed, copies were widely circulated to the detriment of the poet’s reputation.

At any rate, he pressed Collins to ask his masters in Australia to reconsider their position and at first they obliged. On 15 February 1909, about six weeks after sending Tennyson the first memorandum from Melbourne, Collins telegraphed him relaying the news that he had been told to, “inform Tennyson if United Kingdom and other countries, Copyright Union agree extension fifty years, unlikely Commonwealth would not accept alteration”. For the rest of the year,
Tennyson stayed mostly silent, though he evidently caused minor offence by criticising the Australian Copyright Act. In April, Captain Collins cabled the Secretary of the Department of External Affairs on his behalf, conveying the statement that “I have always cabled my criticisms privately, direct to [the Government].”

So stood matters until early 1910 and the dispatch to Tennyson of two cables from the Prime Minister, Alfred Deakin. Deakin wanted to retain the term for copyright set out in the 1905 Act, and also stated his opposition to copyright in the performance of dumbshows and works of architecture. Tennyson did not rush to respond but his return telegram, six weeks after Deakin’s last cable, was emphatic. He congratulated the Prime Minister on his “statesmanlike dispatch” then asked permission to “omit your Clause on term of copyright” on the grounds that “the authorities consider present system open to grave objections and strongly advocate addition of fixed term to the term of the authors’ life”.

Tennyson’s ingenious references to “grave objections”, which implied that the correct copyright term could be arrived at by a process of logic, and unnamed “authorities”, perhaps the members of the Gorrell Committee, might have swayed Deakin, but the last sentence of his telegram, expressed with fantastic condescension, could also have proved fatal to his case. “If you insist,” he said, “on my advocating for literary work this clause of yours I shall be placed in grave difficulty. Leave me free hand.” As it happened, Deakin found no time to respond. He lost office on 29 April, to be replaced by Andrew Fisher, who immediately informed Tennyson that he wanted to review the new British Copyright Bill before deciding Australia’s position.

Copies of the Bill were provided to delegates in advance of the Copyright Conference, but Tennyson evidently did not intend to share the contents with the Australian Prime Minister. On 17 May, the day before the start of the Copyright Conference, he cabled Fisher with a blunt message. “Your proposal to consider details of Bill going through Parliament here impracticable.” The Secretary of the Attorney General’s Department, Robert Garran, replied for Fisher. It was, he said plaintively, “not suggested that details of Bills going through Parliament should be considered … but that Commonwealth should have opportunity to consider draft Bill and make suggestions before introduction.”
The Australian Government seemed then to cave in to its noble representative. In his telegram to Fisher, Tennyson proposed that Australia commit by treaty “to legislate in general conformity with the convention upon legislation being introduced into the Imperial Parliament, and in favour of extension of copyright to life and 50 years and the general lines of the report of the Departmental Committee.” In the absence of contrary instructions, he exercised the free hand he sought. The Commonwealth could now be in no doubt about what to expect from his involvement in the Copyright Conference: consent to all British proposals, and more practically, commitment to legislate in conformity with the British Copyright Act once it was enacted.

**Resolutions and conclusion**

The Copyright Conference agreed 12 resolutions.

Resolution 1 recommended that the British Government ratify the Berlin Convention with as few reservations as possible.

Resolution 2 recommended that the British Government pass a new copyright law applicable to all British possessions and acknowledged the right of self-governing dominions to adopt the British legislation, pass identical legislation or decline to choose either of the first two options. However, a dominion could only modify the provisions of the British legislation if the modifications applied to the jurisdiction of the dominion alone. If a dominion chose to ignore the British legislation it would possess no rights in other parts of the Empire except as conferred by Order in Council or by order of the Governor of a dominion in Council.

Resolution 3 recommended that once the new imperial legislation took effect the existing imperial legislation should be repealed except insofar as it applied to a dominion to which the new legislation did not extend.

Resolution 4 recommended that copyright under the new imperial legislation should subsist only in works of which the author was a British subject or resident of one of the parts of the Empire to which the legislation extended, and copyright should cease if the works was published outside such parts of the Empire. In addition, obligations under the Convention were applicable solely to works the authors of which were citizens or residents of a member of the Union.

Resolution 5 recommended that the Crown be empowered to direct by Order in Council that the benefits of the new imperial legislation
extend to the works of authors who were subjects, citizens or residents of a foreign country.

Resolution 6 recommended that subject to proper qualifications, copyright should include the sole right to produce or reproduce a work, or any substantial part of it, in any material form whatsoever and in any language to perform, or deliver, the work or any substantial part of it, in public, and, if the work was unpublished, to publish the work, and should include the sole right to dramatise novels and vice versa, and to make records etc by means of which a work may be mechanically performed.

Resolution 7 recommended that in the interest of international uniformity to which the Conference “attaches great importance” the copyright term be the life of the author and an additional term of 50 of years. However, the Conference considered it “essential” that after the death of the author of a published work, “effective provision should be made to secure that after the death of the author the reasonable requirements of the public be met as regards the supply and the terms of publication of the work, and permission to perform it in public”. The recommendation concerning term was “conditional on the enactment of some provision of this nature”.

Resolution 8 recommended that formalities, such as registration, be abolished.

Resolution 9 recommended that the definition of artistic works be extended to apply to architecture or craftsmanship.

Resolution 10 recommended that existing works receive the same protections as future works under the new legislation.

Resolution 11 recommended that the “importation of pirated copies of a copyright work” into Britain, or any part of its possessions to which the imperial legislation would apply, be prohibited.

Resolution 12 recommended copyright should not apply to works that infringed copyright.

The memorandum of Conference proceedings noted that a “draft Bill for the consolidation and amendment of the Law of Copyright embodying the above conclusions was submitted to the Conference, and generally approved, after discussion in detail.” On this note, the Imperial Copyright Conference ended, on the lines laid out by the British Government. The draft Copyright Bill approved by the
delegates passed into law the following year, following further refinement and debate. After another year, Australia accepted the option of incorporation, passing a Copyright Act that adopted the provisions of the British legislation and included further clauses specific to Australia.