

Chapter 3 – A new era and new legislation

The Copyright Debate in Britain, 1911–12

A public debate

For most of 1911, from Buxton's introduction of the Copyright Bill on 2 April until its passage through the Lords on 16 December, a dual debate occupied the pages of *The Times*, which followed the copyright controversies of that year attentively. By comparison, the pages of the *Sydney Morning Herald* in 1912 made few references to the Copyright Bill before the Commonwealth Parliament and the issues debated. The absence of correspondence on the subject in the Australian newspaper suggested that Australians, unlike interested Britons, felt little interest in the topic of copyright. The pattern recurred in 1956, when Britain passed a new Copyright Act, and 1968, when Australia followed suit: substantive debate in Britain and minimal interest in Australia.

It would be a mistake to infer Australian intellectual apathy from these comparisons. What they reveal is the economic relevance to both countries of copyright regulation. Britain, in 1911, was the home of a nascent film industry, a powerful phonographic industry, the forerunner of today's music industry, and a highly developed publishing industry. The latter two industries had already established the characteristics that distinguish their modern counterparts: comparatively low fixed costs, high revenues and high variable profits affected by changes in taste. Selling to the public, they deliberately addressed their political arguments to a public audience.

Australia, lacking Britain's resources of population, technology and historical memory could not hope to create an economically productive culture of creative endeavour on the British scale. Australia played a pioneering role in the early development of cinema but it imported, rather than produced, most of its copyright product. In 1912 and 1968, when Parliament adopted new copyright statutes, the Australian press rarely broke its silence on matters of copyright policy. Unfortunately, indifference caused blindness, and Australians failed to see how imperial rules sometimes caused harm to the interests of the Australian public. For instance, Australians paid high prices for imported books

but few protested against the import controls that allowed British publishers to maintain high prices.¹

The political background and focus of debate

On 26 July 1910, two months after the Imperial Copyright Conference ended, Sydney Buxton introduced in the Commons a copyright bill giving effect to the recommendations of the Conference and Gorell Committee. The bill arrived in the middle of ferocious political warfare over the Government's attempts to curb the powers of the House of Lords. Dissolution and a General Election in December stymied progress and copyright advocates waited impatiently for several months before the bill returned to the legislative program.

The Government revived the bill in April 1911, passing it to Standing Committee A, a cross-party "Grand Committee", for consideration and report. The Grand Committee sat 13 times between the middle of April and 13 July, in which time the bill underwent, as *The Times* reported on 14 July, "a considerable transformation". Departing from the recommendation of the Gorrell Committee, the Committee proposed provisions allowing for the compulsory licensing of recordings. The modified bill passed to the Lords in November.

Despite the internecine bitterness poisoning political life in 1911 – the Lords lost their power to veto Commons' bills after two years of bloodcurdling political struggle – the Copyright Bill escaped the partisanship that earlier derailed the Government's social reform measures, and now sabotaged the Home Rule Bill. The reason for the absence of controversy is not hard to find – all parties could agree on the excellence of introducing new property rights. Their support for a bill of property illustrated, with blinding clarity, the politicians' attitude to copyright regulation. So long as it could be said to reasonably satisfy the economic needs of the competing interest groups, they were not disturbed by the generous apportioning of possessory entitlements.

Britain, home to booming recording, film and publishing industries, did not resist the extension of authors' rights and the conferral of rights on

¹ Apathy did not always rule. The Librarian of Fisher Library at Sydney University, Andrew D Osborn, wrote to the Copyright Law Review Committee (the Spicer Committee) on 14 October 1959 to protest restrictions on the import of books. He noted that in his opening address to the University he declared that "the situation in the booktrade and in Australian cultural life was so serious that a Royal Commission was necessary at the present juncture."

industries. But public acquiescence did not mean indifference. *The Times*, for instance, followed matters of copyright policy with keen interest in 1911, as it did in 1956, when a new Act replaced the old. The public debate in Britain, recorded in the pages of *The Times*, concentrated on the claims of the phonographic industry, and the grievances of the publishers, an emphasis that confirmed the politicians' shift towards satisfying the needs of producers. George Bernard Shaw, who in May 1911 carried out a brief and amusing correspondence in *The Times* with John Drummond Robertson of the Gramophone Company, summarised the position dramatically but not wholly inaccurately:

An injustice has to be done either to us artists or to the manufacturers. We, being artists, are poor and politically insignificant. They, being industrialists, are rich and can bully Governments. I suppose we must go to the wall, but I do not see why we should do so without politely informing the public and the Government that we thoroughly understand what is happening to us, and that we submit to injustice because we cannot help ourselves, and not in the least because we are imposed upon by the special pleading of Mr Drummond Robertson and those whom he represents.

Put more starkly, copyright regulation divided the spoils of property between two groups, and one benefited the most at the expense of the other. But regulators neglected a third interest group – the public. As the Liberal MP, Frederick Booth, pointed out in May 1911, in “the bargaining between various interests” the “public are being lost sight of”. In November, Lord Courtney, an egalitarian Liberal peer born, incidentally, a year after Macaulay’s first great speech in favour of the Reform Bill, said the 50 year posthumous term was “going to sacrifice the whole reading public”. A handful of their Liberal colleagues also argued against the long posthumous term. Otherwise, both Houses wasted little time pondering the needs of those who bought books and records.

Compulsory licence for musical works

The Grand Committee had a nasty surprise in store for those who expected a smooth transition to the kind of Copyright Act envisaged by the Gorrell Committee and the Board of Trade. As amended, section 19 of the bill conferred on record manufacturers copyright in records and authorised them to make recordings of any recorded work subject

to payment of a royalty.² Perhaps because the Gorrell Committee endorsed the manufacturer's copyright in records, possibly as a sop for rejecting arguments for the compulsory licence, the provision for manufacturers' copyright met a muted response. Section 19(2), the compulsory licence provision, aroused, however, a furious reaction from musical composers and publishers. Their response is not surprising, since the Gorrell Committee dismissed the arguments for compulsory licensing in categorical terms, and the bill introduced by Buxton contained no provision for the licence.

The fact that the Grand Committee added to the bill so contentious a clause, and few in the Commons or Lords opposed the innovation, illustrates how dramatically, in two years, the phonographic industry transformed thinking about the purpose of copyright regulation. Legislators still mouthed platitudes about authors' rights, but they now recognised the economic consequences of recognising such rights in law. They, far more than the Gorrell Committee, a gathering of supporters of authors' rights, saw the naivety of granting rights that, if unqualified, threatened the competitive existence of one of Britain's newest and most powerful industries.

The recording industry as a whole lobbied to change attitudes, but publicly at least, the indefatigable John Drummond Robertson, manager of the Gramophone Company, seems to have done the most to persuade policy makers of the intended function of compulsory licensing as a device to defeat manufacturing monopoly. Robertson destroyed the proposition that investment and risk ought to rank behind originality as the determinant of legal preferment. For the first time, politicians heard it said without equivocation that the manufacturer of a record had an equal or better claim to the benefits of copyright protection than the author of the recorded work. Robertson preached the heresy of equal entitlement to three audiences: the Gorrell Committee, which rejected his reasoning, the readers of *The Times*, in the pages of which he engaged in a lively controversy during May 1911, and the politicians of the Grand Committee.

On every occasion that he entered into debate he did so by taking, figuratively, two steps forward. He refused to apologise for the alleged deprivations of his industry, and instead painted the record companies

² Section 19(3) provided that the royalty payable for each record sold in the first two years after commencement of the Act was 2.5 per cent and thereafter, 5 per cent.

as injured parties. According to Robertson, *Boosey v Whight*, the hated reminder of judicial witlessness, conferred a legal right on the recording industry, the right to copy. The industry had nothing to be ashamed of and reason for grievance. If the legislature proposed to take away a common law right, let it provide compensation.

Arguments in The Times

The merits and demerits of the proposed compulsory licence were illuminated in the letters page of *The Times*. The prominent men who took a public stand against statutory licensing were Sir Charles Stanford and William Wallace, famous composers and articulate advocates for their fellow musicians, William Boosey the proprietor of the venerable firm of music publishers Boosey and Co,³ and forthright defender of music publishers, and, not least, George Bernard Shaw. John Drummond Robertson opposed them unaided.

Robertson staked his position in a letter to *The Times* on 2 May 1911:

The reasonableness of the proposal is grounded in the fact that a new right and a large new source of profit [the mechanical rights] is being created for the author, to which he contributes nothing from the inventive and artistic side. His work is no more valuable because mechanical reproduction, one of the greatest wonders of the age, has been brought to a high state of perfection by the skill of the inventor and the ingenuity of the mechanician.

Shaw and Boosey responded two days later. The latter concentrated on the extraordinary profits achieved by Robertson's company when returns to composers were nil. The Gramophone Company's profits amounted "during the last three years to the huge total of £358, 557 17s 6d". Furthermore, the Chairman had announced in 1908 "that for each £100 invested they [shareholders] had already received the sum of £168 in dividends." Nor could it be said that the phonographic industry did not take revenues from music publishers. "Records for mechanical players are copies of a work," said Boosey. "Abundant evidence was given before the Board of Trade Committee that the sale of sheet music had been enormously depreciated by the kindly advertising influence and sale of mechanical discs and rolls."

³ Established by John Boosey in the 1760s and in William Boosey's day the publisher of Elgar. Later the firm published Vaughan Williams.

Shaw emphasised that the indispensable role of the composer in the chain of production that led to the sale of a record justified the grant of the mechanical right to authors.

The letter of Mr J. Drummond Robertson is unanswerable, not because it is convincing, but because its audacity paralyses all the nervous centres which make controversy possible. Our comfort is that, if it is brought forward and pushed to its logical conclusion in a speech in the House of Commons, that Assembly, if it has any conscience and any logic, will be stupefied beyond all power of passing the Copyright Bill or anything else for the remainder of the session.

Shaw referred to the desperate circumstances of Richard Wagner.

He was far past middle age before he was free of the most humiliating pecuniary anxieties. And now, if you please, the manufacturers who have made more money out of Wagner's music than he ever spent in his whole life, and who never paid him a farthing, want his heirs to compensate them for the loss of their power to steal his music with impunity.

Shaw attributed responsibility for the economic distress of composers not to the phonographic industry alone but society as well. "The community sinned," he said, "and the community should atone." Robertson responded a few days later "I had supposed that this subject was too dry for dramatic treatment: but Mr Bernard Shaw's letter will have convinced your readers to the contrary, if it convinces them of nothing else." Robertson pointed out that the statutory licence was designed to prevent a producer monopoly, not as an impost on authors. If Wagner was robbed, he was robbed as much by publishers as record manufacturers. The statutory licence, in theory, ought to benefit composers by increasing the dissemination of works and simultaneously expanding the base for payment of royalties.

Robertson undermined the Berne consensus, which asserted moral rights as the basis for economic rights. He denied that natural right, sacred entitlement or social obligation justified the claims of authors to copyright protection. If technology were the means of disseminating a work, the person who invented the technology or used the technology to disseminate the work, was no less justified in claiming a reward than the author. "It is self-evident," he said, "that the share contributed by the author is indispensable, but so also is the work of the artist and the manufacturer".

These were bold apologies. Robertson dared to say what no-one else would: copyright legislation regulated the production and distribution

of goods for commercial purposes. For all the fine words about justice for artists, composers were no more deserving and no less grasping than any other individuals who contributed to the production of records. Shaw, and the other champions of the artistic interest had no grounds for reproaching the phonographic industry, said Robertson, for doing what was legal:

Inasmuch as the exclusive right of making mechanical copies of a rendering of his work has not yet been conferred on the composer by statute, this particular and novel form of reproduction is in public domain and is free to all.

In any case, making a record did not involve copying, “but a registration of the sound waves of the voice of the singer”. Having acted within the law, and now facing the introduction of a new right that took control of the recording process out of their hands, manufacturers were entitled to receive the benefit of the compulsory licence. While the industry recognised that “the composer has a claim to some measure of protection in respect of phonographic publication” Shaw’s talk of theft obscured the real and continuing question as to whether property concepts could really fit abstractions:

I now turn to Mr Shaw’s second proposition ... that makers of records have been stealing the author’s work in the past. This, of course, can only start from the premis [sic] that an author’s work is property. Whether it ever was so has been the subject of endless argumentation; but it is precisely because the author was helpless to enforce any property right at Common Law in his published work that the Legislature started to find a remedy.

If, as Robertson implied, the legislature discovered property in a work for reasons of politics, the scope of rights conferred should be narrow:

But, in conferring this great boon on literature, the Act of 1709 did not establish a freehold right in an author’s creation. On the contrary, it gave him a leasehold with a limited term of years, during which the author would be free from molestation and would enjoy statutory protection against trespassers on his domain, but with reversion to the public at the end of his lease.

Shaw, his nervous centres seemingly still paralysed, did not respond to Robertson’s letter. Nor did William Boosey, who emphasised the Gramophone Company’s vested interest, and was evidently felt much concerned about the perceived threat posed to sheet music publishers by record sales. But Shaw did, in a certain sense, sum up the position when said in his letter that an “injustice has to be done either to us artists or the manufacturers.” He was clear about who would win

in Parliament. “They,” he said, “being industrialists are rich and can bully Governments.”

Bullying or not, and certainly rich, the “industrialists” did win in Parliament. The Grand Committee added to the Bill a provision allowing for compulsory licensing. But it was not as if authors were abandoned. The legislation still offered them primary rights. With his long experience of politics and publishers, Shaw evidently entertained few illusions that copyright regulation might produce justice. In any case, justice for industrialists was not justice for Shaw, and justice for Shaw did not necessarily mean justice for the public. In the two months between Robertson’s last letter in *The Times* and the last meeting of the Grand Committee, he would have pressed his case publicly with vigour. Whether or not the Committee members were, as suggested by Shaw, bullied behind closed doors, they no doubt based their decision on appraisal of economic realities.

The phonographic industry was not only a powerful economic force, it created the gramophone society. In 1913, one third of British households possessed gramophones and in 1914, the Gramophone Company sold 4 million records. Government could not easily ignore the special pleading of which Shaw accused Robertson. At issue, it seemed, were employment, investment, dividends, tax revenue and a hugely popular source of recreational diversion. It was easy enough for the Government to accept the argument that placing the mechanical rights in the hands of creators would result in monopoly or cartel. Compulsory licensing allowing any manufacturer to make a recording of any work recorded – subject to returning to the work’s owner a prescribed royalty on sales – offered an appealing solution to politicians looking for an equitable compromise between opposed interests.

The publishers and the restrictions on term

For all the bitterness aroused in some quarters by the compulsory licence, provisions governing the publishing of books most occupied the minds of legislators and public during the debates of 1911. This was not surprising. Ever since the beginning of the 17th century, when the Stationers Company began collaborating with the government in the control of books, publishers were villains in the public eye. Politicians shared this general dislike, though it did not stop them from passing copyright legislation that benefited publishers. Publishers fitted squarely into the category of rich and bullying industrialists maligned by George Bernard Shaw. As John Murray, a leading publisher, said in a letter to

The Times published shortly before the Grand Committee reported, the “Government admitted at the start that if the publishers opposed their Bill, they could not hope to pass it.”⁴

Australian politicians were noticeably hostile to publishers, and since British publishers profited ruthlessly from their control of the Australian market, they had reason to dislike them. In 1912 Senator St Ledger reflected the mood of many colleagues when he reminded them of Dr Johnson’s satirical paraphrasing of St John’s Gospel 18:40: “Now there was a *publisher* and his name was Barabbas.”⁵ British and Australian parliamentarians both referred in the copyright debates to the sad story of Milton’s grand-daughter, left destitute because her grandfather’s literary estate passed into the hands of a publisher.

As far back as 1842, Talfourd and Macaulay commented on her penury, Talfourd as a moral illustrating the need to pass laws providing for the welfare of authors and their descendants, Macaulay as evidence that such laws only strengthen the hand of publishers. The story was certainly a striking one. As Augustine Birrell, writer and Irish Nationalist MP, told the Commons in April 1911, for licensing the publication of *Paradise Lost*, Milton received £5 advance, £5 at the end of the first run of 1,500 copies, £5 at the end of the second run of 1500 (which occurred within 2 or 3 years of first publications) and £5 at the end of the third impression. When he died, his widow parted with all her rights for £8.

Opposition to publishers, often more visceral than rational, did highlight the awkward truth that copyright laws were a form of business regulation that did not invariably work to the benefit of authors. What was good for publishers – a long copyright term, the right of publication and exclusive distribution rights – was not automatically good for authors, for whom the terms of their publishing contracts were all-important. As the debates of 1911 made plain, copyright law represented more of a bargain between commerce and law than law and art.

Unfortunately for publishers, they were businessmen in a peculiar business. As the reaction of legislators showed, many people regarded the conventional commercial practice of driving hard bargains as unseemly if it disadvantaged authors. To make matters worse,

⁴ Letter John Murray to *The Times* published 7 July 1911.

⁵ The verse says ‘Now there was a thief and his name was Barabbas’

publishers made no attempt to be liked. In letters to *The Times*, Charles James Longman and Thomas Fisher Unwin called the Copyright Bill a “wooden gift horse” and a “gross injustice to be remedied”. For good measure, John Murray later described Lord Courtenay as the victim of “an hallucination” (for suggesting that publishers include in the price of a book the cost of supplying copies to certain libraries). He then observed that “utmost pains have been taken in drafting the Bill to exclude publishers from the extended benefits given to authors.”

Dogmatic and unflagging, the publishers were as friendly as hungry crocodiles. Often self-made, they founded, or inherited, publishing houses still successful today – Heinemann, Unwin, John Murray, Methuen, Longman and Macmillan. They were tough, calculating and unrelenting, the victors in recent memory of a ferocious commercial battle with *The Times*. In 1905, the broadsheet tried to arrest falling circulation by introducing the Book Club, which very soon became the object of the publishers concentrated fury.

The Book Club allowed subscribers to sell or lend books to one another, resulting in extraordinary price savings. For example, the Club advertised Winston Churchill’s *Lord Randolph Churchill* in 1906 for seven shillings instead of 36 shillings. Publishers organised a boycott of the newspaper, which replied by asking its readers to boycott Macmillan. The battle ended in 1908 when John Murray sued *The Times*, for libel and the court awarded £7500 damages. The paper published letters accusing Murray of “simple extortion” but his lawyers showed that correspondents underestimated his production costs. Lord Northcliffe, *The Times*’ new owner, then put an end to further arguments and sought to pacify the publishers.

No wonder that politicians, seeing the strength and dogmatism of publishers disliked and feared them. There was certainly no trace of friendliness towards publishers in the bill presented by Buxton, as they loudly pointed out. In particular, they objected to section 4 which provided for the republication or performance of works under compulsory licence if, after the author’s death, the copyright owner unreasonably withheld consent. The compulsory licence could only operate 25 years after the first publication of the work.

At the end of March 1911, William Heinemann spoke disapprovingly of section 4 in his presidential address to the annual meeting of Publishers Association. In the ensuing three weeks, three more publishers took up cudgels in *The Times*. Frederick Macmillan called

section 4 “a grave injustice to authors” and CJ Longman likened it to a Trojan horse accompanying the gift of the long posthumous term. Edward Bell, the head of George Bell & Sons, wrote to warn that the provision posed dangers to authors as well as publishers. He called the introduction of a 50 year posthumous term “the most important reform” in the Bill but warned that the operation of section 4 would confer on the devisees of literary property “a damnosa hereditas.”

The provision, according to Bell, opened the way to “any speculative printer or publisher who may see a chance of making profit for himself out of a 6d or 1s edition of a more expensive book published 25 years before’. He knew where to lay the blame for the appearance of section 3. “It is difficult to assign an adequate reason for this irritating provision if not to conciliate those supporters of the Government who grudge authors any rights at all.”

Two members of the House of Commons shared his annoyance. On 6 April, the leader of the Opposition, Arthur Balfour, criticised the Government’s “happy detachment” in “so lightly” introducing a provision that “if abused, might evidently be a source of infinite injustice”. The next day, Augustine Birrell, an Irish Nationalist MP, and the author of a book of essays on copyright,⁶ said, “I confess with regard to all this stuff about price, I do not think there is anything in it.”

Parliament supports the 25 year rule

Parliament’s response provides some indication of the general antipathy for publishers. The Grand Committee modified section 4 but not in a way that would please its critics. When passed, the Copyright Act contained three co-located provisions that publishers could regard as inimical to their interests. Section 3 permitted reproduction of works for sale 25 years after the death of their authors subject to payment of

⁶ *Seven Lectures on the Law and History of Copyright in Books*, Rothman & Co, USA, 1971. Although a member of the Nationalist Party, Birrell was English, not Irish. He was Chief Secretary for Ireland 1907–1916 and more highly regarded as a writer than as a politician.

royalties.⁷ Section 4 now simply repeated, in substance, the formula in clause V of the repealed 1842 Copyright Act, authorising the Privy Council to order republication or public performance of a work at any time after the death of its author, if the owner withheld consent. Section 5(2) prohibited assignment of copyright in a work, except by devise under a will, after the expiry of 25 years from the death of the author.

Publishers saw the 50 year posthumous term seemingly shrink to 25 years. They could not receive an assignment of copyright that lasted for more than 25 years after the author's death, and they now contended with a new possibility: at the time they surrendered the copyright (it reverted back to the author's estate), any person giving the prescribed notice, and paying royalty of 10 per cent of the retail price of books sold, could begin to publish the particular work in competition with them. Moreover – an unlikely prospect – they could be forced to permit competitors to publish or perform a work if at any time after the owner's death they were judged by the Privy Council's Judicial Committee to be withholding the work from the public.

Though members of the Grand Committee might have expected that sections 3, 4 and 5, as revised, would stir the publishers like hornets shaken from their nest, the correspondence page of *The Times* registered no protest. The publishers were probably sensible not to waste energy arguing over Parliament's innovations. They understood that the commercial value of most copyright works is exhausted within 25 years of publication and no doubt regarded the 25 year rule as commercially harmless. They knew too that no applications were made under clause V of the 1842 Act, which provided for republication of a book without the copyright owner's consent.

Forty years later, the Gregory Committee, which recommended the changes that led to the British Copyright Act of 1956, called for

⁷ The journalist and literary compiler Clement K Shorter, may have helped inspire the Grand Committee to adopt the 25 year limitation. In a letter to *The Times* on 20 April 1911, Shorter disputed Buxton's statement in his Second Reading speech (7 April 1911) that "nowadays the author retained it [copyright] in nearly every case." To ensure that authors did not give away their copyright, they had to be protected. "Why should it not be definitely laid down in the Copyright Bill that publishers can only buy copyright for a limited period, that while the author and the author's executors hold the copyright of his books, for 50 years from his death that these books may not be entirely alienated from the author and his executors merely for the benefit of publishers?"

abolition of the 25 year rule, declaring that section 3 was redundant. According to the Committee, it was industry practice for the original publisher or a competitor to issue cheap editions long before the elapse of 25 years after the author's death. As for section 4, allowing for compulsory licensing of works withheld, no person had applied to the Privy Council's Judicial Committee under the terms of the provision. Like section V of the 1842 Act, the provision had not been used.

The 25 year rule functioned symbolically. The Government evidently wished to prevent the publishing trade from relying on the 50 year posthumous term to curtail competition. Copyright law, including the posthumous term, conferred great privileges on business, and these privileges were liable to abuse. The publishers could argue that fears of abuse were unwarranted. As the Gregory Committee observed, the short currency of most books meant that cheap editions became available within a few years of an author's death, if not before.

The addition to the Bill of the 25 year rule revealed the curious dichotomy between the general enthusiasm for the extension of property rights, and the equally general distaste for Shaw's "industrialists", who stood behind authors as copyright beneficiaries. These mixed emotions perhaps burdened copyright legislators. Many seemed unable to avoid seeing the process of regulation as a morality play, in which authors were innocents and producers villains. But framing copyright laws never involved a pure exercise in providing economic justice to authors. Now, more than ever, it involved a contest for economic advantage, and conferred rights that allowed works to be traded as commodities.

Who benefits?

Debate over the long posthumous term focused on the question of who benefits most from copyright law. Frederick Booth, a Minister and the Liberal Member for Pontefract, told the Commons that the 50 year posthumous term, however qualified, principally benefited publishers. Booth, as he said, championed "the cause of the poor reader, and the men who want more enlightenment but who have been deprived of the advantage of education earlier in life." To such people, in his view, "the ready access to wholesome and cheap literature is one of the best ends that could be achieved" by legislation.

Unfortunately, "the people behind this Bill are not poor men; they are rich publishers and others with a large stock of books and they

naturally want as long a period as possible given to their monopoly so as to be sure of selling their goods at a profit". To Booth, Buxton's statement that the 25 year rule would promote "free trade in the copyright" seemed risible.

Booth spoke at the end of July, when the Grand Committee had reported on the Bill, and he protested vehemently against "arrangements" made "behind the back of the House". He was, he said, "the one outspoken critic of the Bill" following Buxton's second reading speech, and for that reason excluded from the Grand Committee. The strength of his feelings can be gauged by the fact that he declared that he did not regard the Bill as a Government measure. Booth proposed that the Bill be recommitted to a Select Committee for more comprehensive treatment but receiving support from only one colleague, withdrew the motion.

Booth reported to the House that he had received letters from workmen throughout Britain protesting that the Bill "attacked" their "right and privilege to enjoy cheap literature". He had also received correspondence from publishers who felt the legislation would "put money unjustly in their pockets". In his view, the Grand Committee's changes hardly impeded the wrongful march of the publisher interest. If the Government really wished to benefit the public interest, he said, it should introduce a 20 year posthumous term.

In both Houses, only four others, three of whom were members of the Liberal Government, joined him in calling for a shorter period of copyright protection. The Scottish MP, James Dundas White, who in a letter to *The Times* two months earlier, referred to "a monopoly of copyright ... set up against the public", pointed out that the Berlin Convention did not compel ratifying countries to adopt the 50 year term. Following this point, George Heynes Radford, the Labour Member for Islington East, suggested that a posthumous period of 25 years was appropriate.

Then a few months later, in the Lords, Lord Courtenay proposed that the existing arrangement instituted in 1842 be retained. Like the MPs who wanted to limit the posthumous term, Courtenay considered the primary object of copyright policy ought to be to encourage the dissemination of literature at reasonable prices. To this end, they considered a limited term essential. According to Courtenay, speaking in November 1911, the "claim for [the] extension was not supported by

any injustice shown in the past ... and is much to be deprecated in the interests of education.”

These men argued in vain. Buxton, confident of the Government’s position (MPs negated Radford’s proposed amendment of the term by 118 votes, 153 to 35), did not waste much time debating the merits of the long term. He said simply that the Government introduced the new period “in order to bring the law in this country into conformity with that in other countries.” Later, he added that though the Grand Committee’s decision was irreversible, it made provision for the 25 year rule and compulsory licence to guard against abuse.

In the Lords, Courtenay’s arguments were disposed of without ado. Lord Haldane made the doubtful assertion that the Gorrell Committee supported the 50 year term after “much discussion and inquiry”. But he was on firmer ground when he implied that rights of property do not admit of much limitation. “My noble friend,” he said, “proposes to treat authors in a different way from that in which the law treats other people in respect of their property.”

Lord Gorrell naturally agreed. As he said, submissions to the Committee he chaired in 1909 supported term extension. Furthermore, he declared, the new term “would not militate against the production of cheap editions, for publishers and authors found that it paid them to appeal to a wide public.” So the long posthumous term passed into law with little controversy. The publishers focused their attention on another topic. Though they found the 25 year rule, in the words of Edward Bell, “irritating”, they were concerned, almost obsessively, with a subject that, to the modern eye, seems of minor economic importance.

Compulsory deposit

The 1842 Act required publishers, on demand (and on pain of a £5 fine), to deliver a copy of each book published to the Stationers Company, as well as to the Bodleian Library, the Public Library of Cambridge, the Library of the Faculty of Advocates at Edinburgh and the Library of Trinity College, Dublin. The Bill of 1911 enlarged slightly on this stipulation, requiring publishers to supply a copy of each new publication to the British Museum and adding the Welsh National Library to the list of institutions entitled to demand delivery of new books.

The practice of compulsory (now called statutory) deposit began in the early 17th century. According to the publisher John Murray (in a letter to *The Times* of 7 July 1911), the “compulsory presentation of copies of all books published began in 1602, when no book was permitted to be printed without a licence”. According to Murray, it “was apparently with a view to enforcing the provisions of the Act, and bringing all books readily to the cognisance of the censors, that three copies had to be delivered gratis – one to the King’s Library, one to Oxford, and one to Cambridge”.⁸

After Heinemann, Longman, Unwin and Bell protested over section 4 of the Copyright Bill in April 1911, the publishers concentrated their full attention on the question of compulsory deposit. From May until the Lords approved the final version of the Bill in November, Murray, Heinemann and Unwin poured out, in the pages of *The Times*, their complaints against the tyranny of section 15 (‘Delivery of Books to Libraries’). They – mostly the indefatigable Murray – rushed into print on no fewer than 12 occasions, engaging a variety of opponents, the officials of Cambridge University and the National Library of Wales, “an author”, “a reader”,⁹ even the MP Dundas White.

In a final gambit in November, the Council of the Publishers Association of Great Britain and Ireland addressed a Memorandum on the Copyright Bill to the House of Lords. The Memorandum criticised the “exaction” as a “remnant of an enactment connected with the

⁸ Murray repeated a common myth about compulsory deposit. The practice resulted from the efforts of a private citizen not government’s wish to control opposition or dissent. It began in 1610 when Sir Thomas Bodley, who wanted to expand Oxford University’s library, secured the agreement of the Stationer’s Company to supply the university with copies of works produced. A Star Chamber decree, and then Licensing Acts of 1662 and 1664, gave legal force to the arrangement and the licensing Acts required that books be supplied also to the Royal Library and Cambridge University library. The Government did censor books collected by this device, and probably passed the licensing Acts to facilitate censorship. However, Bodley intended to create a bibliographic record of English literature. See John Gilchrist, “Copyright Deposit, Legal Deposit or Library Deposit? The Government’s Role as Preserver of Copyright Material”, *Queensland University of Technology Law and Justice Journal*, Vol 5 No 2, 2005.

⁹ Quite commonly correspondents identified themselves by a title rather than name. The letter of “An author” published on 21 November called the publishers’ arguments “absurdly exaggerated”, and “strongly deprecate[d] any alteration of the existing practice”. The writer noted that if compulsory deposit were “[r]egarded as a tax, authors, whom the publishers take care to pass it on to, would willingly pay it, in return for more adequate protection of their copyright”.

literary censorship” and said that publishers “feel very acutely the injustice of the burden which they are singled out from all other classes of the community to bear”.

Two weeks after the Lords received the Memorandum, John Murray wrote to *The Times* summing up the publishers’ ostensible source of grievance. By then, the cause was lost. According to Murray: “if matters had been left as they were we would have remained silent; but when we discover that it [compulsory deposit] is regarded as capable of extension for new institutions, and as we have no guarantee that this extension may not be continued in future, we consider that it is time to take objection”. In the same letter, he said that if politicians considered the compulsory supply of books a national necessity, the nation, and not publishers alone, should bear the costs involved. “If it is a national duty and the country is so wealthy, the injustice of throwing this national and Imperial impost on one small body of citizens becomes all the more glaring.”

A week earlier, William Heinemann wrote to *The Times* to make plain to the Lords that publishers “object in principle to the unjust tax levied upon us.” He severely criticised the publishers’ opponents for their “airiness of attitude”, which, he said, was “characteristic of practically all the arguments used on behalf of the University libraries to maintain a privilege they have acquired in a not over-creditable way.” More to the point, the supply of free books could be counted “equal to an addition of over 3d in the pound to the income tax I already paid on the profits of my business.”¹⁰

Murray said in correspondence published shortly before Heinemann’s that publishers resented being “mulcted”. The unfairness of section 15 pointed to the right course of action. Invented, according to Murray, as a device to assist official censorship, compulsory deposit should be abolished. The “sole pretext which could have justified so unusual and unjust a tax has long ago disappeared, and yet we are compelled to pay it still, and it is being increased as a sop to certain supporters of the Government.”

The publishers’ furious reaction to section 15 and the energy they expended on seeking to overturn the provision doubtless perplexed legislators. Even if the statistic quoted by Heinemann were correct, the cost to publishers of supplying free books to certain libraries was

¹⁰ Letter WM Heinemann to *The Times*, 23 November 1911. 3d was threepence; there were 240 pence in the pound.

insignificant. The real reason for their hostility, which they may have been reluctant to disclose, is to be found in the letter of “A Reader” to *The Times* in November 1911. The letter pointed out that, it “is perhaps not the five copies that hurt the publishers, but the 50 that would have sold, had not the book been in the University Library. But against this may be set the 500 readers who would never see the book if it was not in the library.”

If the publishers opposed compulsory deposit because they feared that libraries threatened their business, they were, to borrow John Murray’s phrase deprecating Lord Courtenay, “victims of a hallucination”. They were wealthy men and their businesses were flourishing, so their sense of grievance must have seemed inexplicable. The history of copyright regulation shows that paranoia is frequently the companion of vested interest.

Coleridge-Taylor and compulsory royalties

In November 1912, the Society of Authors launched in London an appeal for the widow and children of the composer Samuel Coleridge-Taylor. Author of the popular song *Hiawatha*, Coleridge-Taylor died three months earlier, leaving his family in straitened circumstances. The Chairman of the Society’s Committee of Management, J Squire Sprigge, wrote to *The Times* to publicise the appeal, and suggested that the musical publishers Novello & Co were implicated in the family’s poverty. In the course of advocating a system of compulsory royalties, he said the musician’s case supplied “an admirable example of the trouble that may and often does follow upon the outright sale of literary or artistic property”.

Given the popularity of Coleridge-Taylor’s work, why was his estate threadbare? In Sprigge’s view, because Novello & Co, bought the rights to *Hiawatha* outright: “it is our experience,” he said, “that it is the author of the work who is generally disappointed by the disposal of copyright.” Sprigge opposed outright assignment because “a system is bad in business which by its capricious event leaves behind it either a recollection of pecuniary loss with the publisher or a deep sense of injustice with the author.” If the value of sales much exceeded the price of assignment, authors who had assigned their rights for a nominal fee could be left impoverished.

Sprigge criticised the publishers for taking advantage of their superior bargaining strength to secure the assignment of *Hiawatha* at a low price

and refuse royalties. Royalties, he said, “would have provided sufficient money for the dependants without any appeal to the public.” The case of Coleridge-Taylor testified to the truth that, “in all the usual circumstances, and especially in the cases of young writers and composers, the disposal of copyright is to be absolutely avoided and the royalty system should be adopted.” According to Sprigge, the royalty system distributed risk equitably, saving the publisher from the cost of purchasing copyright in a work and allowing the author to share in sales revenue.

Five days later, Novello & Co replied in *The Times* that it did not object to paying royalties. It adopted the royalty system 40 years previously and made “constant use” of it “in suitable cases”. The publisher responded obliquely to the implication that it took advantage of Coleridge-Taylor, stating that, “it is characteristic of young and unknown composers that they usually desire to sell their works outright”. But it rejected the proposition that the composer did not benefit from his dealings with Novello & Co. The firm published six Coleridge-Taylor works, securing an assignment of three and paying royalties on the others.

The composer Sir Charles Stanford quickly joined the controversy. In two letters to *The Times*, he claimed that Novello & Co drove hard bargains with Coleridge-Taylor in his early career, refusing his request for royalties on one work and insisting on complete assignment in return for 20 copies of the work when published. According to Stanford, Coleridge-Taylor, accepted these terms because he was unknown, and desperate for recognition. As for *Hiawatha*, the “question is ... its profits and where they went, and the grounds upon which the appeal to the public for the composer’s family has been rendered necessary at all.”

Novello & Co replied that Coleridge Taylor did not ask for a royalty on sales of *Hiawatha*. In other words, the publisher seemed to say, caveat vendor. If Coleridge-Taylor, contracting freely, and in his right mind, struck a poor bargain, the publisher could not be said to be responsible for his later poverty. The last words in *The Times* went to Sprigge, writing again on behalf of the Society of Authors. Of Novello & Co, Sprigge said:

They say that Mr Coleridge-Taylor was not refused a royalty. The real question is – Did he obtain a royalty? ... under a fair royalty system such an unfortunate position as we have in Mr Coleridge-Taylor’s case – viz the need for a pecuniary

appeal to the public on behalf of the dead author of a famous and popular work – could not occur often. For the author would have received during his lifetime and his dependants would be receiving after his death, a due share of the profits earned by his work and genius.

The exchange of letters in *The Times* lasted a little over two weeks. Then, at the beginning of January 1913, *The Musical Times* reprinted the entire correspondence. It did so for a better reason than further darkening the reputation of publishers. The controversy over Coleridge-Taylor's estate hinted at the beginnings of the movement to the collective administration of rights. The Society of Authors appeared to want the Government to institute a system that supposedly overcame the problem of unequal bargaining power by allowing the composer a fixed share of sales. However, over the next year, a different solution became apparent.

In 1914, composers and publishers established the Performing Right Society to collect revenue on their behalf for the performance of musical works. They created a model of taxation that, once emulated, allowed copyright owners to license and claim remuneration for every conceivable use of copyright material. A decade later, the Performing Right Society helped to establish its Australian counterpart which, in the years leading to the Second World War, enforced its right to collect fees for the performance of musical works.

After 1913, Sprigge's proposal for a system of compulsory royalty payments to bring equality to the bargains between publishers and authors went no further. The hard reality of inequality of bargaining power continued to govern creator-producer relations and for most authors, contract determined income. But the appearance of the PRS signalled something new and radical in thinking about copyright. Henceforward, the law would work to deliver revenue to owners predictably and comprehensively.

Fair dealing

Private and public interests

The creation of a system for collecting revenue for the licensed use of copyright material pointed to the remarkable possibilities for profit the law offered to copyright owners. Authors, and the industries that relied on their works to supply mass entertainment, were now placed in a position to demand payment for allowing copyright material to be

copied, transformed, fixated, performed or otherwise used. Use determined remuneration: the person who wished to exercise any of the exclusive rights of copyright must pay the owner of the right for a licence to do so.

The Act of 1911 transformed the scope of copyright regulation beyond the imagining of the men who created the legislation it replaced, and those who passed the Australian Act of 1905. Before 1911, copyright laws functioned primarily to allow publishers to control the supply of books in Britain and its Empire. After 1911, they regulated the large scale production of books, records and films, and, in the case of records and films, their public performance.

The growth of collective rights administration, pioneered by the Performing Right Society, and the ever-increasing revenue from licence fees generally, marched in step with the continuing growth of the copyright industries, and the explosion in mass entertainment. These developments reinforced the status of the Berne Convention and vindicated, in their own eyes, the assertiveness of the advocates of authors rights. But the headlong rush to profit gave rise to a disquieting question. The new rights benefited the copyright owner but did they much benefit buyer of books and records, the viewer of films, and, shortly, the radio listener?

Apart from the conventional statements about the moral entitlement of authors, little in the official literature indicated that policy makers were motivated to consider public before private interest. From the publication of the Gorrell Report until the passage of the 1911 Act, law-makers concerned themselves principally with conferring economic privileges on designated categories of copyright owner. Even when qualifying the exclusive rights for the benefit of the public, legislators framed limitations to protect the commercial interests of copyright owners.

Section 2(1) of the 1911 Copyright Bill, which specified the acts not constituting infringement of copyright,¹¹ permitted the public to make

¹¹ “Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright: Provided that the following acts shall not constitute an infringement of copyright:-

(i) Any fair dealing with any work for the purposes of private study, research, criticism, review or newspaper summary ...” The next five sub-paragraphs in the provision dealt with the non-reproductive use of artistic works for creating other artistic works, the making or publishing of paintings, photographs etc of sculptures

certain uses of copyright material without permission or payment, but not in ways that could not undermine the flow of revenue to copyright owners. The acts enumerated involved non-commercial and educational uses, and were cast in narrow, qualified terms that could hardly be said to demonstrate that the Government prepared the Bill with much thought for public welfare.

The Grand Committee showed still less inclination to permit limitation of the exclusive rights. As Buxton said before the Commons in July 1911, section 2(1) “aroused a great deal of controversy” among Committee members. They added, according to the Liberal maverick Josiah Wedgwood, “proviso to proviso” to avoid “pitfalls” seen to threaten the copyright owner’s interests. In the end, perhaps the most expansive, and certainly the most recognised proviso merely allowed a person to make a ‘fair dealing’ with any work “for the purposes of private study, research, criticism, review or newspaper study”.¹²

The contents of section 2(1) betoken how legislators came to a new understanding of the purpose of copyright law, one that reflected the emergence of a new hegemony, that of the copyright “owner”. The new power of the copyright owner derived not only from the exclusive rights but also the enactment of offences for exercising the rights without permission.

The 1842 Copyright Act proscribed ‘Piracy of Books’, the unauthorised printing, import, publication or possession of books for ‘Sale or Hire’, and the sale or hire of such books, or the offering of the books for sale or hire.¹³ Before 1911, the prohibition against piracy did not apply to

or works of architecture, the publication, for schools of short passages of copyright works in mainly non-copyright collections, the publication of public lectures in newspapers, and public reading or recitation by an individual of a reasonable extract from a published work.

¹² The Australian Copyright Act 1905, section 28 said: “Copyright in a book shall not be infringed by a person making an abridgement 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 copies from or otherwise fairly dealing with the contents of the book for the purpose of a new work, or for the purpose of criticism, review or refutation, or in the ordinary course of reporting scientific information.” The British Act, unlike the Australian, allowed for fair dealing for private study or newspaper summary but the Australian Act seemed to contemplate a broader ambit of copying activity by the individual.

¹³ Clause XV of the Act was called ‘Remedy for the Piracy of Books by Action on the Case’. The purpose of prohibition was to protect the owners of literary property from pirate presses in France and Ireland as well as the United Kingdom.

the unauthorised use of a book for a purpose other than *sale or hire*. The enforcement provisions of the 1911 Act, however, did away with the limited construction of the owner's privilege. They declared unauthorised reproduction or performance of a work by *anyone* for *any* purpose an infringement.

According to the Act, a person infringed copyright “who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred.” Under the legislation, any person who exercised any right ‘exclusive’ to the owner, for any purpose, committed an offence – save for the operation of section 2(1), the fair dealing provision, and section 19(2), the compulsory licence provision.¹⁴ After 1911, the progressive elaboration in legislation of owners’ rights resulted in related expansion in the total of statutory remedies available to the owner.

The copyright owner became a punitive figure, enforcing the multiplying remedies and forcefully ejecting, in the words of John Drummond Robertson, “trespassers on his domain”. In one sense, the 1911 Act treated copyright trespassers more kindly than previous legislation. They were now declared “infringers” not “pirates”. The change in terminology occurred thanks to the Government Minister Frederick Booth who attacked as “wrong and ridiculous” the time-honoured convention of calling breaches of copyright “piratical”. This characterisation reflected, he said, questionable assumptions about the moral content of property rights.

He asserted that the word “pirate” should not be applied to “the poor people who stood in the gutters of our streets and furtively sold copies of a work to the public”. Using the description “so as to apply to the poor seller of goods only served to prejudice a man when placed on his trial, [it] being afterwards applied to him as a stigma”. He proposed that the word “infringing” be substituted in the Bill for the word “pirated”. The Unionist MP, Sir William Anson, opposed his motion on the

¹⁴ According to Patterson, *supra*, US courts in the 19th century distinguished between the use of the *copyright* and the use of the *work*. The Constitution allowed copyright owners to restrain piracy but stated that the purpose of copyright was to “promote the progress of Science and the useful Arts”. In Patterson’s analysis, the Constitution intended that copyright would promote learning while also protecting the author from the piracies of commercial competitors. Its *purpose* was to disseminate, its *function* to protect. The fair use doctrine was promulgated to allow competitors to use a copyright work provided the use did not provide an unfair commercial advantage. Non-commercial uses were never considered infringements.

grounds that the word “pirated” was not “an offensive [description] to apply to persons who appropriated the property of other people” but the House accepted the amendment.

Public access

The ascendancy of copyright owners is traceable not only to the prestige of the Berne Convention, the proselytising of its adherents and the aggressive lobbying of the phonographic industry. Already in the United States, in the later 19th century, courts determining the boundaries of copyright protection began to assert the hegemony of copyright ownership. They did so by developing the “fair use” doctrine, which permitted free unauthorised public access to copyright material in restricted circumstances. Fair use, ostensibly a doctrine promoting public access to copyright material, entrenched the author’s prerogatives as the determinant of copyright subsistence. In defining the circumstances in which a person could use copyright material gratuitously and without permission, the courts accepted the presumption – not previously adopted – that any other unlicensed use constituted infringement.

In Britain, courts in the 18th century developed the concept of “fair abridgement” – the basis for the statutory category of “fair dealing” – to permit a person other than the author to abridge a work for private, (but not commercial) purposes. In applying the relevant provisions of legislation to protect the author from piracy, 19th century judges faced the question of what the non-copyright holder *was* permitted to do. The 1911 Act answered the question simply, declaring, in section 2(1), that copyright in a work “shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright.”

The courts’ gradual delineation of authors’ rights created, inevitably, a metaphorical territory of copyright. Some scholars have drawn an analogy between the common law process of mapping authors’ rights and the enclosure of common land in Britain after the Reformation. In both instances, the law ratified expropriation of subject matter held in common. In the 17th century, common land became private land, and the new landholders erected fences to repel trespassers. In the 19th century, according to scholars, lawyers began the still continuing process of seizure and enclosure of the intellectual commons. As defined, fair use constituted a public right of way across private

property, a limited privilege granted as a convenience to those who would otherwise be trespassers. The doctrine, far from benefiting the public, testified to the steady alienation of territory once common to all.¹⁵

The common law moved inevitably in the direction of treating copyright subject matter as an exclusive possession, foreclosed from the public except by permission or for specified purposes, such as fair dealing.¹⁶ Reasons for the enclosure of the abstract domain are not hard to find. Statutory rights, once conferred, must be interpreted, and the process of interpreting and elaborating tends to enlarge rather than reduce the ambit of those rights. In the English-speaking world, cultural axioms create in lawyers deep psychological aversion to hedging the claims of property, even in the realm of abstractions.

19th century developments in the United States, in particular, testify to this truth. When the United States enacted federal copyright codes in 1790 and 1831, politicians, remembering the independence struggle, wanted to ensure that copyright not be used prevent free speech or allow censorship. The second Act granted the author “the sole right and liberty of printing, reprinting, publishing and vending” a work and it fell to the courts to determine the extent to which the Constitution limited or enlarged the right. Judges were called upon to consider the effect of Article I, section 8, cl.8 of the Constitution, which grants Congress power to make laws to “promote the Progress of Sciences and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries” and the First Amendment, which guarantees freedom of speech and the press.

Taken together, the constitutional directive to make copyright laws to promote learning, and the First Amendment’s guarantee of free expression, could be expected to influence courts to define authors’ rights narrowly. But judges ultimately resolved the conflict between the

¹⁵ See e.g. Hannibal Travis, “Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment” (2000) *Berkeley Technology Law Journal*, 15(2), pp 1–65.

¹⁶ The Australian Act of 1905 dispensed with the presumption that copyright infringement must involve activity directed towards commercial advantage – “[i]f any person infringes any right conferred by this Act ...” – and it made the important concession that “private use” of a book was not an offence. Moreover, in theory, it embraced a broader version of fair dealing, allowing for “fair extracts” as well as specified fair dealings.

claims of property and free speech in favour of the former. The fair use doctrine implicitly asserted the sovereignty of the copyright owner over the use of expressive content, making public access to information a highly conditional privilege.

As one scholar observed, codification of the fair use doctrine in the 1909 US Copyright Act “brought consumer conduct within the realm of infringement” and started “a termitic infestation of the constitutional right of free speech”. According to the same scholar, in the century ensuing since the Act of 1909, fair use law “enlarge[d] the concept of infringement at the expense of the individual consumer’s right to copy the work for the purposes of learning.”¹⁷

In legislation, the expanding range of rights and offences marked most clearly the hegemony of the owner. In the 19th century, the statutes of both the United States and United Kingdom defined infringement narrowly. In Britain, piracy constituted the sole copyright offence. The fair dealing provisions in the 1911 Act, and its enumeration of copyright offences, confirmed the new status of the copyright owner. Statutory provisions forgiving what would otherwise be construed as trespass on the owner’s property – namely the fair dealing provisions as they were progressively enunciated – were now understood as a concession to the “public interest”. When Parliament struck a balance between the public and private interest in 1911, it did so very firmly in favour of the latter.

1912 Parliamentary debate in Australia

The necessity for conformity

The Australian federal Parliament passed the Copyright Act of 1912 in a period of intense legislative activity – between 1910 and 1913, Parliament passed 113 Bills. This fact may account for the relatively perfunctory treatment given by both Houses to many substantive

¹⁷ Lyman Patterson, *supra*. Patterson stated that: “copyright has both a purpose and a function. The purpose is to promote learning; the function is to protect the author’s economic interest. The function, however, must serve the purpose, not vice versa. To say that the copyright owner has a right to the profit and a right to deny public access is to fly in the face of the constitutional scheme of copyright. The purpose of copyright relates to the use of the work; the function of copyright relates to the use of the copyright. In order to protect the author against the use of the copyright, it is not necessary to deny the consumer the use of the work..”(P46).

portions of the Bill after its introduction in July.¹⁸ Legislators debated the Bill at some length in October 1912 but they considered provisions largely in committee, spending considerable time on questions of machinery and drafting.

Politicians resolved to incorporate the British Copyright Act of 1911 in the new copyright legislation for pragmatic reasons. As Australian parliamentarians knew, uniform legislative rules throughout the Empire were an important preliminary to creating the uniform system favoured by imperialist politicians. They also knew that the privileges enjoyed by members of the Berne Union flowed to Australia in its capacity as a British possession, not as an individual State. Until Australia joined the Union in its own right, it must align its legislation to that of Britain or risk ostracism from the Berne family.

As standing outside the Union seemed to be unthinkable, and numerous politicians subscribed to the ideal of imperial unity, it may seem self-evident that in 1912 parliamentarians agreed on the necessity for adopting the British Act. In fact, the Labor Government, manifesting some of the independent spirit of the parliamentary generation of 1905, responded to British developments by introducing in 1911¹⁹ independent legislation to extend Australian copyright protection to the works of authors in Britain, the Empire or the countries of the Berne Union.

The Government soon learnt that any new copyright legislation must conform to British requirements. On 1 December, shortly before passing its own copyright Bill, the imperial Government communicated to its antipodean counterpart a politely coercive message: failure to adopt British copyright legislation would mean that Britain would no longer recognise Australian copyright. Equally importantly, if Australia did not adopt the legislation its Act would not fulfil the requirements of the amended Berne Convention.

A few days later, Lord Tennyson, silent since the London Copyright Conference, cabled the Prime Minister, Fisher, to “earnestly request you to postpone Bill till you have text imperial act [sic].” His message emphasised the necessity for uniformity and the risk of falling out-of-step with the Union. “There was,” said Tennyson, “friendly and unanimous feeling at Conference last year and desire on the part of all to get legislation on uniform lines ... By your action you may put

¹⁸ The Governor General assented to the Bill on 20 November.

¹⁹ In November, prior to the passage of the British legislation.

yourselves outside limits Berlin convention and place myself and the Government in an awkward position.”

Fisher’s Government did not hurry to comply with British requests. But sometime in early 1912, it dropped the draft bill and concentrated on preparing new legislation that incorporated the British Act and included various provisions specific to Australian conditions. No-one, however, expressed enthusiasm for the British legislation. In October, Senator Keating called the Act “unintelligible to the ordinary person ... drafted in such a way that it is impossible for the layman to follow it.”²⁰ By contrast, he said, the Australian Act “is, to those interested in its operation, at least intelligible. On the other hand, to those interested in its operation, and to those who may be called upon to interpret it, the English Act that we are about to adopt is not always intelligible.”

Commenting on section 13(2) of the British Act, which dealt with compensation, Keating said, “some of our latest admitted barristers and solicitors would have been capable of drafting that clause in a more lucid way ... I could quote other clauses which are far worse in respect to draftsmanship.” In the House of Representatives, the Attorney General, Billy Hughes, expressed a similar view: “I am bound to say that not only in this, but in other sections, the drafting of the Act leaves a great deal to be desired, and that the field for litigation seems to be most prolific.”

But, as Keating said, the Government had “no alternative” to adopting the imperial legislation.

If we are going to impose conditions with respect to copyright which are not recognised by the International Copyright Union, we shall be setting ourselves up as different from nearly every other civilised nation in the world. It should be our desire to come into line with them.

The Government’s decision meant the loss of legislative autonomy. Parliamentary debate on the 1912 Copyright Bill could only be significantly constrained, for the incorporation provision in the British Act made plain that the British Parliament did not envisage the dominions making even modest changes to substantive clauses.²¹

²⁰ *Hansard* 23 October 1912, p4512.

²¹ Section 25(1) read as follows: “This Act, except such of the provisions thereof as are expressly restricted to the United Kingdom, shall extend throughout His Majesty’s Dominions: Provided that it shall not extend to a self-governing dominion, unless declared by the Legislature of the that dominion to be in force

Sure enough, much of the debate over the Copyright Bill involved a dreary exchange of non sequiturs on subjects ranging from library deposit to the accuracy of the marginal notes to legislation. Only Patrick Glynn complained, in the House of Representatives, at the length of the proposed copyright term. He reminded the House that two years earlier, the Labor Government itself sent a memorandum to Britain protesting the proposed 50 year posthumous term. The other MPs did not seem to care much.

They realised that discussion of the legislative provisions could only be, for the most part, a waste of time. In the Senate, Sir Josiah Symon, the outstanding contributor to the debates of 1905 remained silent. Never a frequent speaker, the end of his parliamentary career neared and his party no longer favoured him.²² His silence symbolised the change in approach to matters of copyright policy between 1905 and 1912.

In that time, a new understanding superseded the conception of copyright as a limited set of rights directed towards protecting the owner of literary or musical property from unauthorised copiers. The success of the Berlin Conference made clear that substantive debate on issues such as the copyright term would now take place at conferences of the Berne Union. The Union had become the motor of legislative change. No wonder that Symon had nothing to say.

Import controls

A small minority of parliamentarians in 1912 did contest an element of the British legislation that operated to the undoubted disadvantage of Australians – the grant to the copyright owner of exclusive control over the distribution of copyright material. Britain introduced distribution controls in the early 18th century to limit the influx from the Continent and Ireland of pirated books. Controls worked by vesting in copyright owners exclusive control of the distribution of copyright material. Owners could prosecute in British courts any person who imported

therein either without any modifications or additions, or with such modifications and additions relating exclusively to procedure and remedies, or necessary to adapt this Act to the circumstances of the dominion, as may be enacted by such Legislature.”

²² He ran for Parliament as an Independent in 1913, and lost.

books for sale or hire without their permission, and used their power to control the supply of books.²³

After the 1800 Act of Union that made Ireland formally a part of the United Kingdom, book piracy, previously a flourishing activity, gradually disappeared because copyright holders were able to enforce in Irish courts the provisions of British copyright and customs legislation. With the passing of the Copyright Act of 1842, the owner's exclusive power applied, under section XVII, to all British possessions, creating a monopoly, throughout the Empire, over the import or export of legitimate copyright material. Naturally, British publishers greatly valued import controls as a device for stifling competition. As long as colonials were debarred from importing (or domestic suppliers from exporting) books without the copyright owner's licence,²⁴ the latter was free to determine price, range and quantities free from the imperatives of competition.

British publishers were, as their letters to *The Times* during the 1911 copyright debates showed, viscerally attached to the distribution monopoly, particularly as it related to the colonies. The ties of history intensified the emotions some exporters. C J Longman, for instance, could look back 150 years to the days when his great-grandfather transformed Longman into a great exporter of books to the North American colonies. His uncle published a pamphlet on colonial copyright in 1872. For the publishers, so it seemed, Providence conjured countries like Australia to supply them with captive markets until the end of time.

Shortly before the introduction of the 1911 Copyright Bill, William Heinemann addressed the Publishers Association and warned of the dangers to the import monopoly posed by "certain socialistic pretensions existing exclusively so far in certain of the Colonies". Months earlier, Lord Tennyson cabled the Australian Government to advise it of a measure in the British Copyright Bill that would make

²³ Section XVII of the 1842 Copyright Act established import controls. The marginal note stated: "No person except the proprietor, &c. shall import into the British Dominions for Sale or Hire any Book first composed &c. within the United Kingdom and reprinted elsewhere, under penalty of Forfeiture, and if so of 10*l.* and double the value; and Books may be seized by Officers of Customs and Excise."

²⁴ Divisibility of copyright, recognised domestically in Australia in the 1905 Act, and introduced in imperial legislation in the 1911 Act, meant that the British copyright owner could grant copyright for a territory to a local who could then print and publish a British work in the territory.

publishers liable for proceedings in Australia as well as Britain. The publishers, said Tennyson, found the prospect “intolerable”. Why not, he asked, amend Australian legislation to ensure the owner of an Australian work could only be sued in Australia, and the owner of a British work in Britain?

Domestic publishers were also high-handed. In August 1911, George Robertson, co-founder of Angus and Robertson booksellers, dispatched a handwritten note to Billy Hughes (it began “Dear W Hughes”) curtly protesting against the “extraordinary omission of the British Government” to introduce in its Copyright Bill a provision that retaliated against the manufacturing provision in the United States’ Copyright Act. The tenor of the letter implied that Hughes ought to fix the anomaly and the latter certainly responded with alacrity.

He promised to “communicate with the Home Government in reference to the omission” and a fortnight later, the Registrar of Copyrights supplied him with a report titled “Angus & Robertson Ltd, Literary Copyright – Provisions of English, American and Australian Laws”. Representations made on Robertson’s behalf, however, were unavailing. The Commons briefly debated a proposal to add to the Copyright Bill a retaliatory manufacturing provision, but Government pressure led to withdrawal of the proposal.

Adoption of the British Copyright Act did not automatically mean that Australia must adopt rules that allowed British publishers, or their licensees, to monopolise the supply to Australia of books produced or sold in Britain. Under section 25(1) of the British Act, the self-governing dominions could adopt the legislation “with such modifications and additions relating exclusively to procedure and remedies, or necessary to adapt this Act to the circumstances of the dominion.” However, to undo the import provisions enunciated in section 14 of the British Act, parliamentarians needed to be certain that any nullifying changes constituted modification or addition adapting the provisions to Australian conditions.

Few, if any, legislators could have declared with confidence that section 25(1) contemplated revocation of the import provisions. Attempting to decipher the section, they would more likely concur with Hughes’s statement that the drafting of the Act left “a great deal to be desired”, or perhaps agree Keating’s observation that the legislation was “unintelligible”. Section 14(7), did, however, provide some clarity. It said of section 14 as a whole: “This section shall, with the

necessary modifications, apply to the importation into a British possession to which this Act extends of copies of works made out of that possession.”

Even if the apparent intent of section 14(7) were ignored and legislators thought it theoretically possible to revoke the prohibition expressed in section 14, practicality stood in the way. Any weakening of the import rules would cause a row with Britain and complicate incorporation of the British Act. For the great majority of parliamentarians such a course of action seemed unthinkable. They supported unwaveringly section 10 of the Australian Copyright Bill which vested in Australian copyright holders control over the import of copyright works.

Debate over the import monopoly

The import monopoly did, nonetheless, occupy the greatest amount of debating time and, more than any copyright issue discussed in Parliament in either 1905 or 1912, aroused the passions of a few speakers. Exchanges were frank. On one occasion Keating said of the Labor Senator Gregory McGregor, who betrayed no understanding that the monopoly might penalise consumers, “I really begin to totter my belief that the Vice-President of the Executive Council understands the Bill with which he is dealing.”

Australian legislators chose to believe the comforting illusion that British and Australian interests were indivisible and laws made by the former must benefit the latter. Though Joseph Vardon and John Keating pointed out to senators the importance of legislating in Australia’s interest, and Keating implored them to reconsider their endorsement of the distribution monopoly, the need for imperial uniformity remained a predominant concern. In debate, none of the proponents of import controls advanced a single substantive argument for their re-enactment.

Vardon, a successful printer and publisher before entering politics, and a committed opponent of the distribution monopoly, drew attention to its intended function as a deterrent to piracy. Hughes, who introduced the Copyright Bill in the House of Representatives, and McGregor, Labor’s Senate leader, did not advance principles or evidence to justify the monopoly. Hughes did not refer to the monopoly at all. Pressed on the indirectly related question of double payment of royalties, he maintained in relation to sections 10 and 19 of the Bill, which together

could be read to impose the obligation, that “the law is quite clear”: double royalties were not applicable.

McGregor hotly defended the necessity for carrying the import restrictions into Australian law. “A man,” he said, “might go to another country, purchase a copy [of a work] there, and bring it into the Commonwealth. It should be kept out, I say.” He railed against the idea of anyone obtaining copies of a work – albeit unpirated – from a foreign source without the owner’s authorisation:

Suppose ... the owner of a copyright in Canada assigned it to a person in New Zealand ... If this amendment were carried, the person in New Zealand could send copies into Australia, where he should have no right to send them. We do not want any business of that description to eventuate in the Commonwealth.

He begged his colleagues to support him in rejecting Vardon’s proposal to amend section 10 of the Bill²⁵ to allow an Australian to import unpirated copies of works from Britain or its dominions.²⁶ They obliged, rejecting the proposal by a majority of 13 votes, 18 noes to five ayes. Significantly, however, of the six senators who participated in the copyright debates of 1905, only two voted against the amendment and both were Government members.²⁷

British politicians and publishers might have predicted the Australian vote. British parliamentarians took the continuation of import controls for granted. During the copyright debates, no legislator bothered to speak a single word of justification for their existence, assuming no doubt that the dominions would continue to do their duty and uphold

²⁵ Section 10(1) of the Bill read: “Copies made out of the Commonwealth of any work in which copyright subsists which if made in the Commonwealth would infringe copyright, and as to which the owner of copyright gives notice in writing by himself or his agent to the Comptroller-General of Customs, that he is desirous that such copies should not be imported into the Commonwealth, shall not be so imported and shall, subject to the provisions of this section, be deemed prohibited imports within the meaning of the Customs Act 1901–1910.”

²⁶ The proposed amendment, to be added to sub-section (6) of section 10, was to read: “This section shall have effect as the necessary modification of section 14 of the British Copyright Act but shall not apply to copies which have been purchased or made in some other part of His Majesty’s dominions to which this Act extends without infringement of the rights of the copyright there.”

²⁷ Keating, Lt Col Gould, Symon and Walker voted for the amendment; De Largie and Givens voted against. MacGregor was in the Senate in 1905 but did not participate in the copyright debates.

protocols favouring British exporters. The 18 senators who voted against Vardon's amendment justified such confidence.

Dissent of John Keating

The shift in Australian thinking between 1905 and 1912 is striking. The men who passed Australia's first Copyright Act refused to introduce a distribution monopoly, and rather than attack piracy by granting copyright owners the power to control the importation of works, chose to make the import of a pirated work an offence.²⁸ The solution, as they saw it, lay not in distribution monopolies but a simple prohibition of dealings in pirated works. A person could import copies of a work from any source provided that the copies were legitimate.

For the generation of 1912 the catchcry of uniformity swept away considerations of national interest. Governments of any political stripe usually deferred to imperial custom. Politicians in general seemed to consider the longevity of the import monopoly sufficient reason for continuance. They were opposed by a gallant few. Symon was silent, but Keating, the other giant of 1905, wasted no time in speaking out. Keating had no axe to grind. Despite his understandable pride in the 1905 Act, he was not hostile to the copyright bill.

He supported incorporation of the British legislation, and particularly welcomed the 50 year posthumous term and the mechanical rights. But he bitterly opposed import controls. Section 10, he called, "a big blackmailing clause". A commanding man with a beguiling speaking voice – Robert Menzies described him after his death in 1940 as "one of the finest orators in Australia" – Keating tried his utmost to persuade his Senate colleagues. Speaking in October 1912, he stressed the inequity of applying to Australian conditions a rule designed for the benefit of British publishers.

"We have to realise," he said, "that copyright legislation affects not merely publishers, printers, and authors, but readers. It may be assumed in these days of universal education copyright legislation affects the whole community." After inconclusive Committee discussion of Vardon's proposed amendment to section 10, Keating adopted "a somewhat unusual course". He made a final heartfelt appeal to the Government to reconsider its attitude:

²⁸ Section 50 of the *Copyright Act 1905*.

I do not wish to re-open the discussion upon clause 10 or to take the highly unusual course of asking that the Bill should be recommitted for its further consideration, because I feel that the Vice-President of the Executive Council and his colleagues will realise their responsibility. I point out to the Vice-President of the Executive Council in all friendliness, the dangers that will beset the people of Australia if the Bill goes through in the form in which the Committee is about to report it to the Senate ... In adopting this legislation we are adopting British legislation, and honourable senators must recognise that Great Britain is a totally different country from Australia. In adopting clause 10 ... we are adopting a provision made in the United Kingdom to meet conditions with respect to importation of pirated copies, which are totally dissimilar from those which apply in Australia.

Keating gave two examples of the interests which might be affected by the operation of section 10. The first concerned Australian importers of film, records, and moving pictures – “they might find that some individual in Australia claims to have bought the rights in those things and may hold them up at the Customs House. The provision will absolutely prevent such persons carrying on their ordinary business.”

The second example related to a piece of music.

If, for instance, a certain piece of music becomes a “craze” in London, what is to prevent an individual in Australia exploiting it by purchasing the rights for Australia from the owner of the copyright in England? He will buy only Australian rights. Then a firm carrying on legitimate business in Australia may cable an order to their London agents for 1,500 copies of the piece of music in question, and before they arrive a man walks into the Customs House, and says, “You cannot land these, because I have Australian rights.”

Finally, Keating repeated his belief that section 10, unamended, would have sinister consequences:

[S]ection 10, as it stands, affords [opportunity] for blackmail. I used that word by interjection when the matter was being discussed, and I did so advisedly. The clause opens to the door to blackmail, unless we insert a provision of the nature to which I have referred.

His pleas, though, went unheeded. The Senate Committee greeted his arguments with silent indifference, as it had those of Senator Vardon, who warned that section 10, if enacted, would lead to the evils of monopoly:

The result of that provision is to practically give a monopoly to a man who chooses to buy the copyright of a song, as far as Australia is concerned. Take, for example, the importer of 1000 copies of a popular song. When his consignment reaches

Australia, he may find that he can not get delivery through the Customs, and the song will be destroyed as a prohibited import.

If some modification is not made to adapt the British Act to the Commonwealth, an opportunity will be offered to persons in the music trade to practically corner the sale of popular music here.

Double royalty and national interest

Patrick Glynn, Deakin's Attorney General in the Fusion government of 1909–10, construed the problem differently in the House of Representatives. He was concerned that the local owner of copyright could demand from a person importing records made under compulsory licence in Britain the same royalty paid already to the British copyright owner. Payment of the so-called "double royalty", a concern both for British exporters and Australian importers, was a question of excise rather than import restriction.

And though, at the official level, the British and Australians were unanimous in their opposition to double royalties, the debate over whether the purported obligation could be legitimately inferred from the legislation was to continue into 1913. Glynn mistakenly attributed the double royalty obligation to the section 10 distribution monopoly,²⁹ confusing the terms of debate. However, by directing the House's attention to section 10, he inadvertently focused attention on the underlying issue that had been raised by Keating and Vardon – the effect of section 10 on the Australian national interest.

The Labor MP, William Archibald, a follower of Gladstone, an enthusiast for the writings of Macaulay, and the man responsible for the establishment in South Australia of free libraries in corporate towns, broke ranks with the Government on section 10. He said that the Australian interest should be the only criterion for approving legislation. The worst aspect of failing to undo the double royalty obligation, he said, was that, "an injustice will be done to people in Australia."

In the same vein, he said: "I think this Parliament ought to be prepared to go to great lengths to protect Australians from being called upon to pay twice ... the Bill is introduced to obtain uniform copyright law throughout the Empire, and I recognise that the object is most

²⁹ It was the combination of copyright divisibility and British franking regulations that led to double royalties.

desirable, provided that we can secure it without inflicting any injustice on our own people.”

The last speaker on the topic of section 10, David John Gordon, an active member of the Liberal Union executive, ignored fiscal considerations altogether and made a stirring declaration in favour of legislating in the national interest. He said, “we can easily imagine an Australian firm purchasing the copyright of a popular song or a set of films in England and under this clause securing a very large monopoly in Australia.”

He said of section 10:

The clause as drafted is all very well from the British aspect, but from the Australian stand-point it seems to me that we ought to consider the position of the people in this part of the world, and to modify the law to suit our own purposes rather than to suit those of persons who are copyrighting in Great Britain. For example, we can easily imagine an Australian firm purchasing the copyright of a popular song or a set of films in England, and under this clause securing very large monopoly in Australia ...

I submit that we should legislate according to Australian requirements, rather than be content to accept the honourable gentleman's [Attorney General Hughes's] statement that the Bill has been drafted to bring us into line with the British copyright law, and that we cannot amend it in any way without breaking some agreement at which we have arrived at the Berlin Convention ...

I do not wish to see any piracy going on. I desire to insure to the author of a popular song the fruits of his own brain. At the same time, the Australian public ought to be protected to the extent of preventing any person here from having a monopoly and charging them just what he may choose, merely because he happens to have purchased that monopoly for a mere song on the other side of the world.

Gordon, a former journalist, willingly challenged the orthodoxy of placing international unity before national self-interest. In the vanished spirit of 1905, he expressed a bold belief: that Australia's national interest should be preferred to Britain's. He perhaps implied something more, that imperial compacts and international agreements were not sacred covenants. Archibald, the Labor renegade, immediately supported his sentiments, declaring that politicians “should not make away with our rights for the sake of securing uniformity.”

The Government listened to Gordon in polite silence, then ignored him. Like Vardon and Keating, he spoke in vain. Australia adopted import controls designed for the benefit of British copyright owners

and enforced rules that would allow copyright owners to control supply, and fix prices, for the rest of the century.

Publishers and the colonies

Before the new legislation, British publishers were much attached to the rights granted to them under section XVII of the 1842 Copyright Act. As owners of the copyright in books, they alone could import into any British possession any book for sale or hire. The import monopoly increased the price of books imported into the colonies (and later the self-governing dominions) and increased the publishers' profits. Ostensibly, the monopoly prevented piracy of books by enabling the copyright owner to ensure only legitimate copies of books were supplied. In fact, it prevented colonial importers from obtaining books from British wholesalers or retailer at prices lower than those charged by the publishers.

Although colonial markets provided rich pickings for British publishers, the publishers did not look kindly on the colonials who added to their profits. In evidence to the Gorrell Committee, John Murray spoke of the "difficulty which has for many years been experienced with the self-governing colonies with regard to copyright legislation". In 1911, prior to introduction of the Copyright Bill, William Heinemann observed, with apparent distaste, "a growing feeling in the colonies that the enjoyment of copyright should be granted only against a substantial quid pro quo and that it should be limited – in the interest of democracy."

C J Longman, contemplating section 26(1) of the 1911 Act, which permitted self-governing dominions to repeal imperial copyright legislation, noted mournfully in a letter to *The Times* that "the time has arrived when full power to legislate on copyright must be given to the self-governing Dominions." But, said Longman, they must not be allowed to disadvantage British interests: it was the duty of the British polity to consider "how to obtain from the Dominions the best terms for British authors and artists". He, for one, had no doubt that grave danger was looming. The dominions might adopt a manufacturing requirement similar to the reviled obligation in force in the United States.

To secure copyright, British publishers would have to go to the expense of printing in the offending dominion and if they failed to do so,

domestic pirates could publish unauthorised editions of British works and secure local copyright:

What the adoption of a manufacturing clause by each and all of our Dominions against the Mother Country would mean is known to many and need not be enlarged on here. Mr Buxton does not think there is any fear of its occurring. Many persons, however, believe that sooner or later it is certain to occur, and probably sooner.

In correspondence to *The Times*, John Murray raised the same prospect, alluding to the manufacturing provisions in the new Canadian Copyright Bill and the Australian Act of 1905. The *Sydney Morning Herald*, however, rejected as “unfounded” his prediction that the provisions, if enforced, would prove “disastrous to British authors”. The paper pointed out that dominion legislation could not exclude an imperial statute, and the British Copyright Act of 1842 gave the British copyright-holder protection in all British possessions. Moreover, the Australian Act stipulated that to satisfy the manufacturing requirement the British owner need only supply proof of title.

The attitude of British publishers towards Australia stemmed from the ancient mercantilist practices of their trade. Although free trade proponents attacked the waste and inefficiency of the imperial trade system, few exporters were going to advocate that captive imperial markets be freed from laws nicely calculated to increase the margins of British businesses.

With the growth of the Empire, publishers and government combined to create a legislative vice for the colonies that prevented countries such as Australia from importing British books, sheet music and fine art prints from any source other than the copyright owner. Yet the effects of the monopoly aroused little protest. Even opponents of the monopoly, when they considered how it worked in practice, concentrated on the activities of Australian opportunists, not British vested interest. David Gordon, for instance, criticised the monopoly as detrimental to public interest, but he saw the harm coming mostly from sharp-eyed locals exploiting s10(1) to establish a monopoly in the distribution of English hit records.

It did not seem to occur to him – and certainly not to proponents of controls – that the foreign producers of records and books might choose to keep the local rights, or assign them to an Australian subsidiary, and thereby retain the monopoly. In any event, the practice of the British publishing houses provided a long-standing example of

monopoly upheld by imperial legislation to the detriment of local interests. In 1912, Australian legislators, seemingly oblivious to that example, sought unity in preference to attacking monopoly, and disadvantaged future generations of Australians.

The Copyright Act 1912

The *Copyright Act 1912*, which applied for 56 years until the passing of new legislation in 1968, suffers by comparison with the Act it replaced. The Act of 1905 is a model of clear organisation and concise prose but, more importantly, it truly reflected the aims of Australian legislators looking to the Australian interest. The Act of 1912 incorporated British legislation drafted from the British perspective. Adopted in Australia because of perceived necessity, the British Act created norms that reflected international agreement.

The new legislation abandoned the old formula for the copyright term, dating back to the 1842 imperial Act, introduced a generic class of ‘works’ (meaning that the traditional category of ‘Books’ disappeared from the statute books) and the compulsory licensing of literary and musical works. It enlarged the scope of copyright to include production or reproduction in any material form whatsoever, including the right to make a record or cinematograph film.

At the same time, the 1912 Act abandoned the 1905 prohibition against importing of pirated copies of books or artistic works in favour of an import clause that allowed the owner of a work to prevent the importation of even legitimate copies of the work. The class of copyright infringements expanded to include a list of civil offences and the set of summary remedies similarly grew. In conventional copyright narratives, an accretion of new rights and remedies is usually described as “modernisation” or “updating” of legislation, but the uneasy accommodation of foreign legislation in the “modernisation” of the Australian legislation meant the 1912 Act, if modernised, also seemed unbalanced.

The Act was divided into two parts. The first, drafted in Australia, constituted the Act proper and was divided into five parts that dealt in turn with preliminaries, incorporation of the British Act and interpretation of the Act to adapt it to Australian conditions, import controls, summary remedies, the Copyright Office, and miscellaneous matters (primarily concerned with statutory deposit). The second part formed the Schedule to the Act and comprised the British Act.

It was the Schedule that provided the substance of Australia's copyright law until 1968. Part I was headed 'Imperial Copyright' and set out the rights, remedies, obligations and application of copyright. Part II, 'International Copyright', concerned Orders in Council extending the provisions of the Act to foreign [i.e. non-imperial] works and British possessions other than the Dominions. Part III, 'Supplemental Provisions', comprised certain saving provisions and the interpretation section.

As to rights, copyright subsisted, throughout the Empire, in works published anywhere within the Empire.³⁰ Copyright meant "the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof."³¹ It included the rights of translation, conversion from one type of work to another, performance of a converted work, and the making or records, perforated rolls, cinematograph films, "or other contrivance by means of which the work may be mechanically performed and delivered, and to authorize any such acts as aforesaid."³² Copyright was divisible.³³

Infringement occurred if a person "without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright."³⁴ It was an infringement to deal in copyright works, or to import works to any part of the Empire to which the Act applied, for commercial purposes and without authorisation.³⁵

Infringement did not occur in the case of "fair dealing with any work for the purpose of private study, research, criticism, review or newspaper summary";³⁶ the re-use by an artist of materials used to produce a commissioned work, so long as the main design of the work was not repeated or imitated; the making of artistic works which reproduced sculptures or works of artistic craftsmanship located in a public place, or architectural works of art; the publication for schools of collections of mostly non-copyright matter containing short passages

³⁰ *Copyright Act 1912* (No 20 of 1912), Schedule, section 1(1)(a).

³¹ Section 1(2).

³² Section 1(2)(d).

³³ Section 5(2): 'The owner of the copyright in any work may assign the right, either wholly or partially ...'

³⁴ Section 2(1).

³⁵ Section 2(2).

³⁶ Section 2(1)(i).

from published literary works; the publication in a newspaper of a public lecture; and the public reading or recitation of a reasonable extract from a published work.³⁷

The term of copyright subsisted for the life of the author and a period of 50 years after the author's death.³⁸ The Act permitted a person, 25 years after the author's death, by giving a prescribed notice, to reproduce the work for sale, providing that royalties of 10 per cent of the sale price of each copy sold were paid to the owner. In addition, following an author's death, a person could apply to the Privy Council for a licence to reproduce a work that the owner was allegedly withholding from the public.³⁹ The author could assign copyright in a work for a period of 25 years only, at which time the copyright reverted to the author's estate.⁴⁰

In actions for infringement, the Act conferred on the owner the right to obtain an injunction or interdict, damages, accounts and the recovery of infringing material.⁴¹ Summary remedies consisted of fines of 40 shillings for each copy of a work made, without authorisation, for commercial purposes (up to a maximum sum of £50), fines of £50 for possession of plates for the production of infringing copies, or for allowing a work to be publicly performed for profit, and the destruction of plates or infringing copies or their delivery to the owner of the work infringed.⁴²

The Act established a separate copyright "records, perforated rolls, and other contrivances by means of which sounds may be reproduced, in like manner as if such contrivances were musical works". Copyright lasted 50 years from "the making of the original plate from which the contrivance was directly or indirectly derived". Once a work was recorded, any person could make new recordings of the work provided a royalty was paid to the owner at the following rates: 2.5 per cent of the sale price of each record sold, if the recording was made within two years of the commencement of the Act, and thereafter at a rate of 5 per cent.

³⁷ Section 2(1)(ii)–(vi).

³⁸ Section 3.

³⁹ Section 4.

⁴⁰ Section 5(2).

⁴¹ Section 6(1)–(3).

⁴² Section 11(1)–(13).

Copyright in photographs lasted for 50 years from the making of the original negative⁴³ and ‘photographs’ (separately defined as including “photolithograph and any work produced by a process analogous to photography”) were included within the definition of ‘artistic work’.⁴⁴ The Act placed ‘Cinematograph’ (defined as including “any work produced by any process analogous to cinematography”) in the definition of ‘dramatic work’, or rather, “any cinematograph production where the arrangement or acting form or the combination of incidents give the work an original character”.

⁴³ Section 21.

⁴⁴ Section 35(1).