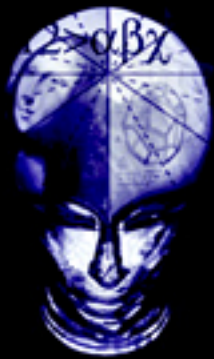
The Internationalisation of Copyright Law

Books, Buccaneers and the Black Flag in the Nineteenth Century

Catherine Seville



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Technological developments have shaped copyright law's development, and now the prospect of endless, effortless digital copying poses a significant challenge to modern copyright law. Many complain that copyright protection has burgeoned wildly, far beyond its original boundaries. Some have questioned whether copyright can survive the digital age. From a historical perspective, however, many of these 'new' challenges are simply fresh presentations of familiar dilemmas. This book explores the history of international copyright law, and looks at how this history is relevant today. It focuses on international copyright during the nineteenth century, as it affected Europe, the British colonies (particularly Canada), America, and the UK. As we consider the reform of modern copyright law, nineteenth-century experiences offer highly relevant empirical evidence. Copyright law has proved itself robust and flexible over several centuries. If directed with vision, Seville argues, it can negotiate cyberspace.

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Abbreviated titles are given in parentheses.

Table of abbreviations and archive sources

Abbreviations

C 1067 (1874)	*Correspondence respecting Colonial Copyright*
C 1285 (1875)	*Correspondence between the Foreign Office and Her Majesty's Representatives Abroad and Foreign Representatives in England, on the subject of copyright, 1872–75*
C 2870 (1881)	*Correspondence relative to a suggested Copyright Convention between Great Britain and the United States 1881*
C 6425 (1890–91)	*Correspondence relating to the United States Copyright Act*
C 7781 (1895)	*Return of monies received from Canada as duties collected on foreign reprints of British copyright works, 1877–95*
C 7783 (1895)	*Correspondence on the subject of the law of copyright in Canada*
Cd 4467 (1909)	*Miscellaneous No. 2, Correspondence respecting the revised convention of Berne*
Cd 5272 (1910)	*Dominions No. 3, Imperial Copyright Conference, 1910*
Col. Corresp. 1872	*Correspondence and Papers on the Colonial Copyright Act, 1847*
Dickens' Letters	Madeline House, Graham Storey and Kathleen Tillotson (eds.), *The Letters of Charles Dickens*, 12 vols. (Oxford: Clarendon Press, 1965–2002)
Minutes of Evidence (1899)	*Select Committee of the House of Lords on the Copyright Bill [HL] and the Copyright (Artistic) Bill [HL], Report, Proceedings, Evidence,*

	Appendix, Index; Minutes of Evidence 8 Parliamentary Papers (362)
Minutes of Evidence (1900)	*Select Committee of the House of Lords on the Copyright Bill [HL] and the Copyright (Artistic) Bill [HL], Report, Proceedings, Evidence, Appendix, Index; Minutes of Evidence* 6 Parliamentary Papers (377)
RC-Evidence	*Royal Commission on the Laws and Regulations relating to Home, Colonial and Foreign Copyrights; Report, Minutes of Evidence, Appendix* C 2036 (1878). *Analysis and Index of Evidence* C 2245 (1878–79)
RC-Report	*Royal Commission on the Laws and Regulations relating to Home, Colonial and Foreign Copyrights; Report, Minutes of Evidence, Appendix* C 2036 (1878). *Analysis and Index of Evidence* C 2245 (1878–79)
Wordsworth's Letters	*The Letters of William and Dorothy Wordsworth*, Alan G. Hill (ed.), 2nd ed., 8 vols. (Oxford: Clarendon Press, 1967–93)

Archive sources

Bowker Papers	Richard Rogers Bowker papers, New York Public Library, Astor, Lenox and Tilden Foundations
Bulwer-Lytton Papers	Hertfordshire Archives and Local Studies: Estate, family, official, literary and personal papers of the Bulwer-Lytton family of Knebworth House, Hertfordshire, 1700–1962
Chace Papers	Chace Family Papers, Rhode Island Historical Society (MSS 998, Box 2)
Everett Papers	Edward Everett papers, 1675–1910, Massachusetts Historical Society (P-349)
Jay Family Papers	John Jay Homestead State Historic Site, Katonah, New York
Johnson Papers	Robert Underwood Johnson Papers, New York Public Library, Astor, Lenox and Tilden Foundations

Lea Papers	Henry Charles Lea Papers, Rare Book and Manuscript Library, University of Pennsylvania
NA	The National Archives of England, Wales and the United Kingdom FO – Records created and inherited by the Foreign Office BT – Records of the Board of Trade CAB – Records of the Cabinet Office CO – Records of the Colonial Office CUST – Records of the Boards of Customs and Excise T – Records created and inherited by HM Treasury
NARA	United States National Archives and Records Administration
Pforz Mss.	Pforz Mss., Beinecke Rare Book and Manuscript Library, Yale University
Putnam Papers	George Haven Putnam Papers, New York Public Library, Astor, Lenox and Tilden Foundations
Saunders Mss.	Frederick Saunders, *The Early History of the International Copyright in America* (1888) and *Recollections* (1890), George Haven Putnam Papers, Manuscripts and Archives Division, New York Public Library, Astor, Lenox and Tilden Foundations

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1 Introduction

International copyright: gazing into cyberspace

This book is primarily concerned with the history of international copyright law. It also asserts that this history is of present relevance. Copyright law's function is to regulate the copying of copyright works. Technological developments have been instrumental in shaping its development in the past. Copying technology is better, cheaper, and more widely accessible than ever before. The prospect of endless, effortless digital copies poses a significant challenge to copyright law. The copyright industries' comfortable distribution mechanisms have been severely tested by the new digital methods of delivery. Affected groups look to copyright law for wider coverage and rigorous sanctions against infringers. Users protest that they are denied reasonable access to copyright works, as the public domain disappears into private hands.[1] Some commentators complain that copyright protection has burgeoned wildly, far beyond its original boundaries.[2] Some have questioned whether copyright can survive the digital age, at least in anything remotely resembling its present form.[3] However, these trials do not

[1] 'If too much of each work is reserved as private property through copyright, future would-be authors will find it impossible to create.' Alfred C. Yen, 'The Interdisciplinary Future of Copyright Theory', in Martha Woodmansee and Peter Jaszi (eds.), *The Construction of Authorship* (Durham; London: Duke University Press, 1994), p. 159. 'We need to show much greater concern for the public domain, both as a resource for future creators, and as the raw material for the marketplace of ideas.' James Boyle, *Shamans, Software and Spleens* (Cambridge, Mass.; London: Harvard University Press, 1996), p. 168.

[2] 'The distinctive feature of modern American copyright law is its almost limitless bloating – its expansion both in scope and duration. The framers of the original Copyright Act would not begin to recognise what the Act has become.' Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (New York: Random House, 2001), p. 106.

[3] 'Intellectual property law cannot be patched, retrofitted, or expanded to contain the gasses of digitised expression.' John Perry Barlow, 'Selling Wine Without Bottles: The Economy of Mind on the Global Net', in Peter Ludlow (ed.), *High Noon on the Electronic Frontier: Conceptual Issues in Cyberspace* (Cambridge, Mass.; London: MIT Press, 1996), p. 10.

necessarily foreshadow copyright's apocalypse, although they ought to trigger a considered reappraisal of its aims and policies. Viewed from a historical perspective, many of these 'new' challenges may be seen simply as fresh presentations of familiar dilemmas which copyright law has attempted to address in the past. Whether successful or unsuccessful, previous strategies offer valuable precedents for approaching contemporary problems. Until these have been considered, it is premature to abandon existing mechanisms. Even though it must be rebalanced and reconfigured for the digital age, copyright law has sufficient capacity to negotiate cyberspace.

Intellectual property rights are national or territorial in nature. Their normal sphere of operation is the state in which they are granted. Eighteenth-century laws therefore sought to regulate copyright norms only within these geographical limits. But in the nineteenth century, as markets for copyright works expanded beyond purely national limits, the permeability of these boundaries began to threaten the interests of copyright holders. Various experiments were tried at that time. Efforts to create and defend impregnable islands of copyright property proved unsuccessful, largely because the physical borders were simply too difficult to patrol. Attempts at draconian enforcement failed in practice, and were also liable to provoke public disregard for copyright law.

Parallels may be drawn with the environment in which copyright law currently operates. The contemporary public has displayed comparable reactions to similar tactics by the modern copyright industries. The question throughout most of the nineteenth century was whether the previously discrete national copyright regimes could be made to work together in an environment of international trade. The question now is whether international copyright law can function in cyberspace, where there is no overwhelming reason to acknowledge physical boundaries.[4] The very structure of the new environment challenges the established order of copyright law. But the leap between national and international contexts was likewise a severe test for copyright law; one which was eventually negotiated with considerable success. The transition to a global environment need not be regarded as essentially different in nature. Indeed, if the various debates are compared, some of the resemblances are striking. A thumbnail sketch of international copyright's origins and development gives preliminary context to these issues.

[4] 'Cyberspace is not a place. It is many places.' Lawrence Lessig, *Code: And Other Laws of Cyberspace* (New York: Basic Books, 1999) p. 63.

In the eighteenth century, national systems of copyright law were tailored to the needs of their home markets, and functioned largely independently of other national systems. As political, industrial and economic conditions changed in the nineteenth century, demands grew for a wider outlook. States began to make agreements to respect the copyrights of other states. A network of bilateral treaties grew slowly throughout Europe. These treaties offered reciprocal protection to their signatories' citizens. Certain accommodations in national provisions were found to be necessary, and successful treaties would serve as models for subsequent arrangements, but there was no formal harmonization of copyright law at first. Although these treaties brought benefits, differences in approach and gaps in coverage caused difficulties.

Demand grew for greater multilateral consensus. There was a considerable divide to be bridged. Countries where the tradition of author's right was established (particularly in continental Europe, especially in France) viewed *droit d'auteur* as a natural property right, which should not be restricted by national boundaries. In the common law world, states on the whole took a more pragmatic line when formulating their copyright law. Although a natural rights argument was present, the claims of authors were weighed together with the demands of the copyright industries and the needs of the public. In the international context, all states sought to negotiate the best protection possible for their nationals. As the markets for copyright works expanded, it became clear that the interests of national copyright holders could not be adequately protected unless copyright law was given an international dimension. These pressures were to lead to the signing of the Berne Convention in 1886. Although this treaty created a copyright Union which included 500 million people, it was essentially a European agreement. To the great dismay of European states, America, a country which was both a huge producer and a huge consumer of creative works, remained aloof from these arrangements. The United States recognised foreign copyrights only in 1891, and even then only under stringent conditions. The reluctance of such a major player had an obvious effect on the development of international copyright law. But it also had significant implications for British domestic law, and the law in British colonies, particularly Canada.

An agreement with America that she would recognise British copyright would have been a great prize, and it was sought as early as the 1830s. Without such an agreement, British works could be reprinted freely in America, as they certainly were. British copyright holders perceived this as a great injustice. Perhaps in reaction, they fought hard to retain exclusivity of the territory which Britain did control. In 1842 the import of all foreign reprints into British colonies was banned, in the

hope of benefiting British interests. The effect was far from satisfactory, particularly in Canada. British books supplied to Canada were so unappealing and expensive that cheap American reprints continued to be smuggled across the long border in large quantities. Canadian publishers were not permitted to offer competing local reprints of British works, because this would have been a breach of imperial copyright. Attempts to alleviate the problem were even less successful, leaving the Canadian public, the Canadian printing industries and the Canadian government justifiably resentful of the British approach. But so long as the American copyright question remained unresolved, the British Government felt its hands to be tied even on domestic and colonial copyright matters. An understanding of this interplay and interdependence of issues is crucial to an understanding of the development of international copyright law in the nineteenth century.

By the beginning of the twentieth century some of these problems had been resolved, or at least eased. The Berne Convention continued to develop. Its 1908 Berlin revision offered authors a significant level of protection, guaranteeing a copyright term of the author's life plus fifty years, and providing that protection arose out of the act of creation itself. However, these basic principles were such that the United States could not contemplate becoming a signatory. The Universal Copyright Convention of 1952, a less stringent convention developed under the banner of UNESCO, eventually succeeded in bringing the United States into the international network of copyright relations. The United States finally became a signatory of Berne in 1988, as did a number of other major states including the USSR and the People's Republic of China. More recent revisions to both Conventions have attempted to address the needs of developing countries. At the other end of the scale, during the 1980s many developed countries became dissatisfied with the standards of protection delivered under the prevailing treaty system. The US government threatened to use trade sanctions against countries which did not offer what it regarded as adequate protection, and fought to bring IP rights within the framework of the GATT. The result was the TRIPS agreement (Trade Related Aspects of Intellectual Property Rights), signed in 1994. It requires WTO members to comply with the substantive Articles of the Berne Convention (other than on moral rights), and sets clear standards for the enforcement of intellectual property rights.

Since then, the advent of the internet has provoked legislative initiatives throughout the world. In 1996 two new intellectual property treaties were negotiated through the World Intellectual Property Organisation (WIPO). One of these is the WIPO Copyright Treaty, which constitutes a Special Agreement under the Berne Convention. It

addresses the issue of online digital services by granting a right of communication to the public, so that copyright owners have an exclusive right to make their works available to the public in such a way that members of the public may access these works from a place and at a time individually chosen by them. Protection is also offered against the circumvention of technological protection measures designed to prevent unauthorised copying. Defining the boundaries of such protection is difficult and controversial. It is clear that wholesale digital piracy should be prevented. However, there is a danger that 'fair use' access to copyright works, although specifically permitted by law, will be hampered by private initiatives (whether technological or contractual).

Digital technology offers extraordinary opportunities to creators, users and all those involved in the copyright industries. It also permits indiscriminate copying, if allowed to function without restraint. The legislative border between permissible and impermissible copying is hotly contested. The US response was the 1998 Digital Millennium Copyright Act, a measure which provoked considerable criticism from those concerned with the interests of users of copyright works. The European Union's Directive on Copyright in the Information Society addresses some of the same issues. It implements the two 1996 WIPO Treaties, and in addition attempts to provide a harmonised framework for copyright and related rights in the information society. The aim is to establish a single market for the new products of the information society, and the Directive therefore seeks to make cross-border trade in protected goods and services easier, particularly over the internet.

The United Kingdom has also felt the impact of a number of previous EU harmonisation initiatives, again often relating to new technologies. There are Directives affecting copyright in computer software, databases, rental and lending rights, neighbouring rights, cable and satellite broadcasting, and the liability of Internet Service Providers (ISPs) for copyright infringement. Yet the creation of more basic EU copyright norms has seemed impossible, given the different traditions which underlie the regimes within Europe. Admittedly, copyright duration has been harmonised within the EU, upwards beyond the minimum Berne Convention term, to the author's life plus seventy years. The Information Society Directive has done a little more. But many important aspects of British copyright law remain essentially untouched, their historical framework easily discernible below the surface of current law. As we consider reform of modern copyright law, nineteenth-century experiences can offer highly relevant empirical evidence which is otherwise impossible to obtain. Adjustments and amendments to the present scheme are certainly needed. But copyright has proved itself

robust and flexible over several centuries. If directed with vision, it can negotiate cyberspace.

Synopsis and guidance

In the remainder of this chapter I introduce the themes which affected literary copyright in the nineteenth century. Literary copyright was not regarded as a narrow legal issue, but was situated in the widest political debates; particularly those concerning the merits of free trade and the nature of literary property. The depth and complexity of these often conflicting perspectives made it difficult to reach consensus, and legislative change to the main body of copyright law was extremely difficult to achieve. The 1842 Copyright Act was driven through only after five hard years of effort, and its initial aims were much compromised. No further comprehensive reform of copyright law was achieved before 1911. Negotiation of more specific protections was somewhat easier. For example, dramatic works were initially protected simply as books, with the result that anyone might perform them without reference to the copyright holder. The 1833 Dramatic Property Act granted a distinct performing right in dramatic works, extended to musical works by the 1842 Act. The 1862 Fine Arts Copyright Act addressed a different problem, bringing paintings, drawings and photographs within the sphere of copyright protection. This book concentrates on the most intractable difficulty, however, which was the internationalisation of literary copyright.

Chapter 2 gives an overview of the historical material which the central chapters explore. A reader with an interest in a particular country, period or person may find it helpful to begin here. There is much detail in the substantive chapters, thanks to the richness of the material available. The legal records of the time are generally quite thorough, so, given patience, the chronology of legislation and case law may be pieced together reasonably straightforwardly. More exciting still are the written sources left by those engaged in the debates – a varied company ranging far beyond the predictable classes of lawyers and politicians. The people most ardently concerned with literary copyright were the writers, publishers and readers of copyright works. They felt themselves to be personally affected by copyright law, and sought to participate actively in its amendment. A wealth of books, pamphlets, articles, journals and letters remain as testament to their often passionate interest in this subject. Unearthing and decoding these less formal sources demands enthusiasm, persistence and luck. This groundwork has been immensely rewarding though, allowing me to reconstruct

numerous minor but captivating stories within the larger account. I hope that aspects of this work may assist not only (the few) historians of copyright, but also those interested in related literary and legal topics, and in the history of publishing.

The main chapters of the book address four facets of international copyright during the nineteenth century. The division is essentially a geographical one, although British interests were greatly affected in each case. The first section is concerned with the emergence of international copyright in Europe, later maturing in the Berne Convention. The second section traces Britain's somewhat turbulent relationships with her colonies, particularly Canada, regarding copyright law. America is the focus of the third section. It traces the slow journey towards the United States' recognition of foreign copyrights in 1891. The final substantive section explores the impact of these international relationships on British copyright law. It was recognised as early as the 1830s that domestic law needed consolidation. However, the various international factors complicated discussions to such an extent that very little forward movement was possible. Each of the four parallel narratives is organised chronologically. Each may be read independently, although cross-references are given to the others where appropriate.

The relevance of this historical material to contemporary copyright law is considered in the final chapter. I argue that nineteenth-century experiments and examples can provide us with valuable insights, which current legislators would be wise to consider. Nevertheless, this is not to suggest that past models should continue to be applied without modification. Copyright has so far been an important mediator in the relationship between creators and their markets. But recently its perceived deficiencies have led to an increasing use of contractual mechanisms. Some of these (for example, licences for proprietary software) will require users to waive their existing rights. Their aim is to fortify the right holder in the possession of entitlements which may far exceed those guaranteed by copyright. If the product is desirable, then this strategy will be effective; customers will accept the deal. Other contractual devices, such as the Creative Commons licences,[5] sit at the opposite end of the spectrum. These allow copyright holders to express their positive choice to accept lesser levels of protection. Both routes have implications for the public domain – a crucial, communal space whose borders and condition must be safeguarded.[6] Such territory may

[5] See http://creativecommons.org/license/

[6] Its boundaries are not predetermined, as Goldstein reminds us. 'Intellectual property law's divide between private property and the public domain is a legal artifact, not a natural phenomenon. The lines shifts not only with the views of particular judges but

be secured only by thoughtful legislation, and not by market forces. A new boundary needs to be drawn, appropriate to the times. If copyright is to retain its past significance as moderator, it must acknowledge the new patterns and practices of cyberspace.

Visions of copyright 1837–1911: coming full circle?

In 1837 Serjeant Talfourd thought it perfectly sensible to introduce a bill from the back benches which addressed both international copyright and the consolidation of all domestic copyright law, including a substantial increase in copyright term. I have traced his travails and particular troubles elsewhere.[7] Many literary and legal contemporaries had great affection for Talfourd. Yet even his most devoted supporter could not claim that in political terms he was either practical or forward looking. His vision of copyright was based on a particular form of literary idealism, and his stubborn devotion to this vision proved to be both a strength and a weakness. It could be argued that it was the accession of Victoria which meant death for his tempting but unfeasibly grand plans. In one very literal way this was true for the 1837 copyright bill – the version with the most vaulting ambitions – since the death of William IV inevitably brought the death of the bill. At this stage there was little opposition, and it is not inconceivable that the 1837 bill might otherwise have passed in its original form. Speculation of this nature has limited value, though. The reality was that Talfourd had to bring the bill back repeatedly, in a new environment where its original aims were significantly curtailed. A new Copyright Act was eventually passed in 1842, although Talfourd was no longer in the House to see it. Many of the forces which opposed Talfourd were generated by desires for reform and change, however dimly recognised and articulated. Talfourd's idealism – Romantic, artist-centred, but essentially parochial – was beginning to appear politically naïve and hopelessly unrealistic. The new age demanded a new view, which would acknowledge and encompass the world.

Yet, despite its significant limitations, Talfourd's 1842 Copyright Act formed the backbone of English copyright law until 1911. Statutory action was then essential in order that the United Kingdom could ratify the recent revision of the Berne Convention. The original Berne

also with national boundaries and with cultural attitudes.' Paul Goldstein, *Copyright's Highway: From Guttenberg to the Celestial Jukebox* (Stanford, Calif.: Stanford Law and Politics, 2003), p. 10.

[7] Catherine Seville, *Literary Copyright Reform in Early Victorian England* (Cambridge: Cambridge University Press, 1999).

Convention was ratified by nine states in 1886, and came into force in December 1887. Copyright's legal context thereby became international in a quite new way. The United Kingdom's position was harmonised with Berne requirements by the 1886 International and Colonial Copyright Act. Further amendments to the Berne Union were expressed in the so-called Additional Act of Paris 1896, which was also adopted by the United Kingdom, this time without changes to primary legislation. However, the 1908 Berlin revision demanded significant modifications to the United Kingdom's domestic law. As a result of the Berlin Act it became essential that signatory states should provide a copyright term of at least the author's life plus fifty years, and that protection under the Convention should be granted without the need for any formality such as registration or deposit.

The changes required by the Berne Convention were strikingly similar to Talfourd's initial position. Talfourd's 1837 bill had sought international protection and a copyright term of the author's life plus sixty years – suggesting that his vision was not so foolish as many have assumed. Yet both of these elements were, at that time, so contentious that they could not be carried as part of the same measure. The British Government did sponsor the 1838 International Copyright Act, which gave power to grant copyright to foreign authors from states which offered reciprocal protection, but progress towards a network of bilateral treaties was slow and difficult. The 1842 Act, limited to essentially domestic matters, did extend copyright term somewhat, if not so much as its sponsors requested.[8] This Act remained largely in force throughout the remainder of the century, in spite of defects which grew only more obvious.

By the time of the 1911 Act the questions which had seemed so contentious were no longer so. International cooperation was welcomed as principled and essential. The extended term was regarded as a reasonable harmonisation measure. Even the abolition of the registration system was accepted almost with relief. This work stems from my desire to understand what happened in the remainder of the nineteenth century to make such changes acceptable. It therefore attempts to chart the path of literary copyright law from the 1842 Act until the 1911 Act, to offer some explanations for the directions taken, and to draw some conclusions regarding the results.

My initial plan had been to consider the history from a British perspective, as standard legal histories tend to do, working chronologically

[8] The term had been twenty-eight years under the 1814 Copyright Act. The new term was the author's life plus seven years, or a minimum of forty-two years.

through the various bills, Acts, Select Committees and the Royal Commission. It soon became apparent that this could not be done satisfactorily: the international issues render any such account two-dimensional. Nor is it easy to untangle the various threads representing Anglo-American copyright, colonial copyright, domestic copyright, Imperial copyright and international copyright within Europe. When the different linear histories are juxtaposed, startling factual links and interactions are revealed. Recognition of this complexity of thematic interrelationship is crucial to an appreciation of the history of copyright law during this period. The developments in any one of these areas can only be satisfactorily understood if seen against the developments in others. They are interconnected to a very considerable extent. Local choices could have unexpected effects elsewhere. For instance, the decision to tighten the rules on foreign reprints in the 1842 Copyright Act set off a chain of events in Canada which was unintended. The aim had been to protect the British book trade's local market. The effect was that American reprints were widely smuggled, and British interests were prejudiced. Similarly, the various cases decided in the English courts concerning the eligibility of foreigners for copyright protection had considerable international significance. The effects of these decisions could be sudden and unpredictable.

Ideas from the widest political debates were brought to bear on all copyright issues. For example, the relative merits of free trade and protectionism were repeatedly discussed, both as a matter of theoretical principle and in the more specific arena of the book trade. Publishers were fighting for the various national markets, and the copyright status of foreigners' works was enormously significant in this struggle. Nor was any national printing trade willing to see what it considered its customary local production depart to other countries. A fear of invasion by rivals can frequently be detected in the arguments used on all sides of the copyright debate. The general quality of argument was not improved by the tendency of the participants to fragment into interests groups of all types: authors, publishers, the reading public, individual states, the colonies, and so on. Consequently, there were disagreements over whether international copyright with America was 'an authors' question' rather than 'a publishers' question', or a matter for the good of the reading public. The fierce possessiveness which characterises these intellectual exchanges finds legal expression in the calls for prohibition or taxation of imports, local manufacturing clauses, compulsory licensing schemes and other protectionist devices. Such approaches to copyright policy were often justified by reference to general national policies on trade, or other matters. Copyright was thus seen to affect

national identity, national education, national literature, national integrity and national autonomy (independence from Britain was a particular concern for the United States, and, in a different way, for Canada also). Every system of copyright law must determine which works are protected, for how long and from what encroachment. These questions are contentious even in a national context, but become more so when the international dimension is added. Local considerations of politics, economics, geography and law result in differences of approach which, once established, are difficult to reconcile.

The mechanisms used to affect the outcomes of these different but related debates are remarkably similar in all parts of the world: petitions and memorials, lobbying of individual Parliamentary representatives, pressure on the executive branch of government, publicity in newspapers and journals of all kinds, the formation of clubs and campaign organisations. All these are commonly used throughout this period, although an increasing professionalism can be detected in the manipulation of these mechanisms as the century progresses. A further notable feature is the extent of the international intellectual exchange between the various parties. Details of the current state of play in the various arenas were frequently offered and discussed, both in private and public communications. Book trade and literary periodicals, for instance, would regularly re-print attributed news and opinion from their counterparts in other countries. Thus the campaigning had a strongly international aspect also, with many of the chief players prominent in several debates, often over many years.

The protection of literary property

What is now understood as intellectual property law did not really emerge as such until the middle of the nineteenth century.[9] However, literary works could trace a considerable history of legal protection. The sixteenth-century licensing system stemmed from Tudor desires to control the printing presses, and was intended to restrict the circulation of seditious or other material objectionable to the Crown. This developed into a regime controlled by the Stationers' Company, which in practice gave its members a perpetual monopoly over the publication of works registered to them. The system was effective and resilient, even surviving the Civil War. It was reaffirmed by Charles II in 1662, again

[9] For a persuasive development of this thesis on a wide canvas see Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Law* (Cambridge: Cambridge University Press, 1999).

with the intention of maintaining Crown control over the press, but was allowed to lapse in 1679. Briefly revived again under James II, in 1695 Parliament refused to renew the Licensing Acts, leaving the book trade without legal protection. The Stationers' Company lobbied energetically, and the result was the first English copyright statute, the Act of Anne 1710. This was stated to be 'an Act for the Encouragement of learned Men to compose and write useful books'. It granted authors and their assigns protection for fourteen years, for all books registered with the Stationers' Company. The right was 'returned' for a further fourteen years if the author was still living at the expiry of the original term.[10]

It was at first thought that the Act of Anne gave rights which were supplementary to the perpetual common law right of literary property. In any event, the London book trade enjoyed powerful customary control over publishing, which was reinforced by trade practices. Provincial booksellers lacked the power to challenge this stronghold, but the Scottish booksellers began to send reprints south of the border, provoking the London trade into legal action. Preliminary exchanges were inconclusive, but in 1769 the bookseller Andrew Millar sued Robert Taylor in the Court of King's Bench, for having published and offered for sale James Thomson's *The Seasons*. Millar had bought the copyright from Thomson in 1729; it had been assigned to him and duly registered at Stationers' Hall. However, Taylor's edition appeared in 1763, considerably after the statutory period of protection had expired. The case was decided in Millar's favour, Lord Mansfield, the lord chief justice, leading the majority in finding that an author did have a common law right of property in his works.[11] Lord Mansfield's judgment was founded on the Lockean argument, that 'it is just, that an author should reap the pecuniary profit of his own ingenuity and labour'. He was not persuaded that the abrogation of the common law right could be implied into the Act of Anne. There was a strong dissent from Yates J., his view being that the common law right did not persist after publication, and that the statute governed the author's rights entirely.

The matter eventually reached the House of Lords, in a further case involving Thomson's *The Seasons*. Since Millar's copyrights had been sold on his death in 1769, several London booksellers now owned a

[10] Details can be found in a number of accounts: Cyprian Blagden, *The Stationers' Company: A History, 1403–1959* (London: Allen & Unwin, 1960); Benjamin Kaplan, *An Unhurried View of Copyright* (New York; London: Columbia University Press, 1967), pp. 1–25; Lyman Ray Patterson, *Copyright in Historical Perspective* (Nashville: Vanderbilt University Press, 1968), John Feather, *A History of British Publishing* (London: Croom Helm, 1988); Mark Rose, *Authors and Owners: The Invention of Copyright* (Cambridge, Mass.; London: Harvard University Press, 1993).

[11] (1769) 98 ER 201; 4 Burr 2303.

share in the work. An unauthorised edition by Alexander Donaldson was met first with a preliminary injunction, made permanent in 1772. However, Donaldson appealed to the House of Lords. The case of *Donaldson* v. *Becket* provoked unprecedented interest and publicity. Five questions were put to the twelve law lords for their opinions. Lord Mansfield, although present in the House, remained silent. On the crucial question of whether the Act of Anne had abrogated the author's common law right of printing, opinion was finely balanced. The majority of the recorded opinions were that the statute had replaced the common law right. Eighty-four lay peers were present. In what was probably a voice vote, the House of Lords reversed the decision to grant an injunction restraining Donaldson's edition.[12]

One of the most powerful results of these cases was the debate they provoked and focused on the nature of literary property. Although the value of mental labour was widely acknowledged, there was disagreement as to whether it could or should be recognised as a form of property. There were various objections made, but at the root of all of them was concern at the absence of any physical substance in the thing claimed. These difficulties were fully debated as a result of the two great eighteenth century cases, but Talfourd was still having to address them in the mid-nineteenth century: 'Is the interest itself so refined – so ethereal – that you cannot regard it as property, because it is not palpable to sense or feeling?'[13] Although by the end of the eighteenth century it was generally accepted that intangible property was an appropriate subject for protection, this did not eliminate all of the difficulties, nor all of the pockets of resistance to the notion.

Some arguments against absolute literary 'property' stemmed from fundamental objections to the private appropriation of ideas, which, particularly in terms of Enlightenment thought, were held to belong to

[12] (1774) 1 ER 837. For discussion of Lord Mansfield's silence, and the suggestion that there was a mistake in recording the opinion of one of the judges, see J. Whicher, 'The Ghost of *Donaldson* v. *Becket*' (1962) 9 *Bulletin of the Copyright Society of the USA*, 102; Rose, *Authors and Owners*, p. 99 and App. B.; Richard S. Tompson, 'Scottish Judges and the Birth of British Copyright' (1992) 37 *Juridical Review* 18–42. See also H. B. Abrams, 'The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright' (1983) 29 *Wayne Law Review* 1120–91; Mark Rose, 'The Author as Proprietor: *Donaldson* v *Becket* and the Genealogy of Modern Authorship', in Brad Sherman and Alain Strowel (eds.), *Of Authors and Origins: Essays on Copyright Law* (Oxford: Clarendon Press, 1994); Ronan Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth-century Britain (1695–1775)* (Oxford: Hart, 2004).

[13] Parl. Deb., vol. 45, ser. 3, col. 927, 27 February 1839. For exploration of the eighteenth-century debate on property in mental labour see Sherman and Bently, *Modern Intellectual Property*, pp. 11–42.

everyone in common. Thus although protection for individual literary property could be justified, its extent had to be reconciled with the public interest. Such objections led those arguing for authors' rights to distinguish between the ideas underlying the work and the form in which they were expressed. Thereby it was conceded that ideas could not be appropriated by individuals, the notion of literary property instead attaching to the form in which those ideas were expressed. This concept dovetailed well with the image of the author as creative genius, expressing unique perceptions in an original form. These qualities were particularly emphasised in the Romantic vision of the author as invested with an autonomous and universal subjectivity, and were also to be found in the work itself. Thus,

> The text, which results from an organic process comparable to Nature's creations and is invested with an aesthetic of originality, transcends the circumstantial materiality of the book – a transcendence which distinguishes it from a mechanical invention, and it acquires an identity immediately referable to the subjectivity of its author, rather than to divine presence, tradition, or genre.[14]

Chartier, Woodmansee and others have noted the somewhat paradoxical association of this ideology with the view that literary production should be remunerated directly, in a market context rather than one of patronage.[15]

Closely associated with the debate as to the nature of literary property are questions about the person writing the texts. The word 'author' has conveyed different meanings at different times, and the role continues to be repositioned and confronted. One of the most remarked on transformations occured as the author regarded ceased to be as an imitator of nature, and began to be perceived solely as a creator. This perception found its strongest expression in the Romantic vision of the author as a central, unique and essentially solitary figure, providing privileged access to the meaning of the text.[16] During the twentieth century this conception of an autonomous and universal authorial subjectivity has been strongly challenged. In the context of modern literary theory, the New Criticism demanded that attention should be focused on the text

[14] Roger Chartier, 'Figures of the Author', in Sherman and Strowel, *Authors and Origins*, p. 15. See also Martha Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the "Author"' (1984) 17 *Eighteenth Century Studies* 425.

[15] Chartier, 'Figures of the Author', 15. Martha Woodmansee, 'The Interests in Disinterestedness: Karl Philip Moritz and the Emergence of the Theory of Aesthetic Autonomy in Eighteenth-Century Germany' (1984) 45 *Modern Language Quarterly* 22.

[16] See, famously, M. H. Abrams, *The Mirror and the Lamp: Romantic Theory and the Critical Tradition* (New York: Norton, 1953).

itself, rather than its biographical or social background. Its position was that the way in which a work was read or received did not determine its meaning, nor could the author claim an advantaged position in this respect. Thus Barthes could proclaim that 'the birth of the reader must be at the cost of the death of the author'. However, later movements, including the New Historicism, and those concerned with 'the aesthetic of reception', have been willing to readmit both author and reader to the space which includes the text. The social space in which literary production exists has once more been acknowledged to be important to its meaning, although its definition is no longer automatically centred on the author, nor will it remain static through time. Therefore Foucault could again ask, 'What is an author?', distinguishing the 'socio-historical analysis of the author's persona' before proceeding to explore what he termed the 'author-function'. This complex and interesting concept is sited within society, and has a relationship to it, but also is capable of integrating individual appropriation of texts.[17]

Such approaches invite the re-examination of the history of the concept of literary property. Thus, for example, instead of seeing literary property as something which must necessarily have its origins in the law of real property, it can be argued that the concept of literary ownership emerged from the book trade's attempts to defend its customary printing privileges. If the booksellers could characterise what the author had assigned to them, the 'copy right', as a common law right, in the eyes of the law the result would be the perpetual protection which they had been used to. Additionally, the threat to these habitual privileges coincided with a number of other factors, which can be seen as affecting both the way in which the book trade framed its demands, and the manner in which it expressed its arguments. As Rose has observed, regarding *Donaldson* v. *Becket*:

> All of these cultural developments – the emergence of the mass market for books, the valorization of original genius, and the development of the Lockean discourse of possessive individualism – occurred in the same period as the long legal and commercial struggle over copyright. Indeed, it was in the course of that struggle, under the particular pressures of the requirements of legal argumentation, that the blending of the Lockean discourse and the discourse of originality occurred and the modern representation of the author as proprietor

[17] The bibliography is vast. For starting points see Roland Barthes, 'The Death of the Author', in *Image, Music, Text*, Stephen Heath (trans.) (London: Fontana, 1977); Hans Robert Jauss, *Towards an Aesthetic of Reception*, (trans. Timothy Bathi) (trans.) (Minneapolis: University of Minnesota Press, 1982); H. Aram Veeser (ed.) *The New Historicism* (London: Routledge, 1989); Michel Foucault, 'What is an Author?', in Josué V. Harari (ed.), *Textual Strategies: Perspectives in Post-structural Criticism* (Ithaca, N.Y.: Cornell University Press, 1979), pp. 141–60.

was formed. Putting it baldy, and exaggerating for the sake of clarity, it might be said that the London booksellers invented the modern author, constructing him as a weapon in their struggle with the booksellers of the provinces.[18]

This approach did not achieve the book trade's aim, which was to endow literary property with some of the desirable qualities of real property, particularly its perpetuity. This is not to say that the strategy had no consequences, however. It had a significant effect in shaping the emerging concept of literary property, and, arguably, in shaping the concept of authorship also.

Copyright and contexts

Copyright's context in the nineteenth century was not a narrowly legal one, as Talfourd discovered to his discomfort. Its relevance extended beyond the obvious connection with the book trade, to encompass wide themes of authorship, economics and popular education. Nor was this relevance purely theoretical. Over thirty thousand people signed petitions against Talfourd's bills. Such opposition reveals the breadth of copyright's perceived significance. This perception was heightened further during the developing international debates. And as copyright's relevance for national interests grew, so did questions of competition with other nations for the same territories. This was particularly true in terms of the market for books, which was expanding rapidly, and becoming increasingly global. But it was also true in other less tangible contexts. For example, America at first sought to justify her refusal to grant copyright to foreigners by reference to her reading public's need for cheap texts. This policy certainly did provide cheap and accessible reading material, but at times it undermined the established local publishing trade, and it also had the effect of hampering the emergence of native literature. With the growing consciousness of the importance of a national literature came a desire to reopen the American market to American works. This led to American calls for a reversal of the copyright policy towards foreigners, which had previously seemed to be in America's interests. Similarly, Canada also sought cheap books for her citizens. However, Canada's colonial status meant that she was not in a position simply to ignore copyright in British works, because these enjoyed legal protection which extended to Canadian territory. Nevertheless, there were strongly felt objections to the price and nature of the books supplied to the Canadian market, and they were fiercely expressed. British publishers were reluctant to relinquish one of their

[18] Rose, 'The Author as Proprietor', p. 30.

traditional markets, and the ramifications of the resulting dispute eventually reached proportions of constitutional significance.

All of these perspectives can be helpful in understanding how the history of copyright law was formed, and all contributed to the making of copyright law for the twentieth century. Yet it is important to avoid the temptation to recount the narrative in terms of its evolutionary 'progress', as if it were following an agreed teleological script. Some of those interested had clear goals for copyright law, but others had opposing or different aims. Many pressures and influences were simply in the air of the time, and their effect on copyright was in this sense incidental, although it could also be profound. It is essential to recognise that contextual differences affected the local meaning and feel of common concepts. To give just one example, in the legal environment which prevailed until 1891, British copyright works could be published in America without permission or payment. Early in the century British commentators often called this 'piracy', a word which conveyed their strong and relatively uncomplicated feelings of outrage and moral censure. Gradually, though, this practice was checked, to the point that a British critic using the word 'piracy' in the 1880s could expect to be reproached by the respected commentators, whether American or British.[19]

The reasons for this change were not simple. In part it stemmed from a greater understanding of the complexity of the American situation, and of the various causes underlying the legal stagnation. It was realised, too, that British hands were not completely clean in this respect: certain American copyright works could be published legally in Britain without permission, and they were. An element of pragmatism is detectable; the sense being that it would be foolish to antagonise those from whom a concession was being sought. But the change in feel also reflects an appreciation of the efforts made in America to acknowledge and respond to the British sense of moral outrage. These efforts took a variety of practical forms, including binding arrangements for voluntary payments, and determined lobbying for changes to the legal position. Many of those British authors involved were somewhat torn between gratitude for what was given freely, and their sense that permission to copy should

[19] The Philadelphia printer and publisher Roger Sherman teased others for their hypocrisy in using the 'pirate' label on several occasions, though good-humouredly consented to wear it himself. Sherman published the Encyclopedia Britannica in America, and testified before the Patents Committee in 1886. He was asked if he paid the authors of the Encyclopedia anything and replied: 'No, sir; our encyclopedia is a reprint. We are what these gentleman call "pirates" and I have got the black flag up now.' Chace Report, 21 May 1886 (49th Congress, 1st session: Report No. 1188).

be a matter of right, not largesse. This caused tensions and disagreements. Not everyone felt willing or able to take a 'principled' stance on copyright, for example by refusing (as Dickens did for a time) to sell early sheets to America in return for payment. Many accepted with grace what was offered, but continued to hope for a right to remuneration. Others were essentially uninterested in the theoretical notion of authors' rights, and just sought the greatest economic return possible. These changing understandings, practices and perceptions affected the label attached to what remained (in a narrow legal sense) the same activity – the publication of British copyright works in America.

In unpacking these contemporary contextual nuances one swiftly realises that there is no inevitable or pre-determined direction for copyright law. Nevertheless, the pressure of the Romantic aesthetic is still considerable, and it is important to recognise the dangers of what Saunders has termed 'Romantic historicism' in any attempt to give an account of copyright's history during this period: 'viewing the history of authorship as if organized by and for the subject-form, the Romantic habit of mind assesses the positive law of English and American copyright as a less than fully realised expression of the human subject'.[20] Even so, copyright law does express values, and I believe should do so, although perhaps with more transparency than has hitherto been achieved. My purpose is therefore not simply to describe the evolution of copyright law in the nineteenth century, fascinating though this is. I also argue that what the history discloses can be of help as intellectual property negotiates what is often described as its latest 'crisis', in the shape of the digital revolution. The nineteenth-century experiences provide empirical evidence of the effects on intellectual property of various globalisation pressures. Several of the 'solutions' put forward today have already been tried; in different contexts, admittedly, but there is still much to be learned from these experiences. Many of the lines of argument have been explored previously, often in great depth. The responses from interested groups may show marked parallels with contemporary reactions, generating insights for those currently addressing the issues. Less tangibly, the combined historical perspectives can reveal to us what the nineteenth century valued in copyright works. This picture necessarily emerges in somewhat shadowy form, but its importance is that it represents the consequences of the many powerful forces acting on copyright law.

[20] David Saunders, 'Dropping the Subject: An Argument for a Positive History of Authorship and the Law of Copyright', in Sherman and Strowel (eds.) *Authors and Origins*, p. 96.

Copyright's realm of relevance expanded considerably during this period, beyond authors, and beyond publishers. Bentham, discussing the eighteenth-century debate, described the lawyers' consideration of literary property as 'a curious spectacle':

> multitudes of advocates and all the judges in and out of office talking about property in general, not one of them knowing what it was, nor how it was created; it was an assembly of blind men disputing about colours.[21]

In the same essay Bentham said that incorporeal property could only exist 'among a people who have made a certain progress, and that a very considerable one, in the arts of life', noting that 'literary property is the most recent, as well as the most important, species of it'. This assessment implies a high regard for creativity, which on the face of it might sit as comfortably with a natural law analysis of authors' rights as a utilitarian one. However, arguments for the absolute nature of authors' rights did not succeed, in legal terms, beyond the eighteenth century. They continued to be put forward during the first half of the nineteenth century, and were reviewed in case law beyond this, but they came to be regarded more as an aspect of history, at least in their pure form. The Royal Commission treated them almost as a foot note, referring readers of their report to the case law sources, but not rehearsing them in full.[22]

This is not at all to imply that authors' rights were regarded as unimportant. Yet their definition in nineteenth-century society came to be accepted as a matter for statutory law, which required that authorial interests be balanced against others, and qualified as necessary. T. E. Scrutton, author of a treatise on copyright which became a standard text, remarked on the pervasiveness of this approach. The 1883 first edition of Scrutton's work noted that: 'In politics ... the Utilitarian formula is almost universally accepted, not only as the test of legislation, but also as affording a scientific foundation for the art of legislation.' Scrutton's formula for literary copyright law was expressed as follows:

[21] Jeremy Bentham, 'Manual of Political Economy' (1793–95), in W. Stark (ed.), *Jeremy Bentham's Economic Writings*, 3 vols. (London: Allen & Unwin, 1952–54), vol. I, p. 265n. Bentham enjoyed the irony inherent in the gulf between argument and practice here: 'But the pleasant thing was to hear on one side contending all the while with great vehemence that it was impossible in the nature of things a certain course of action should ever be observed, viz. the granting the requisite protection to this particular species of property which, according to their own confession, all the while had been ordered by Act of Parliament to be observed, and by virtue thereof, or otherwise, had been observed for ages.'

[22] *RC-Report* 16.

With respect to literary production, the interests of the State are:-

1. To obtain *good* literary work.
2. To obtain it at as *small a cost* to the community as possible.

The interest of *authors* is to obtain as large a return for their work as possible, both in reputation and in money.
The interest of *publishers* is to obtain as much security as possible for the capital they invest in supplying the public demand for literary productions.
And generally it is to the interest of the community to secure these acts *without legislative interference*.[23]

From this point of view there is nothing inherently remarkable or problematic in lawyers discussing literary property without knowing what it is, or how it is created. In a sense they do not need to, since it will simply appear once the scientific formula is correctly stated and implemented.

Scrutton's legislative recipe would have been accepted as indubitable by many of his contemporaries, although it omitted several crucial ingredients. One of these was the timescale over which the 'interests of the State' are to be assessed. This has particular significance in the international context. Writing in 1906, but still using the same language of utilitarian economic theory, Briggs (a far more sympathetic and imaginative commentator than Scrutton) expressed this point impeccably:

Indirect consequences may either discount or enhance present utility. Future interests and derivative results must both be considered in estimating value. The protection of subjects, the enrichment of the stock of literature, the provision of cheap and good books for the people, and the protection and encouragement of native industry, are the chief national considerations which retard the progress of the recognition of foreign copyright; but unreasoning protection of home industries at the expense of other nations, and unwillingness to grant international reciprocity, have often been found suicidal.

The American experience was signal proof of this, and Briggs fully intended the pointed reference to it.[24]

[23] T.E. Scrutton, *The Laws of Copyright* (London: John Murray, 1883), pp. 3 and 8.
[24] William Briggs, *The Law of International Copyright* (London: Stevens & Haynes, 1906), p. 84. See also pp. 87–90. Maine, writing at much the same time as Scrutton, cited the constitutional power 'to promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries', commenting that 'the neglect to exercise this power for the advantage of foreign writers has condemned the whole American community to a literary servitude

It is also essential for practical purposes that literary copyright law should be able to identify what literary property is. Scrutton's prescription was silent on this matter also. The task is a subtle one.[25] Not all literary 'production' will necessarily be deemed literary property. The picture of literary protection that emerges from the nineteenth century is a product of many individual elements acting in often unwitting combination; the forces are sometimes opposed, sometimes parallel, sometimes in harmony. The image is not clear or fixed, but can be glimpsed flickering and changing in different lights. It should not be regarded as in any sense a final reconciliation or resolution of these tensions. The forces and pressures are constantly changing, and it is the nature of the creative product that it too will not be static. The values and choices expressed in such a projection reflect their temporal and geographical position: they should not be thought of as definitive, nor as decisions which should be petrified in copyright law. Nevertheless, as options are chosen and definitions refined for the twenty-first century, contemplation of the environment in which nineteenth-century copyright law was formed offers an opportunity to compare current perceptions of value and creativity with earlier visions, and perhaps thereby to bring new visions more sharply into focus.

unparalleled in the history of thought'. Sir Henry Sumner Maine, *Popular Government* (London: Murray, 1885), p. 247.

[25] 'A broad statement as to what works are to be protected can be made with ease; but it is considerably more difficult to arrive at an exact definition of the fit subjects for copyright.' Briggs, p. 169.

2 International copyright: four interconnected histories

Given the thematic and legal complexity of this subject, a single chronological narrative would quickly become unmanageably dense and convoluted, and would obscure rather than reveal the connections. Four crucial strands are addressed in turn in the substantive chapters of this book: the Berne Convention, colonial copyright, America and international copyright, British domestic copyright. Although all four narratives are intended to be to a certain extent self-contained, the interconnections and interfluences are brought to light wherever possible. The final domestic strand may at first seem to be a surprising intrusion, given that this book is largely concerned with the internationalisation of copyright. However, given that it was the myriad difficulties with the international aspects of copyright that obstructed the reform of domestic law, the interactions with the other three strands are particularly revealing when viewed from this perspective. Also, those striving for the necessary major domestic reforms would where possible seek to include both colonial and international copyright in their schemes. Talfourd's 1837 bill was the first to attempt this integration, and there were several subsequent efforts. Yet it was not until the 1911 Act that this objective could be realised in any form. An indication of the nature of the difficulties which the numerous reformers encountered will be given in the brief account which follows, signalling the main problems and events in each area.

Towards the Berne Convention

Foreign reprints: concerns and responses

The international issue which most troubled the British book trade in the first half of the century was that of foreign reprints of British copyright works. There was great anxiety that these should not find their way onto the British market. Parisian publishers such as Baudry and

Galignani were delighted to supply travellers with reprints of copyright works, and there was considerable alarm about Belgian, German and American reprints also. Only so much could be done to prevent these copies entering Britain illegally. Reciprocal copyright was potentially a stronger mechanism. The 1838 International Copyright Act gave the power to grant (by Order in Council) copyright to foreign authors if their state offered reciprocal protection. The Act opened the door to negotiations with foreign governments, but was poorly drafted, and no Order in Council was ever signed under its terms.

Attempts to restrict the flow of illegal foreign reprints were made via various Customs Acts. The 1842 Customs Act gave Customs Officers the power to seize books whose details had been duly notified to them. Although welcomed by British publishers and authors, this was a controversial measure for several reasons. Officers were understandably loath to conduct a painstaking search of the baggage of individual travellers. More importantly, by an oversight in drafting, the power of seizure did not apply to the colonies. This omission was in theory rectified in 1845. In practice there was great reluctance to enforce a law which resulted in the destruction of cheap copies of works by British authors, which were otherwise scarce. The well-intentioned 1847 Foreign Reprints Act was the result, although it proved hopelessly ineffective in practice.[1] As will be seen, its defects were most sharply revealed in Canada.

Bilateral treaties were hypothetically a better solution, but the process of negotiation was slow and difficult, partly because there was little in the United Kingdom's system of protection to attract other countries; in particular, before 1842 the copyright term was comparatively short. The 1844 International Copyright Act increased the range of what could be offered, and the first convention under the Act was signed with Prussia in 1846.[2] Other countries followed gradually, but some of the major threats to the home market were slow to agree; a convention with France was not signed until 1851, one with Belgium only in 1854 – and none with America until 1891. In non-convention countries 'piratical' editions could be freely printed and sold, in practice circulating without hindrance even in convention states and in the British territories overseas. Consensus as to the subject-matter of conventions could be elusive. The 1838 and 1844 Acts expressly excluded translations, a decision which had to be reversed before agreement could be reached with France.[3] Even then, the protection offered to French drama in

[1] 1845 Customs Act; 1847 Foreign Reprints Act.
[2] 1844 International Copyright Act. [3] 1852 International Copyright Act.

translation was widely regarded as useless in practice. The appropriate status of and protection for translations was to become a significant preoccupation in discussions leading to the Berne Convention.

International initiatives: efforts towards a multi-lateral agreement

In 1858, a congress to discuss the laws of literary and artistic copyright was held in Brussels, under the auspices of the Belgian Government. The location was significant, as the leading book trade journal noted: 'thus, the city which was formerly looked upon as the stronghold of literary piracy is the first to take the lead in an attempt at a general discussion about copyright upon broad and general principle, not narrowed by local interests of prejudices'.[4] The congress was only a qualified success in terms of attendance, and there was little expectation that its recommendations would have any immediate practical effect. Its initiatives were not followed up in an international context for two decades. The final recommendations do, however, bear a striking resemblance to those which were later given effect in Berne.

The year 1878 was the year of the Paris Universal Exposition. Many congresses were held, including an International Literary Congress, with Victor Hugo as its president. Its resolution – that copyright was a form of property which should be guaranteed in perpetuity and not a legal concession – was regarded as hopelessly idealistic in some quarters. Perhaps the Congress' single most useful contribution was its decision to create an International Literary Association (later, with the addition of artists, *ALAI*)[5] to defend the principles of intellectual property in all countries. Annual conferences followed, and then a convention for an international copyright union was drafted, discussed at the Berne conference in 1883. This was an *ALAI* initiative, though held under the auspices of the Swiss Government. The conference prepared a draft of an international copyright union, communicated to other nations during 1883. There were considerable difficulties in reconciling those countries wanting to give the broadest possible protection to authors with those who objected to anything not in conformity with their own national laws. A compromise draft was developed and submitted at the first formal international conference for the protection of the rights of authors held in Berne in 1884.

It now seemed likely that some sort of agreement would be reached, and the British attitude began to alter perceptibly. At the 1883 conference Britain was represented by a delegate in a consultative

[4] *Publishers' Circular*, 1 March 1858. [5] *l'Association littéraire et artistique internationale*.

capacity, with no power to vote or to take part in the drafting. The United States had not been represented at all, which had influenced the Board of Trade's stance. However, when it became known that America intended to send a delegate to the second formal Berne conference, held in 1885, Britain decided to send delegates with full authority. At this meeting a new draft was approved and signed by the representatives of twelve nations. The final protocol was signed by Belgium, France, Germany, Great Britain, Haiti, Italy, Liberia, Spain, Switzerland and Tunis at a third formal conference in Berne in September 1886. The position of her colonies had been potentially an explosive one for Britain, but all her colonies and possessions were included under her signature, as was the case for France and Spain. Ratifications were exchanged by all except Liberia, and the Berne Convention came into effect in December 1887. A great achievement even as it stood, the absence of America nevertheless left an enormous gap in the Convention's coverage. National copyright proprietors from all over the world suffered from America's reluctance to grant copyright protection to foreigners. However, Canada's peculiar position – geographically proximate to America, yet subject to British Imperial copyright legislation – left her doubly vulnerable.

Colonial copyright

The particular problems of Canada

The 1842 Copyright Act gave protection throughout the colonies to works first published in the United Kingdom. It sought to discourage the trade in foreign reprints by imposing heavy penalties. The effect on British colonies was significant, since the North American possessions in particular had been used to plentiful supplies of cheap American reprints of British copyright works. British publishers made some attempts to supply cheaper editions themselves, but their inability or unwillingness to do so effectively left the colonial markets starved of adequate, affordable reading matter. Protests grew to such a pitch that the 1847 Foreign Reprints Act was passed. This allowed for the suspension of the prohibition on admission of foreign reprints, if the rights of British copyright proprietors were secured. The intention was that a local duty would be set, paid and collected. The result was a shambolic failure. Only tiny sums were ever collected under the various local regimes, and these were further depleted by the deduction of collection costs. American reprints continued to flood into the colonies, to the detriment of British authors and publishers.

The Foreign Reprints Act was also unpopular with the emerging Canadian publishing trade, because although it permitted the importation of foreign editions, it did not permit local reprinting. Thus the Canadian industry was powerless to compete with the American industry which was supplying its customers. The House of Lords decision in *Routledge* v. *Low* (1868) appeared likely to emphasise these effects: by holding that aliens publishing in the United Kingdom were entitled to copyright even if only temporarily resident in the British Dominions at the time, whilst denying copyright protection to works published in the colonies. This led to Canadian proposals, formalised in 1868, for a licensing scheme, which would have allowed Canadian publishers to reprint any British copyright work without the proprietor's consent, simply on payment of a royalty. British reactions to the idea were largely negative, although there was a minority strand of opinion strongly in favour of accepting it, on the grounds that it was better than the farcical collection scheme then in place.

The British Government stalled, hoping that the situation with America might change, and alleviate the problem. The Canadian Government continued to press for action, and Canadian publishers persisted in various publishing ventures which provoked British publishers. British concern regarding the Canadian question was a strong impetus for the formation of the Copyright Association in 1870, to work for the protection of British copyright interests. In 1872 the Canadian Parliament lost patience, and passed an Act embodying a licensing scheme, allowing for the reprinting and publishing in Canada of British copyright works on payment of a $12\frac{1}{2}$ per cent duty. Since its terms conflicted with imperial legislation, it needed the Imperial Government's sanction before it could come into effect. Such sanction was not forthcoming, although it was over a year before an unambiguous refusal was given. An alternative imperial scheme was drafted and circulated to the colonies, a process which took a great deal of time. In the meanwhile, some of the Canadian publishers had begun to see potential difficulties with a scheme which granted compulsory licenses to anyone who was prepared to pay a royalty. The fear was that there would be a race to undercut earlier Canadian editions, and that no local publisher could risk producing a quality edition in such an environment. A much more limited and moderate Canadian Act was passed in 1875. This gave Canadian copyright to works published or produced in Canada. Although Imperial copyright was not affected, British authors could now acquire a separate Canadian copyright if they chose to do so, by publishing in Canada.

The 1875 Act was only a limited solution. Canada continued to chafe under the Imperial copyright regime, and her mulish dissent was a

seriously destabilising factor in Britain's negotiations both on domestic and international fronts. Nevertheless, the long-standing Canadian grievances remained entirely unrelieved for a further decade, until the need for changes to implement the Berne Convention finally led to some alleviation of the most pressing problems. Crucially, the 1886 International Copyright Act altered the inequitable rule on publication, so that colonial publication gave copyright throughout the empire. The rules on deposit copies were also relaxed. There was still no thoroughgoing reform of colonial copyright arrangements, as the 1878 Royal Commission Report had advocated. The limited aims of the 1886 Act were understandable from the British Government's point of view, however disappointing the result for interested parties both at home and in the colonies. There was considerable political anxiety as to whether Britain could or should sign the Berne Convention on behalf of her colonies and possessions. Although unanimity of approach was very much desired, the British Government felt obliged to commit itself to consulting the colonies, promising that no action would be taken without their consent. In the end all the colonies did assent, including Canada. However, Canada's geographical proximity to America meant that her Berne status was in practice far more beneficial to the American publishing industry than to her own, since publication in Canada offered a simple doorway to Berne protection. There were comparatively few Canadian authors and publishers able to benefit from the increase in protection offered to Canadian works, and the benefits proved largely theoretical.

Growing discontent led to the passage of the 1889 Canadian Copyright Act, which incorporated a compulsory licensing scheme. The Canadian Government sought the Imperial Government's approval for this Act, and also gave notice that it wished to denounce the Berne Convention. This was a considerable embarrassment for Britain, and the government again played for time, hoping that the Anglo-American situation might resolve. The passage of the 1891 American Copyright Act offered only temporary relief from difficulties, however, because in practice Canadian industry was still at a disadvantage. Americans could obtain Imperial copyright simply by publication anywhere in the UK Dominions, whereas American copyright for foreigners was dependent on manufacture in the United States. The discrepancy in the size and development of the American and Canadian publishing markets only accentuated the competitive imbalance. The Canadian Government took what retaliatory action she could, and continued to insist that the 1889 Canadian Act should be proclaimed, as a vindication of the Canadian Parliament's right to legislate on copyright matters within her territory. In Canada the issue was regarded as of constitutional

significance, and had become closely linked to more general questions of national autonomy. Several attempts to break the stalemate failed. By 1895 positions were entrenched, and the exchanges heated. A breakthrough came late in that year, when the British author Hall Caine travelled to Canada to negotiate unofficially with the Canadian interest groups. Showing considerable flair, he obtained agreement on a compromise bill, based on a scheme of his own drafting.

The Hall Caine scheme was never implemented, because of important ministerial changes in Canada, and opposition from Canadian booksellers and authors. It did result in the abandonment of Canadian efforts to obtain approval for the 1889 Act, though, much to the relief of the British Government. In 1900 a new Canadian Act was passed, amending local copyright law to provide further incentives for holders of Imperial copyright to licence publication in Canada. There was no attempt to interfere with the position of those holding Imperial copyright, but nor was there any retreat from the Canadian position that she had exclusive jurisdiction to legislate for herself on copyright. The 1900 Act could not address the largest challenge to the Canadian publishing industry, which was America's continuing refusal to cede her manufacturing clause, or to join the Berne Union. Canada's reaction to the 1908 Berlin revision of Berne reflected the particular difficulties which she faced. Because of the acute sensitivities involved an Imperial Copyright Conference was called in 1910, to consider whether or not to ratify the Berlin Act, and, if so, how. This conference proved extremely constructive, perhaps unexpectedly so. It freed the log jam which had blocked British legislation for decades, and the contours of the 1911 Copyright Act owe much to the delegates' discussions. Nevertheless, the conference was not in a position to resolve all outstanding difficulties. Although a great deal of uniformity was achieved, the autonomy of the self-governing Dominions was clearly acknowledged. As a result, the 1911 Canadian Copyright Act, while conforming as much as possible to the Berlin requirements, incorporated restrictions inconsistent with Berne obligations. These were intended to protect Canadian industry from aspects of American competition which she considered unfair.

America

Early British demands for the protection of her copyright works

Until 1891 the only protection afforded to foreign copyright works in America was informal and ad hoc. In British terms, copyright law in America was comparatively young. Originally a matter dealt with by

individual states, in 1790 specific federal legislation established literary copyright throughout the nation. Citizens and residents of the United States were guaranteed a fourteen-year copyright term, with an option of further fourteen years if the author was still living at the expiry of the original term. Protection for foreign authors was not much considered. An 1831 amendment extended the normal term to twenty-eight years, with an option for renewal for which the author's widow or children could apply. The same Act also explicitly barred foreign authors from protection, to safeguard the widespread practice of reprinting foreign works. During the 1820s and 1830s some American publishers were prepared to pay for advance sheets of the most popular British authors, such as Scott and Bulwer-Lytton[6]. The more reputable American publishers were less likely to reprint works to which a fellow American publisher had a prior claim. This informal system was known as 'courtesy of trade', and its application varied depending on the particular publisher, and on the prevailing economic conditions. It could make the payment of foreign authors a more secure economic proposition. But such payments were negotiated in the absence of copyright, and were largely market driven. Comparatively few British authors had any hope of payment from American publishers, and those with the market power to attract offers would have preferred to have a legal right to sell – both because of the question of principle and because of the bargaining power which would have resulted.

In 1836 the London publishers Saunders & Otley attempted to establish a New York branch. They met predictable hostility from the American book trade, notably in the shape of the New York publishers, Harper & Bros. Initially undaunted the London firm sought the assistance of its authors and organised a petition. Fifty-six British authors signed, and copies were presented to both Houses of Congress in 1837. A Select Committee, chaired by Henry Clay, reported that justice required that foreign authors be protected. Clay introduced a bill to extend copyright privileges to British and French authors on condition that their works were reprinted and published in the United States within a month of publication abroad. There was some support, but it was too late in the session for the bill to pass. By the time Clay reintroduced it in the following session, formidable opposition had been

[6] Born Edward George Earle Lytton Bulwer on 25 May 1803, he was created a baronet in 1838. On succeeding to the Knebworth estate in 1843 he added Lytton to his surname, under the terms of his mother's will, and was known thenceforth as Sir Edward Bulwer-Lytton. In 1866 he was raised to the peerage as Baron Lytton of Knebworth, and consequently was addressed as Lord Lytton. To avoid distracting changes in the text, he will be referred to as Bulwer-Lytton throughout this book.

mobilised by the book trade, and it was reported unfavourably. The first American International Copyright Association appears to date from this time, run by the young publisher George Palmer Putnam, who became a notable figure in the subsequent debates.

Clay reintroduced his bill three more times, the last effort being in January 1842. Early in 1842 Charles Dickens arrived in America on a lecture tour, and made what has been seen as a disastrous intervention in the debate. His works were immensely popular in America, which teemed with cheap unauthorised reprints. His visit created a whirlwind of interest, and several public dinners were given in his honour. In Boston Dickens spoke warmly of his reception that he and his works had received in America. He also emphasised the power with which American literature had spread affection for Americans and the American nation. In doing so he expressed his confidence that America would grant international copyright before long. The Boston speech was widely reported, but it was another similar speech, given at Hartford, which induced the torrent of criticism. Dickens became defensive and somewhat entrenched. The sensitivities were such that now even a brief mention of the topic, at a high-profile public banquet held for him in New York, was inflammatory. This was questionable publicity for Clay's bill. A petition of twenty-five American authors in favour of international copyright was presented to Congress, and Dickens arranged for an ostensibly spontaneous petition from British authors to be submitted also. But the bill made no further progress, much to Dickens' indignation.

It seemed that pressure for international copyright might be better received in America if it came from American nationals, and in 1843 the American Copyright Club was formed. The initial membership was largely from New York, but branches were established throughout the country. The resulting façade was more impressive than the reality of the organisation. The intention was to coordinate lobbying efforts for international copyright, but little was achieved, other than the publication of *An Address to the People of the United States in Behalf of the American Copyright Club*. In late 1843 George Palmer Putnam collected 97 signatures from booksellers, printers and publishers on a petition calling for international copyright, although the scheme he outlined would have offered the local book trade significant protection against foreign competition. Nothing came of this initiative, though the American Copyright Club took the unprecedented step of paying an agent in Washington to lobby in its favour. A further individual effort in 1848 from the lawyer and politician John Jay also came to nothing.

A more prolonged and highly secret attempt was made in the early 1850s. It stemmed from a coincidence of diplomatic posting. In 1849 Henry Lytton, brother of the author Edward Bulwer-Lytton, was made British Minister to Washington. The following year Bulwer-Lytton's son Robert was sent to Washington as unpaid attaché in British Legation. As has been mentioned, Bulwer-Lytton's immense popularity had allowed him to collect payments for advance sheets from his American publishers. But he was always short of money, and saw further opportunity here. In 1851 he wrote to his son: 'Is there any chance, think you, of getting a Copyright for English Authors in America? Pray urge Henry to it. It might make me a rich man.' Robert's initial reply was discouraging, because of the likely unpopularity of the measure. Henry Lytton returned to England that year, to be replaced by John F. Crampton. Crampton was approached by a powerful lobbying body known as 'the Organization', which offered to carry various bills through Congress in return for payment. Robert Bulwer alerted his father to the possibility that an International Copyright Bill might be passed if sufficient money could be subscribed for the purpose. Bulwer-Lytton took soundings, reported that he thought that the money could be raised, and £1,000 was sent in the summer of 1852. Crampton proceeded, discreetly soliciting petitions from American authors. Eventually he negotiated a draft treaty with Daniel Webster, the Secretary of State. Although it was signed in 1853, it never passed the Senate. Some took the view that the matter was not of much importance, since under the prevailing case law Americans could secure copyright protection for works published in the United Kingdom.[7] More leverage might perhaps have been applied if the House of Lords' judgment in *Jefferys* v. *Boosey* had come a few months earlier. The effect of this was that a foreigner was entitled to copyright protection only if resident in the British Dominions at the time of publication – a catastrophic decision for works previously published on the assumption that place of publication was the relevant factor.

Post-Bellum America: national calls for international copyright

There were few further efforts towards international copyright law in America until after the Civil War. Imported books also had to suffer the burden of heavy tariffs during and after this period. In 1866 George Palmer Putnam revived the International Copyright Association. It presented various petitions to Congress, initially without success. However, there were small signs of a change in mood the following year.

[7] *Boosey* v. *Jefferys* (1851) 155 ER 675.

James Parton's article in the prestigious Boston magazine, the *Atlantic Monthly*, detailed the disadvantages suffered by American writers in the absence of a secure world market for their works.[8] Parton argued that most civilized nations had adopted an enlightened approach to literary property and that America deserved no less. Dickens' second visit to America for an extremely successful reading tour also stimulated discussion, though he did not speak publicly on copyright. Trollope, too, visited America at this time, and lobbied where he could. The impact of America's position on her own readers was being recognised, at least in some quarters. A Congressional committee was critical of the 'antiquated' policy which encouraged the publication of comparatively worthless British works above quality American works or foreign translations. The stalwart campaigners Putnam and Parton were both involved in The American Copyright Association, founded in 1868 'for the purpose of securing the rights of authors and publishers among the civilised nations of the earth'.[9] Significantly, the importance of industrial interests was prominently acknowledged. One of the Association's arguments for international copyright was that it would benefit manufacturing industries. A bill was presented, which would have granted copyright to foreign authors, subject to a manufacturing clause. It did not progress.

International copyright was not a matter of pressing concern to America. In May 1868 the House of Lords had handed down its judgment in *Routledge* v. *Low*, another case which turned on whether foreigners were entitled to copyright.[10] The author in question was Maria Cummins, an American who lived in New York. She had posted the manuscript of her novel *Haunted Hearts* to her publishers Sampson Low in England, and had gone to visit Canada for a few days at the time of publication. The copyright in the work had been assigned to Sampson Low, who had registered both the novel and the assignment at Stationers' Hall. The novel was published in a two-volume edition priced at sixteen shillings, and competition from Routledge's two-shilling edition was unwelcome. Although an injunction had been granted in Chancery proceedings, the decision had been appealed, and the case reached the House of Lords. All their Lordships agreed that a foreigner publishing an original work in England was entitled to copyright under the 1842 Act, provided that at the time of publication he was residing, however temporarily, in any part of the British Dominions. This much was consistent with *Jefferys* v. *Boosey*, and was sufficient to dispose of the

[8] James Parton, 'International Copyright' (1867) 20 *Atlantic Monthly* 430–51.
[9] *Publishers' Circular*, 1 May 1868. [10] (1868) LR 3 HL.

appeal on the facts. However, two of the speeches went further, plainly desirous of avoiding *Jefferys* v. *Boosey*, and construed the statute as giving copyright to every author first publishing in the United Kingdom, regardless of nationality or place of residence.

Such liberality provided little incentive for America to grant copyright to foreigners. In the early 1870s the American Copyright Association made several further attempts to get a bill through Congress. In 1871 Senator Cox introduced a bill essentially identical to the 1868 bill. It was the first international copyright bill to be discussed in the committee of the whole, but there was considerable opposition, and no further progress was made. Early in 1872 Senator Sherman brought in his own bill, the core of which was a proposal to permit general republication of the works of any foreign author on payment of a 5 per cent royalty to the writer. The book trade was also active in the matter. The New York publisher William Appleton was promoting a draft bill which provided that only an American publisher could hold copyright in foreign books, which had to be manufactured in the United States. The Philadelphia publishers were against even this very limited measure. Some of the New York publishers were sufficiently alarmed by the Appleton bill that they drafted one of their own.

The Congressional Library Committees held joint public hearings later in the year, but the passage of a bill seemed to be a remote possibility, particularly given that even those in favour of the abstract notion of international copyright could not concur on specific terms. The Committee's report was written by its Chairman, Senator Morrill, a leading protectionist. Its recommendation was unambiguously against international copyright, which 'would be not only an unquestionable and permanent injury to the manufacturing interests concerned in producing books, but a hindrance to the diffusion of knowledge among the people, and to the cause of universal education'. This put an end to any likelihood of a bill passing Congress in the immediate future.

The next realistic proposal for international copyright between the United States and Britain came from a perhaps unexpected source – the Harper Brothers. In November 1878 they wrote to the Secretary of State, William Evarts, proposing a joint conference to consider their draft treaty. The 'Harper Draft'(as it came to be known) included a manufacturing clause, and various other protective terms. It provoked a great deal of publicity. The American trade journal *Publishers' Weekly* was full of editorials, articles and correspondence on the subject. In Britain the draft was received rather coolly by the press, because of the insistence on a manufacturing clause. Some viewed it as a rather cynical move by the Harpers, who had been staunch opponents of international

copyright while they could make money simply by offering payment for advance sheets, but now faced sharp competition from other publishers within the United States. Nevertheless, in 1880 a draft of a Convention, substantially identical to the 1878 Harper Draft, was submitted to the British government by James Russell Lowell (poet, and American Minister in London 1880–85). Having consulted literary and publishing interest groups, the British Government replied that it was in general agreement, but that the publishers opposed the manufacturing clause. Nevertheless, although reserving its position publicly, the government was prepared to contemplate conceding a manufacturing provision. Taking over as the new British Minister in Washington, Lionel Sackville West attempted to open negotiations there in November, but these were stalled by Canada's private insistence that she be exempted from any treaty. Knowing that the Americans would have little interest in a treaty which excluded Canada, concessions were discussed. The matter drifted on without conclusion until the end of 1883.

Further bills were introduced in Congress in 1882 and 1883, but both were somewhat eccentric, and neither had trade backing. A significant event in 1883 was the founding of the American (Authors) Copyright League. One of the key figures was Richard Watson Gilder, editor of *The Century Magazine*, once described as an 'intimate friend and fishing companion of President Cleveland'.[11] He was also a close friend of Richard Rogers Bowker, editor of the *Publishers' Weekly*. Within a year the League claimed to represent 'the entire guild' of American authors, and had decided to back William Dorsheimer's international copyright bill, introduced in the House of Representatives. The bill's core provision allowed foreigners to hold US copyright, if the President proclaimed that their home country granted US citizens similar privileges. It did not include a manufacturing clause, an approach which the leading members of the League applauded. Although it was reported favourably, there was considerable opposition in the House from protectionists, and Dorsheimer could not get his bill discussed. President Arthur's annual message to Congress expressed strong support for international copyright, making it plain that until Congress had settled the question no conventions would be negotiated. A very similar bill to Dorsheimer's, again backed by the League, was introduced by Senator Hawley in 1885. The bill was referred to the Committee on Patents.

Before public hearings could be arranged, the Chace bill was introduced. The Chace bill was quite different from the Hawley bill in its

[11] Aubert J. Clark, *The Movement for International Copyright in Nineteenth Century America* (Washington, D.C.: Catholic University of America Press, 1960), p. 122.

approach. The Hawley bill was relatively short and simple, was founded on reciprocity and national treatment, and required few formalities. The Chace bill included a manufacturing clause, and had various other provisions which were protectionist in nature. It too was referred to the Committee on Patents, and testimony was taken on the whole subject in four public hearings. Many leading authors and publishers spoke in favour of international copyright, but there were petitions and statements of opposition from powerful trade groups all over the country. There were deep divisions even among the supporters of international copyright. Some insisted it should be granted as a matter of principle and without condition. These – including the Executive Committee of the American Copyright League – strongly preferred Hawley's bill to Chace's. Others took a more pragmatic line, recognising that no bill was likely to pass in the teeth of trade resistance, arguing that even a measure with a manufacturing clause was better than nothing at all. The Patents Committee reported in favour of the Chace bill, but again the Congressional session closed without progress. President Cleveland continued to advocate action, reminding Congress that 'the drift of sentiment in civilized communities toward full recognition of the rights of property in the creations of the human intellect has brought about the adoption by many important nations of an International Copyright Convention, which was signed at Berne on the 18th of September, 1885'.[12]

The Berne Convention came into effect in December 1887. In the same month Chace reintroduced his bill. By this time the American Copyright League had resigned itself to compromise. George Haven Putnam (son of George Palmer Putnam) had called a meeting of leading publishers, and as a result the American Publishers Copyright League was established. An executive committee was formed, and instructed to cooperate with the Authors Copyright League (as the American Copyright League now became known) to ensure passage of an international copyright act. At Putnam's suggestion, a conference committee was made up from the executive committees of the two leagues. Significantly, it was considered necessary to co-opt to the conference committee representatives of both the National Typographical Union and the National Association of Typothetae (employing printers). These decisions were crucial, as they enabled all the interest groups to work together towards a single, achievable objective. The conference committee remained active until the eventual passage of the 1891 Act.

[12] Message of the President to Congress, 6 December 1886: James D. Richardson, *A Compilation of the Messages and Papers of the Presidents: 1789–1897*, 10 vols. (Washington, D.C.: Government Printing Office, 1896), vol. 8, p. 505.

By March 1888 a compromise text had been agreed by the conference committee. This was a turning point. Chace's original bill had included a manufacturing clause which, although it did require reprinting in the United States, permitted the import of clichés of type or duplicates of the plates used in printing the original editions. It had been argued that it would be wasteful to demand dual type-setting. However, the typographical Unions were adamant that American type-setting was necessary for trade interests, and made this a condition of their support. They also wanted a ban on all imports of foreign books copyrighted in the United States. When these 'type-setting' and 'non-importation' clauses were conceded, the unions began to work for the bill. Following extensive and sustained lobbying by the various Copyright Leagues there were now many petitions in support of the revised bill. It was favourably reported in the Senate in March, and passed the Senate in May. Although it was sent to the House, other business rendered it impossible to bring the matter to a vote before the session closed.

The committee's strategy as it managed the bill's passage through Congress proved critical. The bill was re-introduced into the Senate by Platt, Chace having resigned his seat. In the House, the decision was taken to introduce two duplicate bills, one by the Democrat Breckinridge and the other by the Republican Butterworth, to demonstrate that the issue was bi-partisan. The House bill was defeated in May 1890, but re-introduced by Simonds later in the month. Called up in December 1890, it passed – a success again attributable to considerable lobbying efforts. It was hoped that the Senate, which had already passed the very similar Chace bill, would do the same for the Simonds bill. However, there was a good deal of controversy, and a number of potentially destructive amendments were introduced. Tactics and timing were crucial, and tensions in the legislative relationship between the House and the Senate threatened to derail the bill several times. It eventually passed, in the midst of considerable confusion, in the small hours of the last legislative day of the Congress, 3 March 1891. International copyright was thereby established in American law, although its basis was to remain qualified for almost a century longer.

Domestic copyright

The quest for order amongst chaos

As for Britain's domestic copyright situation, its single most glaring defect during the nineteenth century was the fragmented and confusing state of the law. This left successive governments unable to respond

coherently to new challenges, whether domestic or international. Partly this was a consequence of copyright's perceived importance in so many spheres. Many groups sought to protect and promote their interests, either by resisting or by requesting initiatives for change, and the law as enacted reflected their lack of coordination. The need for a sensible approach to copyright, embodied in a single act, was obvious for a good deal of the century. It was not, however, until the 1908 Berlin revision of the Berne Convention generated overwhelming pressure to conform to international standards that British interests could be persuaded to work together. On the whole during the nineteenth century, the efforts of those attempting reform of domestic copyright law have to be recounted as part of a catalogue of failure.

Talfourd was the first to propose a single consolidated copyright act, in his 1837 bill, which did not pass. His plans were severely curtailed before their reappearance the following year, and the 1842 Act was concerned largely with literary copyright. In 1857 a government bill to consolidate the then fourteen existing Copyright Acts was drawn up and printed, but subsequently abandoned. The Edinburgh publisher Adam Black introduced a consolidating bill in 1864. Although it reached a Select Committee, it could make no progress. The Royal Commission Report of 1878 strongly recommended the codification of domestic law: 'our first, and, we think, one of our most important recommendations is that this should be done'.[13] But the project was such a difficult and controversial one that no government department could be persuaded to take it on. The Board of Trade eventually consented to the introduction of a consolidating bill, but only on the clear understanding that it was to be in the personal charge of Lord John Manners, who had chaired the Commission. A bill was drafted during 1879, but it was too sketchy in its detail to be brought in during that session. Its introduction was announced early in 1880, the intention being merely to gather reactions (without any hope of its passing), but the initiative fell with Disraeli's government in 1880. Gladstone, as incoming Prime Minister, made it clear that the issue was not a government priority. But he indicated that he would look favourably on private initiatives.

This brought the interest groups back into action. A comprehensive bill was promoted by the Law Amendment Society in 1881, but it did not progress. A curtailed version, dealing only with fine arts, was introduced repeatedly, but did not pass. In 1886 Britain's imminent accession to the Berne Convention prompted the Society of Authors, the Copyright Association and the Musical Copyright Association to

[13] *RC-Report* 13.

combine to propose a draft consolidating bill to the Board of Trade. The International and Colonial Copyright Act 1886 instead made only the minimum changes necessary to permit signature of the Convention. The Society of Authors continued to press for copyright reform, and in 1890 its amending and consolidating bill was introduced by Lord Monkswell. It was opposed by the government, for many reasons, including international tensions with America and the colonies, and did not progress. In 1896 the Society of Authors took the lead in drafting a short amending bill, addressing only a few pressing issues. The Society sought the input and cooperation of the Copyright Association and the newly formed Publishers' Association. The resulting bill was introduced in 1897, but again foundered in the face of government obstruction. By autumn the Society of Authors and the Copyright Association had fallen out over the Association's proposals for yet another consolidating bill. In 1898 two rival bills were introduced, an amending bill backed by the Society of Authors and a consolidating bill drafted by the Copyright Association. A settlement between the opponents was effected when the eminent parliamentary counsel and draftsman Lord Thring agreed to work on a compromise measure. This in fact became two bills, one dealing with literary, dramatic and musical works, the other with artistic copyright. Government resistance to their international dimensions again meant that they could not pass.

The government's reluctance stemmed from its troubled colonial relations regarding copyright – with Canada in particular. The Berlin revision of the Berne Convention eventually compelled movement, so in 1909 a Departmental Committee was appointed to advise on the necessary changes. The resulting Gorell report recommended strongly that copyright law should be made 'intelligible and systematic' and brought into line with that of other nations as far as was practicable. The sensitivities of the colonies had to be addressed, and an Imperial Copyright Conference was held in 1910. The need for action was obvious to all. The South African delegate complained, 'At present, in the Colonies, we do not know what your law is; it is scattered through so many different Statutes.' George Askwith K.C., Britain's delegate at the Berlin conference, replied at once, 'We do not know either.'[14] Like the Gorell Committee, the Imperial Conference concurred on the urgent need for a uniform framework for imperial copyright. What was unsaid in the formal reports, but was well understood by the British Government, was that this uniformity had to be achieved by choice and not by compulsion. A bill was quickly introduced, with a view to wide

[14] *NA* CO 886/4 item 4, p. 10. Askwith was then assistant secretary to the Board of Trade.

consultation. It was significantly revised before its reintroduction and not untroubled passage in 1911.

The 1911 Act: looking back and looking forward

Although the 1911 Act accomplished the much-needed consolidation and codification of domestic law, inevitable limitations and compromises somewhat qualified its achievements. In particular, the comparative independence given to the colonies would continue to cause discomfort. Nevertheless, it would have been impossible to impose any scheme on the colonies which sought to subordinate them to the Imperial will in copyright matters, and the British Government no longer had any desire to do so. In relation to the self-governing colonies, certainly, such an idea was by then politically unthinkable. When compared to the paternalism of the 1840s, Britain's change in attitude to her colonies is striking. Of course it was not just in the field of copyright law that such changes were evident. But, particularly in Canada, the copyright question was repeatedly used to express growing desires for greater colonial constitutional autonomy, and seemed a natural vehicle for the purpose. In America, too, copyright was linked to conceptions of national independence. Britain was forced to acknowledge that arenas which she had previously regarded as her own by customary right – both in narrow terms of trade and in wider terms of political influence – were now fiercely contended. The process of acceptance was long and often difficult. The 1911 Act set Britain firmly within the new international context which had been forged for copyright law, but as one of many players, even if still a powerful one. In comparison the 1842 Act seems parochial in its vision: its approach outside the United Kingdom was invariably and unquestioningly focused on securing and defending British interests in the narrowest sense. But each Act reflected its time.

Viewed from one angle both Acts failed to deliver what those who created or used copyright works might have wished from them – a definitive legal framework clearly mapping the boundaries of the protected intangible, and ensuring perfect balance between the many and varied interests touched by copyright. In the past such an objective appears to have proved unfeasible in practice, and in the digital world it feels if anything even more unattainable. Discussions of the nature of the intangible, so enthusiastically engaged in during the eighteenth century, were increasingly regarded as of purely historical interest. Such issues seemed too enormous to be encompassed in statutory law, and copyright statutes became focused almost entirely on the objects of copyright. Nevertheless, those interested in the wider copyright debates

refused to be similarly restricted, and in practice their understandings of the intangible did find some expression in copyright law, even if somewhat indirectly; the colonial independence granted by the 1911 Act is just one example of this. Seen from this perspective the goal of a definitive copyright law is a futile and undesirable one, since copyright law should be sufficiently flexible to accommodate changing creative environments, and changing creative priorities.

Copyright law need not go meekly where the strongest wind blows it, however. If more thought were to be concentrated on the present nature of the valued intangible, perhaps copyright law could then serve more openly as a subtle and responsive mechanism for ensuring its protection. It is arguable that copyright law is, in many respects, fundamentally well suited to such a task. Its august history offers a wealth of thought and experiment to draw upon. Its objectives are not so clearly defined as those of patent, trade mark and design law; so they are hitherto less circumscribed. Previous willingness to call the most improbable things 'copyright works' could likewise be turned to advantage. Perhaps the strongest feature of all is that the detailed definition of many important concepts – originality, substantial taking, fair use, public interest – is still a matter for case law, even where the bare outlines are to be found in the statute. These characteristics give copyright law extraordinary depth, strength and flexibility. It is also, at least potentially, capable of great sensitivity of response to the creative object in all its possible forms, known and as yet unknown. If thoughtfully directed, copyright law has the capacity to meet not only the tests set by the digital revolution, but also those of any other creative challenge that might be devised.

3 Towards the Berne Union

International Congress on Literary and Artistic Copyright. All nations represented – universal laws for the control of Art and letters. It sounds imposing. It winds a speech off with a swing ... At all events, they spoke and voted; helping to pass some very harmless resolutions, which as they express no truth in particular, and will not have the slightest influence on Government, no one need give himself the trouble to read.[1]

Thus the *Athenaeum* dismissed the 1858 Brussels congress, whose 'harmless resolutions' in fact can be detected in the 1908 Berlin revision of the 1886 Berne Convention. Such arrogant superiority indicates a hostility to European ideas on copyright which is remarkable. Admittedly it was not until the 1878 Paris Congress that the idea of a uniform convention began to gather momentum. However, in 1858 Britain's scheme of international protection was not such as to justify smugness, and the markets that she had to protect were considerable. Nevertheless, Britain remained a reluctant participant in such debates, until international pressures on Imperial copyright forced the choice to join and influence, as the preferable alterative to being left outside. This decision was not taken until 1885 – when it finally became clear that unilateral or bilateral action would not be sufficient to safeguard British copyright interests overseas.

Foreign reprints: the growing menace

Even in the early nineteenth century the British book trade was beginning to face threats to its market from abroad. During the 1820s the Paris publishers Bossange, Baillière, Baudry and Galignani plied a highly successful trade supplying British tourists with cheap reprints of the latest London publications.[2] In 1830 Baillière opened a shop in

[1] *Athenaeum*, 9 October 1858.

[2] The price was only a few francs (25 francs to £1, under the gold standard). Galignani's works were well printed and produced, and in a convenient, compact format. An attractive, cloth-bound, single-volume edition of any new British novel was usually

London, much to the disgust of the local book trade. Belgium also was an abundant source of cheap publications of British (and French) copyright works, and American reprints were increasingly available. In Germany, the Leipzig firms of Zwickau and Fleischer regularly issued works by British authors. This resulted in two grievances for the British publisher: the loss of the continental market and a danger of encroachment on the domestic market as a result of the import of foreign reprints. These issues were closely linked, but the first of these seemed initially a lesser concern. The continental market could only be protected for a British copyright holder by an international copyright arrangement, and although there was increasing demand for this, it was not the most pressing problem. By the mid-1830s, however, the appearance of foreign reprints in London bookshops, circulating libraries and the collections of reading societies was causing publishers great alarm.

Although foreign reprints were prohibited, there was some confusion as to their treatment if discovered by Customs Officers. The 1814 Copyright Act gave the copyright proprietor a right of action, but did not state whether reprints should be seized.[3] An 1830 Treasury minute authorised confiscation of any large consignment of foreign reprints, permitting travellers to bring in only single copies. In 1834 a well-known London publisher, Richard Bentley, was provoked into legal action after hearing that a provincial reading society had ordered two French reprints of his works. The London bookseller who received the request sent his clerk to Baillière's shop, where the volumes were supplied.[4] The bookseller tipped off Bentley, who sought and was granted an injunction. Baillière settled. Bentley also pursued other cases in 1835, making test purchases of both French and American reprints, and obtaining injunctions.

In spite of these individual successes, the problem increased. In early 1842 the *Publishers' Circular* was 'loudly calling' the attention of the legislature to the 'foreign invasion of British Copyright' by French and

available in Paris within days of its publication in London, and at a fraction of the price. Their quality made them more desirable than their Belgian and German competitors. The catalogues of these publishers were extensive. For examples with prices see William St Clair, *The Reading Nation in the Romantic Period* (Cambridge: Cambridge University Press, 2004), pp. 520–1.

[3] The 1814 Copyright Act seems to have been understood by Customs Officers as prohibiting import for resale, but allowing import for private use, subject to payment of excise duty. Giles Barber, 'Treuttel and Wurtz: Some Aspects of the Importation of Books from France, c.1825' (1968) 23 *The Library* 139.

[4] This fascinating story is among many uncovered by James J. Barnes, to whose admirable work I am indebted. *Authors, Publishers, Politicians: The Quest for an Anglo-American Copyright Agreement 1815–1854* (London: Routledge & Kegan Paul, 1974), pp. 98–105.

Belgian 'piracies' of British works being sold in great numbers and as a matter of course to circulating libraries, book-clubs and individuals.[5] Either new legislation or the rigid enforcement of the existing rules was sought. Pressure came not only from the publishing trade, but also from authors, notably G. P. R. James, who was the recognised leader of the protest. The objection was that the reprinters did not have to pay for copyright, and used cheaper paper and cheaper labour, so could undercut the British publisher. Government ministers were initially concerned that restrictions would lead to artificially high prices, but eventually Gladstone (as Vice-President of the Board of Trade) was convinced that the cheap foreign reprints were in fact causing an increase in the price of domestic books, because the competition was unfair and diminished legitimate sales. James emphasised the 'notorious' fact that all the circulating libraries on the coast and for 40 miles inland were supplied entirely with pirated editions.[6] Wordsworth reported that he had visited a Piccadilly bookshop anonymously, asking for Galignani's edition of his poems. When a single copy was readily proffered, Wordsworth asked for five, then ten, then a hundred – then 500. The bookseller's response to the largest quantities was still positive: 'give me only time'.[7] A new Treasury minute was issued in February, tightening the regulations. This provided that for even a single copy to pass, it had to be cut open and apparently used. In April, as complaints continued, Gladstone issued instructions that the new minute was to be followed to the letter.

Another problem was posed by the American 'mammoth' newspapers, such as the *New World* and *Brother Jonathan*. These offered vast quantities of reading-matter, in columns of tiny print on poor paper, admittedly, but costing only a few pence. Mammoths sold in huge numbers in America, often via subscription. Subscribers were enticed by 'extra' numbers, which regularly included an entire novel – British authors being particularly popular targets. In the absence of international copyright nothing could be done about the practice itself, but British publishers became extremely alarmed when a campaign was started to encourage British subscribers. A Dublin firm advertised extensively in the Irish press, announcing themselves as agents for the

[5] *Publishers' Circular*, 15 February 1842.

[6] G. P. R. James, 'Some Observations on the Book Trade, as Connected with Literature, in England' (February 1843) *Journal of the Statistical Society of London*. In 1841 the Parisian publisher Baudry listed twenty-one of James' novels at 5 francs each. James claimed that he persuaded Mahon to include the words 'for hire' in s.17 of the 1842 Act: James to Lytton, 22 September 1842, *Bulwer-Lytton Papers*: D/EK/C2/31.

[7] Wordsworth to Mahon, 19 April 1842: *Wordsworth's Letters*, vol. VII, p. 327.

New World. A yearly subscription of 72s. 6d. (not much more than a single novel in its customary three-decker format) allowed British subscribers to receive the paper regularly from New York, sent through the General Post Office at the privileged newspaper rate. In August 1842 the publishers complained to the Post Master General, enclosing a recent copy of the *New World* which contained the whole of G. P. R. James' latest novel, *Morley Ernstein*. As a novelist of huge popularity, James was one of the lucky few who could command significant payments in America for advance sheets of his novels. Harper & Brothers were his regular publishers there. In June thieves had broken into the Harpers' Cliff Street warehouse – allegedly in search of an early copy of *Morley Ernstein* – causing a conflagration which did $100,000 damage. The potential losses to James and other British copyright holders were very considerable. The Postmaster General issued an order that the *New World* and *Brother Jonathan* should be charged full letter rate, and the Treasury, having consulted the Law Officers of the Crown, concurred.[8]

These measures to curb illegal imports did not address the root problem, however, which was that it was perfectly legal to print these works abroad. In June 1842 James was one of the organisers of a meeting of authors and publishers called to consider the problem of foreign editions. The resolutions reveal that international copyright was beginning to be perceived as the real solution:

> the means employed for Smuggling copies of Spurious Editions into Great Britain and her dependencies are so artful, and the opportunities so great, that the most effectual check which can be applied to this evil appears to this meeting to be the conclusion of Treaties with Foreign Powers for the mutual recognition of Literary Property.[9]

The meeting therefore expressed 'deep regret' at the delay in implementing the intentions of the legislature in the 1838 International Copyright Act, reported favourable assurances received from the chief booksellers of France and Germany as to their desire to secure literary property and noted that an international copyright bill was then currently before the American Congress.[10]

Powerful trade interests were represented at this meeting. The publishers Longman, Colburn, Blackwood and Spottiswoode all moved resolutions, as did the papermaker Dickinson. The authors present were less prestigious, which perhaps explains the *Athenaeum*'s negative (and

[8] *NA* T 25/38. [9] *Publishers' Circular*, 1 July 1842.
[10] This was Senator Clay's bill, first introduced in February 1836, and introduced four more times until 1842 without success. See below, pp. 160–7.

unhelpful) account of the meeting, which it claimed was poorly attended due to the short notice and inadequate publicity. Dickens was one of those who sent apologies.[11] The *Athenaeum* was dismissive of the decision to present a memorial to the Board of Trade, suggesting more forceful tactics:

> Let them then elect a committee, and, as no one has time to throw away on other people's affairs, they must subscribe their money, and nominate an efficient and well-paid secretary, whose exclusive business it shall be to put himself in communication with like committees in France, Germany, and America – and the whole of these conjointly must keep up a perpetual fire, until governments become sensible that authors and publishers are a substantive something, no matter what – and then . . . they may choose to do justice, if only to obtain peace and quiet.[12]

Doubtless quite unconsciously, this suggestion foreshadows some of the mechanisms of pressure and protest which were to characterise the struggle for international literary copyright throughout the century. The struggle was to be long and difficult.

British copyright and foreign nationals

Linked to these matters was the issue of whether foreigners could acquire copyright in England. Even in the eighteenth century protection had been sought for foreign works published in England. In *Bach* v. *Longman* (1777) it was held that a foreigner who came to England and first published his work there could sue for copyright infringement. The question then arose whether a foreigner could assign his copyright to a British publisher even though he did not visit British territory for its publication. The decision in *Clementi* v. *Walker* (1824) was that first publication had to be made in Britain for protection under the statute. But in *D'Almaine* v. *Boosey* (1835) Lord Abinger held that a foreigner could assign copyright: the publisher – as proprietor of the copyright – could claim protection, regardless of whether he had composed the work himself, or bought it from a foreign author. Serjeant Talfourd sought to put the matter beyond doubt by a provision in his 1837 copyright bill. This would have allowed authors outside the British Dominions to register their works, if they named a publisher within the British

[11] Dickens, just returned from America, expressed an enthusiasm for the cause which was not maintained: 'I have fought the fight across the Atlantic with the utmost energy I could command; have never been turned aside by any consideration for an instant; am fresher for the fray than ever; will battle it to the death and die game to the last.' Dickens to Thomas Longman, 1 July 1842: *Dickens' Letters*, vol. III, pp. 253–4.

[12] *Athenaeum*, 9 July 1842.

Dominions.[13] On publication by this British publisher, the author would have had copyright within the British Dominions with remedies as for a native author. However, Talfourd was pressed to drop the clause, the Government preferring to deal with the issue themselves in the 1838 International Copyright Act.[14] It seems that Talfourd's initiative was directly prompted by the American lawyer Joseph Story, assistant justice of the Supreme Court, and professor of law at Harvard. In April 1837 Story had suggested that the passage of such a bill in England would smooth the path of a similar bill through Congress. Talfourd's original bill was introduced shortly afterwards, in June 1837.[15]

The 1838 International Copyright Act went far further than Talfourd's limited plan of confirming *D'Almaine* v. *Boosey*, which only addressed situations where the copyright had been assigned before first publication in England. The 1838 Act gave a power (by Order in Council) to grant copyright within the Dominions to the authors of books first published abroad, for a term not exceeding the domestic term. It was a condition that the foreign state should grant reciprocal (though not necessarily identical) privileges to British authors. The work had to be registered at Stationers' Hall, and a copy deposited at the British Museum. The measure was also expressly stated not to prevent translation of foreign books – a matter which subsequently caused considerable friction. The measure was relatively uncontroversial at the time.[16] Publishers were content, expecting that foreign authors would

[13] *Bach* v. *Longman* (1777) 98 ER 1274; *Clementi* v. *Walker* (1824) 107 ER 601; *D'Almaine* v. *Boosey* (1835) 1 Y & C Ex 288. Talfourd made explicit reference to the case law, defending 'the expediency and justice of acknowledging the rights of foreigners to copyright in this country, and of claiming it from them for ourselves in return'. Thomas Noon Talfourd, *Three Speeches Delivered in the House of Commons* (London: Moxon, 1840) p. 26. Note the bill's insistence on reciprocity (s.11), although there was no requirement that the book be produced within the territory.

[14] Talfourd to George Palmer Putnam, 28 February 1844. Full text given in George P. Putnam, 'Leaves from a Publisher's Letter-Book' (1869) 14 *Putnam's Monthly Magazine* 559–60.

[15] Joseph Story to Harriet Martineau, 7 April 1837. 'Parliament is now in session, and Mr. Serjeant Talfourd (that miracle of a literary lawyer) is, I perceive, the leader for the amendment of the law of England. Pray let him know it is a matter of grave doubt, whether American authors can now possess a valid copyright in England. Let Parliament pass a declaratory act of reciprocity, declaring that all foreign authors, whose countries allow or shall allow to English authors, the right of copyright, shall be entitled reciprocally to the benefit of the English copyright act. I am sure Serjeant Talfourd could procure such an act to be passed without difficulty; and such an act would ensure success to the same object in Congress at the next session.' W. W. Story (ed.), *Life and Letters of Joseph Story*, 2 vols. (London 1851), vol. II, p. 276. For Story's support of the 1837 petition to Congress see below, p. 161.

[16] For the original intention to negotiate a multi-lateral treaty, and further details of the bilateral negotiations see Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Law* (Cambridge: Cambridge University Press, 1999), pp. 111–18.

inevitably publish with them. But little action followed, and no Order in Council was ever signed. The Board of Trade eventually sent a copy of the Act to the Foreign Office, suggesting that overtures be made to France, Prussia, Austria, Saxony and the United States, through their respective diplomatic representatives in London. The Foreign Office did not do this until March 1839, and the resulting exchanges were unproductive: the British Government was unwilling to accept the Prussian terms; France never made an official reply; the American Minister referred the matter to his government in Washington, but eleven years later the Foreign Office noted: 'It does not appear that any answer ever was received.'[17]

Even though the 1838 Act was never used, its effect was not neutral. It introduced further uncertainty, because some argued that it displaced previous statutory rights and associated case law. This increased doubt as to foreign copyright had a particular effect on the trade in American books, which did not require translation, and became increasingly popular with the British 'pirate' publishers. These reprinters, such as Bohn and Routledge, welcomed the opportunity to produce cheap editions of popular American works which were apparently unprotected by copyright. At the other end of the spectrum were publishers (such as Bentley, Murray and Blackwood) who took pride in promoting American works, and would always pay their authors for 'rights'. The question rumbled on for years, flaring up again in *Jefferys* v. *Boosey* (1854) and (to anticipate somewhat) was in practice only partly settled by the House of Lords decision in *Routledge* v. *Low* (1868).[18]

First attempts to stem the tide

The early tactic was to try to exclude foreign reprints from British territory, by means of draconian enforcement. The 1842 Copyright Act concentrated largely on the domestic law, but contained some provisions which affected the trade in foreign reprints. There was a new £10 fine for importing foreign reprints for sale or hire (the latter added to catch the circulating libraries), and the offending books were subject to seizure and destruction.[19] Imports for personal use were not prohibited,

[17] *NA* FO 5/1534 pp. 1–2.
[18] *Jefferys* v. *Boosey* (1854) 10 ER 681. For a full account see below, pp. 170–80. *Routledge* v. *Low* (1868) LR 3 HL 100, and see below pp. 197–9.
[19] s.17. Piratical imports which made it through customs became the property of the copyright owner, who could sue for recovery or damages: s.23.

however. The publishers had urged the total exclusion of foreign reprints, and objected that the new provisions did little more than the existing Treasury minute. Lord Mahon, the extremely practical politician who had taken over the handling of Talfourd's Bill, refused to follow the publishers this far:

> Suppose for example a man of slender fortune goes abroad for the education of his children; he buys for their use a large assortment of books – Hallam's, Lingard's, Milman's Histories; Southey's or Wordsworth's poems – all in foreign editions. What is he to do in returning? Is he bound to fling from him all these literary treasures – enriched perhaps with his pencil-marks or annotations – from the packet-deck?[20]

The 1842 Customs Act tightened the rules on imports somewhat further. One problem with effective enforcement was that there was no way that customs officers could know which books were copyright works and which were not. A further problem had been the exception which had allowed the import of books not reprinted in the United Kingdom within twenty years, and also books 'being parts of Collections the greater Parts of which had been composed or written abroad'. Because of the 'great Abuse' of this provision it was repealed.[21] The new regulations required proprietors to take positive steps if they wished imports of foreign reprints to be seized, by giving notice in writing to the Commissioners of Customs. The resulting lists were to be published by Customs, and displayed at ports in the United Kingdom. It was hoped that this would result in a more manageable and focused system than one which attempted to enforce a blanket ban. The wider prohibition of importation of unauthorised reprints for sale or hire (under s.17 of the 1842 Copyright Act) remained in force, distinct from the new obligation on customs to seize notified titles.

It had been intended that the notification system would be effective to stop imports throughout the Dominions, but (doubtless due to an oversight) the Customs Act in fact prohibited importation of notified titles only into the United Kingdom.[22] Many colonies were quick to take advantage of the apparent inconsistency, particularly since they had no sympathy with a policy of destruction of cheap British works,

[20] Barnes, *Authors*, p. 107. [21] 1842 Customs Act, s.23.

[22] Gladstone wrote to the publisher John Murray that 'Directions in conformity with the acts of last session will be sent to all colonies.' Simon Nowell-Smith, *International Copyright Law and the Publisher in the Reign of Queen Victoria* (Oxford: Clarendon Press, 1968), p. 25. But see s.24 of the 1842 Customs Act, which refers only to import 'into the United Kingdom'. Where copyright subsisted as a result of the 1844 International Copyright Act, s.10 absolutely prohibited import into any part of the British Dominions without consent.

considering it wasteful and illogical. Evasion was the normal practice, often with the assistance of customs officers, and even of the local legislature. The 1845 Customs Act extended the 1842 notification system to the colonies, but reprints continued to flow in. Demands for action led to the 1847 Foreign Reprints Act, which proved singularly ineffective. This is to leap ahead, however.[23] The original aims of the 1847 Act should be viewed in the context of the more general international copyright initiatives (under the 1838 Act) which preceded it.

The first bilateral treaties

The 1838 International Act had produced no immediate results. The change of Government in 1841 allowed a fresh approach to negotiations with foreign states, although it took some time for the Foreign Office even to discover the state of play. Authors continued to press for treaties. The question of international copyright was brought into particular focus by activities of the German publisher Tauchnitz, who was establishing his famous series, *Collection of British Authors*. In 1843 he visited London, spoke to publishers and addressed a standard letter to a number of British authors. He politely reminded them that he, like other German publishers, was free to publish British copyright works there. Yet he was prepared to offer authors a (varying) sum for their authority to publish, and (most importantly) he was willing to reassure the publishers that he had no designs on either the home or colonial markets:

> Allow me, however, to remark that I as well as any other publisher in Germany have at present the right to embark in such undertakings without any permission from the authors; and that my propositions arise solely from the wish thereby to make the first step towards a literary relationship between England and Germany, and towards an extension of the rights of Copyright, and to publish my editions in accordance with these rights. I therefore beg to offer you ___. For this you will give me your authority for publishing my edition for the Continent. I do not in any way claim the right of sending my edition to England or to your Colonies, and I will not in any way attempt to hinder the sale of the English original editions in Germany . . .[24]

[23] See below, pp. 86–90.

[24] William B. Todd and Ann Bowden, *Tauchnitz International Editions in English 1841–55* (New York: Bibliographical Society of America: 1988), p. 4. The first signatories were Bulwer-Lytton, G. P. R. James and Lady Blessington, soon followed by Dickens, Disraeli, Harrison Ainsworth, Samuel Warren and Captain Marryat. The sums offered varied: £20 would have been an average figure, £50 very unusual (for George Eliot, for example).

Many prestigious authors were flattered to be asked, and were attracted to the idea of selling their continental 'rights'. Tauchnitz's courteous and honourable approach won him much loyal support among his authors. The publishers were very much annoyed by the idea, however, fearing that the series would jeopardise their own chances in the continental markets, and undermine their ability to exclude foreign reprints. The matter was discussed at a meeting of the fledging 'Association for the Protection of British Literature', and a resolution against the arrangement was passed after much discussion. Several authors considered this to be gross interference by the publishers, and apparently resigned from the Association, which never fully recovered.[25] Tauchnitz always preferred to deal directly with authors, perhaps understandably, given this response. The incident reveals sharply the constant tensions between the various interest groups affected by questions of copyright. These underlying stresses explain the difficulties involved in engineering any concerted action to secure changes in the law, and particularly in sustaining consistent pressure for a prolonged period. Tauchnitz's series was a great success. He issued over 40 volumes in his series before even the first British treaty on the subject was ratified. He was thus in a good position to take advantage of the increased protection offered by this, and by the other treaties which followed gradually.

Early negotiations under the 1838 Act had not been fruitful, even though there was something more to offer other states following the extension of term in the 1842 Act, and the Government was willing to reduce duties on imported books for countries signing reciprocal copyright treaties with Britain. The package was still not particularly tempting or convenient, however, and the Board of Trade argued successfully that something further should be done.[26] In March 1844 Gladstone introduced a bill which allowed for reciprocal protection of books, prints and sculptures first published abroad, and also covered rights in dramatic pieces and musical compositions first performed abroad. Again the term was not to exceed the United Kingdom's domestic term, and translations were excluded. Known as the 1844 International Copyright Act, it passed without difficulty. Results were

[25] Todd and Bowden, *Tauchnitz International Editions*, p. 5. Barnes, *Authors*, p. 135. For more on the Association see below, pp. 257–60.

[26] Spain's copyright term was life plus eighty years, France's life plus fifty. Italy gave a life term, with a minimum of forty years from publication, then a further forty years during which others could reprint on payment of a royalty. One important difficulty was that British works were much in demand on the continent. British authors were far more likely to benefit from reciprocal privileges than their continental counterparts, particularly if translations were not covered.

still rather slow to materialise. In February 1845 Peel reported that negotiations were in train with France, Belgium and Prussia. An agreement with Prussia was signed in May 1846, and ratified a month later. It provided that the other states of the Prussian *Zollverein*, and any other states later joining it, should have the right to accede to it (which they all did, gradually). There was little fanfare in the press.

The Anglo-French treaty: the new deal

More excitement was generated by the prospect of an Anglo-French treaty, because of the extent of Parisian publishing. The progress of negotiations was a matter for regular report and discussion in the *Athenaeum* from early in 1850. The convention was signed in November 1851, and was widely welcomed. The *Times*' report flagged the need for a similar arrangement with America, a sentiment which both the *Examiner* and the *Edinburgh Review* endorsed.[27] There was a clear desire that this treaty should lead to widespread international laws on the subject. Certain aspects of the Anglo-French treaty – notably its coverage of translations – required fresh Parliamentary authority. A bill was introduced early in 1852. Its main purpose was to put the convention with France into effect, but it was drafted to be of universal application, and thus the Anglo-French convention came to serve as a model for later conventions. It passed rapidly, although its reception in the House of Lords was mixed.

Although the basic idea of reciprocal protection under the powers of the 1838 and 1844 International Copyright Acts worked reasonably well, the new provisions for translations were to generate a good deal of trouble. Translations had been expressly excluded in the earlier acts, a matter of such irritation to the French that it became an obstacle to an agreement which offered potentially enormous benefits to British authors and publishers. In the 1852 Act the point was to some extent conceded. Unauthorised translations of original works were prohibited under certain rather cumbrous conditions. Notice of intent to reserve the right of translation had to be printed on the title page of the original, and the original registered and deposited in the United Kingdom within three months of first publication. An authorised translation had to be published within a set period (a minimum of a part translation within one year, and the whole within three years of registration and deposit), and itself registered and deposited. The result was then five years

[27] *Times*, 26 November 1851. *Examiner*, 29 November 1851. [Caroline de Peyronnet], 'A Few Words on International Copyright' (January 1852) 95 *Edinburgh Review* 145–52.

protection from rival translations, dating from first publication of the authorised translation. Although the Act did cover dramatic and musical works, protection did not extend to 'fair imitations or adaptations to the English stage of any dramatic piece of musical composition published in any foreign country'.[28] This last exception was to prove extremely controversial (and was subsequently repealed), its effect being felt much more by French dramatists than British. Unauthorised copies of relevant works could not be imported without consent, and the usual rules for forfeiture and destruction applied. Duties payable on works published in France were reduced, and not raised for the duration of the Treaty.

It was obvious that the requirements for the protection of translations would prove burdensome. Even before the bill was introduced the *Publishers' Circular* offered to assist authors and publishers in disposing of their rights, announcing that it had opened a corresponding office in Paris, and promising to print full lists of French titles which had reserved their translation rights. By July it was reminding authors and publishers of the treaty's requirements, and noting with regret that very few appeared to be taking advantage of its protection. Their inconvenience notwithstanding, the provisions on translation were extended to Prussia in 1855.

The 1858 Brussels Congress: early calls for a uniform copyright law

The network of protection for British works in Europe continued to expand on this basis, although rather gradually. A convention was signed with Belgium in 1854, one with Spain in 1857, and one with Sardinia in 1860. France, too, was working hard to secure protection for French copyright works within Europe. In 1858 an international congress was held in Brussels, under the auspices of the Belgian Government, on the subject of international literary and artistic property. Almost three hundred people attended: some as delegates from states, universities, or literary and scientific associations; others as individual authors, artists, journalists or jurists (and so on). Some booksellers' organisations were represented, including the New York Booksellers' Association, as were various publishers and printers; the British publishers Charles Knight and Thomas Longman were present, although in their personal capacities. The Committee of Organisation devised an agenda with five categories: 'international questions', 'property in literary works and artistic works in general', 'dramatic and musical works',

[28] s.6, 1852 International Copyright Act (repealed in 1875).

'artistic works', 'economic questions'. Several days of sectional meetings on discussion questions were followed by general meetings to consider the resulting reports.

The report of the first section was adopted without modification: 'this report was in favour of an international and uniform copyright amongst all civilised nations, to be adopted even when unattended with reciprocity, and of giving foreign authors equal rights with natives, and without requiring the execution of any special formalities beyond those required in the country of original publication'. The second section was assigned the question of whether copyright should be perpetual, and eventually reported in favour of a temporary right only, the recommended term being the author's life plus fifty years. There was animated discussion on this sectional report, but a division revealed a large majority against perpetual copyright. For translations it was thought that the authors should have exclusive rights for ten years from publication, providing that an authorized translation appeared within three years.[29] All the contentious issues were already being addressed, then, and the shape of the 1908 Berlin revision of the Berne Convention is already dimly visible, at least with hindsight. This may seem impressive to us now, but (as has been mentioned) some contemporary commentators, at least in Britain, regarded such gatherings with indifference, disdain or even cynical contempt:

> International Congress on Literary and Artistic Copyright. All nations represented – universal laws for the control of Art and Letters ... Where they get their commission we have not heard. We suppose the gentlemen who undertook to speak and vote in the name of the Literature of our country had some sort of delegation of powers, from somebody, or some society, or some gathering of men of letters, though as we ourselves have not heard of any such organization, we are not in a position to record the fact.[30]

Not every report was so hostile. The *Times* was neutral. *Blackwood*'s detailed account of the Congress stressed the importance and range of the delegates, and described the result as 'a complete code of suggestions for the institution of a system of international copyright'.[31] But this article was written by a partisan: Robert Bell, one of the few British delegates at the Congress. Bell was a journalist and relatively minor literary figure, who had recently published an edition of English poets.

[29] *Publishers' Circular*, 15 October 1858. For a fuller account see Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1985* (London: Centre for Commercial Law Studies, Queen Mary College: Kluwer, 1987), p. 42.

[30] *Athenaeum*, 9 October 1858.

[31] *Times*, 2 October 1858. [Robert Bell], The International Copyright Congress (1858) 84 *Blackwood's Edinburgh Magazine* 687–700.

He admitted that 'English literary circles' were weary of the struggle for international copyright, but believed that they would not remain as mere spectators when they understood what the Congress had in fact achieved.

Both the *Athenaeum* and *Blackwood's* accounts, then, convey a sense of the inertia which had to be overcome before the various national systems could possibly be harmonised. Only very limited enthusiasm could be expected for the theoretical discussions of ideals, or for resolutions of bodies whose capacity for leverage could not be clearly recognised. Copyright Associations, Congresses and Clubs were not yet a usual mode of campaigning in Britain. Calls for international copyright usually came from *ad hoc* groups of those individuals affected (particularly in the early stages), or from established trade groupings who were accustomed to reaching for the handles of power in other ways.

Bilateral agreements: the network expands

British interest groups preferred, on the whole, to address the problems of copyright law in a pragmatic way, by lobbying for specific changes. This perhaps also explains the difficulty in achieving consolidation of domestic copyright law, which had grown up piecemeal, and throughout the nineteenth century was contained in a forest of statutes and case law. Nevertheless, the efforts to negotiate bilateral treaties did focus minds on the state of British copyright law, and required a more abstract presentation of it at least, in order that questions about reciprocity could be asked and answered. As Sherman and Bently have noted, the category of copyright law began to crystallise during this period. There was, however, a considerable gap between the tidy image of British copyright law presented by the treaties, and domestic reality. This had the beneficial result of generating its own pressure for reform. Yet the ensuing reforms tended to address the specific deficiencies highlighted, rather than attempting thoroughgoing codification.[32] Even following the sterling work of the Royal Commission (which reported in 1878), it proved impossible to enact a single, governing copyright statute before 1911. Other countries also had their own approaches, and their own particular areas of idiosyncrasy and resistance. This renders more explicable the wide ranges of tolerance eventually permitted in the 1886 Berne

[32] Sherman and Bently, *Modern Intellectual Property*, pp. 119–28. Specific problems which were addressed included translation rights (1852) and protection of artistic works (1862 Fine Art Copyright Act). Note that the pressure to sign the Berne Convention generated only limited reform in the 1886 Act, rather than the full codification many desired. See below, p. 279.

Convention (even more so in the 1896 Paris Act and Declaration), which at first sight appeared to rob the agreement of many of its potential beneficial effects.

Nevertheless, Britain continued to move forward cautiously to improve her international copyright relations. The French were unhappy with various aspects of the 1851 Anglo-French convention, and in 1873 a mixed Commission was appointed. The double formality of registration and deposit was irksome. France's conventions with other nations required only a certificate from the country of origin attesting that the work was an original copyright work entitled to protection. The three-month time limit for translations was thought impractically short. The worst grievance, though, was s. 6, which permitted 'fair imitations or adaptations' of dramatic works:

> for it is sufficient to alter the title of the piece, to change a name, or to carry the scene of action to some other place, for the work thus represented to be considered, according to the legal principles constantly laid down by the English courts, no longer as a reproduction ... but as a simple imitation or adaptation.[33]

France considered this contrary to the spirit of the agreement, because in practice it offered immunity to flagrant piracies. The British Government was not unwilling to move on the s.6 matter, partly because the case was strong, but also because repeal was expected to have little impact.[34] The various formality issues were more difficult, but following further representations from the *Société des Auteurs Dramatiques*, and the *Société des Gens de Lettres*, the Foreign Office sought to discover whether registration at the British consulate in Paris would be feasible. The Consulate's response was rather guarded, so a limited bill was drafted, allowing for s.6 of the 1852 Copyright Amendment Act to be disapplied by Order in Council. It passed without difficulty, and the necessary declaration was made in August 1875.[35] The change effected was regarded by the British press as a necessary but only a partial improvement.

[33] s. 6, 1852 International Copyright Act, as interpreted in *Wood* v. *Chart* LR 10 Eq 193. See the correspondence between the French Commissioner M. Gavard and Her Majesty's Representative in France, Mr Kennedy, duly transmitted to the Foreign Office: C 1285 (1875) pp. 1–26 at p. 3.

[34] 'Hitherto the rule has been for the English playwright to appropriate wholesale the productions of French writers, and to present them only slightly modified, and generally without any acknowledgement. French playwrights, on the other hand, have been precluded from retaliating by the simple fact that we have on our side no dramatic literature': *Publishers' Circular*, 15 October 1867.

[35] International Copyright Act 1875.

In summing up what had been achieved towards international copyright by the mid-1870s, it is important to recognise a significant achievement. Many of the most important publishing markets in Europe were now governed, at least to some extent, by a considerable network of bilateral treaties. However, there were still no conventions with much of Europe (notably Holland and Russia), and none with the United States. These were all substantial markets, and in these places 'piratical' editions could be printed, imported and circulated perfectly legally. Furthermore, in practice these editions circulated widely in convention states and in the British territories overseas, even though here they became piracies. In addition, there were significant differences in the content of such bilateral treaties as there were. Without harmonised legal protection, ideally covering a coherent geographic area, individual territories would remain vulnerable to smuggled cheap reprints, whatever their particular portfolios of bilateral convention protection.

The United Kingdom was not alone in seeking treaty protection. Prussia, for example, began entering into bilateral agreements with the other German states in 1827, and by 1829 had signed conventions with thirty-two German states. Italy and Switzerland sought similar solutions to similar geopolitical problems.[36] The United Kingdom was most interested in securing protection in countries whose publishing activities threatened the home market; hence the importance of the agreements with Hanover, France and Belgium, and the disappointment at the inability to reach agreement with America. France suffered in similar ways, and to that extent had similar priorities. However, French copyright law had grown up in a very different environment.

French idealism: influence and pressure

Although there had been much discussion of common law rights in the eighteenth-century case law, the trend in England since *Donaldson* v. *Becket* (1774) had been firmly towards a scheme of statutory protection which regulated the scope of these rights.[37] Common law rights were thus regarded as the precursors to the statutory scheme, which controlled and defined the author's claim to exclusivity, balancing it with policy requirements and public interest where appropriate. In contrast,

[36] Ricketson, *Berne Convention*, pp. 25–27. No account of the history of international copyright protection can afford to ignore Ricketson's magisterial study, and this general sketch draws on his work, to which readers are referred for further detail and references.

[37] For powerful recognition of the right of literary property see Lord Mansfield (leading the majority) in *Millar* v. *Taylor* (1769) 98 ER 201. This view did not prevail, however: *Donaldson* v. *Becket* (1774) 1 ER 837.

the system of copyright protection in France was still solidly grounded in natural law. The French revolutionary laws of 13–19 January 1791 and of 19 July 1793 had given formal expression to the philosophical position that authors had an inherent property right in their work:

> Authors of writings of all kinds, composers of music, painters and designers who make engravings or drawings, shall enjoy during their entire life the exclusive right to sell, prepare for sale, and distribute their works in the territory of the Republic, and to assign the property therein in whole or in part.[38]

As a result of France's military and political influence at this time, these ideas took strong root not only within France but also elsewhere in continental Europe.

During the nineteenth century France continued to lead in terms of the principles of protection, although other nations developed perhaps more comprehensive statutory schemes. This was particularly true in terms of international copyright. French authors had suffered considerably from piracies published in Switzerland, Germany, Holland and Belgium, smuggling across France's long borders being relatively easy. Like Britain, France attempted to negotiate treaty protection wherever possible, but the extent of the problem made solution difficult. For instance, negotiations for a convention between France and Prussia, Saxony and Hanover failed because of book trade protests; there were comparatively few piracies of German works in France, and the booksellers did not consider the benefit of their protection would outweigh the loss to them of the French works that they were accustomed to publish. The fragmented nature of the German and Italian states also made it difficult to reach useful agreement. France signed conventions with Sardinia in 1843, and then with Portugal, Hanover and the United Kingdom in 1851.

Nevertheless more was needed, and in 1852 France took the bold step of offering protection unilaterally to all foreign works, regardless of the protection offered in the other countries.[39] This decision indicates the imaginative power of the doctrine of *droit d'auteur*, which required that the author's natural property rights should not be restricted by national or geographic boundaries. From this point of view the 1852 decree is simply a formal declaration of the underlying state of things. However, it also represented a clear attempt to put moral pressure on other nations

[38] Art.1. law of 19 July 1793. The absolute nature of the philosophical position should not be overstated: see Jane C. Ginsburg, 'A Tale of Two Copyrights', in Brad Sherman and Alain Strowel, *Of Authors and Origins: Essays on Copyright Law* (Oxford: Clarendon Press, 1994), pp. 131–158.

[39] Decree-Law of 28 March 1852.

to recognise this universal truth, and to reciprocate. There was a practical incentive, too. The 1852 decree merely permitted a foreign author to enjoy in France the rights granted by his home state, and did not accord national treatment.[40] Since French law was in general generous in terms of the scope of rights granted, this higher level of protection was worth bargaining for. The much-needed agreement with Belgium was secured in the same year, and by 1866 France had negotiated conventions with most European States.

Although the network of bilateral conventions became quite extensive, the fact that the agreements were far from uniform meant that the resulting protection was neither comprehensive nor systematic. Those intended to benefit found it difficult to ascertain what their rights were, precisely. The most satisfactory solution to this problem, logically at least, would have been for all affected countries to adopt uniform, general copyright laws, applicable to foreigners and nationals. The difficulties to be encountered in achieving such a universalist approach are obvious, however, given the great diversity of the underlying national systems. In such circumstances, pragmatists are prepared to contemplate the sacrifice of a certain amount of integrity, and to advocate a lesser degree of universality in the interests of reaching agreement. But for those who regard copyright protection as based fundamentally on natural law and principle, the sacrifices inherent in a pragmatic approach bring with them an unacceptable level of compromise, and result in a dilution of the protection which should be absolutely guaranteed. Functionalism is not reconcilable with high principle here.

The 1878 Paris Congress

The tensions between the pragmatic and universalist approaches were much in evidence in the discussions which eventually led to the 1886 Berne Convention. Since it was authors and artists who felt the absence of a consistent scheme most keenly, it is not surprising that they were often exponents of universalist views. The 1858 Brussels Congress (mentioned earlier) was the first to be organised. A draft law based on its resolutions was introduced in the Belgian Parliament, though not enacted. This draft was discussed at an artistic congress held in Antwerp in 1861, and the 1858 resolutions were endorsed. However, the question of copyright was not raised again in an international forum until a

[40] The principle of national treatment requires a country to assimilate foreign nationals to its own nationals, thus giving the foreign national the same level of protection as that accorded to its own nationals under its own law.

further artistic congress was held in Antwerp in 1877. Although the resolutions were broadly similar to those of the 1858 Congress, an interesting method was proposed for furthering their achievement. It was decided that the new Institute of International Law should be asked if it would prepare a draft universal law on artistic works (later extended to literary works).[41] The Institute agreed enthusiastically, and a group of legal and artistic representatives from five countries was appointed. Nothing ever appeared to happen, however, and the project was effectively abandoned.

A congress held in Paris shortly afterwards proved more fruitful. The Universal Exposition of 1878 was in full swing. Many congresses were held, including an international literary congress, organised by the *Société des gens de lettres*, over which the venerable literary celebrity Victor Hugo presided. Other distinguished literary figures from all over the world were present. The lengthy debates concentrated first on matters of principle, and eventually a number of resolutions were passed. Those calling for national treatment and simpler formalities closely resembled those of the 1858 Brussels Congress. But the two most important resolutions were stronger in their stance than their Brussels equivalents, insisting on the principle that an author's right was a form of property rather than a legal concession, and that it was a perpetual right. The congress called on the French Government to promote an international conference to formulate a uniform convention for the regulation of the use of international property. The French Government did not respond to this request, and it was to be the Swiss Government which would initiate the meetings leading to the formation of the Berne Union in 1886.[42]

However, the Paris Congress did have one immediate result, which was the establishment of the International Literary Association (later expanded to include artists, thus becoming *l'Association littéraire et artistique internationale*, commonly known as *ALAI*). The Association's objects included the defence of the principles of literary property in all

[41] Ricketson, *Berne Convention*, pp. 41–6; Eugène Gressin, *Compte Rendu des Travaux du Congrès Artistique d'Anvers* (Anvers and Leipzic: Max Kornicker, 1862); (1877) 9 *Revue de droit international et de legislation comparée* 320–22; Alcide Darras, *Du droit des auteurs et des artistes dans les rapports internationaux* (Paris: A. Rousseau, 1887), p. 523. The 1877 congress was part of the celebrations for the 300th anniversary of Ruben' birth: see (1877) 9 *Revue de droit international et de legislation comparée* 320–322.

[42] *Association Littéraire et Artistique Internationale – Son Histoire, Ses Travaux* (1878–1889) (Paris, 1889), p. 2. The resolutions appear in Stephen P. Ladas, *The International Protection of Literary and Artistic Property*, 2 vols. (New York: Macmillan, 1938), vol. I, p. 74. Hugo himself seemed more preoccupied with the public domain than with perpetuity: *Discours d'overture du Congrès Littéraire International [17 June* 1878] *Le Domain Public Payant* (Deuxième edition, Paris 1878). See also *Congrés Littéraire International de Paris 1878: Résumé des Séances* (Paris, 1879).

countries. Victor Hugo was named honorary president. He was supported by a distinguished committee of honour, and a larger executive committee with members from nearly twenty countries. The reaction in Britain to the Paris Congress was largely one of indifference. The Royal Commission's report had just been produced, and press coverage was almost entirely focused on this. In a discussion of this report, the *Law Journal* quoted some of the Congress' resolutions in passing, largely in order to ridicule them: 'we are afraid that the *caceothese scribendi* will be disastrously encouraged by this grand talk about the property of copyright in perpetuity'. Scorn was poured on Hugo's suggestion that an author should have (in effect) a right of retraction: 'the proposition is absurd'.[43]

First steps towards a Union of literary property: the Berne conferences 1883–6

The International Literary Association held annual conferences in various European cities, and its members continued to press for international copyright laws which were universalist in nature. A model law (drafted privately) was discussed at the 1882 Rome Congress. A more pragmatic suggestion emerged from this Congress, put forward by Dr Paul Schmidt of the German Publishers' Guild (*Boersenverein der deutschen Buchhändler*). He proposed a union of literary property (*une Union de la propriété littéraire*) on the model of the General Postal Union created in 1874.[44] An important aspect of the scheme was that the ideas and views of all interested parties should be taken into account in its development. Since this consultation could not be done on the spot, it was proposed that 'a conference composed of the organs and representatives of interested groups should meet to discuss and settle a

[43] *Law Journal*, 6 July 1878.

[44] The treaty creating the General Postal Union was signed at Berne in 1874, and came into operation in July 1875. It was replaced by an improved Universal Postal Union in 1878. Both provided for a uniform rate of 21/2d to send letters of half an ounce throughout the Union. Printed matter went for a reduced rate (of 1d per 2oz up to 2lbs). The treaty soon covered almost all of Europe, and much of Asia, Africa, American and Australasia. Several countries were concerned at the free admission of foreign books and periodicals, but in general the advantages of the scheme were thought to outweigh any drawbacks (whether political, religious, or financial in the form of lost Customs duty). The United States, however, made great difficulty over the admission of foreign books, arguing that these were subject to a 25 per cent tariff (which other countries waived in similar circumstances). See the fierce criticism of the American bookseller and collector Henry Stevens, 'The Universal Postal Union and International Copyright', *Transactions and Proceedings of the First Annual Meeting of the Library Association of the United Kingdom* (London, 1879).

scheme for the creation of a Union of literary property'.[45] Berne (in neutral Switzerland) was chosen as the venue. It was already home to the headquarters of several international organisations, including the Postal and Telegraphic Unions. The Swiss Government undertook the necessary diplomatic initiatives, nominating Numa Droz as its representative. Droz was a member of the Swiss Federal Council, who was known to support the idea of an international copyright convention. Droz presided over the four international conferences which were to follow.

The first Berne conference began on 10 September 1883. Three national commissions (French, German and British) had previously considered the topics for discussion, and five preliminary propositions were put to the conference. Attendance was not large, but included authors, publishers, lawyers and officials of literary and publishers' societies. After three days of discussion, a draft convention of ten articles emerged. This required countries to accept the principle of national treatment (on the basis of place of publication rather than nationality). Two contentious requirements were that the exclusive right of translation was to be co-extensive with the copyright, and that adaptation (undefined) was to be treated as an infringement. The draft also reserved to states of the Union the right to enter into other arrangements for the protection of literary and artistic works, if not inconsistent with the proposed convention: thus the aim was only a minimum level of protection. The draft was silent on a number of important matters, including duration of rights.

In December 1883 the draft was circulated (at *ALAI*'s request) by the Swiss Government. The accompanying circular admitted the difficulties of the project, particularly since several recently concluded bilateral conventions on the subject contained elements in frank contradiction to the approach adopted by draft. Notwithstanding, the Swiss Government offered to hold a diplomatic conference if there was a favourable response. Eleven countries expressed themselves willing to send delegates, and six more who did not respond to the circular eventually sent delegates nevertheless. Five states refused the invitation. The United States gave no commitment as to its participation, but expressed doubt as to the feasibility of uniting all states in one convention. Although America was prepared to express support for the principle of international protection, it was also stressed that the interests of the industries involved in book production should be taken into account

[45] Ricketson, *Berne Convention* p. 49. See also Claude Masouyé, 'The Role of ALAI in the Development of International Copyright Law' (1978) *Copyright* 120–6.

when considering the rights accorded to a work's author. America was to maintain this position, which would keep it outside the Berne Union until 1989.

Invitations were issued, and a draft convention circulated. This was based closely on the *ALAI* text, although with some significant drafting and organizational changes. Delegates from ten countries attended the conference in September 1884. In the opening session the German delegation proposed that a model codification of the law should be the goal, rather than a convention based on the principle of national treatment. This immediately opened the problematic issue of whether principle should be sacrificed to pragmatism. The Germans also put a number of detailed questions, intended to clarify or challenge aspects of the drafts, and these offered a focus for the ensuing discussions. A further draft was eventually adopted. The principle of national treatment remained, but one significant change was that duration of protection was now taken into account.[46] As a concession to the Scandinavian countries, the proposal for translation rights was considerably modified, and the principle of complete assimilation was not adopted. Contracting states were also to be allowed to restrict the reproduction right in various ways, for instance by permitting the use of extracts without permission for educational or scientific purposes. The French delegates were utterly opposed to both of these compromises on grounds of principle, but other delegates accepted them as a practical necessity.

The 1884 conference thus produced a significant draft convention, which had some hope of being realised. However, some authors' societies were disappointed by the compromises, even though a *procès-verbal final* positioned international codification as an inevitable future state, if not one presently achievable. The Swiss Government circulated the proposals, and issued invitations to a further conference. This took place in September 1885, again in Berne. Sixteen countries sent delegates: notable additions were the United States, Spain and Italy, but Austria-Hungary and Russia were significant absences. The United Kingdom might well not have been represented, if it had not been for the pressure of the Society of Authors. The British delegates were F. O. Adams and J. H. G. Bergne.[47]

[46] National treatment was only to be reciprocally assured whilst the author had rights in the country of origin. Unqualified national treatment would have allowed a work no longer protected in its country of origin to be protected in contracting states with longer terms. Ricketson, *Berne Convention*, p. 62.

[47] Sir John Henry Gibbs Bergne (1842–1908), superintendent of the treaty department in the Foreign Office, had considerable experience of international copyright negotiations.

The 1885 conference again took the previous documents as a basis for discussion. The French delegates continued to press for stronger protection for authors, putting forward new proposals for the complete assimilation of translation rights, and seeking to confine the restrictions on reproduction rights to the utmost extent possible. The British delegates lent support to the pragmatists, advocating the principle of national treatment wherever agreement on a uniform rule could not be reached. In the end a choice had to be made between a uniform convention which would in practice exclude the participation of many countries with weak copyright protection, or a less rigorous convention which would encourage the adherence of a significant number of countries. The Conference finally adopted a pragmatic approach, but the delegations were not unanimous in this. The substance of the earlier text was retained, though with some amendments. An important change, following much controversy, was the simplification of the translation right, set to ten years from publication. The article concerning the taking of extracts was also hotly disputed, and was significantly modified to leave the regulation of this either to domestic legislation or to individual arrangement between states. The result of these discussions was a significant agreement which achieved a great deal.

The 1886 Berne Convention created a 'Union for the protection of the rights of authors over their literary and artistic works'. This existed separately from any particular act of the treaty, so that the treaty could be discussed and revised without obligating Union members to adhere to the new Act. This structure allowed new countries to join the Union at any time, by adhering to the most recent Act of the Convention. Literary and artistic works were widely defined to include 'every production whatsoever in the literary, scientific, or artistic domain which can be published by any mode of reproduction'. Newspaper or periodical 'articles of political discussion' and 'news of the day' were expressly excluded, however.[48] The Convention was based on the principle of national treatment (familiar from many bilateral conventions). The exception was for the term of protection, which was subject to a rule of national reciprocity (again an approach used in existing bilateral conventions). There was a ten-year minimum term for

[48] Berne Convention 1886, Arts. I, IV, VII(2). All other newspaper or periodical articles could be reproduced unless this had been expressly forbidden. This was a controversial topic in several countries, because of the possibility that copyright could be used to stifle freedom of political expression. In Britain, the reprinting of news items from the London dailies was common practice, particularly by provincial newspapers. The 1842 Copyright Act addressed periodicals but ignored newspaper copyright.

translation rights. Formalities such as registration and deposit were not prohibited, being very common in national laws at the time. Convention rights were therefore made subject 'to the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work'.[49] The reproduction right was not guaranteed explicitly, perhaps because its existence was taken for granted, but perhaps also because it would have been hard to reach agreement on its precise definition. Translation rights and public performance rights were specifically mentioned, however.[50]

Even after the text had been agreed by the delegates, it was still unclear which governments would approve it. For several countries, including the United Kingdom, accession to the Convention necessitated changes to their domestic laws. France was unhappy that the Convention did not offer the high level of protection which she sought, and endorsed the text only to encourage less enlightened states to guarantee at least this standard.[51] Nevertheless, twelve of the sixteen delegations signed the *procès-verbal* requesting a further diplomatic conference in one year, to formalise the text. During this time a number of countries had to consider their domestic laws. Sweden, Norway, the Netherlands and Austria-Hungary could not make the necessary changes in time. In his opening speech at the 1886 conference, Droz said that Britain's adhesion to the Convention was 'of paramount importance for the success of the Union', but that almost insurmountable obstacles had seemed to preclude hope of her being amongst the first signatories. Nevertheless, she did manage to do so, and thus was able to bring 300 million people within the Union, more than double the combined populations of the other original signatories.[52] The other states signing in September 1886 were Belgium, France, Germany, Haiti, Italy, Liberia, Spain, Switzerland and Tunisia. The French and British Governments signed for their colonies and possessions also, whereas the Spanish Government reserved its position until the exchange of ratifications one year later. The Convention came into force on 5 December 1887, all the signatories except Liberia having ratified it. Given the differences in the legal systems and outlook of the states

[49] Berne Convention, Arts. V and II(2). For published works, the country of origin was the country in which the work was first published. For unpublished works the country of origin was the country of which the author was a national.

[50] Berne Convention, Arts. V, VI and IX.

[51] Bergne referred to Great Britain as 'the principal delinquent' in terms of her copyright provision: 'The International Copyright Union' (1887) 3 *Law Quarterly Review* 14–31.

[52] Droz is reported as saying, 'we had now not only announced the adhesion of Great Britain, but also that of the whole of her Colonies, amounting in all to more than 300,000,000 of souls'. *NA* FO 881/5528 p. 147.

involved, the level of agreement achieved was astonishing. Droz, who had been President of all the Berne conferences, described the creation of the Union as 'a striking affirmation of the universal conscience in favour of copyright'.[53] True though this may have been in one sense, there was also a good deal of self-interest and pragmatism involved, certainly as far as Britain was concerned.

Britain's role in the creation of the Berne Union

On the surface, the British contribution to the Berne Convention can be presented in a largely positive light; although a little slow to come to the starting point she caught up strongly, took an active role in the process of negotiation and signed as an important founder member. However, a closer review of the details reveals that some significant doubts and difficulties were encountered before all departments of Government were persuaded of the merits of a Copyright Union.

Early in 1875 the German publisher Tauchnitz had written to Disraeli suggesting an International Copyright Congress. The Foreign Secretary was doubtful, and the Board of Trade agreed:

> For England, however, by far the most important International question is that of an arrangement with the United States and perhaps the next most important question is that of Copyright in English and English-speaking Colonies. Towards the solution of these questions an International Congress would in the present disposition of the United States on the subject, do nothing at all.[54]

At this time it seemed most unlikely that America would concede any copyright to foreigners in the absence of a manufacturing clause. The relationship with Canada regarding copyright had been difficult, to say the least. The government's reluctance to embark on apparently rather theoretical discussions as to international copyright law was understandable. Particular points of difficulty would have seemed more amenable to resolution through direct negotiation with the relevant countries.

The Swiss Government's invitation to the first Berne conference arrived in December 1883. Between 1878 and 1882 there had been efforts to negotiate a treaty with the United States, which had foundered largely because of Canada's stance. Since nothing had changed, initial feeling in some quarters was that Britain should not attend the 1884

[53] *Actes de la Conférence réunie à Berne* (1885), p. 65. For a full comparison of the various national copyright laws prevailing in 1886, and a comparison of treaty arrangements, see Ladas, *International Protection*, Vol. I, pp. 30–67.

[54] *NA* BT 22/39/6 R2378. File note by Farrer, 5 March 1875.

Conference at all. The Foreign Office consulted the Board of Trade, which indicated that any Convention was likely to be too much for the British Government to swallow:

> The Swiss principles of Copyright and the basis of the Convention they suggest recognise the author's natural right to be protected in his literary property, and I do not suppose the English views and legislation would go so far.[55]

The Foreign Office pressed further, and was told that it was exceedingly difficult to give specific reasons why it was inexpedient to deal with the copyright question. Pressure of business was a factor, as was the divergence of opinion in the reports of the 1878 Royal Commission. It was thought useless to appoint another Commission, as they would be certain to disagree. Bergne reported that the opposition came largely from Sir Thomas Farrer, the permanent secretary of the Board of Trade, who seemed 'opposed on principle to all Copyright Conventions and Copyright legislation, as tending to increase the price of books to the public'. The President of the Board of Trade, Chamberlain, was said to be too fully occupied to go into the subject carefully.

The Foreign Office protested that unless the views of foreign governments were ascertained then nothing satisfactory would ever be done. Its suggestion was that F. O. Adams, British Minister at Berne, be sent in a consultative capacity, with no power to vote or to bind the Government, and to this the Board of Trade was willing to agree.[56] Bergne later explained (somewhat disingenuously) that Britain's attitude was largely determined by America's decision not to send a delegate. Adams was authorised (by telegram) to sign the *procès-verbal final*, but only on the distinct understanding that the government would not be bound by any conclusions. Adams sent two enthusiastic despatches to the Foreign Secretary, Granville, after the conference. He urged the government to take steps to amend the law so that Britain could join the Union. Granville replied that he would not express an opinion until the views of foreign Governments had been ascertained, but he did ask the Board of Trade to give serious consideration to the question of amendment. He clearly felt some anxiety that Britain's existing

[55] *NA* BT 22/39/6 R12438. File note by Roscoe, 21 December 1883. Farrer wrote simply, 'I see no good in a conference.' See also Lionel Bently and Brad Sherman, 'Great Britain and the Signing of the Berne Convention in 1886' (2001) 48 *Journal of the Copyright Society of the USA* 311–40.

[56] Bergne, *Memorandum*, 12 December 1883: *NA* FO 881/5528, pp. 10–11. For the published version see Switzerland No. 1, C 4606 (1886), pp. 4–5. Farrer was the Board of Trade's recognised authority on copyright, and had given evidence at length to the Royal Commission: see below, pp. 272–3.

conventions might be denounced if other countries formed a copyright Union.[57]

In December 1884 Britain had fourteen copyright conventions in force, but many of these were with the component states of the German empire. In practical terms, there was international copyright only with Germany (excluding Bavaria), France, Belgium, Italy and Spain, and there were ongoing difficulties with both Germany and Italy. In 1883 an approach had been made by Bavaria, wishing to accede to the copyright conventions (1846–55) between Britain and the German States. The British Government had been happy with this, and suggested that a draft declaration be submitted. However, later in the year Bavaria proposed negotiating a new convention, on the lines of the recently concluded Franco-German treaty. Its provisions precluded Britain from negotiating such a treaty without significant amendments to British copyright law, particularly with respect to registration, deposit and translations. The Bavarian Government maintained its position but the Board of Trade refused to countenance fresh legislation, insisting that further consideration had to be deferred until the conclusion of the Berne Conference. After more correspondence, Britain offered Germany a convention modelled on the existing Anglo-Spanish convention, as containing the only stipulations which could be agreed under British law as it stood. Bergne noted:

> To this proposal no reply has been received; as was to be expected, since experience proves that no foreign Powers will now negotiate on the cumbrous and obsolete forms imposed by our law, which they find not adapted to modern requirements and exceedingly difficult to comprehend.[58]

The same difficulties were looming with the Italian Government, which had denounced the 1860 convention, which was therefore due to expire in May 1885. A draft convention had been proposed in substitution, but again could not be accepted without alterations to British law.

The Board of Trade nevertheless continued to show great reluctance to take any action whatsoever. Their response to the 1884 conference was drafted by Farrer, who had been closely involved with copyright negotiations for many years. Farrer admitted the unsatisfactory nature of British copyright law, but noted that the conference proposals went

[57] Foreign Office to Board of Trade, 22 October 1884: *NA* FO 881/5528 p. 25. See also, Switzerland No. 1, C 4606 (1886), pp. 16 and 28–31.

[58] Bergne, *Memorandum*, 22 December 1884: *NA* FO 881/5124. Negotiations with the government of Salvador in 1881 had also proved abortive, their opinion being that to accept the British draft convention (again modelled on the Anglo-Spanish treaty) would be a 'backward step' on their part.

far beyond mere amendment by repeal of the requirements on registration, deposit copies and translations. The suggestion of a single life-plus copyright term throughout the Union was 'a vital alteration of principle', and would 'lead to endless discussion'. Still more important was the non-participation of the United States, and the probability that she would find the terms of the Convention unacceptable. His conclusion was against any amendment at all:

> Copyright is a most thorny subject. The law is a very confused, illogical, and unscientific shape: but on the whole answers its purpose. There is absolutely nothing to be got for the public by amending it, and not much for authors and artists. It would be well to have it rearranged and logically settled – but every point bristles with difficulty and in every comer lurks a wasps nest. I confess I shrink from touching the subject, unless there were some great object to be gained – such as the American market.[59]

In June 1885 Adams reported news from the Swiss Legation in Washington that the US Government would send a delegate to the next conference. Further pressure for full British participation in the September meeting came from the Copyright Association and the Society of Authors, who also handed in a draft consolidating and amending bill.[60] Just over a fortnight before the conference began, Salisbury, the new Prime Minister and Foreign Secretary, telegraphed the British Minister at Washington to ascertain whether the United States would be represented. On hearing that it would be, the decision was taken to extend the powers of the British delegate. Salisbury's view was that Britain should have a voice in any matter raised by the US delegate. Adams was therefore instructed that he could take part in the discussions and vote, but that the government reserved the right to accept or reject any resolutions arrived at. His official instructions were brief but clear, containing no detail on the substantive issues. He was told only to take particular notice of the views of the US delegates, and to oppose anything that would make it unlikely that the British Government would be able to sign the Convention in future. Bergne was appointed second British delegate.[61]

[59] *NA* BT 22/39/6 R6760. Farrer's file note, 24 November 1884. For the official version (2 December 1884) see Switzerland No. 1, C 4606 (1886), p. 33.

[60] Drafted by the Secretary of the Copyright Association, F. R. Daldy, who was an important figure in many of the informal negotiations concerning copyright.

[61] Switzerland No. 1, C4606 (1886), pp. 36–45. Daldy, of the Copyright Association, was also present, having been given a letter of introduction by Salisbury. The Society of Authors too could be confident that its interests were being considered, Adams being one of its founders.

The two British delegates reported formally only at the end of the conference. Their approach was to try and confine the Convention to 'broad principles indispensable to the formation of such a Union', and to steer the conference away from detail and difficulties inconsistent with the legislative systems of potential members. In doing so they also tried to be guided by the recommendations of the Royal Commission, published in 1878. The delegates' report concluded with a summary of the necessary changes to British law. Their strongly preferred course was to replace all existing statutes with a consolidating measure. Specifically, they suggested that the bill prepared by the Copyright Association would be a suitable starting point. The option of undertaking only the amendments absolutely necessary they regarded as unsatisfactory, and in any case scarcely feasible. They therefore urged complete codification and amendment of Copyright Law in the next session, to allow Britain to join the projected Union. In a confidential memorandum Adams stated that it would be 'unfortunate' if Britain did not do so, because other signatory states might regret the concessions they had made, and because 'the United States would be likely to pause in their onward course if the Convention is not signed by a British representative next September'.

This report and the other papers were forwarded to the Board of Trade for its observations. The reply reflected a complete reversal of the policy of reluctance adopted only one year previously. The Board of Trade now was 'strongly of the opinion that the present opportunity should not be lost for putting the Copyright question on a more satisfactory footing,' and keen to take the opportunity of codifying the existing copyright law, in a Bill which it was hoped to introduce early in the next session.[62]

Britain's implementation of the Berne Convention: domestic and colonial problems

The Copyright Association and the Society of Authors both hoped that the need to amend the law to conform to Berne requirements would encourage the government to undertake complete reform of the area. They quickly sent a memorial to Salisbury, signed also by the Musical Copyright Association, asking that 'the new legislation should embrace the whole subject, and should place the law on a sound and intelligible footing; instead of legislating merely with special reference to the Union'. They referred to their previous draft scheme, and a model bill

[62] *NA* FO 881/5528, p. 90. Switzerland No. 1, C 4606 (1886), p. 71.

was worked on during the early part of the year by both organisations.[63] In March a weighty deputation, its members drawn from a wide range of interest groups, visited the President of the Board of Trade, Mundella, urging codification and amendment of copyright law. Mundella was reported as saying that such a difficult question was best threshed out in the House of Lords, and that nothing would give the government greater satisfaction than to have law of copyright consolidated. He promised, diplomatically, to consult Lord Chancellor as to what could be done.

By this time, however, as Mundella must have been well aware, the Foreign Office had decided that 'in view of the exigencies of the present Session' it was best to confine the necessary legislation to the amendments necessary to allow the convention to be signed.[64] Since Britain wished to sign for all her colonies and possessions, it was thought convenient also to address the anomaly that under existing law publication in a colony did not give copyright throughout the United Kingdom. A departmental committee was considering the bill, and several meetings to hammer out details had taken place at the Foreign Office. The bill's now limited aim was to iron out the difficulties in domestic law which were inconsistent with Berne obligations, and to address some outstanding colonial grievances. It was introduced in the last week of March 1886.

Potentially the most explosive issue was whether Britain should sign the Berne Convention for her colonies, particularly given the history of strong disagreement with Canada over copyright matters.[65] The matter had to be handled with considerable care and tact. The Foreign Office was keen to preserve as much uniformity as possible for Imperial copyright, and hoped strongly that all the colonial and Indian possessions would wish to join the Berne Union; they had all been included in the existing copyright treaties. Nevertheless, given the sensitivity of colonial copyright relations, it was thought necessary to draft a bill which would allow for colonies who did not wish to join to be permitted to remain aloof. A further clause allowed for colonies to withdraw in the future if they wished to.

In addition to membership of the Berne Union, the 1886 bill offered the colonies other significant improvements. It addressed the long-standing anomaly that although a work published in Britain enjoyed copyright throughout the Empire, a work published in a colony or

[63] Switzerland No. 2 (1886), p. 1.
[64] *Times*, 16 March 1886, p. 10. Switzerland No. 2 (1886), p. 3.
[65] See below, pp. 79–115.

India obtained only local copyright.[66] It also removed the somewhat oppressive provision which had required colonial publications to be deposited in the United Kingdom. A long and persuasively argued memorandum from the Foreign Office to the Colonial Office explained and defended the bill's approach, and expressed a clear desire to keep all the colonies under the umbrella of Imperial copyright. Yet there was also acknowledgement of the independence of the colonies, and a barely concealed anxiety that some would be hostile.[67]

Enclosed with this memorandum was another memorandum, written by the Parliamentary draftsman, Edward Jenkyns. This focused on the efforts to remove colonial grievances, and described briskly the benefits to be gained:

> it seems obviously unnecessary to dwell on the advantages of making the Empire one for the purposes of copyright. Indeed, any other system seems to lead to what may be termed inter-colonial piracy, and would tend to create as between the colonies the same difficulties which the Berne Conference has sought to remove as between all civilised States.

Although the bill's various escape-clauses were referred to neutrally, there was little expectation that any colony would 'prefer to stand out, and to forego the benefits offered by the present Bill'. This confidence proved to be justified in the short term, although Canada was later to threaten withdrawal. The government gave an undertaking that it would not act without consulting the colonies, and this it duly did. Replies approving the proposals were received, thus enabling Britain to sign the Berne Convention for all her colonies and possessions as the Foreign Office had hoped.[68]

Various amendments to domestic law were necessary to bring it into conformity with the Berne requirements. Matters such as the rules on simultaneous publication, formalities and the scope of translation rights had to be addressed. The requirement of registration and deposit was simply lifted for foreign works, though left in place for domestic ones. The provision made for translations was more generous than the convention required, protection extending for the full term of copyright in the original work, although this expired if there was no official translation within the ten-year convention time period.[69] The bill passed through Parliament uneventfully.

[66] This was a result of the House of Lords' decision in *Routledge* v. *Low* (1868) LR 3 HL. See below, pp. 92–3.
[67] Foreign Office to Colonial Office 8 April 1886: Switzerland No. 2 (1886), p. 5.
[68] Switzerland No. 2 (1886), pp. 6–14.
[69] The Berne Convention did permit conditions and formalities to be prescribed, but experience of these requirements in the 1851 Anglo-French Convention had shown

The subsequent ratification of the Berne Convention was welcomed by the British press, although the absence of America among the signatories was noted with regret. Bergne reviewed the achievements of the convention in a substantial article in the *Law Quarterly Review*. Significantly, given that the convention was essentially a European achievement, the article began with discussion of the long-felt need for international copyright with America. Although acknowledging the previous history of failure, Bergne welcomed the presence of the American delegate at the Berne negotiations as a sign that progress would follow soon. He concluded that the 1886 Act was 'no mean achievement', although consolidation and amendment of the entire field still remained an urgent necessity.[70]

The Additional Act of Paris 1896

The Closing Protocol of the 1886 Convention had provided for a conference of revision, to be held in Paris within six years of its entry into force. The more progressive delegations had thereby hoped to maintain momentum for change. Other delegations, notably the British, had been anxious to avoid the need for frequent alterations to their domestic legislation. In fact the Paris conference did not take place until 1896. There were now thirteen members of the Union, and the International Office of the Union had been established in Berne. Fourteen non-Union delegations (including the United States) attended as observers, although the Austro-Hungarian and Russian empires were notable absentees.[71] The proposed changes were quite limited, several delegations (including the United Kingdom) having indicated reluctance to accept major revisions. The aim of the Conference was consolidation and clarification. Unfortunately, lack of agreement on

them to be burdensome and counterproductive. A more straightforward approach was adopted in the 1886 Act. Where an Order in Council was made under the International Copyright Acts in respect of a foreign country, the requirements regarding registration and delivery of deposit copies were simply disapplied: s.4. For works first produced in a British possession, local registration was permitted if the possession provided for it, in substitution for the 1842 Act's requirement of registration at Stationers' Hall: International and Colonial Copyright Act 1886, s.8(1)(a). The 1842 Act's requirement regarding deposit copies was also disapplied for such colonies: s.8(1)(b).

[70] J. H. G. Bergne, 'The International Copyright Union' (1887) 3 *Law Quarterly Review* 14–31. See also E. M. Underdown (Honorary Counsel to the Society of Authors): 'The Copyright Question' (1886) 2 *Law Quarterly Review* 213–26.

[71] The American delegate, Alexander, told Bergne that he intended to advocate strongly the accession of the United States to the Berne Union. Bergne to Salisbury (draft, confidential) May 1896: *NA* FO 83/1484, pp. 34–9.

various points led to fragmentation of the Union, as different countries became bound by differently worded texts.

The question of translation rights produced the customary extensive debate. Although there was a clear majority in favour of full assimilation, British and Norwegian opposition prevented agreement on this. A Belgian compromise proposal was eventually accepted, which gave full assimilation only if an authorised translation appeared within ten years, after which point the right would be lost if not yet exercised. It was also agreed that protection was to be granted under the Convention to non-Union authors of works published in a Convention country rather than to their publishers as in the original text. A French proposal that dramatisations of novels, and the making of novels from plays, should be regarded as illicit reproduction was not proceeded with, and was instead dealt with in an interpretative declaration.

Amendments to the 1886 Convention would have required a new convention, and thus Parliamentary approval for a number of signatories. This approach risked leaving the Union much diminished, or even non-existent. It was decided to adopt an Additional Act, which states could sign or not, leaving the original agreement intact. This inevitably led to complexity and fragmentation of the Union. There was yet further fragmentation as a result of the United Kingdom's inability to accept certain matters on which the rest of the Conference did agree: an Interpretative Declaration was therefore drafted, which could be signed separately by any country. Signatories to the Declaration had to agree to three points: firstly, protection was to depend on the completion of formalities in the country of origin only; secondly, 'published works' did not include works merely performed (or exhibited); thirdly, adaptation of a novel into a play, and the reverse, was an infringement of copyright. Britain did not object in principle to the first or third, but some sort of Colonial settlement was essential before the first could be agreed to, and the third required domestic legislation. The issue of dramatisation was different, in that it would have required a reversal of existing law, for which the British Government saw no reason in policy terms.

The British delegates' initial instructions gave them no authority to sign anything. Bergne wrote urgently and privately to the Foreign Office to express his concern: 'if we maintain our stiff attitude on point of form, it will certainly wound French susceptibilities, as the absence of the signature of Britain, would make the Conference rather a fiasco'. He asked that some formula be devised which would allow the British to sign, even if their endorsement was subject to subsequent ratification by the government. This was done, and further instructions were

communicated by telegram.[72] In the end eleven member states signed the Additional Act, including the United Kingdom, and all of these states except the United Kingdom ratified the Declaration.[73] The Additional Act was eventually adopted by the United Kingdom by Order in Council, since no change to primary legislation was required.

The Berlin revision 1908

The 1896 Paris Conference had chosen Berlin as the venue for the next revision conference, intended to be within six to ten years, and had indicated objectives for the Berlin meeting. It was thought that the signatories should agree on the duration of authors' rights, and it was the view of the 'great majority' of delegates that there should be complete assimilation of translation to reproduction rights.[74] Before the delegates convened again, a good deal of progress had been made. Membership of the Union had increased to sixteen, and several Union members (most notably Germany) had revised their copyright laws. *ALAI* continued working hard to publicise and promote the Union. Its 1900 Congress had been held in Paris (as part of the programme of congresses during the Paris Exposition), and after considerable labour in intense summer heat a draft text of a model law was produced. Thorvald Solberg, the US delegate to the Paris Congress, noted sardonically that 'England was again conspicuous by the absence of any representative.'[75] The annual *ALAI* congresses were also important for their detailed deliberations on the reforms proposed for consideration in Berlin.

All member states except Haiti sent delegations, and there were twenty-one observer delegations, including those from Russia and the United States. The conference lasted a month. The result was a substantial revision, expressed in a single consolidated text. A major advance was that the enjoyment and exercise of rights under the Convention were no longer to be subject to any formality. Protection was now to be exclusively governed by the laws of the country in which

[72] Bergne to Larcom (Private) 19 April 1896: *NA* FO 83/1483, pp. 63–4. Telegram Salisbury to Bergne 22/23 April 1896 (draft?). *NA* FO 83/1484, pp. 129–30.

[73] The United Kingdom also ratified the Additional Act on behalf of the Australian colonies, New Zealand, Canada, Natal, Cape Colony and India. The United Kingdom's refusal to sign the Declaration was also made on behalf of these. Ricketson, *Berne Convention*, p. 86.

[74] Ricketson, *Berne Convention*, p. 87.

[75] *New York Nation*, 20 September 1900. Thorvald Solberg (1852–1949) worked in the Library of Congress, and had lobbied hard for copyright reform in America. He later became the first appointed Register of Copyrights (1897) and remained in office until 1930.

protection was claimed, although this principle was qualified in relation to duration. A minimum term of the author's life plus fifty years was agreed in principle, even by countries (such as the United Kingdom) which had shorter periods. This was not made mandatory, however. Until all states had adopted this period, term was to be regulated by the law of the country where protection was claimed, and was not to exceed the term fixed in the country of origin. Translation rights were (finally) completely assimilated to reproduction rights. A number of previously controversial indirect appropriations (such as dramatisations and novelisations) were now agreed. Ratifications were exchanged in June 1910, and the Act became operative in the following September.

The Berlin Act represented a considerable step forward for international copyright law. Authors could now claim significant levels of protection under the Convention, and a good deal of agreement had been reached between countries whose underlying copyright systems were often very different. Britain had sent a delegation of considerable range and weight, which reflected her importance among the signatory states, and the importance of the matters to be discussed.[76] It later emerged that the British delegation had been surprised by the French delegation's formal proposal that the duration of copyright should be fixed at the author's life plus fifty years. On telegraphing for instruction, they were told that this period could not be accepted without further consideration and consultation with those interested. This revelation annoyed the Society of Authors, which had previously been consulted by the Board of Trade and had already communicated its full approval of such a term. The official correspondence shows that the British delegation was strongly persuaded of the need for uniformity of term, and thought life plus fifty would be the minimum requirement, given that the majority of States in the Union had already adopted this term. The British delegation's report concluded that: 'so far as regards the international aspect of the question, we are of opinion that no other term would be practicable or valuable'.[77] The results of the Berlin conference were generally welcomed in the British press.[78]

[76] The delegates were Sir Henry Bergne, G. R. Askwith K. C. (Assistant Secretary to the Board of Trade), Count de Salis (Councillor of His Majesty's Embassy at Berlin), with R. L. Craigie (Foreign Office) and T. W. Phillips (Board of Trade) acting as secretaries. One particular sadness for the British delegation was the death in Berlin of the principal delegate Sir Henry Bergne, from pneumonia following a chill caught there.

[77] For the official correspondence see Miscellaneous No. 2, Correspondence respecting the revised convention of Berne, Cd 4467 (1909), pp. 8–21 at p. 11. See also Craigie's memorandum on the main provisions of the convention, 24 November 1908: *NA* FO 881/9335.

[78] *Times*, 14 October 1908, 3 November 1908.

Britain and the Berlin Act: difficulties and colonial doubts

Britain had been extremely reluctant for the Berlin meeting even to convene, for several reasons. The German Chargé d'Affaires approached the Foreign Office in 1905 regarding the projected conference. The Foreign Office consulted other departments, and, finding that circumstances had changed little since the 1896 Paris conference, sent a reply favouring a two-year postponement. In 1907 the Foreign Office again sought views, knowing that an approach from the German Government was likely. The response was, if anything, even more negative than before. In view of the hostile response to the draft clauses sent to the colonial governors earlier in 1907, the Colonial Secretary, Lord Elgin, considered it undesirable to hold a conference if it would raise questions of the amendment of the International Copyright Acts – as it certainly would. The Board of Trade stated that its position had not materially altered since 1905, but doubted whether further postponement could be proposed. The pessimism deepened following an interdepartmental conference to discuss the matter, and the German Government was advised informally of the British lack of enthusiasm. The German Government was nevertheless reluctant to delay further, citing the discontent of other signatories at the previous postponement, and it pressed the British Government to name a date when it would be ready to resume discussion. At this the government caved in, agreeing that British delegates would attend a conference, but warning that they would have to be instructed on the same lines as the delegates at the 1896 Paris conference.[79]

The outcome of the conference was far more positive than predicted. Further reflection brought admiration for the audacity of the Berlin scheme, and generous acknowledgement of what had been achieved. Yet the more thoughtful commentators were concerned that although the Berlin Act contained the potential for an extremely powerful scheme, its success depended to a large extent on the enthusiasm of its signatories: a great deal had been agreed in principle, but the trade-off had been that member states could adhere to the earlier acts indefinitely.[80] In addition, Britain still faced her own particular and serious anxieties, notably the reluctance of Canada even with regard to the Berne Convention, let alone the Berlin revision. This disagreement had the potential to fragment Imperial copyright, and to undermine the still-fragile copyright relationship with the United States. The need for

[79] *NA* FO 881/9270, pp. 23–30 and 47A.
[80] See for instance Louis Delzons' powerful article, 'L'Oeuvre de la Conférence de Berlin', which was quoted in the British press: (1908) 6 *Revue des deux mondes* 906.

radical reform of the entire British copyright framework had been obvious for years, and was now embarrassingly urgent.

Britain had to address many difficulties before the 1911 Copyright Act would be possible, and the Colonial reaction to the Berlin Act was not the least of these. Union member states had already been warned of the magnitude of the problem, in the declaration read by the British delegation at the opening of the Berlin Conference:

> there exist for Great Britain very serious difficulties in connection with the subject of copyright, especially as regards harmonizing the interests of the mother country with those of the great self-governing Colonies. Unless it should be found possible to remove these difficulties, His Majesty's Government would not probably find themselves in a position to propose to Parliament the legislation which would be necessary in order to give effect to any considerable alterations in the Convention of Berne.[81]

For a real appreciation of these difficulties, however, an understanding of the long and turbulent history of Colonial copyright is needed.

[81] Miscellaneous No. 2, Correspondence respecting the revised convention of Berne, Cd 4467 (1909). For the Foreign Secretary's letter of instruction to the delegates see *NA* FO 881/9502, pp. 35–7.

4 Colonial challenges

The book trade in Canada – origins and development

The first printing press in what would later become British North America was brought to Halifax, Nova Scotia, from Boston in 1751. A second press was brought to Quebec in 1764, just after the formal recognition of British rule in the Treaty of Paris (1763). The European population in 1761 was just under 76,000. There was rapid settlement of all six eastern provinces by American and British settlers, many of whom were accustomed to having newspapers and books in their homes. At the end of the Napoleonic Wars the country had nineteen printing presses, stretching from St John's, Newfoundland to the Niagara frontier. Under the mercantile system, colonies were in a subordinate economic position to the mother country, which expected to have the exclusive right to sell her products (particularly manufactured goods) in colonial markets. Colonies were not encouraged to develop industries which might compete. As a result, the book trade was organised to import books and periodicals. Most British North Americans had little time or money for books. Late eighteenth-century literacy rates were low, especially among the poor and farmers, though there were efforts (particularly from missionaries) to change this. A handful of booksellers imported works for a small, select group of readers: government servants, garrison officers, clergy, teachers, merchants and ladies. American books, newspapers and periodicals also circulated. Montreal led the retail bookselling trade in the early decades of the nineteenth century. In 1821 the population had reached 722,000, but the inhabitants were too few and too poor to sustain a reprint industry. They were dependent on British and American editions.[1]

[1] Michael Winship, *American Literary Publishing in the Mid-nineteenth Century* (Cambridge: Cambridge University Press, 1995), pp. 12–20. Michael R. Haines and Richard H. Steckel (eds), *A Population History of North America* (Cambridge: Cambridge University Press, 2000) p. 373.

By the 1830s communications had improved considerably, and the book trade was expanding in both Britain and the United States. The flow of cheap books and periodicals, particularly from the United States, increased significantly. The newspaper press also spread, fostering a growing readership. Newspapers had literary sections, which would serialise popular fiction (including British works). A number of literary magazines were started, although the titles often did not endure long. A handful of authors and newspaper publishers began to explore local book publishing, but, on the whole, readers were reliant on cheap, imported American books. The booksellers had the choice of ordering expensive, authorised editions from Britain, delivered in weeks or perhaps months, or, buying the latest titles cheaply pirated in America. It is not difficult to see why the American editions were so popular, on both sides of the border, and cheap publishing burgeoned. In the late 1830s and early 1840s, when the 'mammoth' weekly newspapers appeared, the availability of cheap fiction increased still further. Papers such as *Brother Jonathan* and the *New World* had no compunction in reprinting British copyright works, both in serial form and as entire novels presented as supplements for 50c or less. By 1841 the *New World* cost 6c a copy in New York or $3.00 annually. It had fifty-two agents throughout the United States and five in Canada. Customs duties were one potential barrier. Until 1842 the duty on books imported from Britain was 2.5 per cent, whereas the duty on all American books was 30 per cent (often with another 5 per cent provincial duty on top of this). This discrepancy was criticised by some booksellers as a tax on knowledge, although the duty was not always paid. Nevertheless, the value of the Canadian trade was now such that British authors and publishers sought to recapture it. This was the situation when the 1842 Copyright Act was passed.[2]

The ban on foreign reprints: early reactions

The 1842 Copyright Act gave the copyright proprietor protection throughout Her Majesty's Dominions, in respect of any book first published in the United Kingdom. In a deliberate attempt to check the trade in foreign reprints a heavy fine was now imposed if these were imported for sale or hire; in addition, the offending books were subject to seizure and destruction. A week later the 1842 Customs Act imposed further restrictions. Its new regulations allowed copyright proprietors to prohibit all imports of foreign reprints (for whatever purpose) by giving notice in writing to the Commissioners of Customs. Books on the

[2] Winship, *American Literary Publishing*, pp. 58–69 and 91–103.

resulting lists were likewise subject to seizure and destruction by Customs Officers.[3] The new Acts took effect in the British colonies on 1 July 1843. The decision to exclude all foreign reprints had profound implications for the North American possessions in particular, accustomed as they were to cheap American reprints of British copyright works. Gladstone, as President of the Board of Trade and the architect of the customs reforms, was well aware of the likely impact on the supply of books. In a letter to the publisher John Murray, Gladstone observed that new law would be fruitless unless new and popular British books were offered at moderate prices. If the book trade would adapt, Gladstone foresaw 'a great extension of our book-trade as well as much advantage to literature', but, if not, 'we shall relapse ... into the old state of things: the law will be first evaded and then relaxed'.[4] This prediction proved uncannily accurate. In the meantime, British publishers considered how best to supply the hungry colonial markets, newly deprived of cheap reading matter.

The established London publishers were concerned at rumours that the British 'piratical' publishers (such as Bohn, Bogue and Tegg) were intending to take over the supply of cheap reprints formerly provided by the American publishers. It was feared that colonial Customs Officers would not be avid in enforcement of the rules against the importation of cheap British reprints, even if they could be persuaded to exclude foreign ones. Murray, as the holder of many important copyrights, therefore determined to attempt to supply the market himself. In August 1843, Murray wrote to Gladstone concerning a scheme which he had devised, which he was 'determined at all risques to commence'. He intended to publish a 'colonial library', and wished to dedicate it to Gladstone. Murray's prospectus appeared in September 1843. Noting that Parliament had recently ordered the rigid and entire exclusion from the colonies of foreign pirated editions, Murray announced that he would produce a series of 'attractive and useful works, by approved authors, at a rate which shall place them within reach of the means not only of the colonists, but also of a large portion of the less wealthy classes at home'. Murray explicitly defended the policy of excluding foreign reprints on the grounds of justice to local native authors. He also gave the reasons why pirate works could be published cheaply; their authors were not paid, the cost of printing and paper was half of that in Britain, and they were printed hastily without proper revision of errors.

[3] 1842 Copyright Act, s.17. See above, p. 47.

[4] Gladstone to John Murray, 6 February 1843: Samuel Smiles, *Memoir and Correspondence of the Late John Murray* (London: Routledge/Thoemmes Press, 1977), vol. II p. 501.

In contrast, Murray promised that his library would be 'printed most carefully, in a superior style and on good paper'.[5]

Colonial complaints about the new copyright regime began almost immediately, largely from the North American provinces. One letter to the *Times* protested that the price of British books was so high that it amounted to a prohibition, and that British booksellers did not bother to send more than half a dozen copies to supply the whole of Canada.[6] The *Athenaeum*'s suggestion was that an enterprising Canadian bookseller could make a special agreement with London publishers for supply at 20 per cent above cost. This proposal reflected the mercantilist assumption that the mother country was the only appropriate source of supply for colonial markets: an assumption that was later to be sharply challenged as Canadian printers sought to establish themselves as suppliers of their own local market.

The home and colonial markets were very different in their requirements and characteristics, although British publishers seemed remarkably unresponsive to colonial needs. The British market was used to fine paper and bindings, and paid high prices for them. Britain was the home of the three-decker guinea-and-a-half novel, typically with a 'cheap' six-shilling edition following only after at least a year. Those at home who could not afford to purchase outright could use an extensive network of circulating libraries and reading clubs: but these were impractical in Canada because of the distances involved. Books took an enormously long time to arrive from Britain when sent by freight, which in any case was not possible to all areas at all times of the year. If books were sent by post they were charged at the prohibitively expensive letter rate. It was unsurprising that cheap American reprints of British copyright works filtered across the long Canadian border in large numbers. American newspapers (including the mammoths filled with reprinted fiction) enjoyed cheap postal rates, and Canadian postmasters would sometimes act as agents for the newspapers' publishers. A particular local problem was the Deputy Postmaster General of Canada, F. R. Stayner, who benefited from a long-standing newspaper franking privilege, intended as a supplement to his salary to cover unbudgeted expenses. This benefit took on a different aspect once foreign reprints were excluded by the 1842 Act, as a report from the Commissioners of Post Office Enquiry in Canada explained:

[5] Simon Nowell-Smith, *International Copyright Law and the Publisher in the Reign of Queen Victoria* (Oxford: Clarendon Press, 1968), pp. 27–9. See also Angus Fraser, 'John Murray's Colonial and Home Library' (1997) 91 *The Papers of the Bibliographical Society of America* 339–408.

[6] Discussed *Athenaeum*, 2 September 1843.

the pirated editions of these publications which by law are contraband and would be seized if it was attempted to pass them through the Custom houses are freely sent through the Post Offices on payment of a moderate sum, from which however as it is one of the Deputy Postmaster's General's perquisites, the public derives not the least advantage. Original American works which are not contraband but chargeable with a duty of 30 per cent are likewise freely transmissible by the Post on payment of the Deputy Postmaster General's perquisite to the manifest injury of the Revenue which is thus defrauded of the duty. The public have not complained much of irregularities however gross by which they have been enabled to purchase literature at a cheap rate.[7]

The Postmaster General therefore instructed the Deputy Postmaster Generals at Quebec and Halifax to tell their frontier officers to detain all 'extras' which were more pamphlets than newspapers. How carefully these instructions were complied with can be imagined. In addition, the rules could be sidestepped by sending parcels direct to subscribers, rather than to booksellers via Customs.

There was in any case little point in prohibiting foreign reprints unless British publishers were willing to offer the colonial readers an appealing alternative, in terms of both price and content. Murray's Colonial Library was certainly an attempt to do this. Murray had both a commercial and a didactic purpose, aiming to offer 'a substitute to the Canadas and other Colonies for the Yankee publications hitherto poured into them and which besides damaging the copyrights of British Authors by the piracy of their work, are sapping the principles and loyalty of the Subjects of the Queen by the democratic tendency of the native American publications'. In the following six years Murray published 49 titles in 37 volumes, over half of which were travel-related, and half of the rest were history. Less than a third were new titles, and Canadian booksellers understandably complained that it was futile to offer their buyers titles which had already been extensively reprinted and circulated in America at a fraction of the price. The bulk of the titles were thought too serious, and the colonial desire for light reading was left unfulfilled. Murray's series was re-titled the Home and Colonial Library, but sales were not sufficient in either place to make it worthwhile and it was abandoned in 1849. He told Gladstone that it had simply not been possible to compete with American piracies at a remunerative price.[8]

[7] *NA* T 25/38. The Treasury eventually revoked Steyner's franking privilege.
[8] John Murray III to F. B. Head, 20 November 1843: quoted James J. Barnes, *Authors, Publishers, Politicians: The Quest for an Anglo-American Copyright Agreement 1815–1854* (London: Routledge & Kegan Paul, 1974) p. 147. Nowell-Smith, *International Copyright Law*, p. 31.

Other publishers did issue colonial editions of books, although not on this scale. A further reluctance to do so stemmed from fear that such editions would find their way back to compete with the high-priced home editions; there was no legal obstacle to reimport of the proprietor's own titles into the United Kingdom, leaving publishers reliant for market insulation on the pledges of the Canadian trade. It would have been perfectly possible to licence Canadian publishers, an alternative which authors were content with, but publishers were not; they preferred to keep control (and the profits), and to print their own large impressions for all markets. British publishers were thus either unwilling or unable to respond effectively to the conditions and requirements of the colonial markets.[9] Colonial editions did not become commonplace until the late 1880s.[10]

Murray's 1843 prospectus spoke tactfully of 'the highly intelligent and educated population of our Colonies'.[11] In Britain, there was felt a strong sense of responsibility for education in the colonies, as well as a desire to keep colonial subjects free from the undesirable moral and political influences of foreign works. Early colonial complaints reflected a degree of willingness to endorse this picture of responsibility and dependence, with stress being laid on the mother country's obligation to foster education among her colonial subjects, and on the contrast between the poor colonists and the richer more aristocratic tastes of the British market. However, resentment at this characterisation increased as the dispute dragged on without improvement. The Province of Canada in particular sought to establish her independence from Britain, and the copyright issue took on a symbolic quality which did not contribute to its easy solution.

The 1842 scheme to halt the flow of foreign reprints was therefore largely ineffective. A further problem was a flaw in the drafting of the customs provisions, which had been intended to stop imports of notified titles throughout the Dominions, but in fact only prohibited their importation into the United Kingdom. In 1845 the notification system

[9] Two examples of highly popular works published in 1842 illustrate the scale of the problem. Charles Dickens' *American Notes* sold in London for 10s 6d, in Halifax, Nova Scotia for 15s and in New York for 121/2d. Bulwer's *Zanoni*, a typical three-decker, retailed in London for a guinea and a half (£1 11s 6d), in Halifax, Nova Scotia for 15s and in New York for 1s 3d. Report of a Select Committee of the Nova Scotia Assembly, 11 March 1845, Appendix A: *Col. Corresp. 1872*, p. 4.

[10] For the growth of colonial editions in India, particularly successfully in the hands of Macmillan, see Priya Joshi, 'Trading Places: The Novel, the Colonial Library, and India', in Abhijit Gupta and Swapan Chakravorty (eds), *Print Areas: Book History in India* (New Delhi: Permanent Black, 2004), pp. 17–64.

[11] Fraser, 'Murray's Colonial and Home Library', 350.

was extended to the colonies, but it was hopelessly impractical in these geographical conditions. Copyright proprietors who wished to prohibit foreign reprints were required to notify the Commissioners of Customs of their titles.[12] In practice the lists were printed and distributed to the colonies every three months or so, giving an ample window of time during which supplies could be obtained from America. Once a particular copy was safely in Canada it was impossible to know whether it had arrived before or after the notification had been received.

Pressure for change: towards the 1847 Foreign Reprints Act

Complaints about the regime continued, and became increasingly formal. In March 1844 a Committee of Canadian House of Commons considered the effects of the 1842 Copyright Act. The conclusion was that the continued exclusion of American reprints would have a pernicious effect on the population. The committee's report made the point that since imports of British books had not increased under the new rules (because there was no market for such high-priced works) the import of American reprints could not affect the profits of British authors and publishers.[13] A year later, a Select Committee of the Assembly of Nova Scotia considered the matter, and reached a similar conclusion. Their report explained in some detail the differences between their own circumstances and those prevailing in the home market, justifying the consequential resort to American reprints. The efforts by British publishers (such as Murray and Knight) to respond to and supply the colonial market were politely welcomed, but their specific defects were frankly described. The general public's hostility to the system was bluntly recorded, as was the fact that in practice the law was nugatory, and offered no protection to the British author or publisher. The Select Committee's suggestion was that the law should be modified to permit importation of American reprints of all British works on payment of a protective duty.[14]

The Colonial Office forwarded the report to the Board of Trade for comment. The Board replied that it was aware of the difficulties, but nevertheless could not hold out any expectation that the policy 'of protecting the authors of this country in their right of property in their own productions' would be changed, this being a principle of justice not expediency. The Board suggested that colonial booksellers might

[12] 1845 Customs Act, s.9. [13] *Athenaeum*, 16 March 1844.
[14] Report of a Select Committee of the House of Assembly of Nova Scotia, 11 March 1845: *Col. Corresp. 1872*, p. 2.

discuss the problem with British publishers, advocated changes in the postal regulations and expressed the rather bland hope that things would gradually improve.[15] This response has an air of complacent detachment, and the proposals do not convey any sense that the nature or magnitude of the colonial problem had been properly appreciated. British publishers had little incentive to supply the colonial market in the prevailing circumstances, and gentle tinkering with the postal rates could not change the underlying market drivers. The protests grew stronger. The Nova Scotia Assembly was not in the least mollified by the stalling answer that it received, a further Committee of the House responding quickly and more fiercely than before:

> they recommend that Her Majesty's Government be earnestly solicited to reconsider the views contained in the report of last year, and to give due weight to those stated in this, in order that a law so barren in advantages to the author, and so disastrous to Her Majesty's subjects in these colonies, by curtailing the demand for English literature by obstructing the introduction of libraries in our villages and districts, by encouraging the sale of American books, by affecting the provincial revenue, and fostering a system of smuggling necessarily injurious to the public morals, may speedily be amended.[16]

The following month the Lieutenant Governor of New Brunswick, Sir William Colebrooke, wrote to Gladstone (at this time a transient Colonial Secretary) arguing that the Copyright and Post Office Acts should be amended, and that English copyright ought not to extend to the North American Provinces except by virtue of Provincial Acts. This latter suggestion was an alarming one, because it would have destroyed utterly the integrity of Imperial copyright. Nothing could have been done by the provinces unilaterally, as such a change would have required the consent of the Imperial Parliament, but Gladstone was evidently rattled. In his reply to Colebrooke he was firm in refusing to change the statute, but he added defensively that 'the present stringent provisions of the law did not proceed originally from any proposal of Her Majesty's Government, but were adopted by Parliament on the suggestion of an individual Member of the House of Commons in deference to strong public sentiment, and to the arguments by which it was sustained.'[17]

Although solid in defence of the *status quo* to Colebrooke, Gladstone sought action at home. Perhaps now more aware of the strength of feeling in the colonies than when at the Board of Trade, Gladstone

[15] *Col. Corresp. 1872*, p. 6.
[16] Report of a Committee of the House of Assembly of Nova Scotia, 13 March 1846: *Col. Corresp. 1872*, p. 9.
[17] *Col. Corresp. 1872*, pp. 8–10.

wrote to his former colleagues in strong terms, asking for all of the complaints received to be communicated to the principal London publishers:

> Mr Gladstone thinks that the trade should be informed that it is the opinion of Her Majesty's Government that unless vigorous and decided efforts be made by the publishers to meet the views expressed in the annexed passage from the Report of the Committee of the House of Assembly of Halifax, the result will be an increase in dissatisfaction on this subject in the North American Provinces, and a diminution of whatever limited benefit the English authors and publishers now derive from the exclusion of the American reprints of English works.

The Board of Trade reversed its position. Now 'fully alive' to the force of the colonists' arguments, and 'extremely desirous' of addressing them, it suggested that the Colonial Legislatures should themselves be invited to frame regulations appropriate to local conditions. The proposals were vague in the extreme, and the Colonial Office's letter of concurrence added nothing of substance. Lord Grey, as the new Colonial Secretary, was responsible for transmitting the good news to the Governors of the North American colonies. His circular explained that the Government would rely on 'the disposition of the Colonies to protect the authors of this country from the fraudulent appropriation of the fruits of labours upon which they are often entirely dependent'.[18]

The 1847 Foreign Reprints Act provides no solution to the problem

The enabling legislation passed rapidly through Parliament. The 1847 Foreign Reprints Act provided that where a British possession made legislative provision for securing the rights of British authors there, if that Act was 'sufficient for the purpose of securing to British authors reasonable protection within such possession', it could be approved by Order in Council. Any Orders in Council and the relevant Colonial Acts had to be laid before both Houses of Parliament for approval. If this was done, the normal prohibitions against the admission of foreign reprints would be suspended within the relevant colony. Although this was not specified anywhere in the Act, it is reasonably clear that the Government's intention was that a local duty would have to be set and paid to the relevant authors (or their publishers, presumably).

However, the provision of a compensatory duty was not stated to be an absolute requirement. Canada was quick to seek to take advantage of the new situation, passing a new Canadian Act within a week of the

[18] *Col. Corresp. 1872*, pp. 10–13.

Imperial Act's passage. The Canadian Copyright Act 1847 did not allude to the Foreign Reprints Act, instead granting copyright protection to British authors who 'printed and published' their works in the Province. On the face of it this was of little interest to any British author, who would have had copyright protection under the Imperial Act in any event, which the Canadian measure appeared to duplicate in part. The Board of Trade approved the Canadian Act, without (apparently) objecting to the absence of compensation, but also without arranging an Order in Council. It was nine months before the Provincial Government formally requested an Order in Council. The Board of Trade sought the opinion of John Murray, who brought the matter before the Committee of the Society for the Protection of Literature.[19] Having received the Society's response, the Board of Trade refused to recommend that an Order in Council should be issued, noting that the effect of the Canadian Act would be simply to take away existing protection without any compensation.

As a result of this fiasco it was the other North American Provinces who were to benefit first from the 1847 Foreign Reprints Act. Nova Scotia and New Brunswick quickly passed Colonial Acts and sent them for confirmation. These provided for a 20 per cent duty 'upon the importation of what were before pirated editions of English works published in the United States, and providing that the proceeds of that duty should be remitted for the benefit of those who had the copyright in this country'. Unfortunately, although the Government approved of the acts in principle, they had been returned because of certain 'objectionable' details, although it was thought the matter 'would, no doubt, be satisfactorily arranged'.[20] Satisfactory local Acts were passed by Nova Scotia and New Brunswick in March 1848, by Prince Edward Island in May 1848, and by Newfoundland in April 1849. These were duly approved by Order in Council. Canada did not pass an acceptable Act until August 1850, approved in December of the same year. Canada's Act provided for an *ad valorem* duty *not exceeding* 20 per cent, whereas this rate was fixed by the other provinces: duties were to be paid to the British Government for the benefit of the author.[21]

[19] This organisation is the renamed 'Association for the Protection of British Literature', which split almost before it was properly formed, over Tauchnitz's proposal to buy British author's continental 'rights'. See above, pp. 49–50, and below, pp. 259–60.

[20] Parl. Deb., vol. 95, ser. 3, col. 751, 7 December 1847.

[21] Two Acts in 1850 preceded the one which was approved. The Canadian Government eventually agreed to a figure of 12.5 per cent. See George L. Parker, *The Beginnings of the Book Trade in Canada* (Toronto; Buffalo: University of Toronto Press, 1985), pp. 115–6.

One can readily imagine the difficulties faced by those attempting to enforce the chaotic jumble of laws during this period, especially given the public dislike of the system. Some records still exist. Returns from the Customs House at Montreal, sent to Her Majesty's Commissioners of Customs in London during 1850, reveal an early (and isolated) effort seriously to enforce the Act in Canada. Returns were made up for each seizure of foreign reprints of British copyright books. These, and the books themselves, were sent to London. The standard report forms, requiring details of the consignment and its intended recipient, are revealing. All were completed by the industrious and vigilant young Englishman Henry Pratt, Landing Waiter and Searcher. There were usually only a few copies in any consignment, estimated value from a few shillings to (rarely) a few pounds. Several seizures would be recorded in a typical week, but probably amounting to no more than hundred volumes a month. Reading through the report forms, a pattern emerges. The majority of offenders are designated 'bookseller of this city', or 'bookseller of Quebec', and reference is often made to dozens of previous seizures from the same person. In all of these cases the importer had the option to pay the ($12\frac{1}{2}$ per cent) duty and retain the book, but chose not to.[22] In these instances the cumbersome and time-consuming procedures brought little detriment to the importer, and no benefit to the copyright holder. Presumably the booksellers would try again another day, hoping to slip through the net. Only a tiny fraction of foreign reprints could possibly have been intercepted.

The Foreign Reprints Act proved to be 'a ludicrous failure', although the extent of the failure did not emerge at once.[23] Warning signs appeared in 1855. The Edinburgh publisher William Chambers drew attention to a statement from the Canadian Custom House that the amount being collected by way of duty on American reprints of British copyright works was scarcely sufficient to pay the expenses incident to their collection. In 1856 the official returns from Customs became available. The total sum collected over a five-year period was £687 10s $8\frac{1}{2}$d, which (as the *Publishers' Circular* put it) 'has lately been distributed amongst the several publishers whose works have thus been imported, or rather whose property has been confiscated for the amusement

[22] *NA* CUST 34/75. Pratt made himself exceedingly unpopular, even ordering destruction of some consignments, and was later made redundant. Fraser, 'Murray's Colonial and Home Library', 371–8.

[23] This assessment is that of Augustine Birrell, Quain Professor of Law, University College London: *Seven Lectures on the Law and History of the Copyright in Books* (London: Cassell and Co., 1899), p. 216. Equivalent judgments from contemporary commentators abound.

and intellectual cultivation of the colonies'.[24] A further grievance was the deduction of the collection costs, which in Canada amounted to almost half of the already pitiful total.

A Treasury Minute singled out Canada for particular criticism, pointing out that the 1847 Act had been passed with an especial view to meet the Province's complaints, and that the suspension of the ban on foreign reprints was permitted only on condition that there was 'reasonable protection' within the colony for British authors:

> but it is obvious that a net profit of less than 7 per cent. on the value of foreign reprints of the works of a British author imported into Canada, especially when the exceedingly low price is considered at which such reprints are produced, cannot afford anything approaching to adequate provision for the rights which the author possessed within the province by virtue of his copyright.[25]

The Minute suggested that the Colonial Secretary might consider inducing the Canadian Parliament to raise the duty, and observed that the deduction of collection costs was contrary to the spirit of the Order in Council approving the Canadian Act.

British publishers were understandably provoked by these figures, which demonstrated that efforts at collection in the colonies were largely a sham. British authors were no better pleased, since their own fractional entitlements often arrived via their publisher's account.[26] More irritation was provoked the following year by the publication of a Parliamentary return showing the provisions made by every colony benefiting from the 1847 Act, including the restrictions and deductions.[27] In 1858, following the brief depression of 1857, Canada imposed a protective 10 per cent duty on British books, specifically exempting American books on the grounds that they already paid a 12.5 per cent duty. The decision was predictably unpopular in Britain. Cheap American editions of both British and American works flooded into Canada, and were avidly read by a new generation of Canadian readers. The flaws in the underlying scheme were now plain. The main beneficiaries were the Canadian reading public, and the American reprinters who supplied them. British authors and publishers gained next to nothing. Canadian publishers were still in the position that they could not reprint British copyright works without permission, and this restriction rankled with them

[24] *Athenaeum*, 17 March 1855; *Publisher's Circular*, 15 November 1856.
[25] Treasury Minute 6 May 1856: *NA* CUST 34/75.
[26] *Athenaeum*, 22 November 1856. Not all of the duties reported in the 1856 figures had been apportioned to individual names. The despairing Treasury ordered the unappropriated £56 7s 103/4d to be rateably divided among those who were named in the list, on the presumption that a part of it belonged to them.
[27] *Publishers' Circular*, 15 September 1857.

increasingly. Nothing was changed, however, until after Canada had become the empire's first self-governing dominion.

The Dominion of Canada, and the impact of Routledge v. Low

The 1867 British North America Act (s.91) specified copyright as one of the subjects within the legislative authority of the Canadian Parliament. The same act delegated to the Governor General the function of the Crown to assent to enactments of the Dominion Parliament. The Governor General could, however, withhold assent to, and 'reserve' for consideration in Westminster, any legislation in conflict with Imperial law. This power was to be of real importance in the increasingly confrontational exchanges on copyright between the Dominion and Imperial Parliaments.

In 1868 the Canadian Parliament passed a new Copyright Act to impose a duty on foreign reprints of British copyright works. The Canadian Act was in essentially the same terms as the previous arrangement. However, in its address to the Governor General, the Senate not only asked that the new Act be approved, but also requested that the provisions of the 1847 Foreign Reprints Act be extended to cover colonial reprints also: 'by which means British authors will be more effectually protected in their rights, and a material benefit will be conferred on the printing industry on this Dominion'. This was soon followed by a memorandum to Colonial Office from John Rose, the Canadian Minister of Finance, in support of this new approach.[28]

The existing law permitted the import of foreign reprints on payment of duty, but did not permit reprinting in Canada (since Imperial copyright prevented publication within the British Dominions by anyone other than the copyright proprietor). In practice, since British editions were expensive, this left Canada dependent on supplies from the United States. Rose proposed an arrangement whereby Canadian publishers would be licensed to reprint British copyright works, on payment to the Government of a duty for the benefit of the author. This, he argued, would benefit not only the Canadian public and the Canadian printing industry, but also the British author: a secure and reputable scheme of reprinting would drive out the largely illicit trade existing at present.

The Colonial Office recommended the continuance of the existing arrangements, so the relevant Orders in Council were approved.

[28] *Col. Corresp. 1872*, pp. 16–7. Highly trusted by the Canadian Government, Rose seems to have been recognised as the unofficial representative of Canada in Britain. He subsequently became a member of the Royal Commission on Copyright (1875–78).

However, it sought the views of the Board of Trade on the wider proposal. The Board of Trade now had a clear appreciation of the potential difficulties that could materialise if the Canadian scheme were to be accepted. The letter was signed by Louis Mallet, a much respected representative of free trade opinion, who was later to become a member of the Royal Commission on Copyright.[29] Two striking points emerge. One is the evidently strong desire of the Government to maintain a model of copyright based on an exclusive reproduction right, and to maintain it, as a matter of principle, throughout the Empire:

> while the mother country enforces an absolute monopoly in works of literature for a term of years, it is very undesirable to admit in British Colonial Possessions an arrangement, which whatever advantages it may possess ... , rests upon a wholly different principle.[30]

Apart from the question of philosophical consistency, Mallet was also concerned that if a licensing system was agreed for the colonies, then foreign countries (doubtless meaning America) would demand similar arrangements, leaving only the British public paying the high price for books presently required (apparently) in order to afford the necessary encouragement to authors. The fragmentation of Imperial copyright was something to be feared – a fear which Canada later used to put pressure on Britain.

The other striking aspect of the Board of Trade's response is its view that the Canadian problems could not be seen in isolation, and had to be addressed in the context of North America as a whole. Mallet revealed that communications had recently taken place with a view to the resumptions of negotiations for a copyright treaty, and implementation of the Canadian proposals would necessarily jeopardise their success:

> If such a Treaty should be concluded, its main stipulation would doubtless be the reciprocal extension to the authors of both countries of the prohibition afforded by their respective laws, in which case British authors would enjoy, in the United States, the absolute monopoly given to American authors during the existence of their copyright. If under such circumstances Canadian publishers were enabled to reprint the works of British authors on payment of $12\frac{1}{2}\%$, it is probable that a contraband trade would spring up across the United States frontier, and that they would be enabled to undersell the works of such authors legally circulating in those States; a consideration which can hardly fail to operate in deterring the United States government from concluding a Treaty with this country.[31]

[29] Sir Louis Mallet (1823–90): Board of Trade 1847–72; India Office (permanent under-secretary of state for India) 1872–83.
[30] *Col. Corresp. 1872*, p. 21. [31] *Col. Corresp. 1872*, p. 21.

These negotiations were in fact very recent. The Foreign Office despatch instructing the British Minister in Washington to act was dated 3 July 1868, only three weeks previously. It seems likely that this burst of activity was provoked by a House of Lords decision concerning the entitlement of aliens to copyright under English law. Although the relevance of the case to Canada was not immediately obvious, it soon began to cause considerable concern.

The case in question was *Routledge* v. *Low*.[32] It involved the American author, Maria Cummins, who lived in New York. She had posted the manuscript of her novel *Haunted Hearts* to her publishers Sampson Low in England, and visited Canada for a few days at the time of publication. The copyright was assigned to Sampson Low, which duly registered both the novel and the assignment at Stationers' Hall. Their two-volume edition sold for 16 shillings, and when Routledge published an unauthorised 2-shilling edition they took action. Sampson Low obtained an injunction in Chancery proceedings in 1865, but the decision was appealed until it reached the House of Lords in May 1868. Three questions arose. Where did publication have to take place to secure copyright? What area did that copyright protection cover? And who was entitled to that protection? It was held that publication had to be in the United Kingdom, and that protection extended throughout the whole of the British Dominions. Finally, it was held that an alien friend (here an American) publishing an original work in the United Kingdom was entitled to copyright under the 1842 Act, provided that at time of publication he was residing, however temporarily, in any part of the British Dominions. This was so even if the temporary residence was in a British colony with an independent legislature (such as Canada), under the laws of which he would not be entitled to copyright.

The implications of this decision for Canada were considerable. One point stemmed from what turned out to be a real inequity: although publication in the United Kingdom gave copyright throughout the empire, publication in a colony did not. This was a major disincentive to publication in Canada, unless for a strictly local market. It also gave rise to the apparent unfairness that Americans could obtain Imperial copyright by dint of a holiday in Canada on the day of publication in England, whereas Canadians publishing in Canada could not. A further major concern was that the decision appeared to remove all possible leverage for obtaining international copyright: if Americans were already entitled to Imperial copyright, then America had little incentive to

[32] *Routledge* v. *Low* (1868) LR 3 HL 100.

negotiate for an international copyright agreement to benefit non-Americans. It was to take decades for these matters to be resolved.

Mallet therefore concluded that Rose's scheme raised too many considerations of Imperial policy for legislation in the current session. He fully admitted the anomalous position of the Canadian publishers with respect to their US rivals, but argued that the careful inquiry which was needed could not be undertaken in isolation from other questions of Imperial Copyright, and International Copyright Treaties. He described the sanctioning of the Canadian $12\frac{1}{2}$ per cent duty in 1849 as an arrangement 'essentially of an exceptional and provisional character, and one which could not, without seriously compromising the principles of copyright, both municipal and international, be made the foundation of future Colonial legislation'. The timing of this outright rejection of the royalty principle by the Board of Trade is particularly significant. A number of royalty schemes to govern the Anglo-American copyright relationship were later to be proposed and seriously considered, by American politicians at least.[33]

The 1868 Canadian Act came into force in September, providing as before for the payment of duty on foreign reprints. The usual complaints continued: a despatch from the Newfoundland authorities stating that they had transmitted to the Lords Commissioners of Her Majesty's Treasury the sum of fourpence, received under the provisions of the 1847 Foreign Reprints Act, provoked a sarcastic editorial from the *Times*. The return for 1866 arrived, revealing that in that year a total of £145 0s 9d was received from the nineteen colonies which had taken advantage of the 1847 Act, of which £117 1s 6d was remitted by the colonies now forming the Canadian Dominion.[34] The wider arguments rumbled on also. Rose produced a further memorandum, attempting to rebut Mallet's arguments. He 'very strongly' called attention to the decision in *Routledge* v. *Low* as to the relevant place of publication, and the 'unfair position' in which the Canadian publisher and the Canadian public are placed as a result. Rose asked that all publishers should be put on an equal footing, and repeated the call for a licensing scheme.[35] The Board of Trade sent a further letter to the Colonial Office, commenting on Rose's arguments, and noting that 'it is impossible to make any complete or satisfactory arrangement with Canada unless the United

[33] The first formal proposal was in the Sherman Bill, introduced in the American Senate, 21 February 1872. See below, p. 203.

[34] *Times*, 18 February 1869. Board of Trade to Colonial Office, 27 July 1869: *NA* FO 5/1534 pp. 42–55.

[35] 'Copyright Law in Canada', Memorandum dated 30 March 1869: *Col. Corresp. 1872*, p. 34.

States are also parties to it'.[36] Although concluding that Rose's proposal should be rejected, it recommended that the grievance regarding publication should be remedied as soon as possible.

British diplomacy: the 'Canadian proposals' and a draft bill

While these exchanges were taking place, some semi-formal diplomacy was undertaken, by a man who was to become a key figure in the development of international copyright relations. F. R. Daldy was a respected publisher, partner in the firm of Bell and Daldy. He was to undertake many negotiations, particularly in Canada and America. A trusted figure with strong government connections, he was to be elected Honorary Secretary of the Copyright Association, became a member of the Royal Commission, and was present to advise the British delegation during the Berne conferences. In June Daldy travelled to Canada to see Rose for discussions, and then wrote laying out a scheme which he considered 'would be satisfactory to British copyright-owners, and beneficial to Canadian printers and publishers, and to the Canadian public generally'.

The plan was to repeal the 1868 Canadian Act (which authorised the introduction of foreign reprints), and replace it with a new act authorising the reprint of British copyright books in Canada by licensed printers, subject to a 10 per cent duty on the retail price of all copies printed under the Act. Copies were to have 'Colonial Edition' printed at the head of the title page, a Government stamp on the title page, and the printer's name and address on the back of the title page. Duties were to be transmitted by the Canadian Government to England half-yearly, with notice of the amounts to be paid 'to the British publishers of the books'. The new act would be stated to cease on conclusion of a copyright treaty between the United Kingdom and the United States. Daldy also thought it desirable that the Canadian Government should agree to receive notice of copyright direct from British publishers, and that 'proof of non-British copyright in any book whatever imported into Canada shall rest on the importer'. Daldy stated that it would be a 'condition precedent' that an Imperial Act would prohibit the import of colonial editions into the United Kingdom, by post or otherwise.[37]

[36] *Col. Corresp. 1872*, p. 29. Mallet's file minute is revealing: 'I despair of any just or satisfactory settlement of this question. Wholly disapproving of the temporising expedient proposed by Canada, I think it equally wrong to leave the matter as it stands – because the present situation is equally at variance with justice and has proved an egregious and ludicrous failure in every respect.': *NA* BT 22/17 C687.

[37] F. R. Daldy to Sir John Rose, 23 June 1869: *Col. Corresp. 1872*, pp. 71–2.

These proposals were carefully drawn to address the needs of British publishers. The 'condition precedent' of a prohibition on import of colonial editions would have prevented new competition in the British market: this concern had previously checked their inclination to supply the colonial market. The word 'author' does not appear once in Daldy's letter. These became known as the 'Canadian proposals', but the considerable public debate provoked by them did not start until the following year. In the meantime the Colonial Office asked the Board of Trade to draft a bill to address the publication point, and wrote to the Governor General of Canada to say that this would be done, adding that the more general question was difficult and could not be decided without further information.[38] It was widely felt that the decision in *Routledge* v. *Low* confining copyright protection to works published in the United Kingdom was unfair. Also, it was feared that failure to concede the point might 'create much dissatisfaction in Canada, and lead to the discussion of questions of constitutional might which it is on every ground important to avert'.[39] The short draft Bill was in some ways generous, therefore, it granted the same rights whether the book was first published in the United Kingdom or in a colony, and it did so retrospectively. The formalities of both the local copyright law and the Imperial copyright law were to be complied with. The registration and deposit requirements thus remained intact, although extra time for delivery from the Dominions was allowed.[40]

The Canadian licensing scheme was still being mooted, however. Daldy's Canadian Proposals resurfaced, this time in London. A meeting to discuss them was held at John Murray's house in Albemarle Street, and it is known that there was considerable disagreement: 'Gentlemen who were present expressed an opinion strongly in favour of the above ''Canadian Proposals;'' but a resolution based on an opposite opinion, was maintained by others, and was carried by a large majority.'[41] The meeting was chaired by Lord Stanhope (formerly Lord Mahon) who had managed the final passage of the 1842 Copyright Act. Many of the leading publishers were present, but only a few authors (though these included Dickens and Trollope). Even though the

[38] *Col. Corresp. 1872*, p. 30.

[39] Board of Trade to Foreign Office, 18 November 1869: *Col. Corresp. 1872*, p. 32.

[40] In *Routledge* v. *Low* Lord Cairns noted that the only register was in London, and that deposit copies were to be delivered within one month. Such clauses he thought intelligible only if publication in the United Kingdom was essential: (1868) LR 3 HL at p. 109.

[41] This meeting was held on 16 March 1870. For a report of the meeting, see the Copyright Association's *Memoranda on International and Colonial Copyright*, prepared in March 1872 and issued as a pamphlet (reprinted in *Col. Corresp. 1872*, pp. 68–75).

proposals were drawn up with the interests of publishers in mind, and Daldy, their chief instigator, was present to defend them, they were not generally endorsed.

Two resolutions were passed and sent to Gladstone (as Prime Minister). The first urged the prompt repeal of the 1847 Foreign Reprints Act. The second drew attention 'to the unjust and unexpected position in which all British colonial authors and publishers are placed by the decision of the House of Lords, in the case of Low v Routledge ... as to works first published in any part of the British Dominions not included in the United Kingdom'.[42] Gladstone's Secretary replied that Gladstone would take an early opportunity of looking into the matter. The publishers heard nothing, although, at the Board of Trade, Farrer considered the petition 'very reasonable'. He thought it worth consulting the Colonial Office on the matter. Farrer also took a most unprofessional but nevertheless delicious swipe at the American position: 'The U.S. are as selfish *re* protection as ever. It would be a fine reprisal to inundate them with cheap smuggled Canadian prints of English books.'[43]

The Board of Trade's official response was to forward the publishers' letter to the Colonial Office in April, noting cautiously that it was satisfactory to find that the draft bill would be supported by those at the meeting, but observing that this support would be to a degree dependent on the government's willingness to repeal the Foreign Reprints Act in the teeth of opposition by the North American colonies. The Board of Trade concluded that it was difficult to see on what grounds the continuance of the 1847 Act could be defended. It asked the Colonial Office whether it would be desirable to delay the bill in order to seek the Canadian Government's concurrence in the repeal of the Foreign Reprints Act. Thus, the Board of Trade was now urging the coupling of the two issues of publication and repeal: issues which it had previously been anxious to separate. The abrupt change of direction was certainly due to 'the improbability, according to the last Despatches from Her Majesty's Minister from Washington, of any satisfactory arrangements with the United States for International Copyright Law'.

The Foreign Secretary, Granville, steered a judicious course between coupling and de-coupling the issues. On 1 June he wrote to the Governors of Colonies enclosing the draft bill on publication, and asking for suggestions or observations. The following day he wrote to the same Governors enclosing the Board of Trade letter reporting the Albemarle Street meeting and resolutions, and asking whether, 'in view of the

[42] *Memoranda*, p. 12. [43] *NA* BT 22/71 C399.

benefits intended to be conferred upon British Colonial authors and publishers by the proposed Bill', there would be any objection to the proposed repeal of the Act. He then wrote to the Board of Trade to say that he thought it better to postpone the introduction of the bill until answers had been received. The Canadian response was that although there could be no objection to the proposed bill, there would be 'very strong objections' to repeal of the 1847 Act from the people of Canada, and that it was highly inexpedient to legislate without the Canadian Government being given full opportunity to consider the whole subject. The Colonial Secretary therefore wrote to request a full statement of the Canadian Government's views. Many of the other colonies indicated that there were so few books of any value published there that the whole subject was a matter of indifference to them. Replies drifted in over the next year or so. Most colonies were either indifferent or content.[44]

Canadian turbulence and the formation of the Copyright Association

Thus it was the Dominion of Canada which continued to be the main source of discontent, and this discontent continued to grow. In December 1870 the Privy Council forwarded the Canadian Government's views on copyright, which are positively confrontational in places:

> The important point at issue, and on which the view of the London publishers, and of the people, both of Canada and the United States are irreconcilable, is that the former insists upon the extension of copyright without local publication, and to this the latter will never consent.[45]

A model was suggested, in which there would be a material increase in the duty on imported foreign reprints, with measures to prevent evasion. However, import of foreign reprints of any works published in Canada would be forbidden. Any author publishing in Canada would thus be protected, but unless British copyright works were published concurrently in Canada, licensed Canadian publishers would be allowed to publish them on payment of a duty. Such a scheme was obviously unacceptable to British publishing interests. Murray protested:

> Surely as owners of that property we should be allowed to decide whether it is or is not for our benefit to part with our rights; and we can hardly be expected

[44] *Col. Corresp. 1872*, pp. 45–57.
[45] Confidential memorandum, 30 November 1870, signed by the Minister of Finance (Hincks) and the Minister of Agriculture (Dunkin): *Col. Corresp. 1872*, p. 58.

blindly to adopt the Canadian proposition and reasoning after the experience we have had of the Act of 1847![46]

Murray's proposal (with Longman's concurrence) was that colonial reprinting should be allowed only if these copies could be guaranteed to be excluded from the United Kingdom.

Printing was now a major industry in Canada (particularly of newspapers), and Canadian publishing activities grew steadily more provocative. Reports of some of the more infamous cases were publicised in Britain. One such involved the barrister Edward Jenkins, who was later to become an MP, and was made a member of the Royal Commission on Copyright because of his continuing interest in the subject. At this time, however, he was known as the author of a satire on sectarian education, *Ginx's Baby*, published in 1870. In 1871 the *Publishers' Circular* reported that it had been reprinted in Canada, but no duty had been sent to the author. The article also noted that although the 1865 Colonial Laws Validity Act provided that any colonial law which was repugnant to an Imperial Act was void, the issue was too sensitive to be tested. Jenkins had chosen not to test his rights by bringing legal action, explaining ironically in the *Daily News* that:

> *Ginx's Baby* might be the crux of Empire. I should have raised the delicate question of Imperial Relations, and the 600,000 persons said to be enrolled in the Dominion militia would be immediately called out to vindicate the right of Canada to legislate for herself, and to rob an Englishman ... I dare not face the consequences, so I appeal to you.[47]

Not content simply with reprinting the volume, the Canadian newspapers were claiming the right to reprint *Ginx's Baby* and any other British copyright works they liked, under s.91 of the 1867 British North America Act, and the 1868 Canadian Copyright Act. This was too much for the London book trade to bear, and Daldy sought the opinion of two eminent counsel: Sir Roundell Palmer Q. C. and Farrer Herschell Q. C. Their conclusion was (predictably enough) that the 1868 Canadian Copyright Act gave a local copyright, but did not affect the prohibition on piracy laid down in the Imperial Act.[48]

Murray and Longman wrote again to Gladstone, having heard nothing since his promise in March 1870 that he 'would take an early

[46] *NA* BT 22/17 C78.

[47] *Publishers' Circular*, 1 July 1871. *Daily News*, 23 June 1871. For Jenkins' subsequent involvement, see below, p. 108.

[48] *Memoranda*, pp. 9–19. Both counsel were well-known for their interest in copyright matters. Farrer Herschell was an active campaigner for copyright reform, introduced several bills (some with Jenkins) and was later a member of the Royal Commission.

opportunity of inquiring into the matter'. They wrote also to the Foreign Secretary, Granville, asking what steps had been taken towards a treaty with the United States. His reply was that the chief publishers in the United States had 'shown a disinclination to an arrangement for International Copyright on any terms' and would oppose any arrangement unless it contained the condition that all protected books should be manufactured in America. The letter made it clear that this was not regarded as a desirable basis for a treaty.[49] This news must have been extremely unwelcome to the publishers, and they took immediate action. A 'Preliminary Meeting' was held at Murray's house, where it was resolved that it was expedient to form 'The Copyright Association': 'authors, publishers and other persons interested in copyright property' were eligible for membership, on payment of a 1 guinea annual subscription. The objects of the Association were:

(a) To watch over the general interests of owners of copyright property.
(b) To obtain early information of all measures affecting copyright property, and, as opportunity offers, to suggest and promote improvements in existing copyright laws.

A letter of invitation was issued to a further meeting on 19 March. Longman was elected Treasurer, and Daldy the Honorary Secretary.

More illustrations of the flaws in the Canadian regime came to light at this time. One involved the Montreal publisher, John Lovell.[50] In the autumn of 1871 Lovell had spent $160,000 constructing and equipping a new printing factory in Rouse's Point, just within the United States. In January 1872, in Montreal, he set up the type and stereotyped two British copyright books, one of which was Macaulay's *Lays of Ancient Rome*. He then had the plates taken to Rouse's Point, printed off an edition there, then imported the books into Canada to be bound and sold. His mischievously chosen imprint was 'The International Printing and Publishing Company'. Counsel's Opinion was again sought, but Lovell had been well advised. Lovell was not infringing s.15 of the 1842 Act, because he was not 'printing' within the British Dominions. His

[49] Gladstone's Secretary replied unhelpfully (but truthfully) that as it had been necessary to communicate with every colony on the matter the correspondence had not yet been completed, and referred them to the Board of Trade. *Memoranda*, pp. 15–19.

[50] For a brief account of Lovell's publishing career see John Tebbel, *A History of Book Publishing in the United States*, *Volume II*: *The Expansion of an Industry 1865–1919* (New York; London: Bowker, 1975), pp. 344–5. The five-storey factory at Rouse's Point had a foundry and electrotyping equipment, and boasted a running track for employees. The Canadian workmen travelled four miles by river to work in America, but were paid in Canadian currency.

activities were clearly incompatible with s.17's prohibition on import for sale, but this no longer applied in Canada, as a consequence of the action taken under the 1847 Foreign Reprints Act: the 1868 Canadian Act had been followed by an Order in Council suspending the prohibitions on imports of foreign reprints, on the grounds that the Canadian legislation imposing a duty afforded sufficient protection to authors. Thus Lovell's activities were not illegal. As Counsel observed: 'The real grievance appears to be that the assumption upon which the order proceeded was ill founded.'[51]

Lovell was already something of a hero in Canada as a result of his high-profile printing activities. He had been frustrated by the lack of cheap current literature in the colony, and had undertaken previous experiments to test the state of the law. Charles Reade's *Foul Play* was published in 1868, and promptly reprinted in America. Lovell argued (implausibly) that since this was an American copyright work it should not be regarded as a reprint of a British copyright work. He published 3,000 copies of it and sold them for 25 cents, undercutting the American edition which sold at 75 cents, but still making an 'admirable' profit. Threatened by Reade with legal action 'he thought it better to place the profits to the credit of those who might be declared legally entitled to them, and there the money remained to this day'. Lovell maintained that this experiment was provoked by his treatment by the British. Having gone to London to try and persuade the publishers there to withdraw their opposition to Rose's $12\frac{1}{2}$ per cent licensing plan, he reminded Longman that he had once offered £100 for the privilege of publishing Colenso's *Algebra* in Canada:

> but Mr Longman adhered to the determination that none of his copyright works should be published, as he said, by a colonist, and ended by the exclamation, 'Thank God, we have got the power and intend to keep it.'[52]

Whether this is an accurate report or not, it is impossible to know. It is at least plausible: Longman was infuriated by the failure of the 1847 Act, and disliked the Canadian proposals intensely.

The extent of Longman's dislike began to emerge publicly at the end of March, when the meeting to form the Copyright Association was reported in the *Times*. The committee was to be made up of almost equal numbers of authors and publishers: the authors were Robert Browning, Arthur Helps, William Smith, Charles Reade and Sir Charles Trevelyan; the publishers were Murray, Longman, Macmillan, Bentley

[51] *Memoranda*, p. 19.
[52] From a newspaper report of a speech by Dymond, in the Canadian House of Commons, 13 May 1874: HC Return, 1 March 1875, p. 10.

and Routledge. Longman moved one of the resolutions, and in doing so was reported to have remarked that 'in regard to her interesting volume the Queen had not availed herself of her own laws'. This reference would not have been clear to most readers, and the following day Longman wrote to explain it. The background to the remark was the complete failure of the 1847 Act to secure due protection for the rights of British authors. Yet:

> the Act still exists as an empty form, and some publishers go through the useless ceremony of registering their books under the forms of the Act for protection in the Colonies, like Hogarth's gardener watering a dead plant. This was done by the publishers of *Lothair* as a last experiment, and, as might be expected, the ink was wasted. The result is *nil*. So well, indeed, is the futility of attempting to obtain any advantages under this Act known, that even so important a work as Her Majesty's *Our Life in the Highlands* has never been registered at the Customs for protection under the forms required by the Act of 1847, and at least 40,000 copies of the American 'pirated' edition of the Royal work have been sold in Canada.[53]

Longman demanded the Act's repeal, describing it as 'an Act for the special injury of authors and publisher, and a disgrace to legislation on literary property'. He observed (with heavy irony) that repeal would surely not be resisted by the Dominion Government, which had so completely failed in working out the purpose of its own act.

Support for the Canadian proposals had come from one prominent figure though: Sir Charles Trevelyan. A distinguished British administrator, and also an author, his particular significance in this debate was that he was Macaulay's executor, and trustee of his copyrights.[54] Trevelyan had been assistant-secretary to the Treasury between 1840 and 1859, a period which the collection of duties under the 1847 Foreign Reprints Act had begun. Trevelyan became aware of an accumulation of annual accounts rendered under the Act, and on investigation it became apparent that the arrangement was 'a ridiculous failure'. The sum received on account of the sale of Macaulay's copyright works in all the colonies, Canada included, was roughly £30 for three years. On Macaulay's death in 1859 Trevelyan became responsible for managing his copyrights. When in 1870 Trevelyan heard of the Canadian Government's suggestion that they should be allowed to reprint in Canada on payment of a real $12\frac{1}{2}$ per cent on the actual sale instead of a nominal

[53] *Times*, 20 and 21 March 1872. This Royal illustration of the defects of the Act became a *cause celèbre*. The experience in Canada of former Prime Minister Disraeli, who received nothing from the reprints of his extraordinarily popular novel *Lothair*, was also much quoted.

[54] He had married Macaulay's sister, Hannah, in 1834.

customs duty, he urged its acceptance.[55] However, the general view at that time was against the Canadian proposals.

Longman – who was Trevelyan's publisher, as he had been Macaulay's – perhaps thought that Lovell's publishing activities offered an ideal opportunity to press his views on Trevelyan. Somewhat provocatively, Longman sent Trevelyan Lovell's now infamous edition of Macaulay's *Lays of Ancient Rome*, reprinted at Rouse's Point by the International Printing and Publishing Company. Trevelyan (returning the volume) stated again his strong view that the Canadian plan should be adopted. He also, in his turn provocatively, noted that that there was 'a printing and publishing interest distinct from that of the owners of copyright' which had led to the refusal of this 'just and liberal offer'. The exchange continued and became more heated. In his next letter Trevelyan repeated his accusation that it was the printing and publishing interest which had resulted in the rejection of this offer 'so obviously advantageous to the owners of English copyright works'. In a final letter he suggested that in rejecting the proposal the 1870 meeting had been 'acting under the influence of your [i.e. Longman's] legal adviser', and that if it had not been for this he would have 'profited largely by it'. A brief pamphlet war ensued. Trevelyan's three letters to Longman were published in March. Longman then issued *Some observations on copyright and our colonies*, which included his own letter to the *Times* of 21 March, and reprinted *Some objections to the Canadian Proposal*. Finally, Trevelyan wrote to the *Athenaeum*, claiming that 'every party concerned' would benefit from the Canadian proposals.[56]

Copyright Association business nevertheless continued during this distracting episode. Longman and Murray wrote directly to the Colonial Secretary, Kimberley, asking if any steps had been taken regarding colonial copyright. Their concerns were brushed off. The Colonial Office replied enclosing copies of the despatches sent to the colonies in June 1870 (asking for their views on the draft bill regarding publication, and their views on repealing the 1847 Act), and explained that the answers were not yet complete.[57]

[55] Trevelyan told the story himself in May 1876: *RC-Evidence*, 1–94.

[56] Longman's legal adviser was Alfred Turner. Charles Edward Trevelyan, *The Compromise Offered by Canada in Reference to the Reprinting of English Copyright Works* (London, March 1872). *Some Objections to the Canadian Proposal of June 1869* (London: Spottiswoode, 1872). *Athenaeum*, May 1872.

[57] *Col. Corresp. 1872*, p. 65.

A clear challenge: the 1872 Canadian Copyright Bill

The Canadian Government was not prepared to wait any longer for action. Having had no official reply to the memorandum of its views sent in December 1870, in May 1872 it again called for Imperial legislation to permit reprinting of British works in Canada, subject to an excise duty. Although Trevelyan is not mentioned by name, his support for the licensing plan had clearly given the Canadians fresh hope. In early June the Canadian Government decided on direct confrontation: it introduced a bill to put its licensing scheme into effect. The bill allowed for the reprinting and publishing in Canada of British copyright works, by licence of the Governor General. All reprints had to be registered with the Minister of Agriculture, and an *ad valorem* duty of $12\frac{1}{2}$ per cent paid. Importation into Canada of foreign reprints of such reprinted works was prohibited. The final clause of the bill provided that it would come into force only on proclamation of the Governor General. The Governor General, Lisgar, forwarded the bill to the Colonial Secretary, together with a Privy Council Minute suggesting that:

> inasmuch as the existing Copyright Acts of the Imperial Parliament expressly run into the Colonies of the Empire, and as this Bill, should it receive the sanction of the Parliament of Canada, will conflict with that legislation, the proclamation contemplated by the last clause of the Bill should only be issued with the sanction of Her Majesty's Imperial Government.

This was an extraordinary challenge to the Imperial Parliament. The bill was passed by the Canadian Parliament on 14 June, its basic principles unaltered.[58] It must have been obvious at once that the Act could not possibly be sanctioned, but no direct refusal was given for a full year.

It is unclear when the British Government was first informed, but soon after the Act was passed Rose wrote to warn Farrer:

> As I feared the Canadian Government have taken the matter into their own hands and asserted their right to deal with the question of Copyright ... My friends write that it may probably be reserved for the Royal Assent as they do not wish to precipitate any issue of a Constitutional kind at the present moment.[59]

The news did not break publicly in Britain until 1 July, when the *Times* published a brief factual report from its Ottawa correspondent. Longman, as Treasurer of the Copyright Association, responded with a

[58] HC Return, 1 March 1875, pp. 3–4 and13.

[59] 19 June 1872. Rose and Farrer had been corresponding privately on the subject of colonial copyright since Lovell's much-publicised antics in January 1872: Private Correspondence Between the Hon. Sir J. Rose and T. H. Farrer Esq. on the Subject of Colonial Copyright, *NA* BT 22/9/7 and BT 22/17 R6157.

furious letter. In the course of further public exchanges, Longman hinted that a compromise measure was being considered. The British Government would only say that it was 'considering suggestions'.[60]

At the Board of Trade, Farrer had had talks with two prominent Canadian publishers, Lovell and Graeme Mercer Adam, and also with Daldy. Farrer's personal preoccupation was with the price of British books, and with overcoming the publishers' resistance to the import of their own foreign or colonial reprints. He sketched a plan of his own, which would have allowed reprinting on payment of a duty if there was no publication in a colony within three months, and would have allowed colonial reprints into Britain one year after publication. The Copyright Association was so alarmed that it agreed a 'Compromise of the English Copyright-owners'. Their scheme was a simple one: British copyright holders could obtain Canadian copyright by registering and republishing their works in the Dominion within one year of publication; the Dominion Government was to undertake not to impose a heavier duty on British books, or to prohibit their importation; and the import of colonial editions into Britain would be prohibited.[61]

In December the Board of Trade gave instructions for the preparation of its own draft bill: the 1847 Act was to be repealed; Imperial copyright was to be obtained by publishing in the colonies as well as in Great Britain ('In other words repeal the recent case of Routledge & Low in the H. of Lords.'); colonial copyright could be obtained even if there had been simultaneous or previous publication in Great Britain; colonial publication was to be effected by registration and issue of the work within a fixed time, to prevent the introduction of American reprints in the period between publication in England and the arrival of copies in the colony.[62] But by March 1873 the bill seems to have been far closer to Farrer's sketch than would have been expected from these instructions. It allowed reprinting of a copyright work originally published in England if it was not republished in the colonies within twenty days: applications were to be referred to the Judicial Committee of the Privy Council, with licences to be granted on terms thought just. It also permitted importation of these editions into Great Britain a year after their publication, on payment of a fixed duty. Rose had been consulted, informally, and his views seem to have been influential. In a private note to Farrer he said the new text was 'a very great improvement on the

[60] *NA* BT 22/17 R6157. *Times*, 5, 6, 19 and 31 July, 9 August 1872.
[61] Graeme Mercer Adam (1839–1912). Farrer's notes of the talks, and his own scheme: *NA* BT 22/17 R6157. *The Compromise of the English Copyright-owners*: *NA* BT 22/17 R4884.
[62] *NA* BT 22/9/7 E1999.

former draft', and 'seems to carry out the object aimed at'. The Privy Council Office was unenthusiastic, and asked Farrer not to press the measure.[63]

Daldy was given a copy of the draft bill in April, to show to Longman and Murray. The publishers' reaction was predictably hostile. Farrer remained unperturbed, arguing that they could avert all these unpleasant prospects by simultaneous publication. Longman and Murray called on Farrer to discuss the issue. They had planned a meeting of the Copyright Association to consider the draft, but Farrer did not want it discussed. Instead it was agreed that the Copyright Association would engage a barrister to draft a different bill – presumably intended to embody a compromise reflecting negotiations at the meeting – to be submitted to Farrer.[64] The initial intention was to use Henry Ludlow, who had drafted the Board of Trade Bill, but instead James Fitzjames Stephen undertook the task. The publishers were extremely agitated, and Farrer heard rumours of an attack on the government. He wrote firmly to Daldy about this, adding that the publishers' reaction led him to question Daldy's earlier assertion that British publishers did provide cheap editions within a reasonable time.[65] The negotiations continued. Rose met Daldy, Longman and Murray in May. He reported that they acquiesced to the principle of colonial publication, but continued to object to the admission of colonial reprints.

Stephen's first draft for the Copyright Association was ready in late May. It was similar to the Board of Trade draft, except it did not permit the importation of colonial editions. It was not warmly received. A brief note from Rose dismissed it as 'putting the cart before the horse', and Farrer's file minute concurs: 'I heartily agree with Sir J. Rose – and hope the Govt will introduce our Bill and not the publishers' – which is really as bad as can be.'[66] Herbert at the Colonial Office also preferred Ludlow's bill, although he advised omitting the provision allowing import of colonial reprints. The Colonial Secretary, Kimberley, endorsed Herbert's points. The Board of Trade produced a further

[63] Rose to Farrer (Private), March 1873: *NA* BT 22/16 R6157/73.

[64] *Colonial Copyright: Memorandum 28th April 1873*. This printed document carries no explicit reference, but, from its style and format, was almost certainly printed by the Copyright Association: *NA* BT 22/9/7.

[65] *NA* BT 22/16 R6157/73.

[66] *NA* BT 22/17 R3715, R3850 and R3950. By September Fitzjames Stephen had also prepared a second draft, known as the Anglo-Canadian Copyright bill because it was confined to Canada. Again reprinting was permitted, but import into the United Kingdom was not: *NA* BT 22/16 R6157. Stephen strongly disagreed with the proposals, which he considered 'an invasion of literary property of the most dangerous kind': *Mr Stephen's Opinion on the Anglo-Canadian Copyright Bill* (printed, dated 16 September 1873): *NA* BT 22/16 R6157.

revised draft in July, which was sent to the Colonial Office. It sought to enact a highly elaborate licensing scheme. Some parts of the bill were extraordinarily involved, others hopelessly imprecise and vague. It seems hardly credible that it was thought to be a workable solution. Nevertheless, this cumbersome draft was circulated to all colonial governors in July 1873, with a brief letter asking for any 'suggestions'.[67]

Reactions from the colonies accumulated gradually. Most were content enough with the bill, though several made the point that the 20-day period (after which republication could be authorised) was far too short. It was of course Canada's response that seemed likely to determine the bill's future. However, it was delayed by the Pacific Railway scandal, which forced a change of government: in November the liberal Mackenzie replaced the conservative Macdonald as Canadian Premier. The Canadian report eventually arrived in January 1874. It welcomed the proposal to give Imperial copyright on publication in a colony. On the subject of reprints, it observed that there were four different interests at stake, which were somewhat in conflict:

> The authors contend that they have an undeniable and inalienable right to dispose of their property as they please; the public seems to be satisfied with the supply of books which it now gets; and the book trade also appears disposed to be in favour of things as they are ... These three interests are not advocating, at least for the present, any material change, beyond extending to Canadian authors the privileges of the Imperial Copyright Act as before stated ... The publishers, however, although not unanimous in their opinions, are advocating the changes which were embodied in the Canadian Act of 1872.

The report noted the 'intricacy' of the bill's procedures, and thought them likely to lead to litigation. It therefore concluded that only the change to the definition of publication was urgent.[68]

Towards a compromise: the 1875 Canadian Copyright Act

This uncharacteristically peaceable report from the Canadian Parliament must have been a pleasant surprise for the British Government.

[67] C 1067 (1874), p. 2. The Colonial Secretary also wrote to the Canadian Governor General, Dufferin. His letter explained that the Government had been unable to advise the Queen to assent to the 1872 Act, but that he had 'deferred' announcing this decision 'as they were then, and have been since, considering how, with a due regard to existing interests, the Colonies might be placed on a similar footing to the United Kingdom with respect to copyright'. The draft bill was the result of their deliberations, although the 'serious difficulties in framing such a Bill which would be likely to obtain the assent of Parliament' had prevented its introduction in the current session. C 1067 (1874), p. 1. It is unlikely that the home government much regretted this delay.

[68] C 1067 (1874), p. 9.

But its reactions were of little relevance, since Gladstone lost the general election the following month, and was replaced by Peel. The Canadian Government seems to have thought it worthwhile to test the mettle of the new administration. Governor General Dufferin forwarded resolutions adopted by both Houses of the Canadian Parliament, asking him to convey 'the respectful expression of the anxiety of this House' that the 1872 Canadian Act had not been assented to. The new Colonial Secretary, Carnarvon, replied that he had advised Her Majesty not to assent to the 1872 Bill, because it conflicted with Imperial legislation (as the Canadian Privy Council had itself admitted). Carnarvon also expressed his confident hope that a measure might be agreed without difficulty.[69]

Carnarvon in fact had good reason to be confident, having discussed a highly promising plan with Daldy earlier in the month. Daldy was going to Canada shortly, the Committee of the Copyright Association having asked him to try and resolve matters. He outlined a new plan, which he had reason to believe would be satisfactory to the Canadian publishers. As evidence of this Daldy enclosed a letter to the Canadian Deputy-Minister of Agriculture, from the Montreal publishers, Dawson Brothers. The Dawsons had considered the Canadian publishers' demands to reprint at any time and in any manner on payment of a royalty of 10 per cent. These demands were strongly resisted by British authors as well as publishers; their fears being that rival editions would undersell each other, each worse in quality than the last, and that 10 per cent on cheap editions would amount to very little. The Dawsons frankly admitted the truth of this. Under such circumstances no Canadian publisher would risk producing a quality edition, and, since United States reprints would be excluded, the Canadian public would be offered only the most inferior editions. Since the scheme was in any event stated to determine on the conclusion of an Anglo-American Copyright treaty, the Dawsons concluded that there was no good reason to adopt this it. It was also known that the Toronto publishers, Hunter, Rose & Co, held similar views. The arguments were persuasive, and this letter doubtless helped shape the new Canadian Government's view that action on these lines was not urgently needed.

Yet the Dawsons' letter contained the outline of a different solution, and it was this approach that Daldy proposed in his letter to Carnarvon. The Canadian law could be changed to provide that a book with

[69] HC Return 1 March 1875, pp. 7 and 12. Time was running out for the 1872 Act: Dominion Acts expired if not assented to within two years, leaving it only one further month of life.

Imperial copyright, if republished in Canada, would be treated as if originally published there. It would thereby obtain Canadian copyright, the term of protection to be only for the shortest of the two possible periods. This would ensure local republication, and would thus satisfy the Canadian Privy Council report, but it would not involve confiscation of copyrights, nor conflict with the Imperial Act. The other essential element in this plan, as far as the publishers were concerned, was that the Imperial Act should prohibit import of colonial editions into other parts of British Dominions. Daldy then saw Carnarvon, obtaining his general approval for these proposals, and an introduction to the Governor General of Canada. The Governor General introduced Daldy to the Prime Minister, Mackenzie, and informal diplomacy triumphed: 'After much consideration, Mr Mackenzie not only accepted the suggestions, but promised to legislate on the subject during the next session of the Canadian Parliament.'[70] A Canadian bill on these lines passed in 1875. It gave Canadian copyright to works published or produced in Canada, whether for the first time or contemporaneously with or subsequent to publication elsewhere. The basic term was twenty-eight years from registration (renewable in some circumstances), but Canadian copyright ceased if all copyrights elsewhere had expired. Import into Canada of foreign editions was prohibited. The only remnant of the fixed royalty proposal was one very limited provision, which under certain circumstances allowed the Minister of Agriculture to license the publication or import of out of print works copyrighted in Canada.[71]

In Britain, the Canadian Act was on the whole welcomed, if somewhat cautiously. Another new lobbying group had been formed: the Association to Protect the Rights of Authors. It issued a report on the state of copyright, which gained a certain amount of publicity.[72] Disraeli received a deputation from the Association, asking that a Select Committee or a Royal Commission be appointed. One member of the deputation was Edward Jenkins, whose personal interest in Canadian copyright was well known, as a result of the notorious *Ginx's Baby* episode.[73] The Association's anxieties on the Canadian question were the rather general ones that the Canadian Act was perhaps *ultra vires*, and that an Imperial Act might be needed to sanction it. An Imperial

[70] [Copyright Association], *Report of the Copyright Association for the year 1874–5*, (1875) pp. 10–13.
[71] HC Return 1 March 1875, pp. 13–18.
[72] The Chairman was Tom Taylor, but the Association's report was written by its Honorary Secretary, Moy Thomas: *Publishers' Circular*, 16 March 1875. A good account of the report is in (1875) series 3 vol. 4, *Law Magazine*, 434–47.
[73] See above, p. 98.

Act was indeed required, partly because the Canadian Act was arguably repugnant to the 1868 Order in Council which suspended the prohibition on the import of foreign reprints, but particularly to provide that colonial reprints of British copyright works should not be imported into the United Kingdom. Farrer expressed the Board of Trade's 'strongest possible objections' to the ban on importing authorised editions, which he thought improper and undesirable, whether looked at as a question of economy, policy, justice or education. Carnarvon's view was that the clause was indispensable for pragmatic reasons, since it was too late in the session for a contested bill to pass. It passed in July.

Initial evidence was that the Act was at least a limited success, to the extent that a number of British works were republished by authority under its terms, and were sold at prices which undercut the unauthorised American reprints.[74] The 1875 Canadian Act did not modify the Imperial Act of 1842, so Imperial copyright still ran throughout the British Dominions including Canada. The essential change for British authors was that they now had the option of benefiting under the local act if they chose to do so, on condition that they published in Canada. The 1875 Act did not allow republication without consent, unlike the unapproved 1868 bill. Nevertheless, there was still a body of Canadian opinion that copyright was one of the exclusive powers of the Dominion under the British North America Act. Others tried to argue that the 1875 Imperial Act intended to repeal the 1842 Act so far as Canada was concerned, leaving them free to reprint British copyright works. In 1876 the Toronto publishers, Belford Bros., reprinted Samuel Smiles's work, *Thrift*, without permission, and the Copyright Association arranged for a test case to be brought. Belford Bros.' solicitors wrote defiantly to Smiles' solicitors:

> Messrs. Belford Bros. hand us your notice concerning this Canadian publication. The persons for whom you act have no interest or right in the matter and you may inform them so.[75]

Vice-Chancellor Proudfoot did not accept the publishers' arguments, much to the disgust of parts of the Canadian press. Belford Bros. sought funding from the Canadian book trade to appeal the decision, but authors' rights were again upheld by the Toronto Court of Appeal.[76]

[74] *NA* BT 22/16 R7072 and R8547. See also *RC-Report*, 201.

[75] *NA* BT 22/16 R185/1876, which also includes a printed 'Appeal Book' containing all the legal documents. Belford Brothers was founded in Toronto in 1872, and was known for its cheap reprints of American works, which it was happy to post over the border.

[76] *NA* BT 22/16 R7607 includes a number of Canadian press reports of VC Proudfoot's decision, given to Farrer confidentially by Rose. *Smiles* v. *Belford* 1, Upper Canada Reports 436.

The Royal Commission and colonial issues

The Royal Commission on Copyright was appointed in 1875, and began taking evidence in 1876. Several of those questioned expressed views on colonial copyright. Sir Charles Trevelyan was the first witness to give evidence. Trevelyan had written publicly on the 1868 Canadian proposals. He was still strongly of the opinion that a right to reprint on payment of a Royalty would benefit both the colonies and copyright holders. Admittedly, there would be only a small profit on each copy, but he argued that the volume of sales would compensate. Trevelyan was particularly interested in the situation in India. He had spent a good deal of time in the Administration there, and had been involved in the 1834 education controversy. Macaulay's famous *Minute on Indian Education* (2 February 1835) had favoured the Anglicist faction over the Orientalist, arguing for the promotion of European literature and science in India. Trevelyan was also of this view. He thought that cheap literature was a necessary complement to a system of national education, and that the extensive reprinting of British copyright works would benefit the people of India. The Commissioners pressed Trevelyan a good deal as to how such a plan might operate in practice, but he tended to brush off such questions as matters of 'legislative detail', or 'administrative arrangement'. His view was that giving the author control over republication, as in the 1875 Canadian Act, was a mistake.[77]

Sir Thomas Farrer, now Permanent Secretary to the Board of Trade, had worked closely with copyright issues, and gave a great deal of evidence. He was critical of the high price of books in Britain, which he thought were only sustainable because of the copyright 'monopoly'. Although Farrer conceded that the principle of copyright as 'monopoly' was entrenched in the United Kingdom, he was against any further extension of this principle to the colonies or America, and argued that the ideal solution would be a right of republication subject to a royalty. He particularly objected to the prohibition on import of Canadian editions into the United Kingdom, as sacrificing the interests of readers in the United Kingdom to those of the Canadian publisher and British copyright owner. He also objected to the stringency of the Customs Acts in excluding foreign reprints, believing that this protected only the British publisher:

> The most valuable productions of the human mind, even though produced with the sanction of their author, are proscribed and kept from the English public

[77] *RC-Evidence*, 1.

with the same stringency and in the same clause and terms as false coin, obscene books, and the rinderpest.[78]

Farrer was an early advocate of the principle of international exhaustion of rights, therefore, and would have made it an absolute rule that any edition published with the consent of the author in any part of the world should have free access to the UK market.

The Commission's Report gave a good deal of attention to colonial copyright. They were critical of the long-standing anomaly that publication in a colony did not give copyright throughout the Empire, whereas publication in the United Kingdom did, and recommended that the situation should be rectified. It was also thought important that British literature should be available to colonial readers at cheap prices. The Commissioners therefore proposed their own version on the licensing theme:

> in case the owner of a copyright work should not avail himself of the provisions of the copyright law (if any) in a colony, and in case no adequate provision be made by re-publication in the colony or otherwise, within a reasonable time after publication elsewhere, for a supply of the work sufficient for general sale and circulation in the colony, a licence may, upon an application, be granted to re-publish the work in the colony, subject to a royalty in favour of the copyright owner of not less than a specified sum per cent. on the retail price, as may be settled by any local law. Effective provision for the due collection and transmission to the copyright owner of such royalty should be made by such law.[79]

They were not prepared to recommend the simple repeal of the 1847 Foreign Reprints Act, however. Although a licensing system had the potential to work well in colonies with printing and publishing firms of their own, it was recognised that smaller colonies were dependent almost wholly on the supply of foreign reprints for their literature. The Commissioners were firm in the view that the widespread abuse of the duty provisions should stop, recommending that existing Orders in Council should be repealed, and no future ones made unless there was better provision under local law for securing payment of the duty. Notwithstanding Farrer's evidence, the Report recommended that the prohibition on the import of colonial editions into the United Kingdom should continue.[80]

[78] *RC-Evidence*, 3930.

[79] *RC-Report*, 207. Many elements from earlier schemes, actual and proposed, are recognisable.

[80] The Commissioners did not agree with Farrer that competition from colonial editions would drive down the price in the home market, instead believing that it would prevent the publication of authorised colonial editions: *RC-Report*, 225.

Canada's role in Anglo-America treaty negotiations, 1880–84

Colonial copyright was only one aspect of the Commission's work. The evidence and report ranged widely over all copyright issues: domestic, colonial and international.[81] Although the need for change and rationalisation was obvious, the tasks appeared so enormous and the problems so intractable that progress was impossible. The acknowledged colonial difficulties could not be addressed in isolation, international copyright relations with America seemed a long way off and there was little political enthusiasm for engaging with the domestic predicament. As far as the UK government was concerned, colonial copyright troubles usually had to wait. However, in 1882, the tempting prospect of an Anglo-American treaty almost provoked a radical change in Imperial copyright strategy.

The possibility of a treaty had been under discussion since 1878, when the New York publishers, Harper & Bros, launched a campaign to promote the 'Harper draft'.[82] The British Government's reaction was lukewarm, partly because the proposals included a manufacturing clause, but also because legislation was supposedly pending following the Royal Commission. However, Disraeli's government fell, and with it any immediate prospect of domestic legislation. The American government continued to show some interest in the subject, submitting a formal treaty proposal in September 1880. Consultations with interest groups were undertaken, and in November 1881 direct negotiations began in Washington. Britain was represented by her new envoy, Lionel Sackville West, who submitted a draft treaty proposal as a basis for discussion. Canada then delivered a bolt from the blue. The British Government had invited the Dominion to send a representative to the negotiations, because there had been apprehension regarding her likely reaction to an Anglo-American treaty. Sir Leonard Tilley, the Dominion's Minister of Finance, was sent.[83] Tilley observed that Canada already had two systems of copyright law, Imperial and Canadian, and was being asked to submit to a third:

> Canada is now asked to become a consenting party to [the Treaty] even though the power of legislating on the matter is not within her control; she is bound by the Imperial Statute of 1842.

[81] For fuller discussion of the Royal Commission's activities see below, pp. 268–71.
[82] See below, p. 208.
[83] Tilley formulated the protective tariff plan known as the National Policy (1879). He had complained that Canada was being used as a 'slaughter-market' by the Americans and he would stop this with carefully targeted tariffs and duties. He was sympathetic to the claims of Canadian industry. The National Policy had included increased duties on imported books (calculated by weight rather than the 5 per cent *ad valorem* rate which had been in place since 1868), and printing materials such as presses and stereotypes.

Tilley therefore proposed that the Imperial Act of 1842 be repealed as regards Canada, leaving her free to legislate and conclude treaties independently and for the best interest of Canada. It was a combative stance, which raised 'serious questions of a Constitutional nature', as the Board of Trade noted. Tilley returned to Canada and made his report to the Canadian Government, which endorsed his position.[84]

A considerable delay followed, although neither side was prepared to say that the negotiations were over. West continued to ask the Americans for a response to his November 1881 draft, but heard nothing officially. West's view was that if the Canadians insisted on their non-participation in the proposed treaty, the US Government would make it a pretext for suspending negotiations entirely. The treaty was of such perceived importance that extreme measures were considered, and West proposed seeing whether Canada would bargain. In May, the Colonial Office wrote to the Canadian Government, asking if Canada would join the proposed convention if she were to be exempted from the 1842 Act (subject to satisfactory legislation in Canada). Granville was still pressing for a reply in September, and there was no response until a Privy Council despatch in November. The Canadian Government was prepared to concede that the strategy would remove the practical difficulties noted in Tilley's memorandum, and, deftly turning the British offer into a Canadian concession, suggested that it be done 'to avoid placing the Canadian Government in such a position as to appear responsible for any possible new failure in the attempt to secure an International Copyright Treaty with the United States'. It was also made clear that Canadian manufacture would be a condition for obtaining Canadian copyright.[85]

The government was willing to contemplate this bargain, and in January 1883 Granville instructed West to press for a reply to the November 1881 proposal, on the basis that Canada would be included in the negotiation. However, the Department of State's formal reply was disheartening: the draft was accepted as a basis for negotiation, but (unspecified) changes would be needed. In the same month, it emerged that the Canadian position was in fact not nearly so aggressive as its Privy Council despatch had suggested. Daldy had been told that Canada did not ask or expect to be released from the 1842 Act, and that the Minister of Agriculture had been 'a little jealous of Sir L. Tilley's

[84] Tilley's Memorandum, 16 November 1881: *NA* FO 414/43 pp. 33–8. Board of Trade to Colonial Office, 13 December 1881: *NA* FO 414/43 pp. 45–6. Tilley's Report and subsequent Order in Council: *NA* FO 414/43 pp. 48–50.

[85] *NA* FO 414/43 pp. 63–8

interference'. It appeared that Canada would be satisfied with a modification of the publication rule to allow books first published in Canada to enjoy copyright throughout the Dominions as if first published in Britain – something which the British Government had already been willing to concede.[86]

The Berne Convention forces change but provokes Canadian resentment

The first modifications to colonial copyright law came almost a decade after the Royal Commission's Report, as a result of the Berne Convention. British law was inconsistent with a number of the Berne requirements, and had to be changed before the treaty could be signed. Many campaigners thought that this offered the Government the ideal opportunity to implement the Commissioners' recommendations by thoroughgoing consolidation and amendment of the whole copyright system. However, this was thought to be too large a task. The central aim of the 1886 International Copyright Act was merely to make the changes necessary in order that Britain could ratify the convention. Two outstanding colonial grievances were addressed in the 1886 Act though. The inequitable rule on publication was at last changed, so that publication in a colony now gave copyright throughout the empire. The other was that the requirement of deposit of colonial publications in the United Kingdom was abolished.

There was also the acutely sensitive issue of whether Britain should sign the Berne Convention on behalf of her colonies and possessions.[87] This matter had caused the government a great deal of anxiety. Eventually it had been agreed that all the colonies would be consulted, and that the clauses affecting colonies would not be proceeded with without their assent. All of the colonies, including Canada, did in fact give their assent, and Britain signed the Berne Convention on behalf of them also. Most colonies found that membership of the Berne Union was of value to them. Canada, however – because of her geographical position – was an exception. The Berne Convention prevented the reproduction in Canada not only of the works of British copyright holders, but also of copyright holders throughout the states of the Berne Union. The United States was not a member of the Union, and was entirely free to

[86] Daldy to Sir Robert Herbert, Colonial Office (Private), 9 January 1883: *NA* FO 414/43 p. 72. For more on the Canadian personnel see Parker, *Book Trade in Canada*, pp. 239–47.

[87] See above, pp. 69–71.

reproduce Union copyright works. US publishers were thus publishing in the same language as Canada, for a similar reading public. Given that the border between the two countries extended for thousands of miles, the United States could flood the North American continent with cheap reprints, with which the Canadian book trade could not possibly compete.[88] The reciprocal privilege given to Canadian authors, of copyright throughout the union, was of little compensation; there were too few authors there who could benefit from it. Resentment was fuelled by the perception in certain quarters that the efforts to bring Canada under the Berne Convention barely concealed the British publishers' desire to control the book trade in Canada.

Discontent with this state of affairs grew. Early in 1889 the Canadian Privy Council received a memorial on the subject from the Canadian Copyright Association. It was signed by 2,000 people, including 300 publishers, 300 booksellers, the printing unions and others. The petition suggested various amendments to the Canadian Copyright Act, including making Canadian copyright dependent on a stringent local manufacturing clause, and a compulsory licence scheme for all non-Canadian copyright works. It was delivered by a deputation which included the Montreal-and-Rouse's Point printer, John Lovell. During the discussion he repeated the story of his visit to England in 1872, and Longman's alleged rebuff was now remembered as the view of all publishers: 'The English publishers would not yield an inch. They said they would not allow any colonial to publish one of their books. Their ignorance of Canada was profound. They treated Canada as if it was part and parcel of the United States.'[89] The story had a different ending too: the resentment at the alleged assimilation of Canada to the United States is a new and significant addition. This desire for a unique Canadian identity, and for independence from the mother country, became a central theme in the Canadian copyright debate. Copyright became a talismanic issue, and was fought over as if victory against British control in this matter would bring victory in every wider struggle: for self-confidence, self-governance and self-determination.

[88] In 1891 there were just under 600 printing establishments in Canada, producing articles worth just over $10m: Parker, *Book Trade in Canada*, p. 305. The United States had significantly exceeded this figure for books alone by 1850. Canada's population was under 5 million. The United States' white population was approaching 63 million. Haines and Steckel (eds), *Population History* pp. 306 and 373.

[89] *Publishers' Circular*, 1 March 1889. Canadian publishers often accused American publishers of negotiating with British authors and publishers for rights to the whole of North America, although the charge does not seem to be strongly supported by the evidence.

Canada seeks to denounce the Berne Convention: the 1889 Copyright Act

In May 1889 a further Canadian Copyright Act was passed, following pretty closely the path suggested in the Memorial of the Canadian Copyright Association. It was introduced by Sir John Thompson, the Minister of Justice, and passed both Houses of Parliament without a division. It would have given Canadian copyright only to those domiciled in Canada or the British possessions and to the citizen of any country having an international copyright treaty with the United Kingdom. There were various conditions of publishing and registration, including a local manufacturing clause; the book was to be printed and published in Canada within one month after first publication elsewhere. This Act also contained a licensing clause on the original model, which gave a mere 10 per cent royalty, and did not require the consent of the copyright owner. The Canadian Government therefore gave notice that it wished to denounce the Berne Convention. Accompanying the request that the Act be approved was a long-supporting report by Thompson. He challenged the Imperial Government's interpretation of the British North America Act, arguing that the Parliament of Canada had essentially unlimited competency to legislate on copyright matters within Canada. The report urged that the 1889 Act be permitted to go into operation, but indicated that no proclamation would be expected until Canada was no longer bound by the Berne Convention.[90] Since it appeared to be in conflict with Imperial law, the Act was reserved by the Governor General for consideration in Westminster.

The Copyright Association was alerted to the situation almost immediately, and Daldy again visited Canada. Matters moved slowly, perhaps while the legal situation was fully explored. In December 1889, the Law Officers of the Crown recommended against approval, although Canada was not told this until March the following year. The Colonial Secretary, Knutsford, concluded that action to give notice of denunciation of the Berne Convention was unnecessary, since no proclamation could be issued. Knutsford wanted the matter left in abeyance until the outcome of the US international copyright bill (which sought to grant copyright to foreign authors, subject to a manufacturing clause) was known.[91] Thompson came to London, and saw the Colonial Secretary twice. Knutsford relied on his advice that the 1889 Act would

[90] C 7783 (1895), pp. 3–9. Thompson supports his position by reference to a number of Privy Council decisions.

[91] C 7783 (1895), pp. 9–13. It was very far from clear at this time that the US international copyright bill would pass. See below, pp. 237–8.

probably violate the 1865 Colonial Laws Validity Act, which rendered invalid any colonial legislation which conflicted with an Imperial statute.[92] Thompson pointed out that many federal and provincial acts had already been approved which did precisely this, and that this line of argument would imply a serious challenge to a vast range of Canadian legislation. Thompson proposed to contest the Colonial Laws Validity Act, or to seek its repeal. After these interviews Thompson wrote a further letter of protest:

> I am charged by the Canadian Government to express to your Lordship, in the strongest terms which can be used with respect, the dissatisfaction of the Canadian Government and Parliament with the present state of the law of copyright as applicable to Canada, and to request most earnestly from Her Majesty's Government, that they will apply a remedy, either by giving approval to a proclamation to bring the Canadian Act of 1889 in force, or by promoting legislation in the Parliament of Great Britain to remove any doubt which may exist as to the power of the Parliament of Canada to deal with this question fully and effectually.[93]

Thompson asked the Colonial Secretary for a final decision, observing that the action of the United States was no longer a reason for postponement since Congress had rejected the latest international copyright bill. In a confidential memorandum, Sir Henry Bergne described Thompson's missive as 'not a very fair, or a very generous statement'. Bergne also noted – correctly, as it happened – that the American bill might pass at another attempt.[94]

It was plainly impossible to do as the Canadian Government asked and approve the 1889 Act, but some response seemed necessary. The idea that Canada should withdraw from the Berne Convention was equally unappetizing, however. As Sir Henry Bergne put it:

> An International Union has only just been accomplished, with great difficulty, and on principles which commend themselves to the civilized world. To this, Great Britain and all her Colonies are parties, with the express and unanimous consent of the latter. Is a British colony, like Canada, for the sake of their infinitesimal interest in the publishing business, or for the supposed benefit of

[92] *NA* FO 881/6416 pp. 21–2. C 7783 (1895), p. 52.

[93] C 7783 (1895), pp. 14–27. For an account of the interviews from Thompson's point of view see R. A. Shields, 'Imperial Policy and the Canadian Copyright Act of 1889' (1980–81) 60 *Dalhousie Review* 634–58.

[94] *NA* FO 881/5989. The defeat of the latest bill in the House of Representatives (in May 1890) had been widely reported. Ironically (given Thompson's point here), it was to be this bill (reintroduced in the same month) which was to become the 1891 Copyright Act. Although this Act eased the Anglo-American tension, it in many ways exacerbated the Canadian frustrations. See below, pp. 130 and 240.

Canadian readers, to be the first to withdraw, and so to raise a hand to destroy the Union, which comprises a population of four or five hundred millions?[95]

A possible refuge was seen in the idea of a licensing scheme, on the model suggested by the Royal Commission, which did not permit licensing until a reasonable time had been allowed to the copyright owner to supply the relevant market. But there was disagreement over this.

The Colonial Secretary (as Sir Henry Holland) had been a member of the Royal Commission, and was prepared to stand by the Commission recommendations on licensing. But Daldy, who had also been a Commissioner, did not support this. Daldy had previously distinguished the Commission's proposal of 'Royalty editions', emphasising that these had only been contemplated when the Canadian market was not adequately supplied with cheap editions. He had also argued that the Commission never intended that the law should be changed to confer a doubtful benefit on the Canadian printing trade at the expense of authors' interests. The Copyright Association agreed strongly. The Society of Authors appeared far more willing to accept the Canadian licensing plan, although it was anxious that there should be satisfactory arrangements in place for the collection of royalties. An article in the Society's journal conveyed a sense that licensing was inevitable given America's intransigence: 'It is hard on the English author to lose his problematical rights in the colony, but the blow is tempered by the remembrance that America has taken due care that he should lose his real rights.'[96] Once again there was a split between authors and entrepreneurs.

America concedes the principle of international copyright

The Society of Authors was right to recognise the enormous shadow which the United States' position on copyright threw over Canada, although compulsory licensing was not the inevitable solution. Thompson continued to press for action. The British Government continued to delay, hoping that the Anglo-American copyright situation would reach a satisfactory conclusion. In March 1891 the American Copyright Act was passed, giving American copyright to foreigners on condition that their works were manufactured in America. This seemed to be a huge step forward. There was a further condition, however, that the Act would only apply to foreign states which offered US citizens

[95] *NA* FO 881/5989 [96] C 7783 (1895), pp. 9 and 30–2.

copyright on substantially the same basis as its own citizens. There had been a certain amount of doubt in Britain as to whether legislative action would be needed to confirm this, but in the event the United States accepted the Prime Minister's word on the matter. Salisbury gave the American ambassador a written assurance that a foreigner could obtain copyright under English law by first publication anywhere in any part of the Dominions. Following a Presidential Proclamation, the Act came into force in July 1891.[97]

Canada did not share in the general rejoicing. Her response to the American Act seriously undermined the British position, endangering the Act's potential advantages to British interests. In October the Canadian Parliament sent an address to the Queen, asking for Imperial legislation to confirm the Canadian Parliament's power to legislate on Canadian copyright, and asking for notice to be given of Canada's withdrawal from the Berne Convention. The address particularly noted the Royal Commission's endorsement of the principle of a licensing scheme.[98] The Canadian Government had thus far refused to allow US citizens to register for Canadian copyright, on the grounds that the 1891 Act and the Presidential Proclamation did not constitute an international copyright treaty. The American Government wrote to the British Ambassador in Washington, seeking an explanation:

> The declaration of Lord Salisbury, and its acceptance by the United States Government constituted an international arrangement which this Government desires to observe and maintain in its entirety, and I should much regret if any untoward circumstance should constrain its abandonment or essential qualification.[99]

This was profoundly embarrassing, both for the British Government and the Prime Minister, personally. Anglo-American copyright was substantively important also, and the Government was extremely unwilling to see the new agreement jeopardised by unilateral Canadian action. The American complaints were referred to the Canadian Government, with a request for a report.

The stakes were so high that appeasement was considered. By the end of 1891 the Colonial Office seemed disposed to concede a licensing scheme, and sought Foreign Office and Board of Trade views on the

[97] See below, pp. 246–7.

[98] C 7783 (1895), pp. 38–40. The Canadian claim, that the Royal Commission's recommendations and the 1889 Canadian Act embody 'principles precisely the same', is overstated: the two schemes would have been very different in both aims and effect (as Daldy had noted).

[99] C 7783 (1895), p. 53. See also *NA* FO 881/6580 pp. 1–6.

plan. A high-level Departmental Committee concluded that Canada's withdrawal from the Berne Convention would be a potentially serious blow to the policy of Imperial and international copyright embodied in the 1886 Act. Nevertheless it was thought that if Canada continued to press for this retrograde and isolating step, her request could not be refused, particularly since Britain had insisted on a procès-verbal reserving this power. As Bergne conceded, 'they are justified in asking to withdraw, however vexatious it may be that they should disturb the unanimous accession of the Empire, after only three or four years have elapsed since they accepted the Convention and adhered to its terms'.[100] The problem of Canada's refusal to register US citizens for Canadian copyright was judged to be more apparent than real, since (as the Law Officers of the Crown confirmed) the 1886 Act gave Imperial copyright to books published anywhere in the Dominions.[101] The committee did fear even the charge of inconsistency on this point, though. It was thought extremely unlikely that an Act seeking to confirm the 1889 Canadian Act would pass both Houses of Parliament.

It was clear to the committee that the demands for change came not from Canadian readers or authors, but from Canadian publishers wanting to exclude competition from across the US border. Canadian publishers admittedly did have a grievance, however, in that they were undersold by American competitors who had the benefits of a larger market, greater capital and a system of protective legislation. The committee sought a legislative concession which might address their difficulties, without undermining either the 1886 policy or the arrangement with the United States. The Royal Commission's licensing scheme seemed the least objectionable option, with a twelve-month period allowed for the copyright proprietor to produce a cheap reprint, and a 15 per cent royalty. It was also suggested that the Orders under the Foreign Reprints Act should be revoked, unless better provision for collecting duty was put in place. The Committee was well aware that the proposal was open to objections from copyright holders, and inconsistent with the views of many of the Berne signatories.[102]

The Board of Trade shared these doubts, and thought that Canada should be given a further opportunity to consider her position. The Committee's Report was therefore sent for the consideration of the

[100] Memorandum, 31 December 1891: *NA* FO 83/1297 pp. 400–2.
[101] Opinion, 9 September 1892: *NA* FO 83/1298 p. 233. See also Rolt's opinion, 22 November 1892: *NA* FO 83/1298 pp. 226–30.
[102] C 7783 (1895), pp. 43–56. Although technically such a scheme would not have put Britain in breach of the Convention, which at this time required only reciprocal protection. This was scarcely the point, though.

Canadian Parliament.[103] The response was that nothing in the Report changed the Canadian Parliament's mind regarding withdrawal from the Berne Convention, and it therefore pressed its request that notice be given.[104] A further report on the proposed Imperial legislation was promised. It was written and sent in February 1894, by Sir John Thompson, as previous ones had been. Thompson was now Prime Minister as well as Minister of Justice. Its conclusions were essentially as before. Thompson's anger and hostility was unabated, and his position on the constitutional question was as strong as ever: he 'does not deem this a proper place to discuss the details of the Canadian Act; as he does not deem it the proper place to discuss the legal rights of the Canadian Parliament to pass that Act'.[105]

Canadian autonomy and copyright: a matter of constitutional significance

Canada continued to apply pressure, introducing a tariff bill. This gave notice that the $12\frac{1}{2}$ per cent duty on imported foreign reprints of British copyright books would no longer be collected after 27 March 1895, 'in view of the changes which are expected in the Imperial copyright laws so far as they apply to Canada'. This caused consternation in Britain. The Foreign Office pressed the Colonial Office to prevent Canada passing a legislative provision 'which would have the effect of prejudicing the decision of the general question or of forcing the action of the Imperial authorities in regard to it'. The Colonial Office was not prepared to advise that the Tariff Act be disallowed, although it acknowledged that the Dominion Government could not complain if

[103] C 7783 (1895), p. 60.

[104] Privy Council Minute, 22 June 1892: *NA* FO 83/1298 pp. 141–4. Although Canada had seen the Berne Convention and had authorised the British Government to sign it on her behalf, there was continued feeling in Canada that she had not been present at the negotiations or ever properly consulted. See for example the letter from the Canadian MP J. D. Edgar (*Times*, 26 December 1894) and response from Daldy (*Times*, 10 January 1895). But see also Sir Henry Bergne's account: 'It cannot be said that Canada joined without sufficient consideration. She was represented by Sir C. Tupper on the Departmental Committee, when the question was discussed. The matter was most fully explained in Mr Bryce's letter of the 8th April, 1886, and the accompanying Memoranda, after the reception of which, the consent of Canada was expressed.' Confidential Foreign Office memorandum, 14 August 1890: *NA* FO 881/5989. Tupper's summary of the bill was sent by telegram from London to the Canadian Minister of Agriculture (19 March 1886), asking for concurrence. The Governor General telegraphed the Canadian Government's acceptance later in the month, and a despatch from the Privy Council followed: *NA* FO 881/5526, pp. 128–30.

[105] C 7783 (1895), pp. 64 and 77.

the Order in Council issued under the Foreign Reprints Act was revoked when collection of the duty ceased.[106] The matter was referred to the Departmental Committee which had met previously. Both the Copyright Association and the Society of Authors were asked for comments. Events were followed closely in the press, and there were a number of Parliamentary questions. Lobbying groups were more active and varied than ever. The London Chamber of Commerce called a meeting of all those with copyright interests, and appointed a committee to hold a watching brief. A number of powerful interest groups were represented at a meeting of a 'Special Committee on Canadian Copyright' in June.[107] The Committee agreed to draft a report for Colonial Office.

In July 1894 a Colonial Conference was being held at Ottawa. When it opened, reports reached London that discussions would include international and colonial copyright. Daldy was hurriedly dispatched as the Copyright Association's representative, armed with letters of introduction provided by the Colonial Office at the Foreign Office's request. In the event, Thompson's latest memorandum on copyright had been distributed to members of the Conference, but no discussion took place. Daldy arrived too late to attend, nor (following a rather cool exchange of letters) did he see Thompson. News of the dispute also alarmed the American government. The US Chargé D'Affaires in London was instructed to ask whether Canada was likely to succeed in her attempts to repeal the Imperial copyright acts. It was made crystal clear that 'the sanction of the unrestricted freedom of the literary reproduction in the Dominion' would imperil the agreement between Britain and the United States. The British Government could only reply that the matter was under consideration and that it was impossible to make any statement.[108]

On his return home Daldy reported that most of the agitation had come from a small ring of printers. The issue of Canada's competence to legislate on copyright within the Dominion was kept prominently before the British public as a result of an exchange of letters in the *Times* between Richard Lancefield (Honorary Secretary of the Canadian Copyright Association) and Daldy. John Ross Robertson, the president of the Canadian Copyright Association, had been sent to Britain by Thompson to see if he could use unofficial means to persuade the

[106] C 7783 (1895), pp. 78–88.

[107] The committee met at John Murray's offices in Albemarle Street: *Author*, August 1894.

[108] C 7783 (1895), pp. 89–92. Daldy rebuked Thompson for giving his memorandum to the conference without waiting for an answer. Thompson replied that he thought that subject was 'quite past the stage of negotiation'.

British Government to act. However, Robertson reported that the interest groups, and Daldy in particular, were so powerful that the government 'would never recede from its present position'.[109] The Special Committee on Canadian Copyright produced its report for the Colonial Office, drawn from Daldy's written observations on Thompson's report. The covering letter made a strong appeal to principle:

> [the Committee] desire to impress on your Lordship the urgent need and absolute necessity there is for maintaining an author's control over his own works ... and a departure from this course would sap the very foundations of copyright, and would be so retrograde that it would, in their opinion, be unworthy of a highly civilised community such as the British Empire, and shake the confidence of other countries in England's fidelity to her engagements.[110]

Rhetoric aside, it should be remembered that Daldy had drafted the original 'Canadian proposals' in 1869, without ever using the word 'author'. A deputation from the Special Committee visited the Colonial Secretary, Lord Ripon, to put their arguments in person. Lord Ripon explained that he intended to have full discussions with Thompson, who was in London.

Sir John Thompson's death: impact on the campaign

The *Times* expressed the hope that Sir John Thompson's visit would allow some progress towards settlement of 'the much-vexed question of Canadian copyright'. However, just one day after this article was published, Thompson died suddenly at Windsor after having been sworn in as Privy Councillor. He had been one of the most passionate advocates of Canadian autonomy in all matters, including copyright. Existing momentum carried the campaign forward for a time, though. The December number of the *Canadian Bookseller* was almost entirely devoted to the question. In February 1895 a report was telegraphed from Ottawa concerning a large deputation of publishers, papermakers, type-founders and employers of printing labour, which had been received by Sir Mackenzie Bowell (the new Premier) and Sir C. H. Tupper (the Minister of Justice). It had pressed for an early proclamation of the 1889 Canadian Act, justified both as in the interest of native industry and as a vindication of the rights of the Canadian Parliament. Sir Mackenzie Bowell was reported as saying that policy was

[109] *Times*, 11 and 18 October, 9 and 21 November 1894, reprinted in the *Author*, November 1894. Shields, 'Imperial Policy', 652.
[110] C 7783 (1895), pp. 93–101.

unchanged, and that the matter would be pushed with the full energy of the Government.[111]

These reports prompted a Parliamentary question as to whether or not the Crown would be advised to assent to the Canadian Act. The reply was that Thompson had been in communication with the Colonial Secretary on the subject of Canadian copyright, but his death meant that no statement could be made. The following month the Colonial Secretary wrote to the Canadian Governor General, expressing the government's deep regret that the personal discussion which they had hoped might result in a solution had not taken place. Referring to the already extensive correspondence, he observed that this had failed to achieve 'even an approximation of view' between the British Government and the Canadian Parliament. His suggestion was that a Canadian Minister be sent for a personal conference: 'The interests in this country affected by the measure are extensive and powerful, and the persons concerned have become seriously alarmed, whilst those in Canada whose interests are at stake may naturally be becoming impatient at the delay which has taken place.'[112] The Canadian Deputy Minister of Justice, E. L. Newcombe, was subsequently authorised to travel to London to discuss the copyright question with the British Government.

In the mean time the Colonial Office was subject to a good deal of lobbying. Several British interest groups published leaflets on Canadian copyright.[113] A resolution condemning the Canadian Act was unanimously carried at a meeting of the Society of Authors. It was proposed by Hall Caine, the best-selling romancer whose name was to feature prominently in the negotiations which were to follow. Proposing the resolution, Caine suggested that 'all authors should bind together to oppose the passing of the Act'. A petition to the Colonial Secretary was organised, and announced in a letter to the *Times*. The petition, 'praying her Majesty to withhold her assent from the Canadian Copyright Bill in its present form' was signed by some 1,500 people. It was sent to Lord Ripon at the Colonial Office, and then forwarded to the Dominion

[111] *Times*, 8 February 1895. Sir Charles Hibbert Tupper (1855–1927) was the son of the former Canadian Premier, Sir Charles Tupper (1821–1915), who had represented Canada at the Departmental conferences to discuss the implementation of the Berne Convention in 1886. See above, p. 70.

[112] Lord Ripon to Lord Aberdeen, 15 March 1895: C 7783 (1895), pp. 107–8.

[113] The Society of Authors issued a short 'flyleaf' which they circulated amongst authors, and a longer 'memorial': C 7783 (1895), p. 104 and pp. 116–18. The Copyright Association's circular detailed arguments against sanctioning the Canadian Copyright Act. The London Chamber of Commerce issued a leaflet, also.

Government.[114] There was some counter-balancing Canadian material, though it came largely from one source. The Canadian Copyright Association issued a detailed circular giving 'the Canadian point of view', repeating the arguments put to the Canadian Premier by the deputation earlier in the year.[115] The British press was on the lookout for internal Canadian dissent, and published whatever there was. The point generally made was that all the protests were from manufacturing interests, not from Canadian authors or readers. For example, an article from the *Montreal Weekly Witness* concluded that 'the only people who would profit by [the Canadian Act] would be a few Canadian publishing and printing firms'. A letter to the *Toronto Mail and Express*, from the Canadian lawyer John G. Ridout, took a similar line: 'the crucial question is whether the authors, engravers, printers, sculptors, and photographers of the country are to be deprived of the vast benefits of the Berne convention at the bidding of a few clamorous publishers'.[116]

The Society of Authors continued to build its case. The Colonial Secretary had acknowledged its petition, observing somewhat testily that by characterising aspects of the licensing provisions as 'unjust and impracticable', the Society had gone much further than in its previous letters: 'The former communications ... appeared to Her Majesty's Government to justify the conclusion that the Society of Authors did not entertain any insuperable objection to a system of licensed re-printing.' This was a fair point, since the Society's initial position had been one of resignation. The Secretary of the Society replied, somewhat defensively, that the previous communications had come from a previous chairman, Sir Frederick Pollock: 'it is only recently that the attention of British authors has been seriously directed to this question and that anything like a strong consensus of opinion has been formed about it'.[117]

One does sense a clear change in tone, and it is tempting to suggest Caine as the significant new influence. He had proposed the resolution which led to the Society of Authors' massive petitioning effort, and he

[114] Sir Thomas Henry Hall Caine (1853–1931). General Meeting of the Society of Authors, 25 February 1895: *Author*, March 1895. *Times*, 26 February 1895. C 7783 (1895), p. 108–9. The reports in the *Times*, 21 March 1895, and the *Author*, April 1895, list many prominent authors and the leading publishers as signatories; the lawyer T. E. Scrutton was another.

[115] C 7783 (1895), pp. 109–12.

[116] *Author*, February and May 1895. See also Ridout's letter describing the Canadian Copyright Association: 'this association comprises some twenty-six members, more than half of whom are inactive and indifferent; while there are 340 printing and publishing houses in the Dominion who do not care enough to pay 5 dollars to join the association'. *Toronto Globe*, 12 June 1895, reprinted in *Author*, July 1895.

[117] C 7783 (1895), p. 115. The former letters referred to were 3 November 1890 and 9 December 1892: see above, p. 118.

maintained a high profile in discussions on the subject. In a letter in the *Contemporary Review* he eloquently attacked the manufacturing clause as without principle, and objected to the 10 per cent royalty. Caine also raised a point about native literature which was to be used to powerful effect in the American debate, but which had scarcely been mentioned in relation to Canada:

> As long as she is literary pirate, or at best the dispenser of a copyright which is no copyright at all, but only a sham and a mockery, she will never develop a literature of her own. She may grant whatever copyright she likes to Canadians, but no Canadian literature will be able to exist side by side with a pirated literature.[118]

Caine's interventions changed the course of the debate. Later in the year he was to visit Canada, as had Daldy, as yet another ambassador for Britain. This ambassador would hold the views of British authors firmly in mind.

There were signs from Canada that action was imminent. News came that the Dominion Government had ceased collection of the $12\frac{1}{2}$ per cent royalty due under the 1847 Foreign Reprints Act, and notionally collected by Customs, although it was rumoured that collection would not cease until the current Parliament dissolved. It was then announced in the press that E. L. Newcombe, the Canadian Deputy Minister of Justice, was shortly to leave for England, to confer with the Imperial authorities on the copyright question. The Canadian House of Commons was reported by the *Times* Ottawa correspondent to be bullish: Edgar (one of the leading members of the opposition) said that he hoped that Newcombe would be instructed that any amendments to the 1889 Act must be made in Ottawa not London. The reported remarks of the Minister of Justice (Newcombe's superior) were no more conciliatory:

> Mr Newcombe would be instructed to point out that Canada desired a speedy settlement of this question and the recognition of her powers, and that both political parties were united in this matter. The question was one of principle. Canada would never rest until her views were acceded to.[119]

As soon as Newcombe's visit was a matter of public knowledge, both the Copyright Association and the London Chamber of Commerce wrote to the Colonial Office asking to be represented at any conference. The stiff reply was that as yet the department had no official intimation of Newcombe's appointment, and that any discussions which might be

[118] *Contemporary Review*, April 1895. [119] *Times*, 30 May and 17 June 1895.

held would be private.[120] The despatch with official news of Newcombe's appointment arrived on 19 June. However, a few days later Rosebery's Government collapsed, and the Colonial Office had to telegraph to postpone Newcombe's departure. Yet again the attempts to address the Canadian copyright problem had been thwarted. A Parliamentary return provided strong evidence that the matter urgently required resolution. The amounts received from Canada since 1877 as duties collected on foreign reprints of British copyright works totalled (less charges for collection expenses) £5,278 9s. This represented an average annual trade of about £2,400, for which it seemed scarcely rational to imperil international copyright.[121]

The Hall Caine initiative

Perhaps despairing of satisfactory Government action, the Society of Authors announced that Caine had been invited to act as the Society's representative in Canada, to put the facts of the case to Canadian statesmen and the Canadian people. There was some anxiety that the new Colonial Secretary, Joseph Chamberlain, might be disposed to assent to the Canadian Act.[122] Such action would have undermined the Anglo-American copyright agreement, and there was great reluctance to risk this – on both sides of the Atlantic. The American publishers were quick to perceive the potential threat to their market from unauthorised cheap Canadian reprints, and this was fully reported in Britain. Both the American Copyright Leagues (authors' and publishers') watched carefully as events unfolded.[123]

[120] C 7783 (1895), pp. 120–1.
[121] Parl. Deb., vol. 35, ser. 4, col. 32, 27 June 1895. For the figures see C 7781 (1895).
[122] *Publishers' Circular*, 14 September 1895.
[123] *Law Journal*, 28 September 1895; *Author*, September 1895, quoting an article from *Harper's Weekly*; *Critic*, August 1895; *Publishers' Circular*, 14 September 1895. The American publishing industry was already protected by the manufacturing requirement of the 1891 Copyright Act, to the detriment of the Canadian printing trades. Since America and Canada shared a long land border, contraband trade was inevitable, the direction of which would have changed to the disadvantage of the Americans had the Canadian reprinting plan been adopted. American publishers were also unhappy because of a Treasury department ruling that it would no longer intervene to stop unauthorised reprints unless more than two copies were imported, leaving the author to seek relief in the courts: *Author*, October 1895. See William Appleton to Robert Underwood Johnson, 30 August 1895: 'The recent Treasury decision is also giving a great deal of trouble here, and in the West, the country is more or less flooded with Canadian pirated editions of "BenHur" and the works of other American authors.' See also Appleton to Johnson, 6 and 11 September 1895. *Johnson Papers*.

Newcombe's visit to Britain took place in August. His instructions forbade him to meet anybody except the government, but it is clear that the Colonial Office kept the Copyright Association and the Society of Authors informed. Chamberlain explained the government's three main objections to the 1889 Canadian Act: its refusal of Canadian copyright to US citizens, its inconsistency with the Berne Convention and its inadequate protection for British authors. Newcombe indicated that the Canadian position was somewhat more flexible than it had previously been, and Chamberlain suggested a meeting with Sir Henry Jenkyns, an experienced Parliamentary counsel. Newcombe's draft report to the Canadian Minister of Justice, Tupper, was sent confidentially to Jenkyns for comment. The original plan of the 1889 Act had been to refuse Canadian copyright unless a work was reprinted and republished in Canada. Jenkyns suggested that Canadian legislation which authorised publication under licence in certain circumstances was not likely to be thought inconsistent with Berne obligations. Newcombe seems to have been given assurances that a Canadian Act along these lines would be approved. His recommendation to Tupper was that this pragmatic and diplomatic compromise should be explored: 'Some of the suggestions are doubtless debatable, but what is important, from the Canadian point of view, is that the principle of the 1889 Act, if not virtually conceded, has not been substantially denied.'[124] There was no official statement by any of the parties, but it was generally understood that the Colonial Office had suggested certain modifications to the 1889 Act, which Newcombe was taking back for the consideration of the Canadian Government.

Caine sailed for Canada in late September, and took with him a letter of introduction from Chamberlain.[125] The Canadian Minister of Justice, Tupper, continued to pressurise the Colonial Secretary to respect the unanimous will of the Canadian Parliament: 'We have a right to misgovern ourselves, if we choose, in the matter of copyright as we have in tariffs and everything else.'[126] The effect of such nationalism on British ears can readily be imagined, but Tupper's comments provoked a Canadian reaction also. In the course of his remarks he had said that the interests of Canadian authors and publishers were identical: this was flatly denied by several Canadians. The point was again made repeatedly

[124] *NA* FO 881/6793 pp. 49–57.

[125] Hall Caine wrote to thank Chamberlain for the letter of introduction to 'the Government of Canada', adding, 'I trust my visit to Ottawa may contribute some little toward the settlement of the long-vexed question of Canadian copyright': to Joseph Chamberlain, 6 September 1895 (autograph letter in the possession of the author).

[126] *Times*, 11 September 1895.

that the agitation was fomented by a few interested individuals, and that neither Canadian writers nor the wider public were consulted about it. The issues were vigorously discussed in the Canadian press throughout the summer and early autumn.[127]

Caine arrived in Canada in October, and his itinerary was assiduously reported in Britain. He began in Montreal, where he met leading members of the publishing trade. He then went to Ottawa, where he had long interviews with the Canadian Premier, Mackenzie Bowell, and Tupper. Initial reports were that he had presented the case of British authors in a moderate and diplomatic manner, which had been appreciated. It was thought very likely that new Canadian legislation would be introduced in the following session. There was tremendous international interest in the whole issue: the French, Belgian and US Governments all instructed their Canadian ministers to report on the probable effect of the Canadian legislation.[128] At the request of the Canadian Copyright Association, Caine then travelled to Toronto. From Toronto he travelled to New York, intending to return to Canada in mid- November. There was a good deal of correspondence in the *Times*, discussing the merits of the Canadian case. The general editorial view was moderate and conciliatory towards Canada – and hopeful of agreement. Another apparently positive sign was the news that Daldy was to go yet again to Canada, on behalf of the Copyright Association. Caine's stay in New York resulted in a convenient delay, which allowed Daldy time to arrive in Ottawa.

After further consultation with the Toronto publishers Caine returned to Ottawa, with an agreed draft bill to submit to the Canadian Government. A sub-committee of the Privy Council was appointed to meet Caine, Daldy, representatives of the Canadian publishing houses, the Canadian Copyright Association and the Canadian Press Association.[129] The draft bill did propose a licensing scheme, but not an unlimited or compulsory one. The copyright holder could secure absolute Canadian copyright by publishing in Canada within sixty days. After this time one single licence could be sought, but the copyright holder then had a further sixty days in which to publish himself to

[127] Letter from a 'Canadian Author': *Times*, 21 September 1895. Editorial from the *Overland Mail*: 'the point we put is that it is a question of equity and honesty, and not, as Sir Charles Tupper puts it, a question of the right of Canadians to misgovern themselves'. (reprinted *Author*, October 1895).

[128] *Times*, 18, 19, 20 October 1895. *Author*, November 1895.

[129] Tupper, speaking for the Canadian Government, made it clear that there was no commitment to introduce a bill, and that the meeting was simply to allow the participants to explain their ideas. *Conference on the Copyright Question: Appendix to the Report of the Minister of Agriculture 1895* (Ottawa, 1896).

prevent licensing. Licensed editions were to be stamped. All members of the delegation spoke in support of the measure as a fair compromise, although there was considerable discussion of the details of the bill. Caine also sought and received a form of endorsement from the American Authors' Copyright League, and the Publishers' Copyright League.[130]

The immediate feeling in Canada seems to have been one of brotherhood and satisfaction. Caine was entertained at farewell public banquets in both Ottawa and Toronto. He gave persuasive and charismatic speeches in support of the draft bill, although characterising it as a compromise demanded by the peculiar situation in which Canada was placed.[131] The reaction to the draft bill in Britain was one of relief, and was generally positive. This was perhaps not unexpected, considering that representatives of the most powerful interest groups had been consulted beforehand and were present at the negotiations, and the outline scheme had been approved by the British Government. The Colonial Secretary was reported to be gratified at the amiable adjustment of an awkward question, as he might well have been.[132]

The Hall Caine plan abandoned: towards the 1900 Fisher Act

Superficially satisfactory though it might have appeared, the Caine plan was never put into effect. Canadian retail booksellers were opposed to the settlement, and Canadian writers were unhappy that they had not been consulted. The draft bill was arguably inconsistent with Britain's obligations under the Berne Convention, as the French publishers pointed out vigorously. Then a ministerial crisis in Canada resulted in Tupper's resignation as Minister of Justice, and the replacement of the Minister of Agriculture (in whose department copyright lay). Although Newcombe did draft a new copyright bill, nothing ever came of it. Caine's message to the Society of Authors was nevertheless one of triumph:

> Meantime, after five years' fruitless agitation, I think we may congratulate ourselves on some results. We have secured the abandonment of the Act of

[130] *Times*, 23 and 26 November 1895. 'On our way home through New York Mr Daldy joined with me in asking the two Copyright Associations of America to say if the proposed measure removed the objections which they had urged so strongly against the Act of 1889. The answer was generous, prompt, and satisfactory. Through Mr Putnam, representing the Publishers' League, and Mr Underwood Johnson, representing the Authors' Association, we received resolutions of congratulations and general approval.' *Author*, February 1896.

[131] *Author*, November and December 1895. For the Ottawa speech see *Critic*, 30 November 1895.

[132] *Times*, 23 December 1895; *Author*, January 1896. Compare the very qualified welcome for the draft bill from the *Publishers' Circular*, 14 December 1895.

1889, we have shown Canada the way to protect herself and yet hold on to the Berne Convention, and enable us to retain the substantial advantages of American copyright, we have come to terms of peace and good will with the interested classes in the dominion, and above all we have held fast to the great principle that an author has an inalienable right to the property he creates in books.

This summary remained true to some extent, notwithstanding the failure to implement the Caine scheme. The next Canadian Copyright Act, the Fisher Act, was not passed until 1900. This short measure had no compulsory licensing clause, and only a very qualified manufacturing clause: it approached the issue from another direction, by providing incentives to licence publication in Canada. Although the 1900 Act came with far less constitutional baggage than the 1889 Act had done, there was continuing resentment at Canada's lack of freedom to legislate entirely for herself in copyright matters. Also, America's protectionist position on copyright continued to cause difficulties in Canada. In 1897 Canada refused to countenance a proposed Anglo-American treaty which would have forced her to allow US citizens to register for Canadian copyright – something which she continued to refuse to do, on the grounds that the Presidential Proclamation did not amount to an international copyright treaty for the purposes of the Canadian Copyright Act. Canada wanted reciprocal treatment before she would relent: 'Canada would be quite willing to amend its Copyright Act, and accord to American authors the privilege of copyright in Canada on publishing only, if a similar favour is conceded to Canadian authors who desire to obtain copyright in the United States.'[133] This was sufficient to halt discussions of a treaty. Canadian resentment at the American position continued to burn unabated, and this problem was later to be present again in acute form after the Berlin revision of the Berne Convention in 1908.

The more general copyright question resurfaced in Canada early in 1898. The Canadian Copyright Association pointed out that a draft bill had been prepared as the result of several conferences between the Association and Hall Caine, and called for a united effort to urge the Government to settle the question on this basis.[134] The Society of Authors heard of this activity, and drew up a statement of their views of the appropriate course which copyright legislation should take – which

[133] Report of the Privy Council of Canada, August 1897: *NA* FO 881/7111 pp. 38–9. See below, p. 249.
[134] Full report (reprinted from *Toronto World*): *Author*, May 1898.

was certainly not on the lines of Hall Caine's licensing scheme. Their twin priorities now were: first, that the author's freedom of contract should be limited as little as possible by publishing requirements or other trade restraints; and second, that the Canadian publisher should be able to enjoy an exclusive right to publish in Canada, without competition from British imprints.[135] It was agreed that the Society's Secretary, G. H. Thring, would be sent to Canada as a delegate for the Society's views. But legislation was postponed in Canada.

Some concern was caused in Canada by the unproductive attempts to reform Imperial copyright law during this period. Lord Monkswell and Lord Herschell made several unsuccessful attempts to get private bills with various ambitions through Parliament. The British Government was lukewarm about these efforts, and the possible effects on the colonies were one important concern. The president of the Canadian Society of Authors, James Mavor, had given evidence in June to the Select Committee considering Lord Monkswell's 1899 bill, offering what was sometimes called the 'Canadian Compromise'.[136] He proposed a clause be added to the bill to address the problems faced by a Canadian publisher who had purchased the right to publish in Canada, but had to compete with imported British editions, and other colonial editions. British editions could enter Canada not only directly from Britain, but also indirectly from other colonies, via wholesalers. Mavor's clause would have allowed local legislatures to pass an act preventing import (into that particular colony) of British and other colonial editions where the British copyright owner had agreed a Canadian licence for 'reproduction' of the work. There would have been no requirement for reprinting (although it would have been normal practice to send stereotyped plates), and Mavor's view was that if the British publishers agreed this concession then the Canadian publishers should give up their agitation for a manufacturing clause or for compulsory licensing. However, British publishers were unwilling to concede the local printing that Mavor envisaged. The Select Committee found the issues and evidence so complicated that its investigations were left incomplete.[137]

[135] In June 1898 the Minister of Agriculture, Fisher, announced that the Government would legislate on the question in the next session. At this stage the legislation was still being referred to as the Hall Caine agreement: *Times*, 2 June 1898.

[136] See *Publishers' Circular*, 8 April 1899; *Times*, 15 March 1899.

[137] *Minutes of Evidence (1899)*, p. 362. Mavor's evidence at pp. 79–86 and 114–19. Murray's evidence at pp. 145–8 and 177–8. The Canadian Society of Authors had been established only a few months previously, and had merely 60 members. The select committee doubted whether the Society was representative, even of Canadian authors.

Thring travelled to Canada in the autumn of 1899. There he met the Canadian Premier, Wilfred Laurier, and other members of the Canadian Government. He saw a number of Canadian editors and correspondents to explain the Society of Authors' position, emphasising its concern for authors generally, and also for the Canadian printing and publishing trades. Thring made contact with the Canadian Authors' Society, although he did not consider that they had much influence with the Canadian Government. He put a good deal of effort into strengthening these relationships, particularly with Mavor and Ross. Thring himself was not against the Canadian clause in terms of its content, but he thought it unlikely that the British Government would be prepared to bring in any copyright legislation which would stir up the constitutional question. His next thought was that the Dominion Government might introduce legislation drafted along the lines envisaged by Mavor's clause, which would show the British Government that it had nothing to fear from bringing in such a bill. But it became clear to Thring that the Canadian Government was reluctant to bring in any such scheme.

Thring also spoke to several Canadian ministers, including Newcombe (Deputy Minister of Justice), Mills (Minister of Justice) and Fisher (Minister of Agriculture). Mills and Fisher agreed that Caine's licensing proposals were no longer relevant, but thought it would be impossible for them to legislate on copyright in Canada without raising constitutional questions of principle.[138] Thring warned Laurier that there would be no possibility of legislation in the UK Parliament if constitutional issues were raised, and that Canadian trade would thus remain hampered. In a key meeting, Mills pressed very hard for American (but not British) authors to be subject to a manufacturing clause. Thring argued that this would destroy the 1891 American arrangements without benefiting Canadian interests, and Laurier insisted that the suggestion be dropped. The Secretary of State, Scott, suggested bringing in the necessary legislation by attaching it to the Customs Act – forbidding all importation of British imprints once the exclusive rights of publishing the copyright had been secured in Canada by contract. Laurier welcomed this idea, advocating it so warmly that Mills and Fisher felt bound to assent. However, this was not, in the end, the solution which was adopted. The pressures to discuss the constitutional aspects of Canadian copyright were simply too strong.[139]

[138] Mills based the right not on the reading of the British North America Act 1867, but on a common law right of the colony, based on the English common law.

[139] Thring sent a confidential report of his Canadian visit to Lord Salisbury, 21 December 1899: *NA* FO 881/7771 pp. 32–9. A brief account appeared in the *Times*, 31 August 1900.

Lord Monkswell's 1900 Copyright Bill (eventually withdrawn) was again referred to a House of Lords Select Committee. Evidence was again taken from Mavor, and from the Canadian publisher George Morang. Both discussed the new 1900 Canadian Copyright Bill. Mavor was keen to make it clear that the bill only applied where the author had sought Canadian copyright, and did not affect Imperial copyright at all. It did not grant a compulsory licence, and the manufacturing clause was very qualified: Canadian copyright could be obtained if the type was set in Canada, or if the book was printed from stereotypes sent from England, but not if the sheets were sent over. The main purpose of the new bill was to encourage the holder of Imperial copyright to licence its publication in Canada: if this was done, then any other reprints of it could be excluded. Morang gave evidence to the effect that all the Canadian publishers approved of the bill, and that Canadian authors were also keen to settle along these lines. The proposed Canadian bill would have dovetailed with a proposed amendment to the Imperial provisions (to restrict imports into Canada where a licence had been granted). The publisher, John Murray, sounded the only discordant note, complaining that the principle of the Canadian bill was as unacceptable to copyright owners as the American proposals for international copyright.

In the same month that this evidence was taken, a special committee of the Canadian House of Commons was considering the Canadian measure. The constitutional resentment had not disappeared. Canadian critics of the bill argued that the passage of such legislation by the Canadian Parliament would indicate retreat from the position taken by Thompson in 1889, and would be an acknowledgment that Canada could only legislate on copyright by virtue of Imperial legislation. The Committee agreed that nothing should be done by the Dominion Parliament to impair its claim to exclusive jurisdiction on copyright, however: 'while the constitutional question is under discussion, this Parliament desires to secure to Canadian publishers the advantages to be derived from the passage of Lord Monkswell's Bill'.[140] The bill was reported without amendment. Often called the Fisher Act, it passed in July 1900.

The new Canadian measure was welcomed in Britain, although knowledgeable commentators were careful to express enthusiasm for the passage of Lord Monkswell's Bill, which (had it passed) would have provided an Imperial framework for this sort of colonial legislation.[141]

[140] *Times*, 9 June and 5 July 1900.

[141] Copyright Bill (HL) 1900 ss.33–36. For reaction to the Canadian Act see *Author*, October and November 1900; *Publishers' Circular*, 7 July 1900; *Times*, 31 August 1900.

Although the Act offered improved conditions for Canadian publishers, it could not address their major difficulty; that while the United States continued to insist on a manufacturing clause, there was no prospect of her joining the Berne Convention. The 1896 Paris Act of the Berne Union had given convention benefits to authors from non-Union countries first publishing in a Union country, hoping to encourage these countries to join the Union. Often Union authors were not adequately protected in these non-Union countries, but this was not normally a significant concern. Canada, however, had good reason to be extremely concerned. First publication in Canada offered American authors an easy gateway to Berne protection. Yet Canadian authors and publishers faced highly restrictive American laws as to the protection of foreign authors, with even the 1909 United States Copyright Act maintaining a manufacturing clause. With the passage of the 1900 Fisher Act Canada's dissatisfaction with her copyright system was somewhat quieted, but not quelled.

The turbulence continues: Imperial Book Co. v. Black

The following year the Canadian Minister of Justice, Mills, met several members of the Cabinet in London to discuss the copyright question, again insisting that Canada should be permitted to legislate for herself. The Colonial Secretary, Chamberlain, emphasised the importance of existing agreements between the United Kingdom and other foreign powers. He also pointed out the serious consequences for Canadian authors if Canada were to leave Berne, particularly given the likely difficulty for Canada in negotiating a separate treaty arrangement with the United States. Mills unhesitatingly replied that legislative independence ranked higher than the profits of Canadian authors. This unyielding stance made it virtually impossible for the British Government to contemplate any change in domestic law, since any concession likely to satisfy the Canadian Government would almost certainly have unravelled the agreement with the United States.

Canadian publishers continued their defiance also. Later in the year Adam and Charles Black brought an action against the Imperial Book Co. of Toronto, claiming that it was infringing their copyright by importing American reprints of the Encyclopaedia Britannica into Canada. Imperial alleged various technical defects in the registration of Black's Imperial copyright, claiming that notice to the Commissioners of Customs in Canada had not been given correctly. But, more importantly, Imperial also raised the constitutional argument. Their contention was that since the passing of British North America Act 1867, the Canadian Parliament had had authority to legislate for

Canada in regard to copyright and to override the Imperial Acts prior to 1867. Since the respondents had not complied with the requirement of the Canadian Statutes, accordingly, they could not be entitled to relief. The action was tried in September 1902. Mr Justice Street agreed that the notice given was defective and dismissed the action. But Black obtained leave to re-argue, and in January 1903 Street delivered a second judgment, restraining Imperial from importing and selling the Encyclopaedia, directing delivery up of unsold copies, and an account of profits. Imperial's appeal to the Court of Appeal for Ontario was dismissed by a majority. A further appeal to the Supreme Court of Canada was unanimously dismissed in January 1905, and leave to appeal to the Privy Council was refused. However, all of these judgments concerned the narrow technical point concerning registration. In the Supreme Court Mr Justice Sedgwick emphasised this carefully:

> We are unanimously of the opinion that the conclusion at which the majority of the Court of Appeal arrived at is the correct one and that the appeal should be dismissed with costs. In so deciding, however, we wish to state that we express no opinion one way or the other upon the question as to whether 'Smiles v. Belford' was rightly decided.[142]

Thus the constitutional position of Canada with regard to copyright was raised but not settled in the Canadian courts – a situation which made the British Government extremely uneasy.

Implications of the Berlin revision of the Berne Convention

These instabilities must have been starkly apparent as Britain contemplated the prospect of the proposed Berlin meeting to consider revision of the Berne Convention. The problem was now wider than just Canada. In January 1907 the Colonial Secretary, Lord Elgin, sent a new set of proposed clauses to the self-governing colonies, in substitution for those in the 1900 bill. The Attorney General of Natal advised that one of the draft clauses sought to override the Parliament's right to legislate under the terms of the Colony's charter, and that the matter needed to be fully discussed from a constitutional point of view. Natal's Prime Minister informed Elgin that he was not prepared to offer views on the clauses unless the offending proviso was withdrawn. Although there were more positive responses from New Zealand, Newfoundland and Cape Colony, Australia also raised serious objections. Neither the Board

[142] *Times Law Reports*, 24 May 1905.

of Trade nor the Colonial Office were in any mood for a controversy which would undermine existing international arrangements, so they proposed abandoning legislation for the present.[143]

By the end of 1907, however, the British Government had agreed to send delegates to the Berlin conference in 1908. Although they were to be instructed as they had been for the 1896 Paris conference, and Britain was making no public commitments to any changes, changes were certainly needed. Since it seemed impossible to get the colonies to assent to any proposals, the Board of Trade proposed a subsidiary Colonial Conference. The idea was to induce the Dominions to undertake concurrent legislation on a limited number of topics, but to postpone any attempt to deal comprehensively with colonial copyright itself. The Board wrote soothingly to the Colonial Office:

> The chief amendments which are needed relate to the extension of the term of protection, and the scope of copyright in general, and it appears to the Board that there should be no difficulty in obtaining the assent of the Colonies to the principles involved, without raising the question of their constitutional rights in the matter.[144]

Lord Elgin insisted on seeing a memorandum of the exact proposals to be laid before such a conference, and warned that it would be impossible to avoid raising the constitutional question. The Board of Trade pressed its request, however, and Colonial Office sent a circular to the colonies in September, explaining that the proposed comprehensive legislation had been abandoned for the present, and that only certain specific amendments would be proceeded with.

The Berlin conference began in October. Although Britain was in principle supportive of the proposed amendments, her delegation made a cautious declaration at the conference's opening:

> there exist for Great Britain very serious difficulties in connection with the subject of copyright, especially as regards harmonizing the interests of the mother country with those of the great self-Governing Colonies. Unless it should be found possible to remove these difficulties, His Majesty's Government would not probably find themselves in a position to propose to Parliament the legislation which would be necessary in order to give effect to any considerable alterations in the Convention of Berne.[145]

The conference agreed significant changes to the Convention, including the abolition of formalities, and the principle of a life plus fifty-year term. The British delegation was on the whole content with what had

[143] *NA* BT 209/690. [144] *NA* FO 881/9502 p. 14. [145] Cd 4467 (1909), p. 3.

been accomplished.[146] In March 1909 a Departmental Committee was appointed by Board of Trade to advise the Government as to the necessary legislation required to give effect to the Convention, chaired by Lord Gorell. This reported in December 1909, very much in favour of ratification of the Berlin Act. However, it was fully recognised that the views of the rest of the Empire had to be ascertained, and an Imperial Copyright Conference was called for May 1910.

The government was extremely apprehensive in the months leading up to the Imperial Conference, particularly as to Canada's position. One positive sign was a communication from the Australian Government, expressing its desire to be included in the Union, and saying that they did not foresee any difficulty in securing the necessary amendments to their local copyright law. Also enclosed was a memorandum from Australia's Attorney General, observing that the Berlin revision had given new importance to the revision of UK copyright law:

> Owing to the want of unanimity in the views expressed by the various British possessions, there appears to be a danger that Imperial copyright, as it now exists, may be sacrificed, or at least seriously impaired in efficiency, with the result that the Imperial Government will not be able to adhere to the Copyright Union for the Empire as a whole, and international copyright would be seriously affected. It would not only be a blow to the Imperial idea, but also the loss of a national asset of great value, if, through sectional difference of comparatively small importance, this were to occur.

The constitutional question was addressed squarely but moderately. The Attorney General noted Canada's claim that a Dominion's power to legislate on copyright was absolute, although this had never been conceded by the Law Officers of the Crown, and he observed that such a claim had never been made on behalf of the Commonwealth. He regarded this as a question of law, for determination elsewhere. However, he made the point that the Dominions were naturally jealous of their rights of self-government, and that the Imperial Parliament *ought* not to legislate so as to bind the self-governing Dominions without their concurrence, except in matters of grave Imperial concern.[147]

The Attorney General then outlined his suggestion. He proposed that an Act dealing with all the essentials of Imperial copyright law should be passed by the Imperial Parliament after consultation with the Dominions. The Act should be expressed to extend to all the British possessions, however, every self-governing Dominion should have power to legislate to declare that the Imperial Act should not extend to it. Thus a colony would be free to opt out and pass any laws it pleased. But this

[146] See above, p. 75. [147] *NA* FO 881/9941

would give it a purely local copyright, and the benefit of Imperial and international copyright would be lost if it did so. He thought it almost inconceivable that a colony would do this, but if it did the position would be clear and unequivocal, with no qualifications or reservations permitted. It was this proposal which provided the impetus for the breakthrough so desperately needed. The British Government remained apprehensive.

The Imperial Copyright Conference

The Conference began on 18 May 1910, at the Foreign Office. The chairman was Sir Sydney Buxton, President of the Board of Trade.[148] He stated the British Government's view that it was of the highest importance to obtain uniformity of legislation throughout the British Empire, and to attain as great a degree of uniformity as reasonably practicable among the nations of the world with regard to international copyright. The Government considered it desirable to ratify the Berlin Convention, if that course was practicable without any undue sacrifice of important British interests. Finally, he put forward the government's opinion that if the Convention was to be ratified at all, it should be done with as few alterations and reservations as possible.

Australia's delegate was Lord Tennyson, her former Governor General. As son of the former poet laureate, and holder of his copyrights, he had good reason to be interested in the subject. Buxton asked him to read the despatch from the late Prime Minister of Australia, and the Attorney General's memorandum. He did so, adding that both had been confirmed by the present Prime Minister and Government. Tensions became apparent as soon as the proposals were offered as a resolution. Richard Solomon (High Commissioner for the Union of South Africa, and its former Attorney General) objected that each proposal should be taken separately. When the first resolution was then proposed, Fisher (the Canadian Minister of Agriculture) immediately objected that framing an Imperial copyright law in consultation with the Dominions would commit them to acceptance of that law, whereas his position was that the Federal Parliament of Canada should have full right of

[148] The line-up was impressive. Sydney Buxton was assisted by Sir H. Llewellyn Smith, G. R. Askwith, W. Temple Franks (also from the Board of Trade), H. W. Just (Colonial Office), A. Law (Foreign Office), Sir Thomas Raleigh (India Office), F. F. Lidell (Office of the Parliamentary Counsel). The representatives of the self-governing Dominions were Sydney Fisher, P. E. Ritchie (Dominion of Canada), Lord Tennyson (Commonwealth of Australia), Sir W. Hall Jones (Dominion of New Zealand), Sir Richard Solomon (Union of South Africa), Sir Edward Morris (Newfoundland). Cd 5272 (1910).

legislation for Canada. He thought it objectionable if the Imperial Act was intended to apply to the self-governing Dominions without the intervention of their legislature. The discussion of possible mechanisms continued for the entire morning, with only a provisional conclusion. Fisher was particularly irritated by Art. 6 of the Berlin Convention, which gave all the advantages of the Union to anyone publishing within the Union, regardless of whether or not their home state was a signatory. This allowed American authors a simple route to Berne privileges by publishing in Canada, while the United States maintained an exclusionary policy towards all foreign nationals. Buxton was sympathetic to this complaint, revealing that the Board of Trade was considering ratifying the Convention only subject to Art. 6 not applying to Great Britain and the Empire. The afternoon was spent on preliminary discussions of the substantive issues of importance. Although all were agreed that the term should be life plus, there was early anxiety about the fifty-year element, which was not easily resolved.[149]

The following day the delegates returned to the constitutional question, and a revised draft of the proposals, which Fisher regarded as satisfactory. There was further discussion of the question of term, where the delegates showed a good deal of hesitancy. Tennyson spoke in favour of life plus 50 years, making specific reference to his father's works. There was no firm conclusion. When the conference reconvened the following week, a reservation had been drafted to Art. 6, which would have allowed any self-governing Dominion to restrict her Convention obligations to the works of authors who were citizens or subjects of a Union country, or bone fide residents therein. Buxton explained that the larger question of whether the Empire should denounce Art. 6 was still open, but this might raise a copyright war, and might be fatal to the bill also. Fisher pressed for the Conference to express its opinion that the article was not a good thing for the Union, even if it did so in diplomatic language. It seems that this was very much the feeling of the conference, and that the United States' attitude was widely resented. Buxton commented, unguardedly:

> I should like to knock them over the head as hard as I can; in all these things I think they treat us perfectly monstrously. But at the same time it is a question whether at the moment it is expedient to have a row with them on a question of this sort.

[149] The minutes, which were confidential (to the point that they were scarcely circulated beyond the delegates), are in *NA* CO 886/4, item 4.

The tone of the conference was by now much more amicable. There was further discussion of the question of term. Lord Tennyson had brought lists of books which had fallen into the public domain, but would have been profitable to their families with the proposed extension. Buxton said that some clause would be needed to give protection against withdrawals of books, or excessive prices. Lord Tennyson said that he had spoken to representatives of authors and publishers, 'and they seem to think that it would be perfectly feasible and practicable'. The conference then adjourned for three weeks, to allow for the preparation of a rough draft bill.

When the conference reconvened in mid-June the mood was positive and cooperative, although great care was still taken with the details. After three more days of discussion the majority of the work was done. The question of term remained a sticking point. Most of the delegates were prepared to agree life plus fifty for the sake of uniformity, but with great personal reluctance. Hall Jones (New Zealand's High Commissioner) held out doggedly for life plus thirty, and the matter was deferred. The bill was reprinted with amendments for the conference's final session ten days later. It had also been agreed that the formal resolutions should be recorded, with some synopsis of the decisions taken on points of detail. In the end the entire summary was drafted in the form of resolutions. In the intervening period Hall Jones had received instructions to vote against the life plus fifty proposal. He accepted it would be passed subject to his dissent, but wanted his dissent recorded somewhere. Buxton preferred it not to be recorded in a vote, or in the resolution, because he wanted to be able to tell the Cabinet that the conference 'was unanimous on all other points, especially as regards the Imperial question, which is very important'. This explains the wording of the *Memorandum of Proceedings*, which says that 'after full discussion the following Resolutions were agreed to'. The wording of the resolutions was changed from 'the conference agreed unanimously' to 'the conference is of opinion' in a deliberate attempt to divert attention from the disagreement, and the delegates agreed not to sign the document, in order that the dissent would not appear publicly. There was a considerable smoothing of the views expressed in private before their presentation in public, and the conference delegates were entirely complicit in this.

Given the magnitude of the challenges, the Conference's achievements were remarkable. Of the resolutions drafted for public consumption, the crucial ones were the first three – which laid out the new understanding of constitutional relations on copyright. It was recommended that the Convention should be ratified by the Imperial

Government on behalf of the various parts of the Empire; and that with a view to uniformity of international copyright reservations should be kept to a minimum. However, no ratification was to be made on behalf of a self-governing Dominion until its assent to ratification had been received, and provision was to be made for the separate withdrawal of each self-governing dominion. There was thus an urgent need for a new and uniform copyright law throughout the Empire, and the conference recommended that an Imperial Act to provide for this should be passed. The Act was not to extend to a self-governing Dominion without a declaration from its legislature, and was to provide for subsequent withdrawal by a dominion. A Dominion was also to have the ability to pass its own legislation 'substantially identical' to the Imperial Act, and still be treated as if it were a Dominion to which the Act extended for the purposes of the rights conferred by it. The fourth resolution addressed the conference's anxiety about Art. 6, recommending that copyright should only be granted to authors who were British subjects or bona fide residents in some part of the British Empire (subject to extension to other countries by Order in Council).[150] As agreed, the resolution regarding term was insistent that there should be some provision to protect public by securing their reasonable requirements as to supply and price of copyright works.

The aftermath of the Imperial Conference – an incomplete solution

At last, Imperial copyright law could move forward in the international arena. The resolutions of the Imperial Copyright Conference indicated a strong measure of agreement. The Conference had endorsed a new approach, including the two central principles of the Berlin revision, that copyright should arise without formality, and should endure for a term of life plus fifty years. However, as the Secretary of the Society of Authors pertinently observed: 'The unanimity of the Delegates is, we regret to say, not necessarily the unanimity of the Empire. The crux of the matter ... still lies with the Colonies.' Thring clearly felt that the colonies had been left too much freedom of action, and feared that they might undermine the coherence of the Imperial plan.[151] And the bill had yet to pass through Parliament.

Canada was extremely pleased with the results of the Imperial Copyright Conference, regarding it as marking the end to Imperial

[150] The UK Government had to recede from this position eventually.

[151] G. H. Thring, 'Imperial Copyright' (1910) 88 *Fortnightly Review* 688–96. The *Publishers' Circular* (8 April 1911) criticised what it termed the 'practical abdication by His Majesty's Government of control of copyright in the Empire outside the UK'.

denials of Canada's right to legislate on copyright. Fisher was drafting a new Canadian copyright bill, and was quoted as saying:

> It is even more than I expected to obtain. The British Government pledged itself that British legislation shall remove from us this disability to legislate for ourselves on foreign copyright. It repeals the Imperial Act of 1842, and adheres to the Berlin Convention of two years ago. The British Bill will adhere to that Convention, with the proviso that Canada and each part of the Empire may adhere or not as they like. I propose to conform our copyright law as much as possible with the Convention of Berlin. The Bill will dispense with the giving of the Canadian market to the United States publishers in virtue of British copyright. Hereafter such copyright will not run in Canada.[152]

The intention was to restrict Canadian copyright to bona fide Canadian residents, and to recognise British copyright in Canada only in the case of the work of a British subject, or of a *bona fide* resident in Britain, which had been printed in Britain. Most of these restrictions were in fact incorporated in the 1911 Canadian Copyright Act, and were inconsistent with the Berlin Act. The British Government had fully intended to make a similar reservation for the Empire. However, there was great pressure from publishers and authors who feared the loss of American copyright, so the plan had to be abandoned. The other delegates at the Imperial Conference were approached informally, and agreed to the strategy. Buxton knew that Canada would continue to insist on this requirement. He telegraphed apologetically to Fisher, promising to make every endeavour to persuade the signatory powers to accept a suitable reservation. Fisher's reply was uncompromising:

> Regret exceedingly the proposed amendment to Copyright Bill and recession from fourth resolution of Imperial Copyright Conference. Canada obliged to adhere to that resolution and consequently unable to pass substantially identical legislation ... In the event of non-acceptance of reservation on behalf of Canada, it would be impossible for Canada to adhere to Berlin Convention and denunciation of Berne Convention by Canada would follow necessarily. Think it best to present views of Canada, although I note that your cable is decisive on the matter.[153]

The Foreign Office then attempted to negotiate a reservation from Art. 6 for the Dominions. There was strong resistance from France and Germany, who protested that it would infringe one of the principles of

[152] *Publisher's Circular*, 22 October 1910, quoting the *Standard*'s Ottawa correspondent. A rather different version of Fisher's remarks appeared in the (highly partisan) *Canadian Bookseller and Stationer*: 'I was surprised at the completeness of what I got. People in England were at first a little startled at the position I took, but they proved to be amenable to reason.' *Author*, January 1911.

[153] *NA* FO 881/10057.

the Union – one which was in the original 1886 convention, and in the 1896 Paris Act. In May, with the 1911 bill just introduced in the House of Commons, the situation was critical. The Colonial Office felt certain that Canada would withdraw unless a reservation was permitted, and thought that the signatory states would lose more by the withdrawal of Canada than Canada stood to lose by withdrawal. It suggested that these consequences 'should be pointed out clearly in a very confidential way to France and Germany, and that these Governments should be asked to permit reservations to be made on behalf of any self-governing Dominion which so desires'. The Foreign Office considered the French and German Governments unlikely to yield, so sought to negotiate 'a further additional Act providing that in the case of the British Empire and any other members of the Union so electing the obligations imposed on the Conventions should relate only to works, the authors of which are subjects or citizens of a country of the Union or bona fide residents therein'. This was the solution eventually achieved, but not until 1914.[154]

The Imperial Copyright Act 1911 came into effect on 1 July 1912, with ratification of the Berlin revision imminent. The colonies (other than the self-governing Dominions), the protectorates and Cyprus could be treated as parts of the United Kingdom for the purposes of the Acts.[155] Self-governing Dominions were excluded by s.25(1) unless the Dominion legislature declared specifically that the 1911 Act did apply to them. Newfoundland, the Commonwealth of Australia and the Union of South Africa all adopted the 1911 Act.[156] Canada and New Zealand both adopted independent Acts on similar lines to the 1911 Act. The 1911 Act provided for certification by the Secretary of State that the legislation of a self-governing Dominion granted British subjects (or those resident in the parts of Her Majesty's Dominions to which the Act extended) rights within that Dominion which were substantially identical with those conferred by the 1911 Act. In this event, the Dominion could be treated as if it were a Dominion to which the 1911 Act

[154] *NA* FO 881/10057 pp. 5–27. BT 209/836. The UK Government drafted a protocol permitting the government of a Union country to restrict protection in the case of authors from non-Union countries which failed to protect the authors from the Union country 'in an adequate manner'. This was submitted to the International Office, which prepared an Additional Protocol which was signed in Berne in March 1914. Canada was the only country to make use of this facility.

[155] For the colonies this was done by s.25(1). By s.28 protectorates could be included by Order in Council, and many were included in 1912.

[156] Section 25(1) did permit limited modifications to deal with procedure, remedies and local conditions. Australia and South Africa both made certain modifications. Newfoundland adopted the 1911 Act without modifications. Notice of accession for South Africa was given on 1 May 1920.

extended.[157] The New Zealand Act of 1913 did so, when coupled with an Order of the Executive Council made thereunder of 27 March 1914, and this was certified the same year. It was only in 1921 that such a Canadian Act was passed, and this was certified in 1923. On 1 January 1924 the United Kingdom gave notice of Canada's accession to the Berne Union. Canada restricted protection in respect of US works under the terms of the 1914 Additional Protocol.[158]

Writing in 1909, W. Morris Colles (of the Society of Authors) described the formidable body of local copyright that had come into being, commenting on the diversity of local laws and their archaic distinctions. He described the copyright system of British India as 'chaotic', praised the 1905 Australasian Copyright Act for providing incentives to take out local copyright, and noted that the 1900 Canadian Act had only shelved the problem temporarily. He concluded (with some feeling) that interference with colonial legislation was 'a thankless task', and that Berne's advantages were insufficiently appreciated. His vision was of an English-speaking copyright league: 'an absolutely free English-speaking copyright, operative and self-contained throughout the world'. Colles admitted that this vision was at the moment only 'an idle dream'.[159] The immovable obstacle was the United States, which did not accede to the Berne Convention until 1988. Her intransigence requires explanation: its roots lay in a protectionist approach to copyright which dated from the early decades of the nineteenth century.

[157] Section 25(2) and s. 26(3).

[158] In accordance with ss. 13, 14, 27 of the Canadian Copyright Act 1921. Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1985* (London: Centre for Commercial Law Studies, Queen Mary College: Kluwer, 1987), pp. 97–8.

[159] W. Morris Colles, 'An English-speaking copyright league' (1909) 86 *Fortnightly Review*, pp. 659–69.

5 The independence of America

You steal Englishmen's books and
Think Englishmen's thought,
With their salt on your tail your wild
eagle is caught;
Your literature suits its each whisper
and motion
To what will be thought of it over
the ocean[1]

Independence is one of the great themes of American history. The history of copyright in America reflects this. Having first to develop her own domestic copyright law, America had then also to consider international copyright. There was much resistance to giving copyright to 'foreigners'. America's interaction with Britain over the matter was understandably coloured by their previous history, and the charged relationship between the two nations meant that feeling on both sides was strong and passionate. The argument that America needed her own literature and culture, rather than that of other nations, was put forward early. However, not everyone was persuaded that international copyright protection was a necessary element in achieving this. America's publishing trade grew rapidly until it supplied a huge market of eager readers, and short-term economic interests could be more compelling than long-term contribution to nationhood. Although eventually national self-confidence grew to the point that copyright could be conceded to everyone, trade pressures ensured that an element of compromise remained in America's international copyright law until almost the end of the twentieth century.

America's publishing trade – origins and opportunities

America's first press was shipped over from England, and set up in Cambridge, in the Massachusetts Bay Colony. The first work from the

[1] James Russell Lowell, *A Fable for Critics* (New York: Putnam, 1848).

press was the *Freeman's Oath* (1638). In the mid-eighteenth century there were twenty-four presses operating in the British colonies, and at least 1,200 titles were printed. Government work, sermons, philosophy and science dominated the early lists, with little imaginative literature, but as the industry expanded in the late-eighteenth century so did the subject-matter. In geographic terms, Boston's initial domination was challenged by Philadelphia and New York. The Eastern seaboard was best served with both customers and transportation, and there were many presses there. But printing followed the general Westward expansion too, and at the close of the eighteenth century there were presses in a number of Western towns, including Lexington, Kentucky and Cincinnati, Ohio. After the Revolutionary War had ended, production materials were more plentiful, and manufacturing techniques improved rapidly.[2]

The issue of international copyright for America generated tremendous strength of feeling, particularly amongst those who had any link to the book trade. To understand why this was so, it is important to appreciate the size of the market at stake. In 1800, America's population was around 5 million. In 1860, on the eve of the Civil War, it was well over 31 million. In 1890, the year before America's first International Copyright Act was passed, her population approached 63 million. The comparable figures for Britain are (roughly): 10.5 million in 1801; 23 million in 1861; 33 million in 1891.[3] When literacy rates are considered, the position becomes even starker. The 1850 census figures record that 90.4 per cent American adults over 20 could read and write. At the same period in England it was perhaps 50–60 per cent, and rates did not approach 100 per cent until the end of the century.[4] America prized literacy, and it was taught in a wide variety of environments; in the family, in churches and by related organisations such as the American Sunday-School Union, in private and common (free, public) schools. Encouragement was also given by young men's and mechanics' institutions, libraries, lyceums and debating clubs.

[2] For more see John Tebbel, *A History of Book Publishing in the United States, Volume I: The Creation of an Industry 1630–1865* (New York; London: Bowker, 1972).

[3] All figures from census records. B. R. Mitchell, *International Historical Statistics: The Americas 1750–2000* (5th ed.) (Basingstoke: Palgrave Macmillan, 2003), p. 4. B. R. Mitchell, *British Historical Statistics* (Cambridge: Cambridge University Press, 1988), p. 9.

[4] Ronald J. Zboray, *A Fictive People: Antebellum Economic Development and the American Reading Public* (New York; Oxford: Oxford University Press, 1993), p. 83. There were significant differences between the illiteracy rates of the various states, particularly between North and South. David Vincent, *Literacy and Popular Culture* (Cambridge: Cambridge University Press, 1989), p. 22.

Little wonder that there was eagerness to supply this huge and varied market of enthusiastic readers with the books, pamphlets, periodicals and newspapers it craved. The years from 1845 until the panic of 1857 saw the most extraordinary expansion the book trade had yet seen. In the 1830s and early 1840s, about hundred titles a year were published by American presses. By 1855 the number was almost eleven hundred. In 1840 the value of books manufactured and sold in the United States was $5.5m. In 1850 it was $12.5m, and in 1856 it was $16 million (of which $6m came from New York, $3.4m from Philadelphia, $2.5m from Boston and $1.3m from Cincinnati – indicating both the dominance of the Northeast publishing houses, and also the significance of the Western market).[5] Cheap books were widely available, with 50c the standard price of the clothbound paperback, with many (such as *Harper's Library of Select Novels*) at 25c. From 1860 the dime novel was a hugely popular subcategory, distributed in massive editions from newsstands and dry goods stores, and shipped in barrels to soldiers during the Civil War.

Such publishing would not have been feasible in the 1820s. Printers now had access to steam-powered cylinder presses which used machine-made paper, stereotyping and many mechanical processes which replaced the old hand tasks (such as paper trimming). The rail and road network was significantly improved, so distribution to important population centres was far cheaper and easier. Another factor was the very significant concession on postal rates granted to newspapers by the 1792 Post Office Act, which allowed them to travel any distance in the mail for $1\frac{1}{2}$c. The magazine rate was not so favourable as that enjoyed by newspapers, and letter rate was vastly more expensive until the Post Office Acts of 1845 and 1851. Books were excluded from the official mail until 1851, and even then were not regularly distributed by this method.[6] Predictably, enterprising publishers tailored the format of their publications to take advantage of this pricing structure. The 'mammoth' weeklies which flourished in the 1840s, such as *Brother Jonathan* and the *New World*, were printed in newspaper format, sold for as little as $12\frac{1}{2}$c, and often contained whole novels. These were books in the guise of newspapers, offering stiff and unwelcome competition to the book publishers. Another significant advantage was the absence of international copyright, which allowed American publishers to reprint

[5] Tebbel, *History: I*, p. 221.
[6] Richard R. John, *Spreading the News: The American Postal System from Franklin to Morse* (Cambridge, Mass.; London, England: Harvard University Press, 1995), pp. 37–9 and 160.

popular British titles without payment either to author or original publisher, thereby reducing costs and virtually eliminating risk.

With a strongly growing economy, the United States was fast becoming a major economic power. By 1860 per capita income in the United States was second only to England among the major world economies, and her GDP overtook England's at the end of the nineteenth century. After the Civil War, general industrial production rose sharply. New technology and aggressive tactics brought rapid economic growth, and a dramatic increase in the size of the average business. The publishing industry was in many respects in the vanguard of such changes, its growth being most startling before the war, in response to the increased demand and developments in technology just mentioned. This unprecedented expansion had an impact on the structure of printing establishments. Previously it had been a highly skilled hand craft, guild-based in organisation, with strict demarcation between differing roles. Now master printers could run much larger mechanised establishments by hiring unskilled machine workers instead of journeymen and apprentices. The largest publishing houses integrated all their production functions under one roof, instead of farming out their work to trade specialists elsewhere. The Harper Brothers in New York were among the first to do this, with their magnificent Franklin Square establishment opened in 1854 (making something of a virtue out of necessity, their previous premises having been completely destroyed by fire).[7] Until this time publishing houses had often been family businesses. Individual publishers were known for their particular likes and dislikes, their strengths and weaknesses. They traded on their personal judgment, often commanding considerable personal loyalties from their authors. Although this remained the case to some extent, particularly in the old houses, publishing was becoming a large-scale modern industrial business, with all the changes this entailed. As the craft became a mechanised process, the traditional skills of compositor and pressman became less important. The traditional power of the typographical unions, though inevitably somewhat diminished, still had to be reckoned with, however. These unions were to play a key role in the negotiations towards international copyright.

In 1893 – the first complete year in which the 1891 International Copyright Act was in operation – over five thousand titles were issued in the United States. Of these, 2,800 were by American authors,

[7] For a fascinating account of the layout and running of the Franklin Square building see Jacob Abbott, *The Harper Establishment* (New York: Harper & Brothers, 1855; reprinted Delaware: Oak Knoll Press, 2001).

manufactured in the United States; roughly 1,100 were by British and other foreign authors, manufactured in the United States; and about 1,100 more were by British authors, imported in sheets. The American publisher George Palmer Putnam had been collecting such statistics since 1834, partly in an attempt to show that American authors were handicapped by the absence of international copyright. The fact that an American publisher had to respect the copyright of an American author was reflected in its price to the purchaser. In 1834 the average retail cost of a volume was $1.20 for American authors, and 75c for British and other foreign reprints.[8] American copyright was first granted in the last decade of the eighteenth century. Since this time, American authors had had to persuade both publisher and public that the extra price was worth paying, even though a tried and tested British classic could be had for a lesser sum. The phenomenon had been observed since the early decades of the century, by authors such as Washington Irving and James Fenimore Cooper. A chilling effect on American literature seemed to be the obvious likely consequence. Others were concerned that the effect was to immerse the American people in British ideas and culture, rather than their own. Admittedly, American presses issued fewer than hundred titles a year until the early 1840s, so the evidence could be dismissed as anecdotal, particularly by those who were enjoying the fruits of the disparity. But with thousands of titles per year, and tens of millions of dollars at stake, these considerations would take on a somewhat different aspect.

Early American copyright legislation

Noah Webster, one of the early fathers of American copyright law, was sharply aware of the need for cultural independence. His article 'On Education', serialised in the first issues of *The American Magazine* (1797–98), concluded with a striking exhortation:

> Americans, unshackle your minds, and act like independent beings. You have been children long enough, subject to the control, and subservient to the interest of a haughty parent. You have now an interest of your own to augment and defend – You have an empire to raise and support by your exertions – and a national character to establish and extend by your wisdom and your virtues.[9]

[8] John Tebbel, *A History of Book Publishing in the United States, Volume II: The Expansion of an Industry 1865–1919* (New York; London: Bowker, 1975), p. 23.

[9] Noah Webster, 'On Education' (December 1787-May 1788) *American Magazine*, 22–374. Webster also proposed a national orthography, simpler and close to ordinary pronunciation than English orthography. Webster presented the fact that 'the same impressions of books would not answer for both countries' as a clear benefit, because it

Webster's now famous speller, grammar and reader were powerful tools for the creation of a single unified language in America, and he was conscious of their potential value. But although he was anxious to protect his work before he published it, there was no American copyright law. So in 1782 Webster travelled to the Continental Congress of the United States in Philadelphia to seek protection for his spelling book. Members of Congress were willing to support him, but the Articles of Confederation gave them no power to enact a copyright law. Webster had therefore to seek protection from each state legislature. He travelled extensively, and wrote many letters attempting to win support for his project, arguing that his books would spread literacy, and unify the American people with a new American language. In May 1783 James Madison secured a resolution from the Continental Congress recommending that states grant a fourteen-year copyright to authors and publishers of new books. In January 1783 the state of Connecticut had been the first to pass copyright legislation, followed later in the year by Massachusetts, Maryland, New Jersey, New Hampshire and Rhode Island. Webster obtained a Connecticut copyright in 1783, then in 1785 he gained protection in Pennsylvania, South Carolina and (with the help of a letter from George Washington) Virginia. By 1786 all of the original states of the Confederation except Delaware had enacted copyright legislation of one sort or another.[10]

Webster was later instrumental in persuading James Madison to sponsor federal copyright legislation, and was himself involved in drafting it.[11] The US Constitution granted Congress the power 'to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries'.[12] A bill was discussed in the House during the first session of the first Congress; it was read twice but postponed. president Washington's address to Congress the following session drew the legislature's attention to 'the promotion of science and literature', and in May 1790 the first federal legislation was passed. It gave copyright protection for a term of fourteen years, renewable for a further

would encourage home publication. Noah Webster, *Dissertations on the English language* (Boston: Isaiah Thomas, 1789, reprinted London: Routledge/Thoemmes, 1997), pp. 397 & 406.

[10] The Congressional resolution and the state laws are conveniently collected in Thorvald Solberg (compiler), *Copyright enactments of the United States 1783–1900* (Washington, D.C.: Government Printing Office, 1900).

[11] Webster's diary 17 April 1789 records, 'prepare a copy right bill for Congress': Richard M. Rollins (ed.), *The autobiographies of Noah Webster* (Columbia, S.C.: University of South Carolina Press, 1989), p. 265.

[12] Article I, Section 8, Paragraph 8.

fourteen if the author was still living.[13] Protection was granted only to US citizens and residents. Webster seems to have thought that Congress would revisit the issue in late 1803. He wrote to Simeon Baldwin, who had been involved in the bill's passage through the House in 1790, suggesting that copyright term should be renewable by the author's heirs.[14] Webster argued that an original literary composition, being 'a species of property more peculiarly a man's own than any other', should be treated no differently from other personal property. He considered the House of Lords' decision in *Donaldson* v. *Becket* to be 'erroneous', regarding the judgment in *Millar* v. *Taylor* as correctly grounded in principle. He admitted, though, that it was a common opinion that copyright term should be limited, and therefore confined himself to a more limited request. Nothing came of it at this time, although Webster remained convinced that in principle copyright should be perpetual.[15]

Webster continued to devote himself to his lexicography projects, and in 1825 secured a publisher for his great work, the *American Dictionary of the English Language*. Concerned that he and his heirs should be the ones to benefit from it, he wrote to his younger cousin Daniel Webster, then a member of the House of Representatives, repeating his criticisms of *Donaldson* v. *Becket*, and asking him to make efforts to have literary property put on the same footing as other property 'as to exclusive right and permanence of possession'.[16] Daniel Webster agreed that authorship was by nature a ground of property, but thought that property in a social state had to be a creature of the law. He saw objections to making it perpetual, but was in favour of an extension of term. He promised to lay Noah Webster's letter before the Committee of the Judiciary, which was contemplating changes to copyright law. The issue of copyright had been brought before the House earlier in the year by Gulian Crommelin Verplanck: representative from New York, prolific writer and member of the Bread and Cheese Club.[17] In 1828 Verplanck drafted a bill providing for a twenty-eight-year copyright, renewable by the author or his heirs, but it was submerged by the distractions of the 1828 election.

[13] U.S. Statutes at Large 124.

[14] Webster to Simeon Baldwin, December 1803: Harry R. Warfel (ed.), *Letters of Noah Webster* (New York: Library Publishers, 1953), pp. 253–4.

[15] Webster to John Pickering, December 1816: Noah Webster, *Letters*, pp. 341–89 at p. 386.

[16] Noah Webster to Daniel Webster, 30 September 1826; Daniel Webster to Noah Webster, 14 October 1826: Charles M. Wiltse (ed.), *The Papers of Daniel Webster, Correspondence, Volume 2* (Hanover, N.H.: University Press of New England for Dartmouth College, 1976) pp. 130–2, and 137.

[17] The Bread and Cheese Club was a New York literary society founded by James Fenimore Cooper in c.1822.

Nevertheless, Noah Webster's petition in favour of perpetual copyright was presented in the Senate.

The following year Noah Webster's son-in-law, William W. Ellsworth, was elected to the House of Representatives. It was Ellsworth, as a member of the Committee on the Judiciary, who reported the bill in January 1830. It was read twice, but pressure of business prevented further progress. Ellsworth reintroduced an amended version in December, and Webster travelled to Washington to lobby for its passage. The bill passed the House of Representatives in early January 1831, and with Daniel Webster as its sponsor passed the Senate later in the month.[18] It gave a term of twenty-eight years, renewable for a further fourteen by the author's heirs. Its supporters celebrated with a public dinner in New York. However, there had been serious opposition.[19] Representative Michael Hoffman, First Judge of the Court of Common Pleas, Herkimer County, New York stated that the bill was 'at variance with every principle of sound policy'. Using an analogy with patents, he argued that there was an implied contract between the author and the public, and that the public therefore had a right to the work when the copyright expired.[20] The account of the debate in the *Register* paraphrases the speeches somewhat, and the precise points taken are not absolutely clear, doing no favours to either side's arguments. Verplanck is reported as claiming that the King's Bench was unanimously of the opinion that authors had an inherent right to their works, whereas in fact the decision in *Millar* v. *Taylor* was a majority one, and was in any event overruled by the House of Lords in *Donaldson* v. *Becket*. It has therefore been argued that in granting the 1831 term extension Congress had been persuaded that copyright was a natural right – a view rejected only three years later in *Wheaton* v. *Peters*.

However, Verplanck's own account of the debate differs in some significant respects from that in the *Register*. In his speech at the celebratory dinner in New York, he said that 'the debate was very imperfectly reported', and sought to put the record straight. Verplanck spoke of Hoffman with great respect (both accounts agree on this), although he differed from him on this particular matter. Verplanck summarised

[18] U.S. Statutes at Large 436.

[19] On precisely the same grounds as were argued recently before the Supreme Court in *Eric Eldred, et al.* v. *John D. Ashcroft, Attorney General* (2003) 123 SCt 769. See Catherine Seville, 'Copyright's Bargain – Defining our Terms' [2003] *Intellectual Property Quarterly* 320.

[20] 7 *Register of Debates in Congress* at 423 (Gales and Seaton 1831).

the opposition position as follows:

> The author and inventor has and can have no rights of property beyond what the law confers upon him. This right is for a limited term only, and at the expiration of that term his book or invention ceases to be his, and belongs to the public. If Congress should think fit to extend that term to those who may hereafter contract with the public – though the policy of doing so was broadly denied – they have certainly the power, but they have not that of giving to any individual for twenty-eight years what are now vested rights of the individuals who compose the public.[21]

According to Verplanck, then, Hoffman considered that Congress had power to set the term for new copyrights, but not to grant extensions to existing copyrights. This position is, frankly, more coherent and persuasive than that attributed to Hoffman in the *Register*. Verplanck then claimed to have argued in rebuttal that property in intellectual productions was founded in natural justice, and that the framers of the constitution had acknowledged this by their choice of language; '*securing* to authors and inventors the exclusive right to their writings or inventions'. He admitted that positive law had intervened to limit the term of exclusive protection, on grounds of public policy, but sought to characterise the extension of term as merely a prolongation of the period during which the author's natural rights would be enforced by a legal remedy. Verplanck did refer to Lord Mansfield's reasoning in *Millar* v. *Taylor* with admiration, and said that it was 'founded upon' the principle of natural law. However, there was no repetition of the misstatement in the *Register*. Although it is possible that during the debate Verplanck was carried into error by his own rhetoric, there is also a significant possibility that the report was faulty.

Whatever the true content of the speeches may have been, the result was clear. Hoffman's amendment, which would have retained the original fourteen-year term, was defeated by a majority of fifty. The bill met no formal opposition in its passage through the Senate. Verplanck's speech welcoming the 1831 Copyright Act certainly sought to invest it with constitutional authority, emphasising the unanimity of the constitution's framers in giving Congress the power to act in this sphere, and stressing its importance 'in perpetuating our liberties and our union'.[22]

Thus the law of literary copyright in America is almost as old as the nation itself, and its role in the development of that nation was recognised then too. Thomas Paine, an inspiration to Americans in

[21] Gulian Crommelin Verplanck, 'The Law of Literary Property', in *Discourses and Addresses* (New York: Harper, 1833) 220.
[22] Verplanck, 'Law of Literary Property', 225 and 226.

their struggle for independence, was another who stressed its importance:

> The state of literature in America must one day become a subject of legislative consideration. Hitherto it has been a disinterested volunteer in the service of the Revolution, and no man thought of profits: but when peace shall give time and opportunity for study, the country will deprive itself of the honour and service of letters and the improvement of science, unless sufficient laws are made to prevent depredations on literary property.[23]

Paine's comments were provoked by an incident which displayed perfectly the need for international copyright law.

Early international exchanges

In 1781 the distinguished French historian, Abbé Raynal, had written an account of the American revolution, *Révolution d'Amérique*, which was translated and reprinted all over the world. Paine sought to correct what he saw as errors in the Abbé's account, but his own pamphlet begins by taking issue with the editor of the London edition. Paine believed that the piece was intended as part of a larger work, and had been obtained unfairly, either from the Abbé's printer or from a manuscript copy. By forestalling the Abbé's London publication, this editor had not only defrauded him by anticipating the sale of his own edition, but had precipitated him into errors which he might otherwise have corrected.

This scenario was common enough in a world without provision for international copyright, and it regularly provoked the outrage of authors whose work was garbled by opportunist publishers. Unusually though, Paine's indignation is coupled with an understanding of the legal environment which permitted it:

> The embezzlement from the Abbé Reynal, was, it is true, committed by one country upon another, and therefore shows no defect in the laws of either. But it is nevertheless a breach of civil manners and literary justice: neither can it be any apology, that because the countries are at war, literature shall be entitled to depredation.

The French revolutionary laws of 13–19 January 1791 and of 19–24 July 1793 reflected the philosophical stance that authors had an inherent property right in their work, and in 1852 France bravely extended this unilaterally to all foreign works, regardless of the protection offered to French authors in the foreign state.[24] Paine's views acknowledged as a

[23] *Letter to the Abbé Raynal* (1872), reprinted in Michael Foot and Isaac Kramnick (eds.), *The Thomas Paine Reader* (Harmondsworth: Penguin, 1987), p. 148.
[24] Decree-Law of 28 March 1852. See above, pp. 57–8.

priority the civil benefits which followed from protection, both in a national and international context. The United States was not willing to approach these positions until 1891, although there was pressure for her to do so from the 1820s, from authors at least.

Even at this time some authors managed to make contractual arrangements for publication on both sides of the Atlantic. In England there was legal authority for granting copyright protection to foreigners, as well as some customary trade practices. As early as 1777 it was held that a foreigner who came to England and first published there could sue for infringement of copyright.[25] Also, the members of the London book trade tended to respect one an other's arrangements. Legally it was not absolutely clear whether the author's presence in British territory on publication was a requirement for protection. But in 1835 a further case held that if a foreigner had assigned copyright to a British publisher, then that publisher could claim protection, even though the author had never entered British territory.[26] Thus John Murray, and later Richard Bentley, were prepared to pay generously to publish Washington Irving's works in England. James Fenimore Cooper's first three novels were handled in England by John Miller, who was a bookseller, publisher and (to a certain extent) literary agent. Miller was trusted and popular with American writers, but he could only afford to pay half-profits. Cooper eventually moved to Henry Colburn, and then Richard Bentley, both of whom would purchase copyrights outright.

The situation in America was less congenial for foreign authors. American publishers were perfectly free to reprint British copyright works, and did so. The American publisher Samuel Goodrich estimated that in 1820, 70 per cent of American book manufacture was the work of British authors – though Goodrich was most pleased to record the rapidly diminishing 'element of British mind' in the production of American publications.[27] There was advantage in being first in the market, so arrangements were sometimes made to obtain early copies of popular authors' works. In 1817 Thomas Kirk, a New York publisher, offered a third of his net profits to John Murray, for early sheets of British works. Kirk had previously published British works without

[25] *Bach* v. *Longman* (1777) 98 ER 1274.

[26] *D'Almaine* v. *Boosey* (1835) 160 ER 117. Nevertheless, there remained some doubt about the matter. [See above, Berne: English copyright and foreign nationals.]

[27] Samuel G. Goodrich, *Recollections of a Lifetime*, 2 vols. (New York; Auburn: Miller, Orton and Mulligan, 1857), vol. II, pp. 388–91 and 552–3. The figures are necessarily very rough. Goodrich put the British share of American productions at around 60 per cent in 1830, 45 per cent in 1840, 30 per cent in 1850 and under 20 per cent by 1856. He stressed that his figures covered all British works, not just those of living authors, and he was proud to enumerate the strengths in the American market.

payment, although his letter to Murray spoke of 'the injurious operations of the law in this country, inasmuch as they do not recognise the copyright of any books published by citizens of another state or nation'. In the early 1820s Carey & Lea paid Miller, who acted as their London agent, to forward Sir Walter Scott's novels as soon as they were published. When this route proved too slow to forestall the competition, they paid Scott's publisher to send early sheets from Edinburgh to America as soon as they were printed. Cooper, in an attempt to assist Scott with his serious financial troubles, suggested that his forthcoming *Life of Napoleon* be copyrighted in the United States as the property of an American citizen. Scott rejected this plan, but was prepared to convey to Carey 'the exclusive right of publishing' in America this and all his future works.[28] This tactic on the whole defeated the other American reprinters, who instead bought copies from Carey & Lea at wholesale prices, inserting their own title pages and imprints before distribution. With Emerson's encouragement and assistance, early copies of Carlyle's works were also sold to American publishers, although the enterprise ran far from smoothly.

Washington Irving was one of the first to notice the effect this imbalance of copyright protection had on American literature and authors. As an American citizen Irving was entitled to copyright there, and his publishers paid him accordingly. However, this cost was reflected in the price at which his books were sold. When compared to reprints of foreign works, Irving's were expensive. He wrote:

> the public complains of the price of my work – this is the disadvantage of coming in competition with those republished English works for which the Booksellers have not to pay anything to the authors. If the American public wish to

[28] Samuel Smiles, *A Publisher and His Friends: Memoir and Correspondence of the Late John Murray*, 2 vols. (London: Murray, 1891), vol. I, p. 27. Andrew J. Eaton, 'The American Movement for International Copyright, 1837–60' (1945) 11 *Library Quarterly* 99. Scott to Cooper [?6] November 1826. Sir Walter Scott, *The Letters of Sir Walter Scott 1826–1828*, H. J. C. Grierson (ed.) (London: Constable, 1936) p. 122. Eidson's often-repeated assertion that Ticknor's payment for Tennyson's *Poems* of 1842 is 'possibly the earliest copyright payment by an American publisher to a foreign author' is misleading, since, in the modern sense of the word, Tennyson had no American copyright to sell. However, in the early part of the century, in America, a royalty payment was sometimes referred to as a copyright payment. This was the most common arrangement for American authors. Foreign authors usually received payment for advance sheets, but occasionally a royalty (normally around 10 per cent) was agreed. It was under this latter scheme that Tennyson was paid $150 (10 per cent of the retail price of the first printing) for the first American edition of his poems (1842). American authors rarely sold their copyrights outright, whereas in Britain this was common. John Olin Eidson, *Tennyson in America* (Athens, Georgia: University of Georgia Press, 1943), p. 37. Michael Winship, *American Literary Publishing in the Mid-nineteenth Century* (Cambridge: Cambridge University Press, 1995), pp. 133–7.

have literature of their own they must consent to pay for the support of authors.[29]

Cooper also noted the disincentive for American writers, though he was embarrassed that American law restricted copyright to its citizens, and had supported Verplanck's attempts to change this. He wrote to his publishers, Carey & Lea, arguing passionately that the restriction of copyright to American citizens ensured that Britain retained her moral dominion long after her political sovereignty had ceased: 'What Publisher will pay a Native writer for ideas that he may import for nothing?'[30]

Carey & Lea later told Cooper that they were in favour of the extension of copyright privileges to foreigners, but did not believe it practicable. They confined their lobbying activities to supporting the proposed extension of term to twenty-eight years.[31] The firm's position was to change later. Henry C. Carey, son of the firm's founder Mathew Carey, had taken over in 1817, and retired in 1838 to pursue his intellectual interests. As a leading political economist he was to become one of the most effective opponents of international copyright. Mathew's grandson, Henry Carey Lea, then ran the publishing business, and he too was opposed to international copyright.[32] It seems likely that the 1831 bill passed because its sponsors wisely limited its ambitions: extra protection for American nationals was relatively uncontroversial, whereas an extension of copyright to foreigners was potentially contentious. Nevertheless, there was a significant body of opinion in favour of international copyright.[33] Henry Wheaton, a respected authority on international law who had recently been the plaintiff in high-profile copyright

[29] Irving to Henry Brevoort, 12 August 1819: Washington Irving, *Letters*, Ralph M. Aderman, Herbert L. Kleinfield, and Jenifer S. Banks (eds.), 4 vols. (Boston: Twayne Publishers, 1978–1982), vol. I, p. 554.

[30] Cooper to John Miller February 1826; Cooper to Carey & Lea, 9 November 1826: James Fenimore Cooper, *Letters and Journals*, James Franklin Beard (ed.), 6 vols. (Cambridge, Mass.: Harvard University Press, 1960–68), vol. I, pp. 127–8 and p. 172.

[31] Carey, Lea, and Carey to Cooper, 28 April 1828. Cooper, *Letters*, vol. I., p. 259 n.5.

[32] See below, pp. 183–4 and pp. 201–2.

[33] It is claimed that in 1828 the prolific author and editor John Neal called for international copyright in the *Yankee*: Goodrich, *Recollections*, vol. II, p. 357. However, although the *Yankee* was in favour of payment for 'native authors', it also advocated reprinting the best articles from 'foreign journals': (1828) *Yankee*, 1 and 287. In 1829 the *American Jurist and Law Magazine* was critical of Verplanck's bill because it made no provision for foreigners: (1829) 2 *AJLM* 248–67 at 264. The *Knickerbocker* claimed that its crusading editor Willis Gaylord Clark first drew attention to the inadequate copyright law: (1842) 19 *Knickerbocker* 384. For early mentions of the need for international copyright see (1833) 2 *Knickerbocker* 163, (1834) 4 *Knickerbocker* 502, (1835) 5 *Knickerbocker* 547, 575. The American dramatist Robert Montgomery Bird argued that American authors were 'positively oppressed' by existing legislation: 'Community of Copyright' (1835) 6 *Knickerbocker* 285–9.

litigation which reached the Supreme Court, is thought to have been the author of an article in the *Westminster Review* which called for mutual recognition of literary property.[34] However, there was to be powerful opposition from Harper & Bros., a very successful New York publishing house, known for its ambitious and uncompromising business practices.

In 1835 the Harpers made a formal agreement with the British author and politician Edward Bulwer-Lytton, to pay him £50 per volume for advance sheets of his highly popular novels. Harpers had made such payments before, but this was their first continuing contractual arrangement. First publication had to be in Britain for Bulwer-Lytton to secure British copyright. The Harpers intended to rush into print immediately after this, so before any American competitor. They had occasion to rebuke Bulwer-Lytton when the sheets were not sent promptly, since (without copyright) time and position was their only advantage in the American market. Harpers also made it clear that if Bulwer-Lytton later sought better terms from another publisher, that they would reprint in competition. Although he was outraged by the implied threat, the Harpers politely maintained their position, explaining that they needed to protect their previous investment by keeping their edition of his works complete.[35] In the spring of 1836 the Boston publishers Marsh, Capen & Lyon did attempt to poach Bulwer-Lytton.[36] He had no particular loyalty to Harpers, feeling that they did not pay him as much as he was worth, and he was incensed when one of his new plays was turned down by one of the younger Harper brothers (who was passing through London). A draft contract with the Boston firm was drawn up, under conditions of strict secrecy, but discussions were suspended in the autumn when he learned that an international copyright bill would be put before Congress. The Harpers would certainly have retaliated, and it was thought sensible to support the proposed bill, moving to Marsh, Capen & Lyon only once there was a legal way to prevent competition from the Harpers. When it became clear that the bill would not pass, he was obliged to stick with the Harpers.

[34] (1836) 24 *Westminster Review*, 187–97. Wheaton was Reporter of the Supreme Court, and was furious when Richard Peters' *Condensed Reports* undercut his own: *Wheaton* v. *Peters* (1834) 33 US 591.

[35] *Bulwer-Lytton Papers*. Harper & Bros. to Bulwer Lytton: D/EK/C23/59/4, D/EK/C23/59/6, D/EK/C23/59/7. Memorandum of agreement, 7 April 1835: D/EK/C23/59/8.

[36] Marsh, Capen & Lyon had offered Marryat royalties on the American sales of *Mr. Midshipman Easy*. Although Marryat could not obtain copyright himself, the publishers attempted to secure copyright in their 1836 edition, claiming that it contained editorial corrections. Carey & Hart nevertheless brought out a cheap reprint, and no legal action was taken. Marryat later visited Carey & Hart, and seems to have negotiated some sort of payment. Arno L. Bader, 'Captain Marryat and the American Pirates' (1935) 16 *Library* 328. And see below, p. 175.

The question of international copyright had been brought sharply into focus by the activities of Bulwer-Lytton's London publishers, Saunders & Otley. The firm determined to compete with American publishers directly, on their own ground. In May or June of 1836 Frederick Saunders opened a branch office in New York. The intention was to publish Saunders & Otley publications in New York and London simultaneously, forestalling the American competition. This was not entirely a raid into a hostile country, since Saunders seems to have been encouraged by a body of American opinion. The editor of the *New York Evening Post*, William Cullen Bryant, was in favour of international copyright, and allowed Saunders to put his arguments in its columns.[37] But there was one very public disagreement over territory, involving Harper & Bros., whom Saunders believed bribed his staff to procure the firm's works.[38] Saunders & Otley were advertising heavily their forthcoming *Memoirs of Prince Lucien Bonaparte*. They had the author's exclusive authority to publish in England, France and America – for what this was worth. When Harpers also announced that they had the same work in press and almost ready, Saunders printed an advertisement detailing the facts, and inviting the public to judge the 'moral rectitude' of the rival publication. The Harpers replied with a rather crude parody of the Saunders advertisement, attempting to drive home the message that international copyright would raise the price of books.[39] Saunders eventually closed the branch office, finding it impossible to survive in such conditions.

The Clay bill: early petitions and pressure

In the autumn of 1836 Saunders & Otley drafted a petition and sought the help of its authors. Fifty-six British authors put their signatures to the petition. One notable exception was Wordsworth. Although strongly

[37] The effort was said by Saunders to have been 'inspired, if not instigated' by the Boston author and publisher Nathaniel Parker Willis. Frederick Saunders, *The Early History of the International Copyright in America* (1888), *Saunders Mss.*, but largely reprinted in James A Rawley, 'An Early History of the International Copyright Movement' (1941) 11 *Library Quarterly* 202–6. Arno L. Bader, 'Frederick Saunders and the Early History of the International Copyright Movement in America', *Library Quarterly* 8 (1938) 25–39.

[38] 'The NY publishing firm of Harper & Bros got hold of proof sheets of our books; our own pressmen having been tampered with; and published books, that were the property of S & O, several days sooner than we could get them out ourselves. This action of the NY firm was widely announced with placards proclaiming "Great American Enterprise".' Frederick Saunders, *Recollections* (1890), *Saunders Mss.*.

[39] Saunders' advertisement, *New York Evening Post*, 22 September 1836. Harpers' riposte, *Morning Courier and New-York Enquirer*, 26 September 1836.

in favour of reciprocal protection he thought the strong condemnatory language impolitic.[40] Printed copies of the document were sent to influential Americans, with personal letters, asking them to petition also. In February 1837 Henry Clay presented one petition to the Senate, and Churchill Cambreleng submitted the other to the House. Clay also presented a petition in favour of international copyright signed by American citizens. A Select Committee was appointed to look into the question, to be chaired by Clay.[41] It reported that justice required protection for foreign authors, and recommended that America should enter into agreements to this effect with Britain and France. Clay submitted a bill which would have extended copyright privileges to British and French authors on condition that their works were reprinted and published in the United States within a month of their appearance abroad. Clay wished simply to publicise the bill, hoping it would pass in the following session. Prospects seemed not unfavourable. Joseph Story, at this time an associate justice of the Supreme Court and Professor of Law at Harvard, suggested that the bill would have passed if Congress had sat a month longer. A supportive article, discussing the Clay report at length, appeared in the *American Quarterly Review* – a periodical known for its national pride.[42]

But the situation had changed by the time Clay reintroduced the bill in December. The American publishing trade had petitions against international copyright presented in both houses. Economic conditions were extremely difficult, and the book trade was under pressure. There were some significant petitions in support. Nevertheless, the Patents Committee reported the bill unfavourably, its supplementary report – the 'Ruggles Report' – arguing strongly against the bill's aims. Nevertheless, there was considerable backing for the bill in the press.[43] Clay

[40] Wordsworth to Crabb Robinson, 15 December 1837: *Wordsworth's Letters*, vol. VI, p. 493. See also Wordsworth to Spring Rice, 26 November 1836: *Pforz Mss.*.

[41] Henry Clay, *The Papers of Henry Clay*, Robert Seager II (ed.), 11 vols. (Lexington: University of Kentucky Press, 1959–92), vol. IX, p. 22 (which has the text of the British petition). A list of signatories is given in Thorvald Solberg, *Copyright in Congress 1789–1904: A Bibliography and Chronological Record of All Proceedings in Congress in Relation to Copyright from April 15, 1789, to April 28, 1904* (Washington, D.C.: Government Printing Office, 1905). The British memorial contained specific allusion to Saunders & Otley, and the dispute with Harper & Bros.. The full text of the American petition is in R. R. Bowker, *Copyright: Its History and its Law* (Boston; New York: Houghton Mifflin, 1912), pp. 341–4.

[42] Joseph Story to Harriet Martineau, 7 April 1837: William W. Story (ed.), *Life and Letters of Joseph Story*, 2 vols. (London, 1851), vol. II, p. 275; (1837) 21 *American Quarterly Review* 216–29.

[43] The Patents Committee was chaired by John Ruggles. The arguments used in the Committee's report perhaps owe something to Philip H. Nicklin's *Remarks on Literary Property* (Philadelphia, 1838). Bader gives a long list of articles advocating international

introduced the bill three more times: December 1838, January 1840 and January 1842. The Judiciary Committee appointed in 1838 did nothing. Clay thought that the bill's prospects were bad: 'the activity of some of the large publishers has been such as to make strong impressions against it on the minds of many Senators'.[44] Nevertheless, he reintroduced the bill in 1840. A similarly composed Judiciary Committee reported it without recommendation, leaving the Senate to decide its fate. Opponents of the bill were proposing amendments, including the restriction of copyright privileges to American citizens. In the end Clay asked for the debate to be postponed, but did not call for the debate again, doubtless wishing to avoid rejection by the whole Senate. Clay reintroduced the bill one final time in January 1842. Again he was unsuccessful, thanks to the opposition of the powerful publishing interests, which overwhelmed the supporters of international protection.

The American advocates of international copyright may be accused of failure to coordinate or sustain their efforts, at least in the early stages of the campaign. One of the first initiatives was the formation of the American International Copyright Association in 1837. This was founded by the publisher George Palmer Putnam, who was to work tirelessly for international copyright. Its committee (including Bryant and Cooper) made appeals to the press and signed petitions, but the organisation lapsed before 1840.[45] The first petition from American nationals, presented by Clay in February 1837, was signed by thirty authors and ten prominent journalists. It asked that:

> such changes may be had in the present law of copyright, as, while they ensure to authors a safer interest in their property, to our own writers encouragement, and to foreigners a reasonable protection, the public may be secured against a discouraging monopoly, the commonwealth of literature open to a fair and liberal competition, and the groundwork laid for a future international law of copyright between the Old World and the New.[46]

Neither Irving nor Cooper signed it, though Longfellow did. Also in February arrived the 'Memorial of G. Furman and other public writers', and a petition from the professors of the University of Virginia.

copyright, and notes that the main opponent was the Philadelphia *Public Ledger and Daily Transcript*, the mouthpiece of the Philadelphia publishing interests: Bader, 'International Copyright Movement', 36.

[44] Clay to Francis Lieber, 28 December 1839. Henry Clay, *Papers*, vol. IX, p. 369.

[45] George Haven Putnam, *George Palmer Putnam: A Memoir* (New York; London: Putnam, 1912), p. 33. The organisation was revived by George Palmer Putnam in 1866. See below, pp. 193–4.

[46] Thorvald Solberg, 'International Copyright in Congress, 1837–1886' (1886) 2 *Library Journal* 252.

Furman's memorial had 154 signatories, mainly from New York: it argued that literary property should be protected as other property. The nine professors stressed the inadequacy of US copyright law for encouraging native literature and science.

For the 1838 bill, a number of petitions in favour came from Philadelphia, Boston and New York. The Boston petition had seventy-eight signatures, led by the prominent politician Edward Everett, who would continue to be involved in the matter. It argued that a foreign author should have as much liberty to consign and transfer literary property as a foreign merchant had regarding his merchandise. The New York petition had 136 signatories, including the writer Cornelius Mathews, who would be a significant campaigner, and Grenville A. Sackett. Sackett is thought to be the author of the first independent work published in America on international copyright, the pamphlet *A Plea for Authors*.[47] The New York petition argued that international copyright law was 'not only demanded by a just regard to the property of foreign writers but is imperatively required for the advancement of our own literature'. The Ruggles report, which considered these petitions and reported adversely against the bill, was noticeably reluctant to engage with the question of authors' natural rights.

Francis Lieber, the German–American political theorist, had advocated international copyright in his *Manual of Political Ethics*.[48] Anxious to see his ideas put into practice, Lieber urged Clay to keep on fighting. Lieber wrote a long essay arguing that international copyright was ethically and theoretically desirable, and also a practical necessity to protect American authors. Six publishers rejected Lieber's pamphlet, and eventually he published it at his own expense.[49] Lieber also contacted the eminent historian William Hickling Prescott. Prescott had remained passive in the early stages of the campaign, but to Lieber he admitted his interest in it. He was unwilling to travel to Washington to defend a memorial in public, but he wrote to Irving suggesting that he should prepare a petition. Irving described himself as 'the very worst person to draft and set on foot a petition on the subject', because he was

[47] *A Plea for Authors, and the Rights of Literary Property. By an American* (New York: Adlard & Saunders, 1838).

[48] Francis Lieber, *Manual of Political Ethics*, 2 vols. (Boston: Lippincott, 1838–39).

[49] Clay to Lieber, 19 June 1839; Preston to Lieber 30 April 1839, quoted in Frank Freidel, 'Lieber's Contribution to the International Copyright Movement' (1945) 8 *Huntington Library Quarterly* 200–6. Francis Lieber, *On International Copyright, in a Letter to the Hon. William C. Preston* (New York, 1840).

a procrastinator, and lived in the country. He did offer to sign one if it was sent.[50]

Irving's excuses seem astonishing, given his stature in the literary community, particularly as he was in favour of the principle of international copyright. As Clay introduced his bill for the second time, Irving wrote to the *Knickerbocker* to explain that he had declined signing the 1837 appeal not because of indifference to its object, but because he 'did not relish the phraseology of the petition'. He now sought to 'enroll [his] name among those who pray most earnestly to Congress for this act of international equity'.[51] As Clay prepared to introduce the bill for a final time, Cornelius Mathews wrote to Irving to ask if he would write something on the international copyright for Mathews' magazine, *Arcturus*. Irving quoted Mathews' words straight back at him in flat rejection: 'I have no idea of ''employing my pen publicly in advocacy of this interest''.' He did volunteer 'to aid the good cause ... by writing to such persons of my acquaintance at Washington, both in and out of Congress, as I may think likely to be of service'.[52] However, this rebuff may have been provoked more by Mathews himself than by the subject of the request.

Cornelius Mathews trained as a lawyer, but devoted himself increasingly to literary pursuits. He published numerous works, many of which manifest a concern with literary nationalism, and was one of the founders of the 'Young America' party. He was close to Evert and George Duyckinck (editors of several New York literary journals), and other figures who were associated with the campaign for international copyright, such as Bryant, William Gilmore Simms and John L. O'Sullivan. Personally though, Mathews was greatly disliked by many of his contemporaries. He was considered pompous, vain, tactless and conceited. The target of many attacks, he was particularly detested by Lewis Gaylord Clark, the editor of the influential literary magazine, the *Knickerbocker*, which espoused different political views. Mathews was the butt of scorn and parody, which had the unfortunate effect of making the causes he espoused seem faintly ridiculous also.[53]

[50] Quoted C. Harvey Gardiner, *William Hickling Prescott: A Biography* (Austin, T.X.: University of Texas Press, 1969), pp. 160–1.

[51] Senator Preston (as a member of the 1837 Select Committee) had written to Irving, asking for his opinion on international copyright (letter untraced). Irving replied (22 February 1837) that he was in favour of extension of American copyright to all countries which offered reciprocal protection: Irving, *Letters*, vol. II, p. 900. Irving to the Editor of the *Knickerbocker*: Irving, *Letters*, vol. III, pp. 32–3.

[52] Irving to Cornelius Mathews, 18 December 1841: Irving, *Letters*, vol. III, pp. 174–5.

[53] Mathews featured in James Russell Lowell's *Fable for Critics*: '... this gall is the merest suggestion / Of spite at my zeal on the Copyright question ... '.

Dickens in America: controversy and the Clay bill

Early in 1842 Dickens arrived in America for a lecture tour. His intervention in the international copyright question was generally regarded as disastrous for the cause. Dickens' interest in copyright was not new. He was jealously protective of his copyrights, and had supported Talfourd's attempts to improve domestic protection.[54] Dickens undoubtedly had a legitimate interest in the international question, given the massive popularity and extensive reprinting of his works abroad, particularly in America. He had written to Lewis Gaylord Clark in 1840, welcoming Irving's intervention in the international copyright question:

> It is one of immense importance to me, for at this moment I have received from the American Editions of my works – fifty pounds. It is of immense importance to the Americans likewise if they desire (and if they do not, what people on earth should) ever to have a Literature of their own.

Clark had quoted this in a *Knickerbocker* editorial supporting Clay's 1840 bill, then floundering in Congress.[55] The stress on native literature is significant: it was a point which Dickens was to make in person to the Americans during his tour, causing considerable consternation.

Dickens first mentioned copyright at a dinner given in his honour in Boston on 1 February 1842. Josiah Quincy gave a speech of welcome. In reply Dickens spoke warmly of the way that he and his books had been received in America. His final theme was the power of national literature to refine and improve the people of that nation, and its importance as a source of national pride. He spoke of the great American writers who diffused knowledge of and love for America all over the civilised world, and expressed the hope that they would 'receive of right some substantial profit and return in England from their labours; and when we in England, shall receive some substantial profit and return for ours'. Admitting that he would rather have the affectionate regard of his fellow men than gold, Dickens nevertheless argued that the two were not incompatible, and ended with a clear call for an international arrangement: '*firstly*, because it is justice; *secondly*, because without it you can never have, and keep, a literature of your own'. He pressed his points again in Hartford, the following week.[56] The Boston speech was fully

[54] See Catherine Seville, *Literary Copyright Reform in Early Victorian England* (Cambridge: Cambridge University Press, 1999), pp. 184–5.

[55] *Dickens' Letters*, vol. II, pp. 55–6. 'Dickens & International Copyright' (1840) 15 *Knickerbocker* 529.

[56] Dickens confessed: 'I have made a kind of compact with myself that I never will, while I remain in America, omit an opportunity of referring to a topic in which I and all others of my class on both sides of the water are equally interested.' K. J. Fielding (ed.), *The*

reported, but the comments on international copyright attracted no particular remark. It was the Hartford speech which provoked the trouble. The *Hartford Daily Times* wrote stiffly: 'It happens that we want no advice upon this subject, and it will be better for Mr Dickens, if he refrains from introducing the matter hereafter.' The *New World* attacked the remarks as 'in the worst taste possible'. It argued that it was the very absence of international copyright law to which Dickens was indebted for his widespread popularity, and bragged of selling thousands of copies of his works throughout the land.[57]

Dickens continued apparently unabashed. In New York he was invited to a public banquet in his honour, at the City Hotel. The invitation was signed by Washington Irving and forty other New York figures. Members of the dinner committee were worried by the outcry with which Dickens's international copyright campaign was being received – although admitting that they agreed with him – and begged him not to pursue the subject. But he replied (or so he told Forster) 'That nothing should deter me ... that the shame was theirs, not mine; and that as I would not spare them when I got home, I would not be silenced here.'[58] Washington Irving took the chair. Dickens in fact made only a brief and dignified reference to the matter:

> I assert my right tonight, in regard to the past for the last time, my right in reason, truth and justice, to appeal to you, as I have done on two former occasions, on a question of universal literary interest in both countries.[59]

Dickens' toast was to 'The literature of America'. This was the last time that he spoke on the subject of international copyright during his trip. Washington Irving also gave a toast, to 'International Copyright'. A long speech from Cornelius Mathews followed, concluding with a ringing toast to 'International Copyright – The only honest turnpike between the readers of two great nations.'[60] Dickens was not displeased by the

Speeches of Charles Dickens: A Complete Edition (Brighton: Harvester Wheatsheaf, 1988), pp. 17–22 at p. 21 (Boston); pp. 22–6 (Hartford).

[57] *Dickens' Letters*, vol. III, p. 60 n.1. The *New World* was one of the leading 'mammoth' weekly newspapers, with a national circulation, providing huge quantities of cheap print to its readers. The newspaper format brought cheaper postage rates, and no binding or stitching costs. In 1841 it had experimented with reprinting an entire book (not just instalments) as a gift for new subscribers, and in 1842 it published 21 of these 'extras'. Editions sizes were huge, with 10,000 the normal first printing (though 50,000 for Dickens' *American Notes*).

[58] Dickens to Forster, 24 February 1842: *Dickens' Letters*, vol. III, pp. 81–3.

[59] 18 February 1842: Dickens, *Speeches*, pp. 26–32 at p. 28.

[60] Irving's toast was, 'International Copyright – It is but fair that those who have laurels for their brows should be permitted to browse on their laurels.' This ghastly pun has been attributed to the lawyer William Evarts: William Glyde Wilkins, *Charles Dickens in America* (London: Chapman & Hall, 1911), pp. 139–47.

sensation he had created, telling his friend John Forster, 'As the gauntlet is down, let us go on.' He asked Forster to arrange for a letter to be addressed to him, by the principal British authors who had signed Clay's petition, expressing their sense that Dickens had done his duty. When Dickens met Clay in Washington the following month, he took with him a further petition from American authors, the twenty-five signatures headed by Washington Irving's.[61] Clay's bill had been referred to the Senate Judiciary Committee, which intended to report it negatively. In the House, a Select Committee had been appointed, chaired by John Pendleton Kennedy, and this remained Clay's only hope. Dickens had promised that he would write something which could be used in the Select Committee Report, but did not.[62] Kennedy in the end did not issue a report at all.

Forster had complied with Dickens' request to obtain a letter of support from home, although it was Bulwer-Lytton who drafted both the letter and also a memorial, thinking this might usefully be presented as a petition to Congress. The memorial concentrated on the injury done to American authors, and thereby to the American reading public. The letter expressed warm support for Dickens' efforts for the cause of international copyright.[63] These were sent to the editors of four American newspapers at the end of April, with a separate letter of support sent to Dickens by Thomas Carlyle. Editorial reactions to the letters were mixed. Carlyle's letter provoked many, because it argued badly that stealing from another nation was contrary to 'the Law Book of the Maker of this Universe', and (by implication) compared the American activities to those of Rob Roy and his cattle-thieves.[64] Most worrying was Greeley's *New York Tribune*, now defending the reprinting of published material. The highly influential Greeley had claimed to be in favour of an international copyright law, and had recently signed Irving's petition. Such reactions lend support to those arguing that Dickens' intervention prevented the passage of the 1842 bill, and thus postponed the achievement of international copyright. Given the

[61] *Dickens' Letters*, vol. III, p. 86. The petition is dated 18 February, the date of the New York dinner for Dickens.

[62] See Dickens to Forster 15 March 1842, but then to Kennedy, 30 April 1842: *Dickens Letters*, vol. III, pp. 135 and 221.

[63] The memorial was not presented to Congress, and Bulwer-Lytton seemed unenthusiastic about the exercise, writing to Forster: 'After all little is to be gained, I fancy, except by Dickens and Ainsworth, to whom we benevolently purvey – even if the Yankees yield.' *Dickens' Letters*, vol. III, p. 214 n.3. He was to take a different view later. See below, pp. 180–2. For text and signatories see *Dickens' Letters*, vol. III, pp. 621–2.

[64] Dickens' letter (27 April 1842); Carlyle's letter (26 March 1842): *Dickens' Letters*, vol. III, p. 212 & p. 623.

deep-seated opposition of the book trade this analysis is too simple. It should also be remembered that this was the period in which the 'mammoth' periodicals flourished. These massive publications relied heavily on reprinted material, and Dickens' works were an obvious target. *Brother Jonathan*, the first of the mammoths, took pride in 'having first introduced into the cash newspapers the custom of reprinting [Dickens'] novels as they appeared in numbers'. International copyright would have hampered such activities, although, oddly, several of those signing Irving's petition either owned or edited mammoths.[65]

On his return home, Dickens sent a printed circular to British authors and journals, stating that he would never again send early proofs to America, nor accept payment from this source. He did not presume to suggest that others take this strong line, but he did ask them to act against 'the editors and proprietors of newspapers almost exclusively devoted to the republication of popular English works', by which he meant the mammoths. British journals reacted favourably to the circular, whereas American comment was predictably hostile.[66] In the autumn Dickens' published an account of his trip, *American Notes for General Circulation*. It sold hugely in America. Both *Brother Jonathan* and the *New World* published it on the day after it arrived on the *Great Western*, priced at twelve and a half cents.[67] Although popular, the work was not well received critically on either side of the Atlantic, and the reception at home was particularly painful. Dickens largely withdrew from the campaign for international copyright, although he did contribute to another more discreet effort in the early 1850s. Nor did he

[65] *Brother Jonathan*, 5 February 1842, p. 157. Notable signatories included Rufus W. Griswold and H. Hastings Weld, both of whom were associated with *Brother Jonathan*. N. P. Willis, editor of the *Dollar Magazine*, was another. Lawrence H. Houtchens, 'Charles Dickens and International Copyright' (1941–42) 13 *American Literature* 22. Another signatory, John L. O'Sullivan, editor of the *Democratic Review*, later withdrew his support for international copyright. In an article which he termed a 'solemn act of recantation and disavowal', he called Dickens (in a Pickwickian sense, presumably) ''a Humbug!'': (1843) 12 *United States Magazine and Democratic* Review 115–22. But see also a fierce rejoinder, 609–16.

[66] *Dickens' Letters*, vol. III, pp. 256–9. Dickens later explained his position with a lighter touch: 'As to the Pirates, let them wave their black flag, and rob under it, and stab into the bargain, until the crack of doom. I should hardly be comfortable if they *bought* the right of blackguarding me in the Model Republic; but while they steal it, I am happy.' *Dickens' Letters*, vol. III, p. 457.

[67] *Dickens' Letters*, vol. III, p. 346 n.2. The *New World* printed an announcement that it had received *American Notes* at 8pm on Sunday evening, and issued it as a 'double extra' at 1pm on Monday, a mere seventeen hours later. It claimed to have printed 24,000 copies in twenty-four hours, and to have orders for 100,000 copies: quoted Houtchens, p. 23. See also, Sidney P. Moss, *Charles Dickens' Quarrel with America* (Troy, New York: Whitston, 1984).

speak publicly on the subject during his second trip to America, in the winter of 1867–68.

The formation of the American Copyright Club

American efforts to keep the subject in the public eye continued. At the beginning of 1843 Cornelius Mathews delivered a lecture, *The Better Interests of the Country in Connexion with International Copyright*.[68] It made the familiar point that America needed native authors who could articulate American values, and unite their readers in working for the higher purposes of the American nation. Mathews was also involved in the founding of the American Copyright Club, formed after a sparsely attended meeting at the Athenaeum Hotel in New York. William Cullen Bryant was elected President. Other officers (Mathews, Verplanck and Evert Duyckinck, for example) were also already associated with international copyright. Like several other copyright lobbying organisations, its name promised more than it could deliver.[69] But an impressive membership list was built rapidly, with branch organisations and committees in other parts of America. Soon appeared *An Address to the People of the United States in Behalf of the American Copyright Club*, written by Bryant, Mathews and Francis L. Hawks. This rehearsed the moral arguments for copyright, stressed the need for an independent national literature, and for reputable publishing.[70] Yet there was not much of substance beneath this self-confident façade, and little was achieved.

Initial enthusiasm for the Club died out rapidly after the *Address* was published. Mathews' general unpopularity seems to have been one factor in alienating support. In 1844 the Club produced a petition. All members were asked to collect signatures.[71] One associate member who

[68] (New York; London: Wiley & Putnam, 1843).

[69] Letters of William Cullen Bryant, William Cullen Bryant II and Thomas G. Voss (eds.), 6 vols. (New York : Fordham University Press, 1975–92), vol. II, p. 247. For the formation of the American International Copyright Association in 1837, see above, p. 162. British parallels include: the Society of British Authors (1843) and the Association for the Protection of British Literature (1843) (see below, p. 256); The Copyright Association (1872) (see above, p. 99); The Association to Protect the Rights of Authors (1875) and the Society of Authors (1884).

[70] *An address to the people of the United States in behalf of the American Copyright Club* (New York: The American Copyright Club, 1843). Members and Associate Members of the Club are listed at the end of the pamphlet. Mathews recruited associate members by writing to tell them they had been unanimously elected, and most did not bother to refuse the honour – although James Fenimore Cooper did. John A. Kouwenhoven, 'Cooper and the American Copyright Club: An Unpublished Letter' (1941) 13 *American Literature* 265.

[71] The Club also took the unusual step of paying an agent to lobby for them in Washington – the newspaper editor and anthologist Rufus W. Griswold. Griswold

responded was William Gilmore Simms, editor of the *Southern Literary Messenger*. He published there a series of four long letters, putting the case for international copyright, and refuting arguments against it. Simms also canvassed his friends for signatures.[72] The previous editor of the *Southern Literary Messenger* was Edgar Allen Poe, also an associate member of the American Copyright Club. Poe had found it desperately difficult to get his work published, and developed a strong interest in international copyright. In 1841, when Poe was living in Philadelphia, he met a lawyer, Henry B. Hirst, who helped him familiarise himself with copyright law.[73] The need for international copyright law was mentioned many times in his correspondence, and his essay 'Some Secrets from the Magazine Prison-House' complained that its absence drove authors into writing for magazines and reviews.[74]

Further memorials to Congress: the publisher George P. Putnam, and Nahum Capen

The formation of the American Copyright Club produced little of substance. In the same year that it was founded, the publishing interest also attempted to move matters forward. The American publisher George Palmer Putnam had gone to London in 1840 to open a branch office for Wiley & Putnam. During a visit to America's East Coast in 1843, Putnam sought signatures for a memorial to Congress. Although calling for international copyright, he took care to address trade fears in the details of the scheme. Foreign works were to be printed and bound in America, and foreign authors could transfer their copyrights only to an American publisher (to prevent intrusions such as that attempted by Saunders & Otley in 1836). Putnam secured an impressive range of signatures; ninety-seven publishers, printers, binders and booksellers from the leading houses of New York, Boston, Philadelphia and Hartford were represented. The memorial was presented in December, with

lobbied ferociously for international copyright, unperturbed by his responsibility for many unauthorised editions of British works. Joy Bayless, *Rufus Wilmot Griswold: Poe's Literary Executor* (Nashville: Vanderbilt University Press, 1943), p. 84.

[72] 'International Copyright' (1844) 10 *Southern Literary Messenger* 7–17, 137–151, 340–349, 449–469. Simms singles out 'the notion of the half-witted fellows from the West is that this is a favour to the English'; an early recognition of this particular strand of opposition. For more on the mid-Western cheap printers, see below, pp. 209–10.

[73] Hervey Allen, *Israfel: the Life and Times of Edgar Allen Poe* (London: Brentano's, 1927), p. 521–2. Poe met Dickens in Philadelphia during March 1842, and it seems a reasonable conjecture that they would have discussed copyright.

[74] (1845) 1 *Broadway Journal* 103–4. The *Broadway Journal* was started by Charles F. Briggs, who joined the Executive Committee of the American Copyright Society on its foundation.

no perceptible effect. In January 1844 a lengthy memorial in favour of international copyright arrived from Nahum Capen, a partner in the Boston firm which had tried to poach Bulwer-Lytton from the Harpers in 1836.[75] Again, little resulted. In 1846 the memorials in the Senate files were referred to a select committee, but no action followed. The book trade was acutely sensitive to foreign threats, and in the summer of 1846 lobbied for an increase in the import tariff on literary works.[76]

In the mid-1840s the prospects for Anglo-American copyright looked bleak. The only consolation for British authors was that the system of 'courtesy of trade' was returning after the depression, and American publishers once again felt sufficiently confident to pay for British works.[77] In 1847 there was one isolated triumph for the British, however, which involved *Blackwood's Edinburgh Magazine* – the mighty 'Maga'.[78]

British periodicals in America: Blackwood's Edinburgh Magazine

British periodicals were only imported into America in tiny numbers, because they were so expensive. There had been various attempts to reprint them in America, but it was not easy to do so profitably, because the printing was costly and complicated, and each number dated quickly. Others had made arrangements to import sheets from the British publishers, but it was hard to maintain subscription rates and profit margins, particularly when economic conditions were difficult. There were some transient successes, but also a number of failures during the period 1820–45. One of the more durable players was Leonard Scott, who had been in the reprint business since the 1830s. From

[75] Putnam, *Memoir*, p. 166; Solberg, 'International copyright', 258. See above p. 159.

[76] For details of tariff rates see below, pp. 191–3.

[77] This informal understanding required publishers to respect the priority of the first publisher in the market. Once a work had been announced in the press, others were expected to leave the field clear. If a firm was known as a particular author's publisher, others did not compete for that author's new works. Accidental collisions were sorted out amicably, or by reference to a third publisher who would arbitrate if agreement could not be reached. Transgressions were punished by retaliatory publication of the offender's choice titles. The system worked best in the first half of the century, though it was never universally respected, particularly in tough economic times. By the 1870s the arrangement was under severe pressure from the new entrants into the trade, who cared little for these old customs.

[78] The story is told by James J. Barnes, *Authors, Publishers, Politicians: The Quest for an Anglo-American Copyright Agreement 1815–1854* (London: Routledge & Kegan Paul, 1974), pp. 31–48.

1845–47 he had the market to himself. However, he was soon to be ambushed.

The idea for the trap came from John Jay, New York lawyer and grandson of the first US Chief Justice, and his close friend, the writer and priest Arthur Cleveland Coxe.[79] Coxe admired *Blackwood's*, and wanted to write for it. He also thought that the publishers deserved some recompense from Scott. He offered to pose as an Englishman temporarily resident in America, who would write articles describing the new world in which he found himself. When Scott reprinted the relevant number of the magazine he would be told that Coxe's articles had been copyrighted in America, and that he had infringed these copyrights. Then *Blackwood's* could choose whether to make Scott pay for a licence to reprint, or to appoint a different agent to do so, or to find someone who would pay to import entire copies. Coxe's proposal was accepted, and his article, '*Maga* in America', was sent in June 1847. American copyright law required the deposit of a printed title before publication, and deposit of a copy within six months of publication. Jay registered the title as soon as the proofs of the October number reached America, later depositing the required copy of the magazine when this arrived. Jay decided to break the bad news to Scott before he had had time to reprint. Scott proved unexpectedly willing to compromise. His profits were not such that he was prepared to pay huge sums, and he disclosed his accounts to prove this. An agreement was reached and signed in December 1847. The whole story was told in a *Blackwood's* editorial, framed by a reference to the absence of international copyright, and its effect on American literature:

> no American publisher is likely to pay its due price for any composition of domestic genius, when he can please his customers and fill his pocket by reprinting, without any remuneration to the author, the most successful productions of the British press. The repression of such a system of piracy in America could benefit alike the foreigner, whose copyright is thus pilfered, and the American man of letters whose talent is borne down by so disadvantageous a competition.[80]

Blackwood's stressed that they had not pressed their advantage to the utmost because no blame was attached personally to Scott, who had

[79] Jay had written to Dickens in c. March 1838, enclosing an American reprint of one of his works, observing that his books were read in every part of America, yet that the large sums involved accrued to booksellers, rather than 'to the pocket of the Author & rightful owner. But such will probably be the case until an International Copyright Law shall be passed by our Congress'. Draft in *Columbia University Library*.

[80] 'Blackwood and Copyright in America' 63 (1848) *Blackwood's Edinburgh Magazine* 127–8.

merely acted under a bad system. One senses a touch of embarrassment at the subterfuge, but the successful sting was reported approvingly by the trade papers.[81]

Jay's efforts in Congress

This success persuaded Jay to attempt to interest Congress in international copyright again. He travelled to Washington, and interviewed a number of members of Congress, including Clay and Winthrop. It was agreed that Jay would send a memorial to Winthrop, now Speaker of the House, who would appoint a Select Committee if the question reached the floor of the House. Jay compiled a new memorial, having worked through all the previous material put before Congress. Jay sent reassuring news to *Blackwood's*, convinced that organisation and effort was all that was needed. He saw newspaper support as essential, and explained that this had to be paid for. Proceeding on the assumption that the British publishers would raise the $5,000 he had asked for, Jay worked on the memorial. It was presented in March, by a known supporter, Thomas Butler King. Also included in the bundle of documents were Putnam's December memorial, a list of books by American authors reprinted in Britain (compiled by Putnam), and a further memorial signed by Bryant and fifteen others. Jay argued that an international copyright law 'would afford to our native authors what they have never yet enjoyed, "*a fair field*"'.[82] The memorial was referred to a Select Committee of the House, chaired by King. Jay made efforts to generate petitions. Lieber responded promptly. Simms too agreed, and was enthusiastic about prospects.[83]

Blackwood's initial response to Jay's request for money had been cautious. Doubtful that others would be willing to contribute, he offered to take a large share of the burden if others would join, and in the meanwhile to pay Jay's expenses. Jay visited Britain in May. *Blackwood's* had printed Jay's letter and circulated it to a few authors and publishers under strict conditions of secrecy. As he had predicted, there was little

[81] Jay later brokered a similar arrangement for John Chapman's *Westminster & Foreign Quarterly Review*: Jay to Chapman, 12 September 1851 (original in *Pforz Mss.)* and 16 March 1852, John Jay II Letterbooks, *Jay Family Papers*.

[82] Barnes, *Authors*, pp. 86–8. The second memorial was just the first and last two paragraphs of Jay's memorial. It seems to have been drafted by George Palmer Putnam, as 'Secretary of the Copyright Committee': Putnam, *Memoir*, p. 166. For the text see Bryant, *Letters*, vol. II, pp. 524–5.

[83] Freidel, 'Lieber's Contribution', 205 n.14. *The Letters of William Gilmore Simms*, Mary C. Simms Oliphant and Alfred Taylor Odell (eds.), 5 vols. (Columbia: University of South Carolina Press, 1953–56), vol. VI, p. 92.

enthusiasm for contributing money. Jay tried to encourage King, assuring him that literary London was eager to see the Select Committee's report.[84] But on returning to the United States, however, Jay found that everyone had been busy with the Presidential nominations and nothing had been done about his memorial. Jay admitted defeat before the end of the Congressional session. Sending *Blackwood's* his account as their American agent, Jay subtracted $30 included for expenses relating to the copyright campaign, feeling that they had been wasted. Emerson perhaps captured the general public view in his journal:

> For copyright, it is to expect almost too much magnanimity to believe that our people having had the best English new books so long at 25 cents a volume, should now consent to deprive themselves of the privilege & pay dollars for them. It is like expecting us Concord people, after riding on the railroad now for two years, at 40 cents, & in one hour to Boston, on now discovering that we have violated some vested right of the old stagecoach company, to consent henceforward to go back and pay them 75 cents & ride 3 hours.[85]

Foreign authors under English law: division and doubt

At this time the copyright status of foreign authors in Britain was being challenged. A venerable line of case law considering the matter had focused on the act of first publication within Britain. In *Bach* v. *Longman* (1777) a foreign composer resident in England who published his work there had been able to sue for infringement of copyright: the central difficulty in this case was whether a musical work was a 'book' for the purposes of the Statute of Anne. *Clementi* v. *Walker* (1824) held that for a work to benefit from the statute, its first publication had to be in Britain. Consistently with this, in *Guichard* v. *Mori* (1831) Lord Chancellor Brougham decided that if a book were written by a foreigner, and published in a foreign country, the person who purchased the right to publish it here could not support any claim to the copyright in Britain, either at law or in equity. However, it was not the case that a British assignee of the copyright of a foreigner was necessarily without protection. In *D'Almaine* v. *Boosey* Lord Abinger held that a foreigner could assign his copyright to a British publisher even though he did not

[84] 'Copyright in America': John Jay, Esq. New York, to Messrs William Blackwood & Sons (dated 28 January 1848). *Bulwer-Lytton Papers* D/EK/C15. Jay to King, 8 June 1848, quoted Barnes, *Authors*, p. 92.

[85] August 1848: *The Journals and Miscellaneous Notebooks of Ralph Waldo Emerson*, W. H. Gilman and J. E. Parsons (eds.), 16 vols. (Cambridge, Mass.: Harvard University Press, 1960–82), vol. X, p. 349.

visit British territory: the publisher, as proprietor of the copyright, could claim protection if the work was first published in England, regardless of whether he had composed it himself or bought it from a foreigner.[86]

This was the situation when the 1838 International Copyright Act was passed. This gave a power to grant copyright within the Dominions to the authors of books first published abroad, subject to various conditions. Since the Act contemplated reciprocal arrangements with individual countries, and required an Order in Council to take effect, there was some confusion as to its effect on the general situation. In *Bentley* v. *Foster* (1839) Vice Chancellor Shadwell held that protection was given to a work first published in Britain, whether it was written abroad by a foreigner or not. His view was that if an alien friend wrote a book here or abroad and 'gave the British public the advantage of his industry and knowledge' by publishing it here first, the work became a 'domiciled publication' entitled to the protection of British copyright law.[87] This case concerned a novel by James Fenimore Cooper, and the decision benefited Americans, allowing them to obtain British copyright by ensuring publication in Britain one day before American publication. The reverse was not true. Even a year's residence in the United States did not entitle an English writer to American copyright unless he was intending to reside there permanently, as the English author Captain Marryat found to his cost.[88]

However, in *Chappell* v. *Purday* (1845) the Court of Exchequer challenged the prevailing understanding. Chief Baron Pollock ruled that a foreigner residing abroad, who composed and first published his work abroad, had neither common law nor statutory copyright in Britain. This much was entirely in line with existing authority. However, he went

[86] *Bach* v. *Longman* (1777) 2 Cowp. 623; *Clementi* v. *Walker* (1824) 2 Barn and Cr 861; *Guichard* v. *Mori* (1831) 9 Law J Ch 227; *D'Almaine* v. *Boosey* (1835) 160 ER 117. And see above, pp. 174–5.

[87] *Bentley* v. *Foster* (1839) 59 ER 641. See also Cooper to Bentley 18 June, 12 November 1839: *Cooper Letters* III, pp. 393–4, 424–6.

[88] Frederick Marryat (1792–1848). Marryat was in America from early May 1837 until January 1839. He was a considerable literary celebrity there. Marryat was able to enter a copyright for his book *Snarleyyow* (25 May 1837), but he had trouble in defending it partly because he had no intention of remaining in the United States. He brought an action in New York, and depositions from witnesses were taken, but he had to return to Britain before its resolution. In a decision involving Marryat's novel *The Phantom Ship* in 1839 it was held that resident meant a permanent inhabitant of the state, and the mere filing of a declaration of an intention to become a citizen (as Marryat had done, though only as a matter of form) was not sufficient: *Carey* v. *Collier* 5 F Cas 58 (C.C.S. D.N.Y. 1839). Although Marryat's mother was American, exception was taken to the fact that he was an officer in the British navy, and had offered his services to the province of Canada at the time of the 1837 rebellions: Bader, 'Captain Marryat', 327–36.

on to express the opinion that the purpose of the statutes was *prima facie* to protect British subjects and to foster British industry and talent, so therefore 'when statutes of the United Kingdom speak of authors and inventors, they mean authors and inventors, being subjects and residents in the United Kingdom, or at least subjects by birth or residence, and do not apply to foreigners resident abroad'. Chief Baron Pollock's view was that on the basis of the case law it was doubtful whether a foreigner not resident in Britain could have copyright at all, and certainly could not if he had published his work abroad before any publication in Britain.[89]

The issue was again considered, this time by the Court of Common Pleas, in *Cocks* v. *Purday* (1848). Having considered both principle and the authorities, it held that a foreigner resident abroad could acquire copyright in England in a work first published in England. The Common Pleas decision was straightforwardly followed by the Queen's Bench in *Boosey* v. *Davidson* (January 1849). In this case Boosey was granted an injunction against a rival publisher, restraining him from publishing a number of arias from Bellini's opera *La Sonnambula*, on the grounds that the assignee of a foreign author of a work published in Britain, which had not previously been published abroad, had copyright in Britain. However, later in the year, Boosey lost a case in the Court of Exchequer, concerning more arias from the same opera: *Boosey* v. *Purday*. Chief Baron Pollock once more based his decision on the doctrine that the legislature legislated *prima facie* for its own subjects, and those owing obedience to its laws, so its object was not to encourage importation of foreign works and their first publication in Britain, but to promote the cultivation of the intellect of its subjects. This decision changed the focus in determining whether a foreigner had copyright. The issue was now the foreign author's place of residence when the work was first published, and no longer a question of the place of first publication.[90]

The impact on American publications was very considerable, since the effect of the decision was to turn what had previously been piracies into unauthorised but legal publications. Publishers such as Bentley, who had made a feature of the American authors in his list, knew that they were likely to be badly hit. Bentley nevertheless refused to change his policy, and wrote scathingly of the decision to Melville:

> our sapient Sir Fred[k] Pollock with Justices Platt & Rolfe have decided that a foreigner has *no copyright*. This drivelling absurdity can scarcely be suffered to

[89] *Chappell* v. *Purday* (1845) 153 ER 491.
[90] *Cocks* v. *Purday* (1848) 136 ER 1118; *Boosey* v. *Davidson* (1849) 13 QB Rep 257; *Boosey* v. *Purday* (1849) 154 ER 1159.

remain, I trust, but in the mean time this decision will expose publishers like myself, who am so largely engaged in this department of publishing to the risk of attack from any unprincipled persons who may choose to turn Pirate.[91]

In contrast, there was a good deal of jubilation among the reprinters, chief among whom were Bohn and Routledge.[92] In February 1850 Bohn published Emerson's *Representative Men* as the first number in his new Shilling Series. It soon appeared in Routledge's Popular Library. Bohn retaliated by printing one of Routledge's Washington Irving titles, and a race between the two rivals to reprint Irving's other works began. John Murray's firm had paid generously for Irving's copyrights in the 1820s, and Bentley had been Irving's publisher since the 1830s. They sought an injunction in Chancery, but Bohn and Routledge raised sufficient compelling points of legal doubt that Vice-Chancellor Knight Bruce refused to grant an injunction.[93] Murray and Bentley had to decide whether to seek damages in one of the common law courts. Bentley wrote to Cooper to give a depressed report of business, wondering desperately whether Congress might offer a light on the horizon:

> Almost every American book is now pirated by the infamous dealers in stolen goods here; and there literally appears to be no chance for an American book. Surely, surely it must be worth while to preserve this market for American literature, which could be done immediately by your Congress granting a similar right to us Britishers.[94]

The *Publishers' Circular* made the same point. Referring to the disclosure during the hearing that Murray had paid £10,000 for Irving's works, it observed that nothing could be paid for such works now, following the Exchequer decision, and asked why the government did not take up the subject of international copyright with America.[95]

Nothing could happen quickly, though, so Bentley and Murray had to decide whether to continue their legal action. They knew that there

[91] Bentley to Melville 20 June 1849: Herman Melville, *Correspondence*, Lynn Horth (ed.) (Evanston; Chicago: Northwestern University Press, 1993) p. 596.

[92] See the letter from 'An Importer of Foreign Books' welcoming the decision that there was no copyright for aliens, and announcing gleefully that no one would bid for the latest works of James Fenimore Cooper or Melville: *Times*, 22 January 1850. Although Bentley wrote indignantly to the *Times* (25 January) that he had just dealt generously with Melville, Melville's journals reveal how much trouble he had in selling *White Jacket*. All the publishers he tried (Bentley, Murray, Colburn, Longman, Bogue, Chapman) deplored the uncertainty over the copyright question: Herman Melville, *Journals*, Harrison Hayford and G. Thomas Tanselle (eds.) (Evanston; Chicago: Northwestern University Press, 1989), November–December 1849.

[93] Discussed *Athenaeum* 3, 10, 17 August, 7 September 1850.

[94] Dated 1? August 1850: Cooper, *Letters and Journals*, vol. VI., p. 178. The Chancery hearings were 7–8 August.

[95] *Publishers' Circular*, 2 September 1850.

would be great difficulty in obtaining satisfactory evidence as to where the contested works were written, of their publication dates and places. They also would have to show valid assignments which gave them legal title.[96] Notwithstanding, in December they did determine to pursue their claim, perhaps encouraged by Vice-Chancellor Knight Bruce's decision in *Ollendorf* v. *Black*, that a foreigner who was visiting England at the time of publication of his work was entitled to copyright.[97] Any of the Common Law Courts could hear copyright cases, but the Exchequer was obviously hostile. The Court of Common Pleas had decided in favour of foreign copyright in *Cocks* v. *Purday* (1848), but it was thought that the Queen's Bench was even more promising, partly because it normally dealt with cases relatively quickly, but also because of the new Lord Chief Justice, Lord Campbell. Lord Campbell was an author himself, and happened to be published by Murray. In fact the case did not come on until May 1851, and the defence's tactic was to delay still further by amending the pleas and entering a demurrer. While Lord Campbell was considering this, the appeal in a different case became significant.

Boosey v. *Jefferys*: Lord Campbell and copyright for foreigners

In *Boosey* v. *Jefferys* (1850), another Court of Exchequer Case, Baron Rolfe had (as might have been expected) followed *Boosey* v. *Purday* in holding that a foreigner had no assignable copyright. This case was appealed to the Court of Error, and Murray's solicitor gave the argument prepared for their own case to counsel for Boosey. The facts of the case were simple enough. Bellini had written an aria whilst resident in Milan, and assigned all his rights in it to Riccordi. Riccordi had brought it to England, still unpublished, and duly assigned the copyright to Boosey who then published it. Jefferys had sold copies of it, and Boosey had challenged his right to do so. Baron Rolfe had directed the jury that these facts did not give the plaintiff a right to a verdict. On 20 May 1851 judgment was given declaring that Baron Rolfe's decision was wrong.[98]

[96] Barnes, *Authors*, pp. 158–9. See also Thomas Delf to George Duyckinck, asking for information: 'How they will like to be claimed as Britishers I know not, but Mr Powell must put this in his next edition of the Living Authors of England ... We may require W. Irving's certificate of baptism and H. Melville's pedigree, really this new start is very amusing. What marvellous ingenuity there is in the law!' Jay Leyda, *The Melville Log: A Documentary Life of Herman Melville, 1819–1891* (New York: Gordian Press, 1969), p. 382.

[97] (1850) 20 LJ Ch, 165.

[98] 155 ER 675. The Court of Exchequer Chamber consisted of Lord Campbell, C. J. Patteson, Maule, Wightman, Cresswell, Erle, Williams JJ.

Lord Campbell presided, and began from the premise that a foreigner domiciled in Britain could acquire copyright. Then he considered whether it could make any difference whether he composed the work abroad and brought it with him, or having memorized it abroad first wrote it out in England. His conclusion was that it made no difference. Thus, wherever a foreigner was residing, first publication in the United Kingdom made him 'an author within the meaning of our statutes for the encouragement of learning'. Bentley wrote jubilantly to Cooper:

> At last we have had a decision of the Question – whether a foreigner can hold Copyright – by the Lord Chief Justice and five other judges sitting in a court of Error, deciding this point affirmatively. I am therefore now proceeding against those who have interfered with the novels by you and published by me ... Not but that the pirates threaten to carry the matter to the court of last resort – The House of Lords – but we shall see whether they will like to spend more money.[99]

At this point Routledge decided to settle, first with Murray, then with Bentley. Bohn refused to settle initially, hoping that *Boosey* v. *Jefferys* would be reversed on appeal to the House of Lords. Eventually, however, Bohn agreed to purchase the copyrights of Irving's works from Murray for £2,000 if Murray would drop the litigation, with each party paying their own costs. Bentley also reached settlement by the beginning of October.[100]

The decision was soon taken to appeal *Boosey* v. *Jefferys*, to end uncertainty over such an important issue. A subscription was raised to cover the expenses of the appeal, and the *Athenaeum* expressed strong criticism of a system which forced the public to pay to discover which of two courts was right.[101] The case also had wider international implications, as was quickly recognised. A public meeting was held, chaired by Bulwer-Lytton, to recommend the adoption of measures for the promotion of an 'equitable adjustment of British and Foreign Copyright'. The meeting's organisers believed that Lord Campbell's decision should be reversed, in the interests of British authors and publishers. There was some principled opposition to this approach even at the meeting, and the *Athenaeum* was highly critical, observing that retaliation was no remedy for the admitted problem, and that to set a noble example was the better course. Cooper made the same point to Putnam: 'It is miserable policy for England to do that which is wrong because this

[99] 3 June 1851: Cooper, *Letters and Journals*, vol. VI, p. 274.

[100] Barnes, *Authors*, pp. 162–5. Samuel Smiles, *Memoir of Murray*, vol. II, pp. 262–3. Murray noted that his own legal expenses had reached £850.

[101] Routledge later told the Royal Commission, 'I carried that matter to the House of Lords entirely to get some settlement and to know what we were doing.': *RC-Evidence* 4568. *Athenaeum*, 7 June 1851.

country has done so.'[102] Bohn was Vice-Chairman of the meeting, and many thought it inappropriate that a leading reprinter should be advocating a position so closely aligned with his own self-interest. Bulwer-Lytton's assertion that the absence of American copyright had cost him £60,000 likewise indicated a certain egotism.[103]

Whatever the principled view, it was certainly true that *Boosey* v. *Jefferys* removed one significant incentive for American authors and publishers to press for reciprocal copyright relations with Britain. John Chapman, in his thoughtful article 'The Commerce of Literature', noted ruefully:

> Of all the causes capable of diminishing the price of books in England, we believe none would be so potent as that of an American law of international copyright. Lord Campbell's recent decision – granting to American authors a copyright in England, before English authors have a corresponding right accorded to them in America – will doubtless defer, for a long period, the concession of this much need boon.[104]

Charlotte Brontë, writing to her publisher, George Smith, also saw little likelihood of change.[105] Perhaps the Americans would have acted differently in the subsequent campaign if they had known that in 1854 the House of Lords would again alter the status of foreign authors when the decision in *Boosey* v. *Jefferys* was appealed.

Efforts towards an Anglo-American copyright treaty

The next initiative towards Anglo-American copyright was veiled in secrecy at the time, and is still somewhat shrouded in mystery. Bulwer-Lytton, chair of the Hanover Square meeting, was again at the heart of things. He sought to harness his family's diplomatic connections in order to promote a legislative solution to the problem of Anglo-American copyright relations. In 1849 his brother, Henry Bulwer, became British Minister to Washington.[106] The following year, Edward's

[102] 23 July 1851: Cooper, *Letters and Journals*, vol. VI, p. 279. *Athenaeum*, 5 July 1851.

[103] Bohn collected and edited the speeches and motions at the meeting in his pamphlet, *The Question of Unreciprocated Foreign Copyright in Great Britain* (London: Bohn, 1851).

[104] *Westminster Review* 57 (April 1852) 525.

[105] 'I cannot see that Sir E. Bulwer and the rest *did* anything; nor can I well see what it is in their power to do': Thomas James Wise and John Alexander Symington (eds.), *The Brontës: Their Lives, Friendships & Correspondence*, 4 vols. (Oxford: Blackwell, 1932), vol. III, p. 259.

[106] In September 1850 Longfellow noted in his journal that Henry Bulwer had called: 'He says he has instructions to do all he can for an International Copyright.' Samuel Longfellow (ed.), *Life of Henry Wadsworth Longfellow: With Extracts from His Journals and Correspondence*, 2 vols. (Boston, Mass.: Ticknor, 1886), vol. II, p. 188.

son Robert was sent there also, to act as unpaid attaché in the British Legation. Bulwer-Lytton wrote to his son: 'Is there any chance, think you, of getting a Copyright for English Authors in America? Pray urge Henry to it. It might make me a rich man.' Robert's initial response was discouraging: it would be almost impossible to persuade a member of Congress to propose an international copyright bill, because it would be so unpopular with America's vast reading public, contentedly accustomed to cheap English reprints.[107] But later in the year he suggested a route which he admitted would sound pretty wild:

> It *would* be hopeless to get a bill through Congress about international copyright unless, indeed, the authors of England were willing to subscribe among themselves for a certain amount – perhaps ten or twelve thousand pounds – for a sum to *buy the American Congress*, and then, *seriously*, and without joking – but in *sad and sober earnest*, I think the thing might be done. This, however, is confidential, and I fear the possibility can be turned to no practical use. I cannot very well explain my reasons for making this suggestion in a letter. But you would be amused, I think, by a peep behind the cowslips of politics here.[108]

Robert later grew more confident. He had learned of a lobbying group, known as 'The Organisation', which would manage the passage of measures for a fee. Encouraged by his father, Robert made further enquiries. A figure of $60,000 was quoted: $20,000 in cash as an advance, the same on presentation of the Report and Bill, and the balance on its successful passage.[109] John F. Crampton, the new British Minister in Washington, corresponded with Bulwer-Lytton on the matter. He also told the Foreign Office that he wished to negotiate a copyright treaty, having heard confidentially that Secretary of State Daniel Webster was willing to talk, provided that there was not too much hostility from Congress and the American public.[110] Without alluding to the Organization he asked for permission to proceed, and received full authority to negotiate. A twin attack was planned, however. One option was to persuade the executive branch of the government to negotiate a treaty with Britain, which then could be ratified by a two-thirds majority of the Senate. The other option was to persuade

[107] Bulwer-Lytton to Robert Lytton, 21 January, 24 February and 29 April 1851. The February and April letters are in *Bulwer-Lytton Papers*, D/EK/C41 (1851). The January letter should be in the same folder but it is not, so I am reliant on James J. Barnes' transcription: Barnes, *Authors*, pp. 177–8.

[108] Robert Lytton to Bulwer-Lytton, 8 November 1851, also 13 November and 7 December 1851: *Bulwer-Lytton Papers*, D/EK/C41 (1851).

[109] The exchange rate at this time was just under $5 to £1.

[110] Daniel Webster's interest in copyright was of long standing. He had sponsored the 1828 Copyright Act and he was counsel for Wheaton in *Wheaton* v. *Peters* (1834) 33 US 591, the famous US Supreme Court decision on the nature of copyright.

someone to present a bill in the House of Representatives, hoping to secure a favourable committee report. The Organization was *itself* drawing up a Report for the Patent Committee to issue, and drafting the terms of the treaty – all with Webster's approval. Press lobbying and memorials in support of international copyright were planned, preparing the ground of public opinion. The treaty route was thought preferable, it being easier to influence sixty Senators than several hundred Representatives, even if a two-thirds majority was required.[111]

At this stage a major hitch occurred, when it was discovered that there had been a complete misunderstanding as to the amount required. Robert had inadvertently written home that hundreds of dollars were needed, not the thousands demanded. The Organization's representative was surprisingly understanding. Although willing to work for nothing themselves, £2,000 was already committed to printers whose influence was needed to carry the measure.[112] Money from Britain was urgently required in Washington. Bulwer-Lytton had little ready cash and could only offer £100. He wrote to Dickens, who after discussing it with Forster was extremely dubious about the scheme, but nevertheless agreed to hold a meeting in his house. The timing was particularly bad, being just at the height of the dispute over the Bookselling Regulations, which had heightened tensions between authors and publishers.[113] Although several of the principal publishers flatly refused to become involved, the necessary contributions were gradually secured. A draft treaty was finally agreed with Webster, but his unexpected death following a fall from a horse brought the appointment of a new Secretary of State, Edward Everett, causing further delay. The Organization broke up, and opposition from the American book trade grew as details of the draft treaty were leaked to the press. Publishers and printers presented an elaborate memorandum to Everett enumerating their 'Objections' to a Treaty. Everett showed these to Crampton and asked him to comment confidentially. With the assistance of the English author William Makepeace Thackeray, who was in America at the time, Crampton composed a summary of 'Observations' in response.[114]

[111] Crampton to Bulwer-Lytton, 15 March 1852; Levin to T. C. Moore[?]: *Bulwer-Lytton Papers* D/EK/C11, p. 12.

[112] Crampton to Bulwer-Lytton, 19 April 1852: *Bulwer-Lytton Papers*, D/EK/C11 p. 14; see also p. 12.

[113] The established publishers were defending a system of retail price fixing, enforced by the Bookselling Association. Leading authors had been strongly critical of Association practices, and Lord Campbell's judgment in an arbitration of the matter was delivered at the end of May. See below, pp. 260–2.

[114] Thackeray's surviving letters home hint little of his involvement. He did confide to close American friends that 'I hear the most cheering accounts (but this is a secret I

President Fillmore eventually gave Everett authorisation to sign the treaty, which he did on 17 February 1853. Crampton sent the treaty to the new Foreign Secretary, Lord Clarendon, commenting:

> I had a hard fight to get it signed, and it is yet to go through the fiery ordeal of the Senate, where I have done my best to prepare the ground for it. The assurances I receive would, in any other country, make me sanguine of success; but here political blasts and counter-blasts are so rapid and changeable, and honorable Gentlemen slippery, that it is hard to count upon anything. Whatever becomes of it however it is something to have got such a Treaty signed and presented, for I believe the inherent fairness of the measure and the real advantage of it to American Literature will ultimately secure its success, altho' on the present occasion it may be staved off by the application of dollars by the rich piratical Publishing houses of New York and Philadelphia.[115]

In March President Franklin Pierce was sworn in, and there were important changes in personnel. Everett was now Senator for Massachusetts. There were rumours circulating that the Harpers had sent an agent to Washington with $50,000 to spend in opposition to the treaty, and it was decided to postpone efforts until the December session.

In the meantime the terms of the treaty itself were causing concern in England. Modelled on the 1851 Anglo-French treaty, it was mostly a straightforward attempt to grant copyright on terms of reciprocity. But Everett now believed that a manufacturing clause was a prerequisite for the measure's passage. He had proposed the controversial Article VI, which required local printing and publishing (but not typesetting), as well as attempting to ensure the availability of cheap editions. Although London publishers resisted the idea strongly, the Board of Trade was willing to accede to it, hoping that the practical difficulties of the proposed scheme would lead to early abandonment of the 'obnoxious provisions'. From the Foreign Office, however, Clarendon had instructed Crampton to try and prevent the amendment from being adopted.[116]

Opposition forces were massing. In December 1853 Henry C. Carey's persuasively argued pamphlet, *Letters on International Copyright*, was

believe) of the International Copyright Bill, which on my conscience will make me 5000 dollars a year the richer.'16 February 1853: Gordon N. Ray (ed.), *Letters and Private Papers of William Makepeace Thackeray*, 4 vols. (Oxford: Oxford University Press, 1945–46), vol. III, p. 204. To his daughters he wrote (in March), 'Why, if we get the International Copyright, I shall get as much money on this side of the water as at home; and lord, what fortunes you will have': vol. III, p. 243.

115 Everett Ms Diary, 14–18 February 1853: *Everett Papers*.

116 Clarendon to Crampton, 13 January 1854: *NA* BT 22/38. See also Crampton's report to Lord John Russell (the previous Foreign Secretary and still Cabinet minister), 21 February 1853.

published. Carey was a leading protectionist, and considered copyright a monopolistic tax on the reading public. He also made the powerful point that an international copyright bill had repeatedly failed to pass the House of Representatives, and was now being forced through the Senate without its terms being open for public discussion. Carey's substantial pamphlet was circulated to all members of the Senate. In the early months of 1854 there were a number of significant petitions against the bill, and none in support.[117] Press opposition was strong. In May Clarendon finally gave Crampton permission to accept the amended Article VI, as preferable to entire abandonment of the negotiation. By then it was too late. Everett was ill and intending to resign from the Senate. He did not think the treaty could be ratified, and had despaired of reaching a compromise on Article VI which would be acceptable to both sides. Crampton agreed that it would be useless to press the treaty to the point of rejection, and there the matter rested.[118]

John Blackwood offered a fascinating gloss on this extraordinary episode when giving evidence to the Royal Commission in 1876. He was asked about the incident by Trollope:

> Yes, I had to do with that matter. A very long time ago (I should think it must have been 25 years ago now) there was a strong attempt made in America for uniting American authors and English authors, and the late Lord Lytton took great interest in the movement and took great charge of it, and a number of others assisted to work it, and it was very nearly carried.

Discretion was still essential, admittedly, even a quarter of a century later. But as Blackwood must have known well, the picture he painted was a misleading one. The campaign had certainly not been run by authors united around the focus of Bulwer-Lytton: it was driven by government and diplomatic machinery on both sides of the Atlantic, with considerable intervention from the book trade. Nevertheless it had failed. The opposition in America, largely from the trade but also to some extent from the public, had been considerable. Blackwood was either disingenuous or forgetful when asked if opposition had sprung from any general feeling in America: 'No; I am positive on that point, that it was a mere lapse which happened in the House; I remember thinking as much at that time.'[119]

[117] See particularly a letter from Cyrus W. Field & Co – the largest paper wholesaler in New York – to Harper & Bros., enclosing (for forwarding to Washington) a petition against international copyright signed by the principal Paper Houses, and mentioning the separate petitioning efforts of booksellers, bookbinders and printers: J. Henry Harper, *The House of Harper* (New York; London: Harper & Bros., 1912), p. 108.

[118] Everett to Crampton, 3 June 1854; Crampton to Everett, 7 June 1854: *Everett Papers*.

[119] *RC-Evidence* 958.

Jefferys v. *Boosey*: the House of Lords reverses the position on copyright for foreigners

It is arguable that at least some American attitudes would have been different if the result of the appeal in *Jefferys* v. *Boosey* had been known. In 1851 the Court of Exchequer Chamber had held that a foreigner could acquire copyright by first publication in the United Kingdom, and that the foreigner's place of residence was of no relevance. The House of Lords allowed the appeal from this decision. The judgment was handed down on 1 August 1854, and the *Athenaeum* immediately reported a catastrophic effect:

> Copyright, as regards foreign works in this country, is again in abeyance, and dire is the consternation in the publishing world in consequence thereof. Our newest decision – pronounced by a tribunal from which there is no appeal – would seem to cancel all agreements, destroy all assumed copyright of aliens in their country ... This last reversal of judgment was made at one o'clock on Tuesday in the House of Lords – a reversal which, among other things, in effect upsets all American copyrights – and before six o'clock that day the printers in London were engaged in reprinting cheap editions of American works ... The mails will carry out bad news to America – this decision puts an end to all negotiation between the authors of that country and the publishers here.[120]

An appeal to the House of Lords was an unpredictable affair, in spite of the convention that the lay peers could not vote. Those eligible to give opinions were the Lord Chancellor, Lord Cranworth (formerly Baron Rolfe) and the former Chancellors Lords Brougham, Campbell, Lyndhurst, St. Leonards and Truro. Lord Cranworth had summoned the common law judges to give their opinions: eleven are listed as attending, although only ten of these gave opinions.[121] These opinions were only advisory, but they were very fully argued. A good deal of pride was at stake, not least since several of the judges had been involved in the previous decisions in the case. In the Court of Exchequer Baron Rolfe had directed the jury that the facts did not give the plaintiff a right to a verdict. This direction was challenged in the Court of Exchequer Chamber, and declared to be wrong. Lord Campbell presided. He had

[120] *Athenaeum*, 5 August 1854.

[121] Judges attending from the Court of Exchequer were: Lord Chief Baron Pollock (who had decided against copyright for non-resident foreigners in *Chappell* v. *Purday* (1845), *Boosey* v. *Purday* (1849)), Barons Parke, Alderson and Platt (who did not give an opinion). The judges from the Queen's Bench were: Justices Coleridge, Crompton, Erle and Wightman. Those from the Court of Common Pleas were: Lord Chief Justice Jervis, and Justices Maule and Williams. The opinions were read on 29 June. The case is reported at (1854) 10 ER 681. The case law is helpfully reviewed in Charles Palmer Phillips, *The Law of Copyright in Works of Literature and Art and in the Application of Designs* (London, 1863), pp. 74–109.

begun from the position that a foreigner living in England could acquire copyright if it was first published there, and then considered whether it could make any difference where the work was composed. His conclusion was that it could not.[122] This was the appeal from this decision.

The three Exchequer judges, predictably, maintained their view that a foreigner was not entitled to copyright in these circumstances, as did Lord Chief Justice Jervis. The other six judges agreed with Lord Campbell's conclusion (four of them having already done so in the Court of Exchequer Chamber). Three of the Law Lords gave opinions. They were unanimous that the first instance direction had been correct. Lord Cranworth quickly dismissed the issue of common law copyright, stating that published works were entirely regulated by statute. His view was that the statute had to be construed as referring to British authors only, although he thought that this included a foreigner who was resident, even if he had come solely with a view to publishing his work. One result of excluding non-resident foreigners from protection would be that a foreigner who composed a work at Calais then came to Dover to publish it would obtain copyright, but if he sent his work to Dover with his agent then he would not. This problem had exercised Lord Campbell and persuaded him towards his conclusion that residence should make no difference. Lord Cranworth addressed this example directly, and was robust in his conclusion that this was merely an 'apparent absurdity', and just one of many situations in which the law had to draw a line between two classes of case. Lord Brougham approached the issue in a similar way, although he spent somewhat longer dismissing the notion of common law copyright. His view was that only an alien resident could have the right under the statute, rejecting the Dover/Calais objections as 'more plausible and more showy than solid'. Lord St. Leonards also dismissed the idea of a common law right, but agreed that a resident foreigner would be covered by the statute.

Thus the foreigner's residence at time of publication became a crucial factor in determining whether copyright was obtained. Only Lord St. Leonards really addressed himself to the problem of defining 'residence', the other two judges doing so only indirectly, by the examples they used. The question was not necessary to decide the case, since it was perfectly clear that the foreign composer in question had not been resident, so Lord St Leonard's remarks were *obiter*, and he specifically disclaimed any intention to give an opinion on what would constitute sufficient residence. He was only prepared to say that 'whatever would constitute a man resident here, so as to make him subject, in point of

[122] See above, pp. 178–9.

allegiance, to the country, whilst he was here, and would give to him the common rights to which every foreigner coming to this country is entitled, would be a residence which would give him a copyright here if he published here'. The precise requirements would matter a good deal to foreign authors, but they were given only limited guidance here.

One of the arguments used by counsel for *Jefferys* had been that the US statute expressly declared that there was no copyright except for natives or residents, and that the English statute bore a similar interpretation. Lord St. Leonards mentioned the US statute as evidence that there was no difficulty at all in deciding what was residence (although this was not quite true, as Captain Marryat had discovered to his cost).[123] He also took this as an opportunity to make an extraordinary reference to the state of Anglo-American copyright relations:

> I may remark, in passing, that, although nothing could be more improper than to consider the state of international law in deciding a question upon our own municipal law, ... yet I may observe, that the strained construction which would give to a foreigner the right which is now claimed, would have the effect of placing this country not on a level with the United States. For example, the United States do not allow a foreigner resident out of them to obtain a copyright there; but the American publisher imports his books the moment they are published and sells them without difficulty and without interruption. In the United States they attempted to bring in a Bill in order to reconcile the laws of the two countries, and to put authors upon the same footing in each country. That attempt did not succeed. That of course does not show what our law is, but it shows that we are not called upon to put any strained construction upon our own Act of Parliament in order to give to foreigners a right which their law denies to us.

It is evident that policy issues were in Lord St. Leonard's mind, and his protestations as to their irrelevance rather invite the opposite conclusion; that these were a factor in his decision.

Jefferys v. *Boosey*: comment and consequences

Press reports of the House of Lords' judgment tended, as the *Athenaeum* had done, to focus on the harm done to existing rights. The *Publishers' Circular* expressed the hope that it would provide a further motive for an Anglo-American convention.[124] For British publishers who had paid

[123] Marryat spent over eighteen months in America, but this was held insufficient for the purposes of American copyright, which required permanent residence. See above, p. 175.

[124] *Times*, 2 August 1854. *Publishers' Circular*, 16 August 1854. See also Emerson to G. P. Bradford, 28 August 1854: 'The House of Lords have most unseasonably reversed Lord Campbell's copyright interpretation; bad for Thoreau, bad for me, yet I

good money in good faith for American works, the House of Lords' decision was disastrous. All their contracts had been concluded on the basis that first publication in Britain was the key factor: all their care had gone into ensuring that this point was secure, and no thought had been given to place of residence at time of publication. Publishers now found they had bought little more than a moral advantage, good only against certain publishers. The reprinters fell over themselves to issue cheap editions, and the established publishers of American books had little option but to compete with these. Prices offered to American authors for the British market plummeted.

William Hickling Prescott's negotiations for the publication of his new work, *The History of Philip II*, reveal the situation clearly. In America Prescott was in a strong position, with a high reputation, and four acclaimed previous works which had sold well. Harper & Bros. was his existing publisher, but he was tempted away to Phillips, Sampson & Co by a contract for his old and new titles whose terms (Prescott asserted) gave him at least fifty thousand dollars. The complex agreement was rapidly negotiated, and signed on 4 August 1854. Prescott asked his current British publisher, Bentley, for £1,000 per volume for *Philip II*. In 1843 Prescott had been able to name his price (£650) to Bentley for the *History of the Conquest of Mexico*. Prescott had been delighted by the Lord Campbell's 1851 judgment in *Boosey* v. *Jefferys*: 'the late decision in favour of foreign copyright appeals to my avarice, if my ambition should go to sleep – for it will put thousands into my pocket'.[125] But with the appeal imminent, when proposing terms to Bentley, Prescott suggested that if all he could offer was advance sheets then the price should be £500. Bentley wrote to accept, but details were still being agreed when the House of Lords' judgment was handed down.

Bentley was further pressed as Routledge began to issue cheap editions of Prescott's earlier works, and tried to include a clause which would trigger a refund if another London publication appeared within one month of Bentley's. Prescott refused point blank to sign this. Negotiations were not concluded until late 1854, with publication postponed until autumn 1855. In early 1855 Prescott heard rumours that Bentley was on the edge of bankruptcy, and made enquiries. Bentley was extremely offended: although he had faced a financial crisis,

wish it may drive us to granting foreign copyright which would no doubt restore this Eng. privilege.' Ralph L. Rusk (ed.), *The Letters of Ralph Waldo Emerson*, 6 vols. (New York: Columbia University Press, 1939), vol. IV, p. 459.

[125] 14 September 1851: C. Harvey Gardiner (ed.), *The Literary Memoranda of William Hickling Prescott*, 2 vols. (Norman, O.K.: Oklahoma University Press, 1961), Vol. II, p. 208.

matters were better. He suggested that Prescott come to London for the publication of the new work, to secure the British copyright. Prescott dismissed the idea, and sought to cancel their agreement. Bentley pressed the point, buttressing it with the opinions of his own solicitor Devey, and also those of Turner (adviser to Longman and Murray) and the barrister James Willes. Bentley's letter said that if on reconsideration Prescott still would not come to England, then he would accept Prescott's offer to rescind the contract. Prescott refused once more, and promptly asked for the sheets in Bentley's possession to be returned.[126]

Prescott thus had his volume to sell again, and was not at all pleased at the result. Routledge offered £100 a volume – a tenth of Prescott's original asking price. Bentley eventually secured both volumes for £250, but relations between the two were irretrievably soured. In 1858 the third volume of *Philip II* went to Routledge, on the express understanding that if there were to be any change in the copyright law that Prescott would not be bound as to future volumes. Bentley was thus left with an incomplete work on his hands, and was understandably enraged at being passed over for a publisher who had issued 'pirated' editions of Prescott's own titles.[127] Bentley eventually offered to transfer to Routledge the plates, stock and moral claim to Prescott's earlier works. Routledge paid Bentley £2,600 on the understanding that Bentley would respect his moral title, though he had no legal title.

The House of Lords' decision had been catastrophic for Bentley, and he wrote to Denis Le Marchant, chief clerk of the House of Commons, asking Parliament to remedy the situation. Le Marchant replied: 'I quite agree with Mr Gladstone in considering your case one of singular hardship with respect to the American copyright, and yet unhappily no minister could bring it within the category of public wrongs.'[128] Of the British publishers, Bentley was one of the worst hit, but he was far from being the only one to suffer. Many American authors must have wished, with hindsight, that the Crampton–Everett treaty had been given a different reception:

> The appeal has been to the spirit of selfishness – and this very spirit is now about to turn against them. Their strong ground was – that the wrong was done on English – not on American writers. Now the wrong falls equally on both. The Pirate cause has therefore lost its mainstay.[129]

[126] C. Harvey Gardiner, *Prescott and His Publishers* (Carbondale, I.L.: Southern Illinois University Press, 1959), pp. 88–95 and p. 126.
[127] C. Harvey Gardiner, *William Hickling Prescott: A Biography* (Austin, T.X.: University of Texas Press, 1969), pp. 328–32.
[128] Quoted Barnes, *Authors*, p. 176. [129] *Athenaeum*, 14 October 1854.

Momentum for international copyright lost: 1855–65

The *Jurist* reported that the 'commonly received explanation' of *Jefferys* v. *Boosey* was that it was decided with a view to the renewal of the abortive treaty negotiations. If so, the attempt failed.[130] A number of isolated initiatives for international copyright came from America over the next few years, but no organised movement which gathered general support. In May 1856 the National Typographical Union urged the enactment of an International Copyright Law, to 'give ample protection to the oppressed literature of our country', believing that this would 'ultimately redound to the material interests of all the mechanical trades attendant of the production of books'.[131] There was brief discussion of a tariff system, to be proposed to the US Government by Lord Napier.[132] Samuel Goodrich proposed a scheme for a reciprocal international copyright law with a manufacturing clause.[133] At the end of 1857 Edward Joy Morris introduced an international copyright bill in the House, which bore strong resemblances to the Goodrich scheme. His bill would have required stereotyping, printing and publishing of the work, within one month of publication, by a citizen of the United States. It sank without trace.[134]

There were few efforts towards international copyright during the Civil War period, 1860–65. Congress confined itself to discussing some aspects of domestic copyright, passing in 1865 an Act with a series of amendments to existing laws. The Congress of the Confederate States of America passed its own copyright statute in 1861, which included provision for the protection of foreign authors. The confederacy was willing to enter into treaty arrangements with other nations on this

[130] *British Copyright in Foreign Compositions: Reprinted from the Jurist Nos. 922 & 923* (London: Sweet, 1854), p. 1. The *Jurist* rejected this explanation as a 'libel on the sense and honour of the Court', preferring to categorise it as one of those 'inexplicable though unquestionable blunders'.

[131] George A. Stevens, *New York Typographical Union No. 6* (Albany, New York: J. B. Lyon, 1913), p. 526.

[132] The report came from the Washington correspondent of the *St Louis Republican*, quoted in the *Athenaeum*, 17 October 1857. Lord Napier proposed a small tariff, perhaps five cents a volume, on all reprints of foreign works, to be paid by the publisher to the author. Given the experience with foreign reprints in Canada, the publishers cannot have been enthusiastic.

[133] *Bookseller*, January 1858. Samuel Goodrich was the American publisher 'Peter Parley', who had been a vigorous opponent of international copyright at the time of Dickens' visit. Goodrich's views became more moderate: Goodrich, *Recollections*, vol. II, pp. 355–78.

[134] Putnam, *Memoir*, p. 233. Solberg, *Copyright in Congress*, pp. 179–81.

subject, but no conventions were ever concluded, since no nation recognised the Confederate States to this extent.

Tariffs – their history and their impact on the book trade

The tariff acts were to become a significant issue for international publishing during this period, as rates of duty on imported books reached punitive levels. In addition, protectionists tended to be fiercely opposed to an unqualified international copyright law.

Suggestions that the domestic book trade should be offered special protection were made in the early years of the Union. The Tariff Act of 1789 was an important step for Congress, imposing a general duty of 5 per cent on all goods not otherwise enumerated. There were higher *ad valorem* duties on luxury goods, and products which competed with certain domestic industries. Although there was an element of protection in the policy, its principal aim was to raise revenues for the new government. Alexander Hamilton had been appointed first Secretary of the Treasury, and prepared his three famous reports to Congress: on national credit (1790), on a national bank (1790) and the *Report on Manufactures* (1791). The 'Hamiltonian system' was largely carried by the Federalists, but in the teeth of opposition from the Republicans, led by Jefferson and Madison. Hamilton believed strongly that manufacturing was essential for the prosperity of the nation, and that it was the government's responsibility to intervene to encourage its domestic industry. Under the 1789 Act, books fell within the general category. Hamilton's recommendation was that they should instead be subject to a special duty:

> The great number of presses disseminated throughout the Union, seem to afford an assurance, that there is no need of being indebted to foreign countries for the books which are used in the United States. A duty of ten per cent, instead of five, which is now charged upon the article, would have a tendency to aid the business internally.

Hamilton would have exempted entirely any books specially imported for public libraries and particular educational establishments, foreseeing the predictable objections. He expressed no sympathy for 'the wealthier classes and professional men', who he felt could afford to pay. As for books in general family use, he thought demand was such that it could be met well and cheaply by domestic production.[135] But protective duties were resisted by farmers and merchants, who feared retaliation

[135] Alexander Hamilton, 'Report of the Secretary of the Treasury of the United States on the Subject of Manufactures', in Harold C. Syrett and Jacob E. Cooke (eds.), *The*

against American agricultural exports, and this part of Hamilton's plan was not implemented.

In the aftermath of the War of 1812, a true protectionist tariff was put into effect, by the Tariff of 1816. A 30 per cent *ad valorem* duty was imposed on paper and blank books, though not on printed books. In 1822 a group of Philadelphia paper-makers, printers and booksellers sent a memorial to Congress asking that there should be no reduction in the duty, explaining that the value of books manufactured annually in Philadelphia was over $1m, and that every article used in the business was of domestic manufacture.[136] Rates generally were increased again by the Tariff of 1824. It imposed a rate of 30c per pound weight on bound books, and varying duties on different types of paper. The 1828 'Tariff of Abominations' raised overall rates still further. This Tariff was extremely unpopular in the South, as it raised costs of production there, whilst favouring Northern manufacturers. A serious political controversy was engendered, resolved finally by a promise to reduce rates gradually to 1816 levels, via the Tariff of 1833. Neither books nor paper were specifically mentioned in the 1828 and 1833 tariffs.

The Tariff of 1842 reversed the downward trend, as the panic of 1837 brought about an overall upward revision of rates in the depression which followed. Books in English were charged at 30c per pound if bound, and 20c per pound if in sheets or boards. The provisions were clearly intended to bite hardest on new books – popular copyright works, presumably. The duty was halved if the importer could show that the book was not recent or in demand (if either it had been printed and published abroad over a year previously and not republished in America, or, it had been printed and published abroad over five years previously). The basic rate for printed books and periodicals was set at 10 per cent *ad valorem* in the Walker Tariff of 1846, and the duty on many types of paper at 30 per cent *ad valorem*. The Tariff of 1857 revised the 1846 rates downwards; books were now subject to an 8 per cent duty, paper to 24 per cent. As the Civil War approached, revenue was needed urgently and the pressure to increase tariffs mounted. In 1860 one tariff bill proposed replacing the *ad valorem* rate on printed matter with a new duty of 15c the pound weight. The *Atlantic Monthly* commented sarcastically on the notion of valuing books by weight, arguing that 'a duty on books is not protective of American literature, but simply a tax on American scholarship and refinement'. It called for international

Papers of Alexander Hamilton, 27 vols. (New York: Columbia University Press, 1961–87), vol. X, p. 335.

[136] J. Leander Bishop, *A History of American Manufactures from 1608 to 1860*, (3rd ed.) 3 vols. (New York: Johnson Reprint, 1967), vol. II, p. 277.

copyright, to end the dishonourable competition from cheap and hasty reprints.[137]

But the protectionist interest was extremely strong. With the Southern states no longer in Congress, the ultra-protectionist Morrill Tariff of 1861 was passed. Senator Morrill had based his bill on principles espoused by the economist Henry C. Carey, who had been an effective opponent of international copyright during the abortive negotiations towards a Treaty in 1853. Both Carey and Morrill would continue to obstruct international copyright in and out of Congress, exhibiting powerful influence in the 1872–73 debates. The Morrill Tariff imposed a 15 per cent charge on many imported goods including books. In 1862 the book rate increased to 20 per cent. In 1863 printing paper was specifically targeted, and charged at 20 per cent *ad valorem*. The tariff of 1864 racked up the rate on imported printed matter yet further, to 25 per cent *ad valorem*. These levels were maintained past the end of the century, leaving the American book trade in an enviable position vis-à-vis their foreign competitors for many years.[138] Although international copyright would not affect tariff levels directly, it offered foreign rivals a new benefit – one inconsistent with the protective environment which the book trade had enjoyed for so long. Resistance from this quarter was predictable. Those who needed to use foreign books, on the other hand, thought differently about the heavy tariff. Many academics came to regard it as a tax on knowledge.[139]

Renewed efforts from the International Copyright Association

In 1866 the International Copyright Association, which had been moribund for over a quarter of a century, was revived by George Palmer

[137] (1860) 6 *Atlantic Monthly* 124–6.

[138] See also, Donald Marquand Dozer, 'The Tariff on Books' (1949) 36 *The Mississippi Valley Historical Review* 73–96. The publisher Alexander Macmillan explored possible opportunities for his firm, but noted that 'commercial operations are hampered exceedingly by the absence of international copyright, and the presence of a high tariff': George A. Macmillan (ed.), *Letters of Alexander Macmillan* (Glasgow: Maclehose, 1908), p. 230.

[139] See below, p. 205. Public needs were acknowledged to some extent. Tariff acts often created specific exceptions to the general rule, and these entered at reduced rates, or even free of duty. Common examples included: books and pamphlets in Greek, Latin or Hebrew; Braille books and music; books for the use of the United States or for the use of the Library of Congress; books specially imported for the use of educational, philosophical, religious or literary societies, or schools and colleges (with a stipulation of 'good faith').

Putnam.[140] Twelve petitions were presented to Congress in favour of an international copyright law; Bryant and Longfellow each headed a list of petitioners. They were all referred to the Committee on Foreign Relations, but nothing transpired.[141] In Britain there were rumours that the Board of Trade was collecting statistics for the British Minister in Washington, with a view to a copyright treaty.[142] Dickens returned to America in November 1867, for a successful reading tour which lasted for several months. Although he maintained a public silence on the subject of copyright, his presence provoked renewed debate. The American author James Parton wrote a powerful article in the *Atlantic Monthly*, emphasizing the damage done to American writers by the absence of international copyright: 'the aggravating circumstance of all this spoliation of the men and women who are the country's ornament and boast is, that it is wholly our fault'.[143] The choice of the *Atlantic* was no accident: it was published by Ticknor & Fields, who were known for their payments to British authors notwithstanding the absence of copyright protection.[144]

Ticknor & Fields were also the main publishers of Dickens' works in America, and his tour offered an opportunity for a number of publishing experiments, which generated considerable publicity:

> Messrs. Ticknor & Fields, whose editions bear the author's *imprimatur*, and carry with them all the sanction that he can give in the absence of copyright, publish, we observe, in a neat pamphlet form, the selections read at each evening's entertainment by Mr Dickens, so that the hearers may have the original at their hand. The January number of *Atlantic Monthly* contains a story by Mr Dickens, 'George Silverman's Explanation, part 1,' not yet, we believe, made known in England ... Mr Dickens also contributes to *Our Young Folks* (Messrs. Ticknors' juvenile magazine) a paper called 'Holyday Romance.' It seems probably that this action of Mr Dickens is intended to revive the discussion of the copyright question in America, as connected with rights of aliens.[145]

[140] Putnam had originally formed the Association in 1837, although it achieved little: see above p. 162.
[141] Solberg, *Copyright in Congress*, pp. 188–94.
[142] *Athenaeum*, 21 April and 30 June 1866.
[143] James Parton, 'International Copyright' (1867) 20 *Atlantic Monthly* 430–51.
[144] See Winship, *American Literary Publishing*, pp. 132–9.
[145] *Publishers' Circular*, 16 January 1868. Dickens' earlier announcement, published in American newspapers, that Ticknor and Fields had become 'the sole authorized representatives in America, of the whole series of my books', provoked a row. It was compounded by Dickens' somewhat confusing response, which was taken to be dismissive of the substantial payments that he had already received in America. Several publishers gave details of the sums they had paid him. Sampson Low, as London agent for Harpers, wrote to the *Pall Mall Gazette* (8 May 1867) to disclose that he had paid Dickens 'many thousands of pounds': *Dickens' Letters*, vol. XI, pp. 352–3.

This exercise sought to highlight the question of whether Dickens' extended visit to the United States would (or should) be regarded as residence for the purpose of the US statute: the matter was still unclear, notwithstanding Marryat's efforts in 1837.[146] The equivalent question in Britain would be addressed by the House of Lords later in the year, in the hugely important case of *Routledge* v. *Low*. This was yet to come, though. Dickens was jeopardising his British copyright by first publication in America, and the game would certainly not have been considered for one of his major works.[147] The authorised version of Dickens' readings was issued in cheap form, to forestall speculators who sent shorthand writers to the readings, with the intention of publishing their own accounts.

Dickens sailed from America in April 1868. Trollope arrived in New York just in time to go out in a mail tender and board Dickens' departing ship to shake hands with him. It is tempting to picture the passing of the international copyright baton, also, since Trollope was another with a strong interest in the race. Trollope had no direct dealings with American publishers until he was about to publish *North America*. Control of his foreign interests had been left to his London publishers, who had sold advance sheets of his novels to Harper & Bros. for relatively small sums. But in 1861 Trollope was in America, and called on his publishers to discuss terms. They were willing to match any other publisher's offer, but Fletcher Harper warned that, since the Harpers had issued all his previous works and were known as his publishers in America, they would retaliate against rival issues. Trollope nevertheless gave the advance sheets of *North America* to Lippincott, who offered a $12\frac{1}{2}$ per cent royalty. They were beaten into print by the Harpers, who somehow got hold of a copy and rushed out a cheap and shoddy edition, ruining the American market for Trollope. According to the custom of the American book trade, Lippincott would have been considered deserving of retaliatory treatment for violating 'courtesy of trade'.[148] But Trollope could not see matters from this perspective, and his concern for international copyright stemmed from this episode. In 1866 his paper, *On the best means of extending and securing an international*

[146] See above p. 175.

[147] This is not to imply that the exercise was a trivial one. Fields paid up to £1,000 for these stories, as part of an exchange of material for simultaneous publication (in the *Atlantic* or *Our Young Folks*, and *All the Year Round*) beneficial to both Fields and Dickens as editors of their respective magazines: W. S. Tryon, *Parnassus Corner: A Life of James T. Fields* (Boston: Houghton Mifflin, 1963), pp. 303–6.

[148] *Athenaeum*, 6 September, 18 and 25 October 1862. See also Michael Sadleir, 'Anthony Trollope and His Publishers' (1924–25) 5 *Library* 214–42. Trollope discussed the absence of an international copyright law in his *North America* (1862), chapter 15.

law of copyright, was read at the annual Social Science congress in Manchester. In April 1868, having been sent by the Post Office to America to negotiate a new postal treaty, Trollope also carried (at his own request) a commission from the Foreign Office to do what he could to forward the possibility of a copyright treaty.[149] Nothing immediate came of his efforts, partly because of the impending impeachment of President Johnson.

Formation of the American Copyright Association

In January 1868 Senator Arnell had secured a resolution that the Joint Committee on the Library be instructed 'to enquire into the subject of international copyright and the best means for the encouragement and advancement of cheap literature and the better protection of authors'. The Committee (chaired by Baldwin) presented a bill and a report within a month. The Baldwin report was strongly critical of the current 'antiquated and vicious policy', noting the benefits which Europe had gained as a result of international treaties. The bill was based on a draft submitted by Putnam and Bryant, from the Copyright Association of New York.[150] It recommended the grant of international copyright, where foreign countries offered reciprocal protection. Works were to be wholly manufactured within the United States, and published by a US citizen.

Baldwin's activities were closely linked to efforts outside Congress. On 30 January 1868 a meeting of publishers and authors was held at the Fifth Avenue Hotel in New York, to discuss the question of international copyright. A committee was appointed to draft a plan of action. A further meeting took place in April, at the rooms of the New York Historical Society. The committee had prepared a memorial for presentation to Congress, which was circulated for signing. The Baldwin bill was endorsed, and it was resolved 'that an association be formed for the purpose of securing the rights of authors and publishers among the civilised nations of the earth'.[151] This was to be the American Copyright

[149] George W. Hastings (ed.), *Transactions of the National Association for the Promotion of Social Science* (1867), pp. 119–25 and (discussion) 243–4. The paper appeared in full in the *Times*, 5 October 1866. Anthony Trollope, *An Autobiography*, David Skilton (ed.) (London: Trollope Society Edition 1999), pp. 190–4.

[150] Solberg, *Copyright in Congress*, pp. 194–5. Putnam, *Memoir*, p. 168; Solberg, 'International Copyright', 261–3; Solberg, (writing a history of the struggle): *Critic*, 14 March 1891, pp. 140–2.

[151] Eventually signed by 153 people, the memorial was never presented to Congress, although it was published. An account of the proceedings was published in a pamphlet,

Association (in full, 'Copyright Association for the Protection and Advancement of Literature and Art'). Bryant was elected president.

Routledge v. *Low*: the significance of 'residence' for American authors

The following month the House of Lords heard argument in *Routledge* v. *Low*, handing down its judgment in early July.[152] The case was to be highly significant for Britain's copyright relations with Canada, and had the potential to be no less so for her dealings with the United States. As has been seen, the House of Lords' 1854 decision in *Jefferys* v. *Boosey* had a catastrophic effect on British publishers who had believed that first publication in the United Kingdom of an American work would secure copyright in it.[153] Instead it was decided that if a foreign author was not in the country when the work was published, he was not a person whom the statute intended to protect. Nothing could be done in relation to works already published with the foreign author abroad, and, given the immediate impact of the decision, it is understandable that attention was focused on the severe difficulties caused to these previously published works. However, on reflection, it was realised that, because of America's geographical position, the decision could potentially be used to the advantage of American authors. The decision in *Jefferys* v. *Boosey* flowed from the argument that the legislature must *prima facie* be taken to legislate only for its own subjects: in this general context the Lord Chancellor, Lord Cranworth, referred to 'all persons who are within the Queen's dominions, and who thus owe her a temporary allegiance'.[154] But the facts in *Jefferys* did not require a decision on this point, since the foreigner in question had been resident in Milan at the time of the work's publication in London.

The judgments in *Jefferys* were thoroughly analysed by interested parties. The publisher Bentley had access to the opinions of three lawyers who were highly experienced in the field: Devey (his own solicitor), Turner (solicitor to Murray and Longman) and Willes (a respected barrister). During 1855 Bentley repeatedly urged Prescott to travel to England for publication, offering to pay his expenses. Since Bentley enclosed the various legal opinions in support of his request, it would seem that they concurred in the view that a foreign author's copyright

International Copyright, issued by the *Copyright Association for the Protection and Advancement of Literature and Art* (New York, 1868).

[152] (1868) LR 3 HL. See above, pp. 92–3.

[153] See above, p. 185. [154] (1854) 4 HLC 815, at 988.

was likely to be secured by his presence in England at time of publication. Harriet Beecher Stowe was to act on this reading of the law in 1856 and again in 1859, travelling to England for the publication of her novels *Dred* and *The Minister's Wooing*. But the Lord Chancellor's remarks had also left open the possibility that residence in the British Dominions might be sufficient, and it is clear from a letter sent by Prescott to Routledge that this avenue was being assessed by the London trade:

> The other day my publishers received a letter from a London house, saying that it had obtained the opinion of counsel, which satisfied them that if an American would take his book to Canada and remain there – in Montreal or Quebec, for example – while it was published, and sell the copyright to a publisher there, it might then be transferred to a publisher in London, who would thus get a sound copyright.[155]

There was concern as to whether the foreigner's residence would suffice if it was merely transitory.[156] The question was not legally tested for some time. But Routledge was not sufficiently alarmed to alter his own publishing habits. In 1864 he reprinted *Haunted Hearts*, by the American author Maria Cummins. She had sent the manuscript to her publishers Sampson Low in London, and had travelled to Montreal for the time of publication. The copyright was assigned to Low, and the assignment duly registered. An injunction was granted by in Chancery proceedings, and the Court of Appeal refused to dissolve it.[157]

In 1868 the case reached the House of Lords, which held that an alien friend who published an original work in the United Kingdom was entitled to copyright under the 1842 Act, provided that at time of publication the author was residing, however temporarily, in the British Dominions. The effect of this decision was to offer American authors a simple route to British copyright, via a holiday in Canada.[158] The implications of this for Canada were very considerable, as has already been noted. But the ruling also considerably strengthened the position of American authors. With a few simple steps, their copyright status could be again almost as strong as it had been under Lord Campbell's 1851 ruling in *Boosey* v. *Jefferys* (that a foreigner could hold copyright if the work was first published in England). The concern in 1851 had been that there was no incentive for foreign countries to offer reciprocal protection. But *Routledge* v. *Low*'s focus on publication in the United

[155] Prescott to Routledge, 19 December 1856: Gardiner, *Prescott publishers*, p. 131.
[156] See Hawthorne to Wheeler, 7 January 1863: T. Woodson et al. (eds.), *Nathaniel Hawthorne: The Letters, 1857–1864*, 18 vols. (Columbus, O.H.: Ohio State University Press, 1984–87), p. 518.
[157] *Low* v. *Routledge* LR 1 Ch App 42 (November 1865).
[158] The decision was followed in *Low* v. *Ward* (1868) LR 6 Eq 415.

Kingdom was now thought likely to provoke American publishers into demanding international copyright, from fear of losing business.[159] In a rather desultory way, the British Government had been considering reviving treaty negotiations for several months. The ruling in *Routledge* v. *Low* increased the pressure. Within days of the decision the Foreign Secretary, Lord Stanley, had written to Thornton, instructing him to reopen discussions.[160] The 1868 general election was imminent, and this was one of Stanley's last acts as minister – suggesting the issue's perceived importance.

Further efforts towards an Anglo-American Treaty

Thornton sent Clarendon (who was once again Foreign Minister) a draft treaty, based on the Anglo-French treaty, which he thought the US Government might be willing to sign. After consulting the Colonial Office, Clarendon authorised Thornton to sign the convention at once if he found the US Government ready to do so.[161] Thornton had also submitted the draft convention to Hamilton Fish, the Secretary of State. Fish indicated that American authors were almost unanimously in favour of an agreement, but that the opposition of American publishers could not be overcome without a manufacturing clause. Thornton knew that the publishers had blocked the Crampton–Everett treaty for this reason, even though at that time they had believed that British publishers would use American printers in any event, because they were cheaper. But American publishers now believed that British printing costs had dropped below their own, removing the market incentive to use American printers, so Thornton believed that trade insistence on local manufacture would be even greater. Thornton's explicit presumption that the addition of a manufacturing clause would be unacceptable to the British Government is noteworthy.[162]

Appleton & Co. had told Fish, consistently with their views in 1853, that no convention should be signed without a manufacturing clause. Appleton objected that the treaty as it stood 'throws open to the English authors and publishers the American market free from any and all competition'. They made it clear, however, that they would support a

[159] Board of Trade to the Colonial Office, 27 July 1869: *Col. Corresp. 1872*, p. 29.
[160] Thornton to Stanley, 16 May 1868; Foreign Office to Board of Trade, 2 June 1868: *NA* FO 5/1534 pp. 3–7. Commercial Despatch, no 15 of 3 July 1868, referred to by Thornton in a letter to Clarendon, 5 March 1870: *Col. Corresp. 1872*, p. 48.
[161] Clarendon to Board of Trade, 5 November 1869: *NA* FO 5/1534 pp. 9–10. Foreign Office to Board of Trade, 9 November 1869: *NA* FO 5/1534 pp. 28–9. *Col. Corresp. 1872*, pp. 31–2 and 37–8.
[162] Thornton to Clarendon, 5 March 1870: *Col. Corresp. 1872*, pp. 48–9.

treaty which included a manufacturing clause. In taking this stance Appleton sought explicitly to distinguish themselves (and most American publishers) from Harper & Bros.[163] The Harpers argued that international copyright would allow British publishers to set their own price on the American market, 'making the works of English authors as dear in New York as they are in London'. They forecast a catastrophic effect on the American reading public, since it was 'universally conceded that the people of this country are far more intelligent than the masses of the English nation', due the availability of cheap books. Their conclusion was that international copyright would 'necessarily inure to the exclusive benefit of the London Publisher'.[164] The Harpers' uncompromising rejection of this treaty proposal was to make their subsequent advocacy of a very similar draft in 1878 somewhat paradoxical. Thornton's efforts to find a solution were unproductive.[165]

The issue was put before the British public again in 1871, through letters and leaders in the *Times* and elsewhere. In a series of thoughtful exchanges, immoderate criticism of the Americans was parried by those who argued that British authors had been paid, and sometimes paid liberally, by honourable American publishers. The need for an international copyright law in some form was widely accepted. William Appleton wrote a balanced letter, explaining the American publishers' position on the manufacturing clause:

> [Our people] know the extent of their obligations to your thinkers, and they will be glad to do them justice when the way is shown. But they hold themselves perfectly competent to manufacture the books that shall embody your authors' thoughts in accordance with their own needs, habits and tastes, and in this they will not be interfered with. I am of opinion that an international copyright law, rigorously in the author's interest, requiring him to make contracts for American republication directly with American publishers, and taking effect only upon books entirely manufactured in the United States, would be acceptable to our people.

This provoked a good many letters in response, and exposed a willingness to contemplate compromise on the subject, at least in some quarters.[166]

[163] D. Appleton & Co. to Hamilton Fish, 5 November 1869: *NARA*, Department of State, Miscellaneous Letters Received.

[164] Harper & Bros. to Secretary of State Hamilton Fish, 15 July 1870: *NA* FO 5/1534 pp. 73–93.

[165] Clarendon to Thornton (Private), 4 June 1870; Thornton to Granville (Private), 8 November 1870: *NA* FO 5/1534 pp. 220–2.

[166] *Times*, 14, 19, 20, 23, 24, 25, 26, 28 & 31 October, 1, 2, 3 4 and 9 November 1871; *Publishers' Circular*, 2 and 17 October, 1 November 1871. 'International Copyright' (1872) 1 *Law Magazine* (3rd Series) 24–35.

The incident suggests that Thornton was too quick to presume that British views were cast in stone, at least as far as the wider interest groups were concerned. However, he was quite right in his reading of the government's position. Longman wrote to the Foreign Secretary, asking for news of negotiations with the US Government. Granville's reply gave no room for optimism:

> Her Majesty's Minister at Washington has had the subject constantly before him, and has had interviews with some of the chief publishers in the United States. They have shown a disinclination to an arrangement for international copyright on any terms, and a determination to oppose it, unless on condition that the publication and the entire manufacture of the book should be reserved to Americans. A Bill, of which I enclose a copy, has been lately introduced into the House of Representatives to authorise the grant of American copyright on those terms; but Lord Granville apprehends that if the Bill should pass it would hardly be desirable to accept it as the basis for a Treaty of International Copyright with the United States.[167]

This bill was the Cox bill, introduced in December 1871.

Bills in Congress: 1871–74

The Cox bill was virtually identical to the 1868 Baldwin bill. Samuel Sullivan Cox, a former Ohio Congressman, had been on the Executive Committee of the American Copyright Association since its foundation. The bill was referred to the Committee on the Library. Petitions against it streamed in during early 1872. These followed a meeting of the Philadelphia book trade, led by the publisher Henry Carey Baird, which had adopted a memorial against international copyright.[168] William Kelley, an extreme protectionist, introduced in the House a rival resolution hostile to the grant of monopoly privileges. Henry C. Carey, author of the influential *Letters on International Copyright*

[167] *Col. Corresp. 1872*, p. 71. Farrer described it as a 'Bill for doing as little as possible for Authors or readers, and as much as possible for American publishers'. *NA* BT 22/38 C 36.

[168] Henry Carey Baird (1825–1912), grandson of the publisher Mathew Carey, and nephew of the noted political economist Henry C. Carey. Baird entered the firm of Carey and Hart in 1839, reorganising it as Henry C. Baird & Co in 1840. The Philadelphia memorial began, 'We oppose an international copyright for the following reasons:- 1. That thought unless expressed is the property of the thinker; when given to the world is, as light, free to all.' This echoes Jefferson's comment on *patents* that 'He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me.' To Isaac McPherson, 13 August 1813.

(1853), published a further pamphlet opposing international copyright.[169]

Appleton was working to promote a different bill, with a manufacturing clause, as he had advocated in the *Times*. Hundred-and-one publishers from the three principal Atlantic cities (fifty from New York, twenty-seven from Boston, twenty-four from Philadelphia) were invited to a meeting. Only nineteen firms were actually represented (seventeen from New York, two from Boston), although Lippincott (from Philadelphia) sent notice of his support for international copyright with a manufacturing clause. A report was drafted, including the text of a bill with a manufacturing clause. Nine firms voted in favour of this, four abstained and five dissented. Edward Seymour, the managing partner of Scribner, Armstrong & Co., drew up a strong minority report, protesting that the bill protected American publishers regardless of the rights of American authors, and that it was objectionable in prohibiting the import of plates and of revised editions. Appleton also had a memorial in support, signed by fifty British authors.[170] The American International Copyright Association was likewise active, adopting a brief draft bill whose main clause stated simply: 'All rights of property secured to citizens of the United States of America, by existing copyright laws of the United States, are hereby secured to the citizens and subjects of every country, the government of which secures reciprocal rights to citizens of the United States.' This was named the Bristed bill, after Charles Astor Bristed, the Secretary of the Association.[171]

Faced with this level of commotion, the Committee on the Library held two public meetings, to hear the testimony from both sides. The Committee later held one further private meeting, where Henry Carey Baird presented a printed statement, and a final draft of the bill drawn up by American publishers. This represented a compromise between the International Copyright Association and the New York publishers led by Appleton: its manufacturing clause would have allowed the import of plates, removing the requirement for re-setting the type.[172] Immediately after this meeting, however, two quite new bills were presented to

[169] Henry Charles Carey, *The International Copyright Question Considered, with Special Reference to the Interests of American Authors, American Printers and Publishers, and American Readers* (Philadelphia: H. C. Baird, 1872).

[170] C. E. Appleton, 'American Efforts after International Copyright' (1877) 21 *Fortnightly Review* 237–57. For minutes of the meeting see *Publishers' Weekly*, 8 February 1872.

[171] See also Bristed's earlier article, adopted by the International Copyright Association as 'an expression of its views and purposes': 'International Copyright' (1870) 10 *Galaxy* 811–19.

[172] Original text: *Col. Corresp. 1872*, p. 68. The compromise text (much shorter and simpler) is given in C 2870 (1881), p. 12.

Congress, both based on a royalty principle. Senator Sherman's bill would have given a ten-year 'copyright', which in fact was simply a right to a 5 per cent royalty.[173] In the House James Beck presented a bill drawn up by John P. Morton, the Louisville publisher. This would have given a royalty not exceeding 10 per cent of the selling price. Both were referred to the Committee on the Library.

All this was viewed from Britain with some bafflement. In February 1872 Murray and Longman received news from Granville that there was no hope of a treaty with the United States, and in March the (British) Copyright Association was formed, 'to watch over the general interest of authors and publishers, to obtain early information of measures affecting copyright property, and, as opportunity offered, to suggest and promote improvements in present copyright laws'. The Committee was carefully composed of equal numbers of publishers and authors, but this Association was to be driven by the publishers. The Association's *Memoranda on International and Colonial Copyright* (1872) reflected its concern regarding copyright issues in both the United States and Canada.[174] There was a growing willingness among certain authors to concede the manufacturing clause, something still resisted by the main publishers. In April a Memorial of British Authors, signed by Thomas Huxley and others, was sent to the Foreign Secretary. It recorded their understanding 'that the demands of publishers in this country have hitherto been the most formidable obstacles to the negotiation of a Copyright Convention', and observed, 'it is clear that the Americans have strong reasons for refusing to permit the British publisher to share in the copyright which they are willing to grant to the British author'. This phrase had previously appeared in the memorial of British authors which had been presented by Appleton to the New York Publishers' meeting in January. The memorial suggested that the American condition should be conceded.[175]

There is evidently a connection between this memorial and the dispute over the Canadian Proposals. In March Trevelyan had fallen out with Longman over the publisher's opposition to the Canadian Government's proposals, which would have allowed freedom to reprint copyright works on payment of a royalty of $12\frac{1}{2}$ per cent. Trevelyan had published his letters to Longman, and had later written to the *Athenaeum*, claiming that 'every party concerned' would benefit from the

[173] This bill was also known as the Elderkin bill, because it was suggested to the Committee on the Library (of which Sherman was a member) by John Elderkin.
[174] The Canadian issues are discussed above, pp. 97–102. The *Memoranda* included copies of the Cox bill, the Appleton bill and the compromise bill.
[175] Memorial of British Authors: C 1285 (1875), pp. 29–30.

Canadian Proposals. In his letter Carlyle also reported that he had signed Huxley's petition 'accepting cheerfully the American offer to English authors, and leaving English publishers entirely to their own devices on the matter, which latter class of persons, as you justly urge, should never have been imported into the discussion at all'. Moreover, in May Trevelyan had written to the United States Consul General, General Badeau, enclosing his *Athenaeum* letter, and suggesting 'free reprinting subject to a moderate royalty'. Badeau forwarded Trevelyan's letter to the Department of State, which in July responded politely but coolly, that the next step towards international copyright had to be awaited from Congress. This apparently impetuous and naïve activity by Trevelyan can only have accentuated any division between authors and publishers.[176]

It was obvious by May that none of the bills would pass during the current session of Congress, particularly since the Presidential election was looming. However, the American bills did result in the first speech in Congress in favour of international copyright, given in the House by Stevenson Archer of Maryland, on 23 March. John B. Storm also defended the Baldwin bill, on 13 April.[177] From the British legation Thornton wrote in a more positive spirit to the Foreign Secretary, Granville: 'There is no doubt that during the last few months a good disposition has been shown amongst authors and disinterested persons in this country to do justice to the rights of property of foreign authors, and to guarantee those rights.' But he was clear that the publishers would exert all their influence against a bill without a strict manufacturing clause.[178]

The Committee of the Library eventually submitted their report, presented by Senator Morrill on 7 February 1873. Morrill was a leading protectionist (responsible for the 1861 Morrill Tariff), and the report was unfavourable. It compared American and British book prices in various tables, deducing that copyright checked the diffusion of popular literature by increasing prices. It concluded that any plan for international copyright:

> would be of very doubtful advantage to American authors as a class, and would be not only an unquestionable and permanent injury to the manufacturing interests concerned in producing books, but a hindrance to the diffusion of knowledge among the people, and to the cause of universal education.[179]

[176] Trevelyan–Badeau exchange: RC-Evidence, Appendix 1B. The Department of State's reply was signed by Charles Hall, who had published on the subject of international copyright ten years previously: (1863) 40 *Atlantic Monthly* 495–6. See also pp. 101–2.
[177] Thorvald Solberg, 'Copyright Law Reform' (1925) 35 *Yale Law Journal* 53.
[178] C 1285 (1875), p. 37.
[179] The Morrill Report (7 February 1873) is reprinted in C 1285 (1875), pp. 30–7. Putnam quoted Morrill as saying, 'When you gentlemen are agreed among yourselves,

Thornton sent the Morrill report to Granville, suggesting that a great difficulty would be removed if the British Government could agree to a manufacturing clause. But there was little enthusiasm for this, and progress was again stalled.[180] The following year Henry Banning introduced yet another international copyright bill in the House – a simple and comprehensive reciprocity measure. This was a bold move in a hostile climate, and it received little attention. There were no further efforts towards international copyright in Congress until 1878, although in 1875 Samuel Clemens drafted a petition (in typical style) which was signed by a number of American authors.[181]

The high tariff on imported books was increasingly a topic of concern during the 1870s. In January 1872 a petition from a number of distinguished scientists was presented to the Senate, complaining that the 25 per cent import duty on foreign books placed 'a special burden on Americans engaged in scientific or other researches'. They asked that all books printed in foreign languages be admitted free of duty. In 1876 a number of professors at the Columbian University in Washington presented a memorial to Congress describing the tariff as 'a tax on knowledge of the most onerous character, which bears with especial severity upon those who are desirous of keeping themselves acquainted with the progress of letters and science abroad'. Representative Seelye introduced a bill the following year, to provide for the free importation of books.[182] Predictably enough, although academic groups supported the measure, the book trade opposed it and it never emerged from Committee. Discussion and some pressure continued, though, and in 1878 a further bill proposed lowering the tariff on books and periodicals to 20 per cent. Petitions against it arrived from publishing interests in Philadelphia and Boston. The signatories to the Boston petition included the authors T. B. Aldrich and W. D. Howells, who were both to become active in the campaign for international copyright. The

bring in your bill and this committee will see that the measure is properly reported for the action of the two Houses.' George Haven Putnam, *Memories of a Publisher* (New York; London: Putnam, 1915), p. 369.

[180] C 1285 (1875), p. 30. At the Board of Trade Farrer's comment was, 'Extremely interesting – note the naiveté of the arguments in the Report and the list of prices': *NA* BT 22/38 R4002 and R6184. *NA* FO 5/1534 pp. 346–52 and 360–8.

[181] The text is included with a letter to Howells, 18 September 1875: Charles Neider (ed.), *The Autobiography of Mark Twain* (London: Chatto & Windus, 1960), Appendix N. See also Twain's 'bogus' protest, and another (signed only by Horace Bushnell) ? December 1872: Edgar Marquess et al. (eds.), *Mark Twain's Letters*, 6 vols. (Berkley, Calif.: University of California Press, 1988–91), vol. V, p. 257 n.5.

[182] Julius H. Seelye (1824–95), formerly professor of philosophy at Amherst College, and later its Principal.

explanation is probably their association with the publisher H. O. Houghton, who was a vigorous campaigner against any reduction of the tariff.[183]

The Royal Commission's view of America, 1875–78

In Britain a certain amount of pressure for international copyright was maintained. In May 1875 Disraeli received a deputation from the newly formed Association to Protect the Rights of Authors. Edward Jenkins MP was a member of this delegation, and in July he led a deputation from the Council of the Social Science Association to the Foreign Secretary, Lord Derby, presenting a memorial. Derby promised the delegation that he would speak to Thornton, and see if the US Government was willing to discuss international copyright. But he must have thought the prospect unlikely. Jenkins continued to draw attention to the issue by introducing an International Copyright bill, but was satisfied by the appointment of a Royal Commission in August 1875. The author Charles Reade, who had a particular interest in dramatisation rights and performing rights in America, wrote a series of thirteen letters which provoked a good deal of interest, and were republished in the *New York Tribune*.[184] The journalist Edward Dicey, famous for his writings on the American Civil War, published a carefully considered article in the *Fortnightly Review* arguing for compromise: 'in respect of international copyright, authors must look for a royalty, not for an absolute title of ownership'.[185]

Dicey put forward the same opinion when giving evidence to the Royal Commission later in 1876. He was a well-informed witness, having close links with American authors such as Hawthorne and Motley. He suggested that an Anglo-American commission of literary men would have a better chance of influencing the country than party political figures.[186] Other useful evidence on the American situation came from the sons of two famous American publishers: George Haven

[183] The Wood bill, a general tariff reduction measure, was introduced on 26 March 1878. H. O. Houghton to Jonathan Chace, 14 February 1883: *Chace Papers*. Dozer, 'Tariff on books', 78.

[184] Charles Reade, 'The Rights and Wrongs of Authors' (July–September 1875) *Pall Mall Gazette*, Republished *New York Tribune* (June–September 1875).

[185] Edward Dicey, 'The Copyright Question' (1876) 19 *Fortnightly Review* 126–40. Dicey was a correspondent for the *Spectator* and *Macmillan's Magazine* and had spent time in America during 1862. His book *Six Months in the Federal States* (London: Macmillan, 1863) is still highly regarded for its perceptiveness.

[186] *RC-Evidence* 1431–1513. This idea of a mixed Commission was again put forward by the Harpers in 1879.

Putnam (son of George Palmer Putnam) and Charles Appleton (son of William Appleton). Putnam concurred that there was no hope of any agreement which did not include a manufacturing clause. Putnam also said that the Morrill report had so discouraged the International Copyright Association that no further action had been taken, though it was still in existence.[187] Charles Appleton provided a comprehensive review of the various strands of opinion in the United States. He explained the workings of the system of payments for advance sheets, and what he called 'courtesy copyright' (also referred to as 'courtesy of trade'). Appleton observed that this bought the American publisher nothing more tangible than a week or two's start over the competition, but that comparable payments made under a system of legal international copyright would allow the publisher to issue better quality editions. He believed, as did Putnam, that American publishers would be resistant to a royalty bill which did not protect them from undercutting competition.[188]

In their Report, delivered in May 1878, the Commission recommended the moral high ground. Aliens should be given the same rights as British subjects if their works were first published in the British Dominions, even if not resident there at time of publication. On the American question specifically, the Commission agreed that a copyright convention was most desirable. Even though it had been previous practice to make international copyright treaties only with countries prepared to give full reciprocal protection, it was thought 'not unreasonable for the American people to wish to ensure the publication of editions suited to their large and peculiar market, if they enter into a copyright treaty with this country'. Dicey's suggestion of a mixed commission was welcomed. The suggestion that Britain should take retaliatory steps was emphatically rejected, the Commission concluding,

> on the highest public grounds of policy and expediency, it is advisable that our law should be based on correct principles, irrespective of the opinions or the policy of other nations. We admit the propriety of protecting copyright, and it appears to us that the principle of copyright, if admitted, is one of universal application.[189]

News of the Commission's Report was sent by cable to America. One of the first to comment was the New York journalist Richard Rogers Bowker. Bowker's *Publishers' Weekly* had been staunchly supportive of international copyright. Writing to the *Athenaeum* on the day of the

[187] *RC-Evidence* 1817–1917.
[188] *RC-Evidence* 3521–3608. See also Appleton, 'American Efforts', 237–57.
[189] *RC-Report*: 62–63, 233–252.

Report's publication, Bowker described the Commission's position on international copyright as 'the strongest and probably the most effective appeal that could be made to the generosity, the sense of justice, of the American nation'. Another noted American commentator, Eaton S. Drone, observed: 'Not less liberal should be the United States.'[190]

A further treaty proposal: the Harper draft

Nevertheless, the next initiative was to come from those previously resilient opponents of international copyright, Harper & Bros. On 25 November 1878 they wrote to Secretary of State, William Evarts, proposing:

> That a commission or conference of eighteen American and British citizens, in which the United States and Great Britain shall be equally represented, be appointed by our Secretary of State and the British Secretary of State for Foreign Affairs, who shall be invited jointly to consider and present details of a treaty to be proposed by the United States to Great Britain.

They enclosed a draft treaty which included as its key provisions a manufacturing clause (which permitted the importation of stereos and electrotypes) and a requirement to publish in America within three months of original publication. The draft was based on the convention first floated by Thornton in 1868. It will be recalled that Harpers had been consulted at that time, and their wholly negative response had led the British to abandon any hope of reaching agreement. Now they were advocating a version of the same document. This became known as the 'Harper Draft'.[191]

Nothing happened for some months. Evarts offered to discuss the subject with the Harpers, although he admitted that he could not 'profess either principles or zeal enlisted on the side of international copyright'.[192] In January 1879 George Haven Putnam delivered an

[190] *Athenaeum*, 15 June 1878. Eaton S. Drone, *A Treatise on the Law of Property in Intellectual Productions* (Boston, 1879), p. 96.

[191] Full parallel text (of the Clarendon Treaty and the amended Harper Draft) in C 2870 (1881), pp. 7–13. See also James Appleton Morgan, *Anglo-American International Copyright being an Open Letter to Hon. W. M. Evarts, Secretary of State* (New York, 1879). Note also Joseph Harper's letter to Charles Appleton, in November 1875, arguing that a manufacturing clause amounted to 'virtually a denial of the principles of copyright', because they limited the author's control over the book: quoted Harper, *House of Harper*, p. 382.

[192] William M. Evarts to George William Curtis (editor of *Harper's Weekly*), 8 December 1878, quoted Dozer, 'Tariff on books', 86.

address on international copyright, proposing a ten-year term coupled with a limited manufacturing clause.[193] In March Harpers contacted Evarts again; in their brief letter they enclosed their own November 1878 letter, the amended draft treaty, Appleton's 1871 letter to the *Times* and an extract from Putnam's address. Evarts forwarded this bundle to Thornton, who wrote to Salisbury in support of the appointment of a mixed Commission.[194] The Harpers published these documents as a pamphlet the same day – the *Athenaeum* immediately noted the appearance of these 'Memorandums of the Question of International Copyright'. One wonders what impelled Harper & Bros. to proceed with such uncharacteristic persistence and enthusiasm in the matter.

It was later claimed that the Harpers had been prompted into action by a most interesting letter from England, whose author was not identified, although he was said to have been a member of the Royal Commission:

> You will have seen that I have taken a great interest in the copyright question ... I believe one of the great difficulties hitherto has been that our English *publishers* have endeavoured to *obtain inadmissible privileges in America*. It is simply an author's question; and if you could get your Government to pass a Bill recognising the author's right, and no other, of course the result would be that you would negotiate directly with the author, or that he, if he did not avail himself of the form of registration and publication within, say, twelve months, would lose his American right altogether ...[195]

It seems more likely that the Harpers were driven by self-interest. The established Eastern firms had been facing unwelcome competition from the newer presses in the mid-West and elsewhere.[196] Railway travel had

[193] George Haven Putnam, *International Copyright: Considered in Some of its Relations to Ethics and Political Economy. An Address Delivered January 29th, 1879, before the New York Free-trade Club* (New York: Putnam, 1879), pp. 41 and 44. Putnam advocated what was known as a 'printing clause', which required works to be printed and bound within the United States, but permitted import of stereotypes etc.

[194] C 2870 (1881), pp. 1–17.

[195] Letter quoted by S. S. Conant, *Academy*, 16 August 1879. The writer's identity was not revealed, although he was said to have been a member of the Royal Commission. The letter's style and content perhaps suggest Charles Trevelyan, but he was not a Commissioner. T. H. Farrer would have approved of the sentiments, and was one of the Commissioners originally appointed, but as Permanent Secretary to the Board of Trade his involvement in such an initiative seems improbable. The other Commissioners would seem to be even less plausible candidates.

[196] Cheap publishing in America revived again in the 1870s, and flourished until the 1891 Act. Concentrating on established authors, there was little risk, and these publishers did not trouble themselves over 'trade courtesy'. Some issued almost exclusively foreign works, paying no copyright fees. One pioneer was the *Lakeside Library* (Donnelly, Lloyd & Co, Chicago 1875). The most famous of the 10c collections

increased significantly, and passengers liked cheap novels to read on the train. Paper-covered books were being produced in huge quantities, and sold for little more than the cost of manufacture. The price of paper had declined sharply, and the upstart Western printers began to make severe inroads into the market for British reprints which the Harpers had exploited successfully for so long. Having paid £1,700 for advance sheets of George Eliot's *Daniel Deronda* (1876), the Harpers were outraged to see 20c copies competing with their own editions – which were not expensive. They had issued 6,000 copies in two volumes at $2.50, and 15,000 in papers covers at 50c. In 1877 the firm had been forced to cut the price of their long-established 'Library of Select Novels'. The year 1878 saw them launch a loss-leading series intended as direct competition for other myriad 'Libraries' and the Western dime novel. However, these tactics could not offer a stable solution. Faced with a potentially ruinous price war, even the Harpers became staunch advocates of international copyright law.

The change of tack was certainly noted in Britain. The general reaction was welcoming, although there was still a certain coolness at the prospect of a manufacturing clause.[197] However, the Board of Trade thought action should be postponed since legislation was pending. Parliament was told firmly that there was no arrangement with the US Government for appointing an international commission, and none in contemplation. Lord John Manners' bill was introduced at the very end of the 1879 session for discussion only.[198] Manners had been chairman of the Royal Commission, and the bill generally followed the Commission's recommendations. It was never passed, however. Disraeli resigned in April 1880, following the general election defeat, and the issue was not a priority for Gladstone's government. It was

included George Munro's *Seaside Library*, Norman (George's brother) Munro's *Riverside Library*, Frank Leslie's *Home Library* and Beadle and Adams' *Fireside Library of Popular Reading* (all specialising in Scott and Dickens). Harper Brothers' *Franklin Square Library* (1878–93) was the only one issued by an established publisher. Edition sizes were enormous; 10,000 was a small run, with 50,000 very common.

[197] *Athenaeum*, 5 April 1879; *Academy*, 5 and 26 April 1879; *Times*, 19 April 1879; *Law Journal*, 19 April 1879. See also the exchange between S. S. Conant, an American journalist associated with Harper & Bros., and the British philosopher and journalist Leonard Courtney. S. S. Conant, 'International Copyright: An American View'; 'C' 'An Englishman's View of the Foregoing' (1879) 40 *Macmillan's Magazine*, 153. *Macmillan's* would not print Conant's rejoinder, so it appeared in the *Academy*, 16 August 1879 (see also their editorial, 7 June 1879).

[198] Board of Trade to Foreign Office 7 May 1879: C-2870 (1881), p. 16. Parl. Deb., vol. 248, ser. 3, col. 1628, 17 July 1879.

during this year that Wilkie Collins published his *Considerations on the copyright question, addressed to an American friend*, but with little obvious result.[199]

Pressure was maintained from America. In February 1880 the American members of the 'International Copyright Committee of the Association for the Reform and Codification of the Law of Nations' wrote to Secretary of State Evarts, pointing out the expediency of an international copyright convention. This Association had formed in London during the International Literary Association Congress in August 1879, and the American committee had been asked to confer with the Washington government. The plan outlined was on the lines of the Harper draft; reciprocal copyright, with a manufacturing clause which required local printing and publishing but not re-setting of type.[200] Some rather non-committal exchanges ensued, as the British Government sought to discover whether the proposal was seriously supported in America. Victor Drummond, the Chargé d'Affaires in Washington, recommended both caution and confidentiality, since American publishing interests were divided:

> It therefore appears that the United States Government are willing to enter upon a negotiation with that of Her Majesty, to arrange an international copyright convention, that the older publishing houses in the United States are in favour of one, but that the influence of cheap publishers, the 'Seaside Library' manufacturers, and their class, would be exerted to oppose in the senate, and defeat, what would assuredly damage their business operations.[201]

The American Minister in London was the author James Russell Lowell, a firm supporter of international copyright. Evarts instructed Lowell to submit a treaty to Foreign Secretary Granville: the text was that of the Harper draft. Evarts had recently received the petition drafted by Howells, which may have spurred him into action.[202] Lowell was asked to seek the views of leading British publishers and authors. F. R. Daldy (the

[199] Issued in London as a pamphlet (Trübner & Co., 1880). Also published in the New York *International Review*, in June 1880.

[200] Thorvald Solberg, 'The International Copyright Union' (1926) 36 *Yale Law Journal* 76.

[202] C-2870 (1881), pp. 22–7 at p. 25. See also the supportive article by Eugene L. Didier (Poe's biographer), 'Congress and International Copyright' (1880) 20 *Scribners Monthly* 132–9.

[202] *Memorial to the Department of State from American Authors* (1880). Howells had discussed the issue with the President in May, and was told that the Administration would be prepared to act if the authors and publishers could agree on a basis: Henry Nash Smith and William M. Gibson (eds.), *Mark Twain-Howells Letters* (Cambridge, Mass.: Harvard University Press, 1960), p. 310.

influential Secretary of the Copyright Association) thought the draft 'likely to be accepted by English authors and publishers'. This was because of the concession that re-setting of type and re-making of plates was not required.[203] Tennyson, the Poet Laureate, offered somewhat grudging approval of the proposal, 'should it come to anything'. His work had been extensively reprinted in America, and he had always resented what he regarded as 'pilfering', objecting to both the financial 'loss' and the loss of control of the style and quality of the reproduction.[204] Lowell nevertheless told Evarts that authors' answers 'were in every case warmly favourable'. He did report (and endorsed) objections to the three-month period allowed before deposit of the reprinted work, the brevity of which was thought likely to prejudice young and unknown authors.[205] In Philadelphia, a Book Trade Association Meeting had passed resolutions hostile to the treaty, demanding entire manufacture in the United States. The cheap edition publishers were hostile to any international copyright law.[206] Evarts, who remained at best indifferent to the matter, emphasised that Senate approval of any convention concluded was extremely uncertain.

The Harper draft: Board of Trade consultations

The Board of Trade sought official permission to disclose the draft, and it was sent to Jerrold (for the International Literary Association) and Daldy (for the Copyright Association) for their formal comments. Intriguingly, considerable spin was applied to the proposal before it was forwarded:

> the scheme proposed in the American draft is one which, though not all which could be desired, is yet one which might properly be entertained, provided the following modifications and additions be made:-
>
> 1. That the time within which the British author must intimate his intention of publishing in the United States be extended from three to six months.

[203] Daldy to Granville, September 1880: C-2870 (1881), p. 30.
[204] Cecil Y. Lang and Edgar F. Shannon (eds.) *Letters of Alfred Lord Tennyson*, 3 vols. (Oxford: Clarendon Press, 1990), vol. III, p. 195.
[205] Lowell to Evarts, 9 October 1880: *NARA*, Register of State Department Correspondence, 1870–1906.
[206] Drummond sent a copy of the Philadelphia report to the Board of Trade, where Farrer remarked, 'This is not promising: and I hope the U.S. public will not listen to it. The Philadelphia publishers should subtitle their Bill "A Law to protect stolen property".' *NA* BT 22/38.

2. That the provision requiring the manufacture of books to be in the country of publication be confined to the United States.
3. That all prints or reprints of books by British authors which are published by or with the consent of the author in the United States be freely admitted into the United Kingdom and into all parts of the United Kingdom and into all parts of Her Majesty Dominions.[207]

The Board of Trade's covering letter was written by its Permanent Secretary, T. H. Farrer, who had expressed strong views on various aspects of copyright in his lengthy evidence to the Royal Commission. He regarded copyright as a 'monopoly' which contributed to the high price of books in England, and was against its unqualified extension to the colonies or to an agreement with America, personally favouring a royalty scheme.[208] He was strongly opposed to any prohibitions on import into the United Kingdom of foreign or colonial editions published with the author's consent, believing this sacrificed the interests of readers to those of the publishers. These views were evident in the suggested modifications to the American draft. The first, regarding the time allowed, had been widely recognised as important and was uncontroversial for British interest groups. The second proposal was in line with the Royal Commission's position that copyright law should be based on 'correct principles' irrespective of the policy of other countries, and with British trade policy more generally. The third suggestion, regarding the free movement of authorised editions, was highly contentious, certainly as far as the publishing interest was concerned. It reflected Farrer's personal views, rather than government policy.

The reaction to the Board of Trade suggestions was one of amazement. Jerrold called a meeting of the English Committee of the International Literary Association, which resolved to consider the proposed treaty at a conference of British authors and publishers. The *Athenaeum* reported the Committee's decision, and the three proposed amendments, provoking a reaction of sheer incredulity from the *Publishers' Circular*:

> We have not yet heard of the conference above referred to, nor can we believe it possible that the Board of Trade could seriously propose such amendments as the second and third quoted above, which not only offer the Americans better terms than they ask for, but the logical result of which will be simply to transfer

[207] C-2870 (1881), p. 46.
[208] T. H. Farrer, 'The Principle of Copyright' (1878) 24 *Fortnightly Review* 836–51. See also Farrer's memorandum dated 2 November 1880, where he again reiterates his free trade principles, and objects to the exclusion of authorised foreign reprints: FO 414/43 pp. 7–11. See also below, pp. 272–3.

the printing of English books to America, both for that country and for this country also.[209]

Daldy, for the publishers, also expressed astonishment at the inclusion of the third proposal.[210] The Copyright Association met in early February, the publishers present in strength. Resolutions were passed that the draft was a suitable basis for negotiation, that the time allowed for republication should be six months at least, and that the last two amendments were inconsistent with the American draft. The letter transmitting these resolutions added that 'very strong opposition was displayed to the second, and especially to the third of the riders proposed by the Board of Trade'. The International Literary Association met a few days later, and passed similar resolutions.[211]

The President of the Board of Trade had faced Parliamentary questions from two former Royal Commissioners on the state of negotiations with the United States. Chamberlain replied cagily that it would be inaccurate to say that negotiations were in progress: 'there is great opposition to the proposals now submitted, and I am not sanguine that they will ever assume a formal shape'. Chamberlain disclosed the legal advice he had been given. If Her Majesty could be advised that due protection would be given to British works then a treaty could be negotiated (under the 1844 Act), even if it included a condition that British books had to be printed and published in America. However, an Act of Parliament would be required if the treaty was to include the reverse condition that American books had to be printed and published in Britain. Chamberlain also explained that representatives of British authors and publishers were being consulted. Farrer gave a succinct report of the consultation exercise to the Foreign Office a week later: there had been unanimity that the three-month period was too short, but otherwise it had been considered a basis for an acceptable treaty; a treaty without a manufacturing clause would have been far preferable but if this was impossible then the desire was still to negotiate. He made no mention of the two controversial amendments he had proposed. Granville wrote to Lowell, essentially reproducing Farrer's letter.[212]

[209] *Athenaeum*, 29 January 1881; *Publishers' Circular*, 1 February 1881.

[210] Daldy to Farrer, 12 February 1881: 'You rather spring a mine on us in the 3rd suggestion of your letter, but though very strongly opposed to it I have treated it as lightly as I can, because I know it a favourite opinion of yours.' BT 22/37 R1961.

[211] C-2870 (1881), pp. 47–52. *Athenaeum*, 19 February 1881. See also *NA* BT 22/37 R2568/1881.

[212] Parl. Deb., vol. 258, ser. 3, cols. 495–6, 10 February 1881. C-2870 (1881), pp. 51–2.

Sackville West takes over the negotiations

In May 1881 Thornton telegraphed the unwelcome news that the US Government preferred direct negotiations to take place in Washington. The Board of Trade knew this would be a disadvantage, but thought it impossible to object. Any hope of reaching swift agreement with the current administration was ended in July by the shooting and subsequent death of President Garfield.[213] Nevertheless, during the summer, both sides delicately sought information regarding the other's position. Granville was still seeking an assurance that America would accept a longer period for republication than the three months proposed in the draft. Secretary of State Blaine refused to be pinned down. Blaine himself wanted confirmation that Britain would concede a manufacturing clause, but Granville was equally guarded. Yet a manufacturing clause was considered a prerequisite for the conclusion of a treaty, as Lowell explained in a private letter to Granville:

> Mr Blaine thinks that without such a proviso Congress would not consent to any Copyright Act whatever. I am sure the authors would be willing – it is the publishers only who stand in the way of a rational arrangement on both sides the water.[214]

The British Government, too, was beginning to perceive the publishers as the stumbling block in the path of a much-needed agreement.[215]

There was also time pressure. Once Congress reassembled in December, it was likely that bills would be introduced, wrecking any treaty negotiations which had not been completed. Thornton was to be replaced as British envoy to Washington by Lionel Sackville West. West's arrival in London in August was therefore eagerly awaited, and conferences with leading interest groups were urgently arranged. A draft treaty had been prepared by Daldy, and this was given to West.[216] The government felt itself to be in a weak position. Granville's instructions to

[213] *NA* BT 22/37 R5611. Garfield was shot on 2 July and died on 19 September 1881. Garfield's Secretary of State, Blaine, assured the Boston publisher Dana Estes that if Garfield had not been killed the treaty would have been effected within three months. Estes to Robert Underwood Johnson, 24 February 1887: *Johnson Papers*.

[214] *NA* FO 414/43 pp. 1–5. Lowell to Granville, *NA* FO 5/2005 pp. 119–20. See also James G. Blaine to Lowell, 24 June 1881: *NARA*, Diplomatic Instructions of the Department of State.

[215] See Farrer's memorandum dated 2 November 1880; Bergne's memorandum dated 25 August 1881: *NA* FO 414/43 pp. 7–20.

[216] Board of Trade to Foreign Office 25 August 1881: FO 414/43 pp. 22–5. The main change suggested by the British Government was an increase in the period of grace to six months. Suggestions of American Authors and Publishers for an International Copyright Convention, submitted in August 1880 and Counter-Project submitted by the British Minister, The Honorable L. S. Sackville West, November 22, 1881: *NARA*,

West were that although a convention along the lines of existing conventions was much to be preferred, he was free to frame a draft convention with the modifications required by the United States. He was told to say that the British Government was against a manufacturing clause in principle, but would waive its objections.[217] There were also serious concerns about Canada's reaction to an Anglo-American treaty – which proved to be well-founded.

The Washington negotiations began in early November, and West submitted his draft treaty proposal. But Canada's tactics effectively ended any prospect of immediate success almost before discussions had started. The Canadian delegate was Sir Leonard Tilley, the Dominion's Minister of Finance. Tilley's position was that it was too hard to incorporate provisions affecting Canada into the treaty, so that the best plan was to exempt her from it.[218] Without security as to the Canadian territory, as Tilley would certainly have known, America had little interest in concluding a copyright treaty with Britain. Canada's printing trade was now thriving, and Canadian postal rates had been substantially reduced in 1879. Canadian publishers were advertising in American newspapers, offering to send Canadian editions to the United States at prices which undercut the local publishers. The Canadians had been bitterly criticised by the American trade, who were forgetful of their own habits.[219] Although negotiations were described as 'still in progress' in February 1882, the project was idling. The treaty was of such perceived importance that extreme measures were considered. Canada was offered some potentially very significant concessions, and agreed to participate.[220] So, in January 1883, Granville instructed West to press for a reply to the November 1881 proposal, on the basis that Canada would be included in the negotiation. The Department of State's formal reply was not encouraging.[221] By the end of 1883 it was clear that no agreement was likely. As a matter of practical reality, the introduction of the Dorsheimer bill in January 1884 brought the dialogue with the American Government to an end.

Records of the Department of State. Drafts of Treaties. United States and Great Britain. Vol. 3.

[217] Granville to West, 18 October 1881: *NA* FO 414/43 pp. 31–2.

[218] Tilley's Memorandum, Washington 16 November 1881: *NA* FO 414/43 pp. 33–8. Board of Trade to Colonial Office, 13 December 1881: *NA* FO 414/43 pp. 45–6. Tilley's Report and subsequent Order in Council: *NA* FO 414/43 pp. 48–50. See above, p. 113.

[219] George Parker, *The Beginnings of the Book Trade in Canada* (Toronto; Buffalo; London: University of Toronto Press, 1985), pp. 195–6.

[220] Parl. Deb., vol. 266, ser. 3, col. 1364, 23 February 1882. See above, pp. 113–14.

[221] Frelinghuysen (now Secretary of State) to West, 18 January 1883: *NA* FO 414/43 pp. 68–9.

The American Copyright League: authors combine

For those authors in America interested in copyright law reform, attention returned to Congressional legislation. This led to the foundation of first the Authors Club of New York, and then the American Copyright League. In the spring of 1882 the *Century Magazine* (newly launched as the successor to *Scribner's Monthly Magazine*) published two important articles. One was by Arthur Sedgwick, a lawyer and journalist, associated with the *Nation*, and author of a number of legal treatises. The other was by Edward Eggleston, the clergyman, journalist and popular novelist. Both of these men were to work consistently to promote international copyright. Sedgwick lamented the delay in finalising an Anglo-American treaty. He advocated an outward-looking approach to the protection of American letters, arguing that the whole English-speaking race should be its natural constituency, so protection in foreign countries was essential: 'The continuance of the present system would merely mean that our Government, for the sake of permitting the robbery of the citizens of other countries here, is glad to have its own citizens robbed abroad'.[222] Eggleston too regretted the failure of legislators to deliver protection for literary property: 'it marks the lowness and materialistic character of our civilization that the highest kind of production is discouraged by being subjected to direct competition with stolen wares. The wonder is that we have any literature'. He predicted a comprehensive movement towards this, 'made by men of letters themselves, who are the real principals in the case'.[223] Noises towards an authors' organisation had been heard before, but this time were to prove significant.[224]

The first meeting of the Authors Club was held on 21 October 1882, in Richard Watson Gilder's home, 'The Studio'.[225] Gilder had been managing editor of *Scribner's Monthly*, and was now editor of the *Century*

[222] Arthur Sedgwick, 'The Copyright Negotiations' (1881–82) 1 *Century Magazine* 667–71. Dana Estes described him as an 'egotistic marplot', for his devotion to the Hawley bill: Estes to Chace, 31 January 1887. *Johnson Papers*.

[223] Edward Eggleston, 'The Blessings of Piracy' (1881–82) 1 *Century Magazine* 942–5.

[224] Of less practical significance was a further bill, introduced into the House in March 1882 by William Erigena Robinson. The elaborate bill covered seventy-three quarto pages, and the sum necessary for carrying out its various provisions would have been over $1.2 million. Solberg, 'International Copyright', 268. Solberg, *Copyright in Congress*, p. 221.

[225] Its full name was 'The Authors Club of New York'. For more see Brander Matthews, *These Many Years: Recollections of a New Yorker* (New York: Scribner's, 1917), p. 220; George Parsons Lathrop, 'The Literary Movement of New York' (1886) 73 *Harper's New Monthly Magazine* 830–1.

Magazine. He worked tirelessly for international copyright and became a key figure, although he did not like lobbying. George Parsons Lathrop, then literary editor of the New York *Star*, was also influential. The American Copyright League soon followed, with conscious acknowledgement of Eggleston's prediction of a movement of 'producers of literary property'. In the spring of 1883 Lathrop sent invitations to a meeting, held in Brander Matthews' house. Eggleston and Gilder had drafted a proposal which they had thought might unite authors, and this was read. Henry James is said to have objected to the emphasis on the wrongs done to American authors, since the wrongs done to English authors were the ones needing redress. Lathrop later admitted:

> There was little unity apparent in this first meeting; not because any of us were opposed to international copyright, but because it was difficult, in the first stages, to agree upon a simple statement of the case and the policy to pursue in effecting reform.[226]

Lathrop, Gilder and Julian Hawthorne were appointed to draft a new platform, which was eventually accepted in May. Within a year the League claimed to represent 'the entire guild' of American authors, with a membership of seven hundred.[227]

The Dorsheimer Bill

A further somewhat idiosyncratic attempt to address international copyright by legislation was made in December 1883 by Representative Patrick A. Collins, a graduate of Harvard Law School. He introduced a bill 'to extend the privileges of the copyright acts to persons not citizens of nor domiciled in the United States'. It did require American manufacture (though not re-setting of type) within one year, and gave a general right to reprint (subject to various complicated conditions) if the American copyright was not secured in this way. It was referred to the Committee on Patents and never emerged.[228]

Far more significant was the introduction of the Dorsheimer bill, on 8 January 1884. William Dorsheimer was an experienced politician, and prominent New York Democrat. He was also a minor author in his own right, contributing frequently to the *Atlantic Monthly* and other

[226] G. P. Lathrop, 'The American Copyright League, its Origin and Early Days' (21 January 1888) 834 *Publishers' Weekly* 59. For a striking account of Henry James' contribution to the meeting see Laurence Hutton, *Talks in a Library with Laurence Hutton* (New York; London: Putnam, 1905), pp. 415–6.
[227] *Century Magazine* 5 (1884) 787 and *Century Magazine* 6 (1884) 144.
[228] Solberg, 'International Copyright', 268.

periodicals. His bill had seven short sections, the core provision being that 'Whenever any foreign country shall grant by law to citizens of the United States similar privileges, the President shall issue a proclamation to that effect, from the date of which the authors of such country shall be entitled in copyright in the United States.' The term was to be twenty-five years without renewal, to terminate on the author's death. The bill was referred to the Judiciary Committee, whose members included not only Dorsheimer, but also a number of other supporters of international copyright. The American Copyright League had known nothing of Dorsheimer's bill beforehand. Its executive committee met to discuss the matter. Already there was disagreement between those such as Lathrop, who argued for cooperation with the book-manufacturing interests, and those who opposed this on principle. The committee asked Dorsheimer to propose the normal domestic term (twenty-eight + fourteen). This change having been agreed, the League gave the bill all the support it could.[229]

The bill was favourably reported in February. However, Dorsheimer's efforts to have the bill discussed were unsuccessful. It was rumoured that it had been worked up by British publishers, and was not really an American initiative. There was considerable opposition in the House from some generally in favour of international copyright, but not in this form (since the bill had no manufacturing clause). The protectionist William Kelley called for a delay to allow manufacturing interests to be heard, and Dorsheimer's resolution was lost.[230] Dorsheimer was apparently ready to consider compromise, but opposition to his bill in Congress was so strong that this was impractical. The executive committee of the Copyright League was unwilling to make any concession at all.[231]

[229] G. P. Lathrop, 'The Present State of the Copyright Movement', (1884) 7 *Century Magazine* 314–6. Lathrop, as Secretary of the American Copyright League, had written to Secretary of State Frelinghuysen, asking for information regarding the current state of treaty negotiations. He replied that the difference in foreign laws made it difficult to agree on a detailed reciprocal code. In his view it would be simpler to pass domestic legislation giving foreign authors the same rights as American authors. Frelinghuysen also indicated that protection of the publishing industries was the job of tariffs and not copyright law: (1884) 38 *Nation* 112–3. This, apparently through serendipity, was precisely the approach adopted by the Dorsheimer bill. See also *New York Herald*, 3 February 1884; *New York Tribune*, 3 February 1884.

[230] Chace to Lea 1 and 11 April 1884, *Lea Papers*. Kelley had actively opposed international copyright in 1871. See above, p. 201.

[231] Solberg, *Copyright in Congress*, pp. 224–8. Several articles in the New York press objected to any concession to the protectionists, and arguing for the even more liberal measure originally proposed by the American Copyright League: *NA* BT 22/37 R1954 and R968. Chace to Lea, 5 August 1884, *Lea Papers*. Johnson rejected outright the idea of a moderate manufacturing clause: 'I believe that nothing but divided efforts can

These arguments should be seen against the background of a continuing high tariff on imported books. In 1882 the Tariff Commission had heard publishers such as Houghton argue that any reduction in the rate on foreign books would result in the manufacture of American books overseas, and would favour undesirable foreign works and ideas over local production. Others argued for free trade, insisting that the tariff operated as an obstacle to popular education and hampered international exchange of ideas and culture. The Commission recommended a reduction to 15 per cent, though even this limited step was resisted by the publishers. A number of prominent editors and authors, including T. B. Aldrich, Oliver Wendell Holmes, John Greenleaf Whittier and Edmund Stedman, signed a petition opposing any alteration to the tariff, on the grounds 'That American books demand American publishers, and whatever seriously checks the business of publishing checks the freedom of writing'. The stance taken by these individuals, all of whom were later to campaign for international copyright, requires some explanation. Their close connection with the publisher Houghton is one likely reason, but there is another. The copy signed by Stedman was endorsed, 'In the absence of an International Copyright Law I am compelled to sign this.'[232] Probably every one of these authors had seen their own editions undercut by the substantially cheaper British versions which undoubtedly circulated in America.[233] Congress sided with the publishers, and in the 1883 'Mongrel' Tariff Act the duty on books continued at 25 per cent *ad valorem*. The powerful and entrenched protectionist lobby would have to be appeased before any proposal for international copyright could succeed.

defeat the bill now, and I do not believe you care to take the odium of that end to all our labor.' Richard Underwood Johnson to Bowker, 23 May 1884, and see also 28 May 1884: *Bowker Papers*.

[232] See Dozer, 'Tariff on books', 81–3.

[233] Houghton wrote to Chace, 14 February 1883: 'I do not think it is sufficiently perceived at Washington that the removal or reduction of the 25% duty will strike a serious blow at the publication of American books. I do not refer to reprints alone but to copyright books. And for this reason. The interest of the bookseller is to buy his stock to the best advantage for selling again. He cares little whether he sells books written in England or in America; he only asks that he may get a discount from the publishers, and a good price from the buyer. Now take the case of a very large and important body of books, those intended for the reading of the young. The English publisher, having recovered his investment in his own country, is able to come here with showy books, in large quantities and offer them to the bookseller at a large discount ... The matter with regard to copyright books, where the reputation has already been assumed, is not so clear, but it is certain that a new author will have little chance to be heard, when the market is already full of books, and it must be remembered that nine-tenths of the readers of books buy the cheapest and those nearest at hand. We shall simply resign the writing of books, and a large part of the manufacturing': *Chace Papers*.

President Arthur's annual message to Congress at the end of 1884 recommended the passage of legislation concerning international copyright. He also made it plain that no international conventions on the subject would be contemplated 'until Congress shall by statute fix the extent to which foreign holders of copyright shall be here privileged'. This initiative appears to have been prompted by a request from the American Copyright League, though the President's urging had little effect. Early in 1885 William English introduced an international copyright bill in the House, which would have dealt solely with dramatic works. It was referred to the Judiciary Committee, which took no action.

The Hawley bill

In the spring of 1885 Lowell returned to America from Britain, and was elected President of the American Copyright League at its first annual meeting. The League's executive committee had redrafted the Dorsheimer bill. The new version gave the citizens of foreign countries equal rights to those of United States citizens, but only if the foreign states conferred reciprocal rights. Introduced in January 1885 by Senator Hawley at the League's request, and referred to the Judiciary Committee, it was not reported during that Congress. The League remained active, and in April raised funds by staging two days of readings by American authors, at the Madison Square Theater, New York. Lowell wrote the famous quatrain which was to become the slogan of the authors' movement:

In vain we call old notions fudge
And bend our conscience to our dealing
The Ten Commandments will not budge,
And stealing *will* continue stealing.[234]

Hawley reintroduced his bill in December 1885. It was referred again to the Judiciary Committee, which asked to be discharged, whereupon it was referred to the Patents Committee. The same bill was introduced in the House by Randolph Tucker in January 1886, and referred to the Judiciary Committee. The Patents Committee was authorised to hold public hearings and take testimony, but before hearings could be arranged, another bill was introduced, by Senator Jonathan Chace of Rhode Island. Chace did not approve of the Dorsheimer or Hawley bills, considering that they would affect American interests adversely. Chace was a member of the Committee on Patents, and scrambled to get his bill printed before their meeting in late January.

[234] 7 (1885) *Century Magazine* 488.

The Chace bill adopted a quite different approach from the Hawley bill. It required registration (within fifteen days of original publication), American manufacture (within three months of original publication) and prohibited the importation of any other editions. It had been drafted by the eminent historian from Philadelphia, Henry Charles Lea, who had run one of the oldest publishing houses in America.[235] Lea had been actively interested in international copyright since at least 1872. Lea wanted to see recognition of authors' rights, but was absolutely opposed to an unqualified international copyright law, and had strongly pressed Dorsheimer to adopt a manufacturing clause.[236] This bill was also referred to the Committee on Patents, chaired by Senator Platt, whose support for international copyright would later be invaluable. The Committee took testimony in four public hearings in an attempt to understand the different points of view.

The alternative approaches of the two bills reflected deep divisions amongst supporters of international copyright. Having seen the Dorsheimer and Hawley bills fall, in April 1885 several members of the American Copyright League had proposed endorsing a 'printing clause'. The matter was discussed at the League's annual meeting in November. However, the majority of Committee objected to any form of manufacturing clause, and refused to put the question to a vote of the membership of the League. A Constitution was adopted, but the uneasy victory of principle over pragmatism may be detected in its wording:

> The object of the American Copyright League shall be to procure the abolition, so far as possible, of all discriminations between the American and the foreign author, and to obtain reforms of American copyright law.

Several members resigned following this disagreement, including the League's Secretary, Lathrop.[237] Notwithstanding, the American Copyright League continued to advocate Hawley's approach.

Several members of the League testified at the hearings: Henry Holt, George Ticknor Curtis, Samuel Clemens and Lowell all spoke for the Hawley bill. The veteran Lowell provided quotable material: 'I should

[235] Lea was working on a bill as early as March 1884: Chace to Lea, 15 and 22 March 1884. Chace was also sent a draft bill by the Typographical Union No. 2 of Philadelphia. It differed little from Lea's draft, which Chace used: Chace to Lea, 20 and 23 January 1886. *Lea Papers*.

[236] See above, p. 218. Chace to Lea, 29 February 1884; Lea to Dorsheimer, 12 March 1884: *Lea Papers*. Dorsheimer's reply to Lea appeared in the *Publishers' Weekly* 22 March 1884, p. 347.

[237] Lathrop, 'American Copyright League', 60–1. *First Annual Meeting of the American Copyright League (held at the rooms of the Author's Club, 19 West 24th Street, NYC, November 7, 1885)* (New York, 1885).

answer that there is one book better than a cheap book, and that is a book honestly come by.' Bowker presented a memorial from 145 American authors urging the passage of an international copyright law. George Haven Putnam wrote in support. Most publishers were in favour of international copyright, but on the whole sought a manufacturing clause. Henry Carey Baird (who had opposed the Cox bill in 1872) argued that no foreign protection should be given until the domestic law had been revised. There were petitions against the international copyright from all over the country, mostly from trade unions or trade groups. James Welsh represented the Philadelphia Typographical Union (which claimed to have drawn up the Chace bill), and also presented material from other typographical unions in support of the Chace bill. Welsh made it clear that although the typographers would support a measure which secured their economic interests, they were implacably opposed to the Hawley bill, because it did not include a manufacturing clause. Clemens, speaking after Welsh, also advocated protection of vested interests.[238] The hearings generated tremendous publicity. Several thousand copies of the testimony (which ran to 133 pages) were printed and distributed as a pamphlet.

The Patents Committee reported with an amended version of the Chace bill. Given the strength of the trade opposition it was clear that the Hawley bill would never pass, and it was dropped. The report noted:

> The United States alone, of all the great civilized nations which have made advances in literature, still refuses to recognize the principle of international comity as applied to the production of literary property.[239]

However, the report went on to defend the 'safeguard' of the manufacturing clause. This infuriated the more doctrinaire members of the Authors Copyright League, who considered this a violation of the author's property right, characterised as 'dishonest' in a sharply critical piece in the *New York Tribune*. Chace was irritated, and responded robustly that the Constitution gave power to grant copyright only for 'limited times', and not an abstract right.[240] No further action was

[238] Clemens' testimony seemed tentative in its support for the bills, and he favoured a printing clause in the Hawley bill: Mark Twain, 'Remarks on Copyright', in Paul Fatout (ed.), *Mark Twain Speaking* (Iowa City, University of Iowa Press, 1976), p. 208.

[239] Chace Report (49th Congress, 1st session: Report No. 1188). The passage of any bill through the committee was far from a foregone conclusion, as Chace well knew.

[240] 'A Publisher on Justice to Authors', *New York Tribune*, 24 May 1886. Chace suspected that the piece was by Edward Stedman, Vice-President of the League. Chace to Lea, and Chace to the Editor of the New York Tribune, 24 May 1886: *Lea Papers*. The same points were made more recently on behalf of the petitioners in *Eric Eldred, et al.* v.

secured during that Congress. Chace reintroduced the bill in December 1887. It was again referred to Committee on Patents.

The Berne Convention: the United States stands aloof

During the time of these Congressional activities, international efforts towards a multilateral copyright treaty had reached fruition. The Berne Convention was signed in September 1886, though not by United States, which had shown reluctance to embrace the enterprise from its inception. At the *ALAI* conference at Berne in 1883 a draft convention on international copyright had been prepared. Invitations to a diplomatic conference were issued in 1884. The United States sent no delegate. Although prepared to make a general declaration that it was in principle prepared to accept a proposition in favour of international protection, the United States also foresaw significant obstacles to uniting all states under one convention. One obvious problem was the difference in tariffs.[241] Another significant factor was the United States' stress on the contribution of industry to the production and reproduction of works of literature and art. This focus, on copyright works as commercial products, was philosophically at odds with the priority accorded to authors' rights in the Berne documents. At the Berne Conference of September 1885 a revised draft was approved. The US Minister at Berne, Boyd Winchester, was present only *ad audiendam*. There was no possibility that the United States would sign the new convention in 1886.

President Cleveland expressed concern at the failure to address the question of international copyright, whether by legislation or by treaty, in two annual messages to Congress.[242] In December 1885 he referred

John D. Ashcroft, Attorney General (2003) 123 S Ct 769. See Seville, 'Copyright's Bargain', 320.

[241] In relation to the Universal Postal Union (which served as a model for the Berne Union), the United States had shown little flexibility on tariff collection. Foreign books were often seriously delayed in transit as a result. For the accusation that this policy was driven by the influential publishing houses who made money republishing foreign works see a speech by the American book collector, Henry Stevens: 'The American tariff on books, this tax on knowledge, it is well known, has long been the chief barrier against international copyright.' 'The Universal Postal Union and International Copyright', *Transactions and Proceedings of the First Annual Meeting of the Library Association of the United Kingdom* (1879), pp. 108–20.

[242] Samuel Clemens had discussed the matter with President Cleveland on 19 November 1885: Frederick Anderson et al. (eds.), *Mark Twain's Notebooks & Journals*, 2 vols. (Berkeley; London: University of California Press, 1975), vol. III, p. 211.

to the deliberations of the Berne Conference, and suggested that action was desirable on international copyright. In December 1886 Cleveland was more insistent:

> The drift of sentiment in civilized communities toward full recognition of the rights of property in the creations of the human intellect has brought about the adoption by many important nations of an International Copyright Convention, which was signed at Berne on the 18th of September, 1885. Inasmuch as the Constitution gives to Congress the power 'to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries' this Government did not feel warranted in becoming a signatory pending the action of Congress upon measures of international copyright now before it, but the right of adhesion to the Berne Convention hereafter has been reserved. I trust the subject will receive at your hands the attention it deserves, and that the just claims of authors so urgently pressed will be duly heeded.[243]

Cleveland of his own accord sent to both Senate and House copies of the correspondence between the Swiss Government and the US Department of State concerning the foundation of the Berne Union. Congress adjourned without further mention of the subject. The British delegate to the Berne Conference, Sir Henry Bergne, had tactfully concentrated on demeanour of the American delegate, Boyd Winchester, as showing 'real promise' of practical results in the future. Winchester sent a strongly worded despatch to the Secretary of State, arguing for Congressional action.[244] Some American commentators were unrestrained in their criticism. The *Century* observed that 'the rest of the civilized world has put the seal of shame on us anew by uniting, at the Berne Copyright Conference, in an international arrangement which is at once the most definite recognition and complete protection of literary property in existence'.[245] When Bergne was in Washington in 1888, the British government sought to reopen discussions on international copyright through diplomatic channels, but with little avail. The United States was not to join the Berne Convention for just over a century.

[243] Twelve nations had signed the final *procès-verbal* of the 1885 Conference. The Convention itself was signed the following year, 9 September 1886. Messages of the President to Congress, 8 December 1885, 6 December 1886: James D. Richardson, *A Compilation of the Messages and Papers of the Presidents: 1789–1897*, 10 vols. (Washington, D.C.: Government Printing Office, 1896), vol. 8, pp. 335 and 505.

[244] J. H. G. Bergne, 'The International Copyright Union' (1887) 3 *Law Quarterly Review* 14–31. For the text of Winchester's report see to Secretary of State Bayard, Legation of the United States, Berne 13 September 1886: Foreign Relations, Switzerland, No. 442.

[245] (1887) 9 *Century Magazine* 490.

The Pearsall Smith Royalty Scheme

Before consideration of the Chace bill resumed, a new variant on the royalty scheme came to prominence, in an article by Robert Pearsall Smith in the *Nineteenth Century*.[246] He proposed a bill to grant 'royalty compensation without monopoly'. Every proprietor of a copyright would have to provide a distinctive form of stamp, and furnish these stamps to any publisher on tender of a 10 per cent royalty, or forfeit the 'copyright'. Either the Librarian of Congress or the Secretary of the Society of Authors could be made depositories of copyright stamps, subject to a commission for handling. The plan was developed in some detail, and framed by letters of reaction from various notable British figures, which were at best coolly polite. There were very guarded statements of welcome from Gladstone, Hallam Tennyson and Rider Haggard, on the basis that something was better than nothing. Walter Besant, of the Society of Authors, felt it could be made to work, and claimed that the scheme had been 'introduced by him' at a meeting of the Society. Matthew Arnold declined discussion of privilege, wanting copyright.[247]

Pearsall Smith later put his case more fully in the *North American Review*. Fascinatingly, its editor also sought comments, this time from American notables. As with their British counterparts, some (Holmes, Howells) cautiously stated that it would be better than nothing. But others were less restrained: Charles Dudley Warner described it as a 'clumsy and cranky proposal'; Eggleston said it was 'regarded as impracticable by nearly every reputable publisher in America, while every author of reputation that I know, with a single exception, holds it in more detestation than can be expressed in these limits'. There was also a statement of opposition, to this 'outrageous stamp bill', from Gilder on behalf of the American Copyright League. George Haven Putnam published separately a vigorous and detailed refutation of Pearsall Smith's arguments, and Theodore Roosevelt also wrote

[246] Pearsall Smith had sent a 'rough outline' of his plan to Robert Underwood Johnson, with a view to its publication in the *Century* – though without high hopes: 'Mr Gilder informs me that you are in the International Copyright Corner – and that nothing less than a St Paul conversion w'd not change your mind.' Pearsall Smith to Johnson, 24 November 1886: *Johnson Papers*. He also attempted to persuade Chace of the scheme's merits: Pearsall Smith to Chace, 17 January 1887: *Chace Papers*.

[247] 'An Olive Branch from America' (1887) 22 *Nineteenth Century* 602–10. Besant's account of the date that the plan surfaced is confirmed by two mocking notices in the *Publishers' Circular*, 1 and 15 February 1886. These may well relate to *International Copyright: Protected Copyright with Free-trade competition*; *by an American* (London: privately printed, 1886), which advocates a stamp system, and should probably be attributed to Pearsall Smith.

deprecating, 'what I trust will prove to be an ineffectual diversion in favor of the enemy'.[248]

The strength of feeling was considerable, and nothing came of the Pearsall Smith plan. The assessment of the normally consummately diplomatic Sir Henry Bergne summed it up: 'Not only would it involve endless administrative difficulties of detail, but, being opposed alike to the principles of English and of all continental Copyright laws, it would require a sweeping change of legislation, from which the boldest legislator might well recoil.'[249] Nevertheless, in spite of its impracticability, Gilder regarded the 'Pearsall Smith controversy side-show' as the 'principal stumbling block' facing the Chace bill when it was reintroduced in December 1887. In this month Pearsall Smith wrote to Farrer at the Board of Trade – another who had advocated a royalty plan – with news that even Senator Chace did not expect his bill to pass in the coming session.[250]

The American Authors and Publishers Copyright Leagues combine their efforts

The reintroduction of the Chace bill coincided with the formation of the American Publishers Copyright League. Its practical importance stemmed from the proposal that it should work in cooperation with the Authors Copyright League (as the American Copyright League now became known).[251] In 1885 the American Copyright League had been divided over the manufacturing clause, and the pragmatists favouring this had been defeated. Although the existing committee continued to press for a bill which expressed international copyright ideals, a growing number of authors were willing to accept a right subject to conditions. Misunderstandings and contradictory messages left Chace frustrated

[248] Pearsall Smith was a member of the American Copyright League. His scheme was devised while the League was still insistent that international copyright should be granted without discrimination or conditions. R. Pearsall Smith, 'Anglo-American Copyright' (1888) 146 *North American Review* 67–85. Roosevelt's letter, ibid., p. 221. Putnam's article, 'An analysis of a scheme for international copyright, suggested by Mr. R. Pearsall-Smith', first appeared in the *New York Evening Post*, but was also issued as a pamphlet (New York, 1887).

[249] Bergne, 'International Copyright Union' (1887) 3 *Law Quarterly Review* 19.

[250] Gilder to Fairchild, 23 December 1887: Rosamond Gilder (ed.), *Letters of Richard Watson Gilder* (Boston: Houghton Mifflin, 1916), p. 197. See also Gilder to Lowell, 29 November 1887: *Johnson Papers*. Calcraft (Board of Trade) to Pauncefote (Foreign Office), 21 December 1886 (Confidential) enclosing an extract from a letter from Pearsall Smith to Farrer: FO 414/44 pp. 17–8.

[251] 'The American Publishers' Copyright League: Origin and Organization' (21 January 1888) 834 *Publishers' Weekly* 66–7.

and discouraged. The Boston publisher Dana Estes, an enthusiastic campaigner for international copyright, worked hard to persuade other senior figures in the League that the Hawley bill was a lost cause. They remained resistant to compromise.

Shortly before the annual meeting of the League in November 1887, Chace met Johnson and others in New York. Afterwards, several influential members, including Johnson, showed a new willingness to seek middle ground. At the League's meeting some were still adamant that only the unqualified grant of copyright was acceptable. However, an increasingly vocal faction argued that only by making concessions would the League secure any part of its objective. This more pragmatic group won, and a new executive committee was named.[252] The Authors' Copyright League was now willing to accept that the Chace bill was the only measure with any hope of support in Congress. Its committee was given full discretion to secure 'such enactment of International Copyright as might be found equitable and practicable'. A conference committee was formed, with members from both organisations. Related to this initiative was the formation of the International Copyright Association of Boston, the Chicago Copyright League and auxiliary leagues elsewhere.[253]

The lobbying activities which resulted from this new initiative were remarkable in their volume and variety, and were sustained. A series of authors' readings were arranged in support of the campaign, in towns throughout the country. The publicity helped to promote the copyright cause, and the admission fees went towards campaign expenses. The most illustrious gathering was held on 28 and 29 November 1887, in Chickering Hall, New York. Lowell directed the programme, which included readings by Twain, Eggleston, Stoddard, Cable, Lowell and Howells. A total of $4,000 was raised.[254] Eggleston made seven trips to

[252] *Publishers' Weekly*, 12 November 1887, p. 679. The dynamic Estes appears to have forced change on the reluctant meeting: 'I arrived a few minutes late on account of the train being delayed, and found them rushing business through in the most approved political style, and had I been half a minute later the resolutions would have been passed and the League committed to the same course which it has pursued for the past year.' Estes to Chace, 7 November 1887: *Chace Papers.*

[253] Estes drove the Boston association: *Proceedings at the meeting for the formation of the International Copyright Association, Parker House, December 27, 1887* (Boston, 1888). The Chicago league was organised by the publisher, General McClurg.

[254] R.W. Gilder to Chace, 13 December 1887: *Chace Papers*. Robert Underwood Johnson, *Remembered Yesterdays* (London: Allen & Unwin,1924), p. 262. George Haven Putnam, *The Question of Copyright* (2nd ed.) (New York: Putnam, 1896), p. 50. Henry James wrote from London to express his regret at being unable to be present at the readings, and his cordial sympathy with the League's aims and efforts: *Critic*, 10 December 1887.

Washington during the first four months of 1888, aiming to keep the issue constantly before members of Congress. In January 1888 the eloquent Presbyterian clergyman Henry van Dyke preached a sermon, 'The National Sin of Literary Piracy' in the Brick Church, New York. He declared the result to be 'the perversion of national taste and manners by the vast circulation of foreign books that are both cheap and bad', also 'the partial atrophy of our native literature' and above all 'the weakening and degeneration of the popular conscience'. The League contacted van Dyke, and a month later he preached the sermon again in Washington. President Cleveland's wife was present at the New York Avenue Presbyterian Church, as were a number of Congressmen (who had all been sent a personal invitation). The sermon was published as a pamphlet and widely distributed.[255] In March there were further authors' readings in Washington, and after the second of these the President and Mrs Cleveland greeted the authors at a reception in the White House, which was attended by members of the cabinet and of the Supreme Court.

Eggleston's efforts were supported by others in different ways. Gilder told Chace that as soon as the fight to get the bill through the Senate began they had telegraphed their friends all over the country to ask them to appeal to their Senators. The Authors' Copyright League regarded itself as a 'moral movement', and so the committee refused to employ professional lobbyists, preferring to put their arguments to Congressmen directly. A man was hired, briefly, to keep them informed of the situation in Washington. However, he was fired when he reported proudly that he had employed a page of the House not merely to place the League's printed arguments on the desks of the Representatives, but to remove those of its opponents.[256] Robert Underwood Johnson, the *Century*'s associate editor, was virtually lent to the League after he was made its Secretary in 1888. Gilder did not like lobbying: he preferred to 'print my views where they can be seen than attempt to run around and buttonhole our lawmakers' – in the pages of the *Century*.[257] An open letter from the Executive Committee of American Copyright League sought 'from all citizens who desire the development of American literature and regard the good name of the American people, their personal and active aid in securing International Copyright'.[258] One of

[255] Henry Van Dyke, *The National Sin of Literary Piracy* (New York: Scribner's, 1888).
[256] Johnson, *Yesterdays*, p. 265.
[257] To Chace, 26 April 1888; to Breckinridge, 2 February 1888: Gilder, *Letters*, pp. 198–201.
[258] It asked readers (not just authors) to join the League, sign the memorial for International Copyright, and to write to their Congressmen: *An open letter to readers of*

those who responded was Frederick Saunders, now librarian of the Astor Library in New York. In 1836 Saunders had roused the ire of the American book trade by opening a New York branch office for the London publishers Saunders & Otley.[259] An article by the publisher Henry Holt described the threat to the American reading public and American literature which had resulted from the break down in trade courtesy. His blunt title was, 'The recoil of piracy'.[260]

All this hard work was overseen by a subcommittee on publicity, chaired by Brander Matthews, a stalwart of the League. Putnam gave an extraordinary account of how they achieved press coverage. Newspapers at that time were often made up of four locally printed pages, supplemented by four pages of 'patent insides' or 'ready print' sent out by one of the newspaper syndicates. Editors in remote communities thereby acquired national material, features and advertisements, without undue expenditure of time or money on re-setting. Another service was the supply of stereotype plates of feature stories, sent out in cast form and known as 'boiler plate', which could be dropped as needed into any holes in the page forms. These arrangements were controlled by a few syndicates, in New York and Chicago, and distributed in the West by the Western Newspaper Union. A quarto page of standard size would be made up, containing literary material guaranteed to be 'interesting and informative', and the stereotypes or electrotypes would be sent by express to the subscribing country papers. Putnam explained:

> We sent out from our committee rooms from week to week thousands of more or less cleverly written editorial sermons, paragraphs, references to literary conditions, stories turning upon the value of copyright for literary production and upon the necessity, for the interests of the community, of removing all restrictions upon literary production ... I secured contributions for the column from Edward Eggleston, Richard Watson Gilder, Henry van Dyke, R. R. Bowker, and other clever writers working in the cause of copyright. The material possessed, of course, a higher literary quality than was as a rule to be found in the literary sketches and papers purchased by the editors of the 'patent insides'; and the authors, particularly men like Eggleston who had been in direct touch with the Western taste, were on the whole clever in shaping their 'sermons' so that

books, address of the American Copyright League, January 1888. See also *Critic*, 18 February 1888.

[259] *Publishers' Weekly*, 30 June 1888. Saunders recalled his earlier efforts towards international copyright: 'At that early day, the seed was sown for the now much-wished-for harvest; but the pioneer work in preparing the soil was mine.' For the 1836 activities see above, p. 160.

[260] (1888) 5 *Forum* 27–46. See also Holt's lecture to the Yale Political Science Club (March 1887): 'Some Practical Aspects of the Literary Life in the United States; and Especially as it is at Present Injuriously Affected by the Absence of an International Copyright' (1888) 48 *New Englander and Yale Review* 155–88.

they would not be skipped by readers of the page. These 'patent insides' went to thousands of journals and while the Congressmen from the districts in which these papers were published must have heard of the 'patent inside' system, they could not get over the impression that an article printed in the home paper must represent, to some extent at least, the opinion of the constituents. I heard Congressman after Congressman refer with pride, mingled with a little surprise, to the intelligent service that was being rendered by the local paper in his district to the educational work of the copyright cause.[261]

Evidence of these practices – and the efficacy of the lobbying effort – can readily be found. For example, the small-town newspapers of Utah were supplied by the Western Newspaper Union. Only a couple of short paragraphs on international copyright appear in the *Ogden Standard Examiner* in 1882–83. Although unattributed, these show signs of having originated from Harper & Bros. Between 1884 and 1887, there are brief, factual reports of the progress of bills, presented as just one item of the Washington news – typical of 'patent insides'. But in July 1888 there is an account of a banquet given by the Society of Authors in London as a gesture of thanks to American authors for their efforts towards international copyright. The accurate details provided strongly suggest the work of an insider, and the piece is acknowledged as 'By Western Associated Press'. Three further feature articles, throughout the critical months of 1890, bear the hallmarks of the League – in one case reproducing considerable extracts from Brander Matthews' pamphlets, in the guise of a review.[262] In terms of sheer scale and professionalism, the comparison with the lobbying efforts of British authors and publishers is striking.

A dependable author of these 'boilerplate' productions, Brander Matthews also wrote several of his own 'appeals to the average man' (as he termed them). One of the earliest of these, 'American authors and British pirates', appeared in the *Princeton Review*. It listed American works which appeared in British catalogues, and gave details of mutilations of American works by British publishers – a tactic used by Putnam in 1868. Mark Twain responded in characteristic fashion, teasing Matthews, and making the point that American authors could secure copyright in Britain if they took the trouble to do so, whereas the

[261] Putnam, *Memories*, pp. 374–5. See also Chace to Putnam, 5 April 1889: 'one of the things which is important for us to do is to take care of the American News Co., and the "boiler plate" folks, as Eggleston used to call them'. O. H. Smith, manager of the 'Patent Inside' syndicate of New York was invited to confer with the Joint Committee on the Platt bill before it was submitted: Putnam to Lippincott, 14 September 1889. *Putnam Papers*.

[262] *Ogden Standard Examiner*, 26 July 1888, 23 February, 17 April, 14 December 1890.

reverse was not true:

> Don't you know that as long as you've got a goitre that you have to trundle around on a wheelbarrow you can't divert attention from it by throwing bricks at a man that's got a wart on the back of his ear?' Those blacklegs in Congress keep us furnished with the prize goitre of the moral and intellectual world, and the thing for you to do is to let the wart-wearers strictly alone.[263]

Matthews continued his advertising efforts unabashed, with a long letter to the *Century*, and a further article in the *Princeton Review*.[264]

The British constituencies were not ignored either. When Sir Henry Bergne arrived in America on British Government business, a special meeting of the 'Copyright Club' was arranged, so that Bergne could meet Chace. Chace was keen to ascertain whether the terms of his bill would merit the issue of an Order in Council under the 1886 International Copyright Act. Bergne was encouraging, though diplomatically noncommittal, and the discussions were carefully relayed to the Foreign Office.[265] In a more public initiative, two separate but obviously coordinated letters appeared in the *Athenaeum* in March: one from Eggleston (as Chairman of the Executive Committee of the American Authors' Copyright League), and one from Putnam (as Secretary of the American Publishers' Copyright League). Eggleston admitted that the bill was a compromise measure, but asked for support, stressing that the bill was backed by authors, publishers and typographical unions. Eggleston appealed to 'our English friends' to forbear adverse criticism while the bill was pending. Putnam's letter likewise stressed the 'harmony of action' of the various groups, and echoed Eggleston's point that no ideal measure was attainable.[266]

Agreement between the Leagues and the typographical unions: further compromise

The timing of publication of these letters from the Authors and Publishers Leagues was no accident. By March 1888 a compromise text had been agreed, by both Copyright Leagues and the typographical unions.

[263] Brander Matthews, 'American Authors and British Pirates' (1877) ser. v, vol. 4 *Princeton Review* 201–212. Twain's response and Matthews' letter: (1877) ser. v, vol. 5 *Princeton Review*, 47–65.

[264] 'What Property shall Authors have in Their Works?' (1888) ser. v, vol. 5 *Princeton Review* 134–9. Two of Matthews' articles were issued by the League as pamphlets: *Cheap Books and Good Books* (1888), *American Authors and British Pirates* (1889).

[265] *NA* FO 881/5790 pp. 38–40. Bergne met Chace in New York, and several times in Washington.

[266] *Athenaeum*, 3 March 1888. Note also that Pearsall Smith had promised not to 'interfere' with their efforts.

An outline of the power of these labour organisations is helpful in understanding the significance of this development. America's typographical unions began as local organisations, dating from the late eighteenth century. By the mid-nineteenth century, printing was spread widely over the country, and there was competition between the leading printing centres. Disputes usually had a local focus, therefore, although the unions could combine if a suitable national issue arose – and international copyright was one such. The National Typographical Union was formally organised at a convention held in Cincinnati, Ohio, in May 1852. Its seeds lay in a meeting held in New York City in December 1850, of representatives from local typographical associations in New York, New Jersey, Pennsylvania, Maryland and Kentucky. These local organisations remained very strong. This structure should be compared with the position in Britain, where London was the main printing centre, though with significant activity in Scotland, and in English provincial towns. Again local unions were usual, and although they did for a time combine in a National Typographical Association, this was not a lasting success. Both countries' unions shared the same preoccupations: rates of pay, and a desire to minimise the employment of apprentices or untrained, non-union workers. On the whole the London compositors seem to have been more successful in resisting the employment of unskilled labour than their American colleagues, perhaps because of the concentration of printing in a single main centre. In America, it was a constant struggle. In 1887, following a long recession, the New York Typographical Union No. 6 issued a revised scale, and attempted to enforce a closed shop. Most employers were willing to accept the increased rates, but would not undertake to employ only union men. The strike was broken because the Typothetae (master printers) were able to recruit printers from other regions. Although the new rate (43c per 1000 ems for ordinary English bookwork) was agreed, its effect was to reduce the amount of composition done in New York. Smaller places nearby, such as Hartford and Connecticut, would do the same work for a 35c rate.[267] Those who had learned basic printing skills at country newspaper presses would seek enhanced opportunities in these towns. The balance of power varied with economic conditions. When trade was flourishing, labour was short, and employers were content to pay Union rates to fully trained workers. But mechanisation of book trade processes continued to put severe pressure on the unions, and during hard times tended to give employers the upper hand in struggles with employees. Mechanisation also eased the entry into the

[267] Stevens, *New York Typographical Union*, pp. 317–22. Tebbel, *History II*, p. 49.

market of rival printing operations, which used unskilled labour and cheap materials to produce large editions of popular works at rock-bottom prices, putting severe pressure on the established printers.[268] With respect to these threats, the typographical unions were prepared to combine with the Typothetae, to defend their joint livelihood – if the terms were right.

Obtaining the unions' cooperation represented a vital break through, but entailed a major concession. The first draft of the Chace Bill had contained a manufacturing clause which required printing to be done in the United States, but permitted import of clichés of type or duplicates of the plates used in printing the original editions. Its rationale was that dual type-setting was wasteful, and likely to introduce errors. However, the typographical unions had resolutely insisted that American typesetting was necessary for trade interests. One of the cost-cutting measures used by the rival Western printers was to print from existing plates, and this the unions were keen to inhibit. The printing industry employed a considerable workforce, and was well-organised. As the supporters of international copyright knew, Congress was less likely to pass a measure resisted by a significant body of employees.

Recognising the blocking power of the unions, the authors and publishers leagues eventually conceded the point. But there was considerable reluctance, and the New York and Boston leagues were still 'earnest and warm in their opposition' in late February. Chace was growing weary of the fight. He wrote to Putnam, 'as the matter now stands, we must choose between accepting their demands, or accepting defeat'.[269] Following this, a representative of the National Typographical Union was co-opted on to the Conference Committee. The next draft of the bill required printing from type set in the United States. It also prohibited imports of all foreign editions of works copyrighted in the United

[268] Aubert J. Clark, *The Movement for International Copyright in Nineteenth Century America* (Washington, D.C.: Catholic University of America Press, 1960), p. 100. See also a letter from the printer A. W. Hammond to another printer, Bennett, 26 January 1888. 'The robbery of English authors by the American publisher has resulted in bringing into the cities a large number of printers from the rural districts, who cannot correctly be called printers at all ... A copyright law would enable us gradually to get rid of them, and for this reason it would be greatly welcomed by 9/10 of the Union ... Petitions which would set forth closely and strongly the arguments and advantages of International Copyright, should be circulated, and if that is done I really believe that within a year we would have nearly a million of signatures of workingmen in favor of the law. That would be something that the United States Congress would not venture to disregard.' *Chace Papers*.

[269] Chace to Lea, 26 February 1888: *Lea Papers*. Chace to G. H. Putnam, included in a letter from Putnam to Eggleston, 21 February 1888: *Johnson Papers*.

States.[270] The publisher Henry Charles Lea was chiefly responsible for drafting these 'type-setting' and 'non-importation' clauses. Lea treated the typographical unions with immense respect, and they were always consulted. A senior member of his firm, Christian Febiger, became a trusted negotiator with the Philadelphia unions in particular. Chace refused to timetable hearings until he had heard from Febiger 'how he finds the ''Typos'' '.[271]

The Senate Committee on Patents held a further hearing in March 1888, and was told of the agreement between the various groups. There were petitions in favour of the bill.[272] The committee reported it favourably, observing: 'It is time that the United States should cease to be the Barbary coast of literature, and that the people of the United States should cease to be the buccaneers of books.' Breckinridge introduced a duplicate bill in the House, which was referred to the Judiciary Committee and favourably reported in April. Breckinridge was a friend of Putnam's, and had worked with him in the Free-Trade League. On 9 May the Chace bill was passed (35:10). It was then sent to the House, which already had the identical Breckinridge bill under consideration. The Judiciary Committee reported it without amendment. The bill was placed on the calendar, and the American Copyright League made efforts to get it called up, but the House was preoccupied with the Mills tariff bill and it was not discussed before the first Congressional session closed.

An unwelcome blow in the following session was the public intervention of George S. Boutwell, former Congressman and Secretary of the Treasury. Now 70 years old, he had a considerable political career behind him, and was known for defeating the speculators on the infamous 'Black Friday' of 23 September 1869, by releasing great quantities of Treasury gold. In March 1889 Boutwell published an article in the *North American Review* opposing international copyright, argued from a

[270] This was again a hard-fought compromise. Foreign editions could be imported for use but not for sale. However, no more than two copies could be imported at any one time, and each importer had to show written consent of the copyright proprietor, signed by two witnesses. Against the unions it was argued that those Americans who could afford them should be permitted to import fine British editions for their own libraries.

[271] Chace to Lea, 13 February 1888. For an example of Lea's drafting see Lea to Chace, 17 February 1888: *Lea Papers*. The Union was potentially a force which could be harnessed when needed: 'I think if the Typographical Unions would take action, directing their proper officers to write letters to Collins, and to their own Members of the House and Senate it might do good.' Chace to Lea, 12 April 1888: *Lea Papers*. But the work force was unpredictable and volatile, as evidenced by Chace's telegram to Lea, 12 January 1889: 'Have Febiger send influential printer to counteract mischief among typographers here.' *Lea Papers*.

[272] See also the American Copyright League's March publication, *What American Authors Think about International Copyright* (New York, 1888).

protectionist view point. Putnam did his best to rebut Boutwell's points in a substantial rejoinder the following month, but the conference committee was fighting an uphill battle. In spite of the earlier success in the Senate there was no progress in the House, and the bill died with the end of the fiftieth Congress.[273]

The Chace bill: British reactions

In Britain, the book trade's response to the Senate's passage of the Chace bill had been at best muted. The *Publishers' Circular* sought views on the redrafted bill from a number of publishers, which were almost uniformly negative. Edward Marston labelled it 'the very smallest mouse that ever a mountain could bring forth'.[274] There was particular concern regarding the manufacturing clause. The Printing and Allied Trades Section of the London Chamber of Commerce sent a considerable deputation to the President of Board of Trade, Sir Michael Hicks Beach, arguing that the bill would transplant the business of manufacturing books from the United Kingdom to the United States. The Edinburgh Chamber of Commerce held an extraordinary meeting to consider the matter. At the Foreign Office, Bergne wrote a robust memorandum following these protests, pointing out that there was not the slightest chance of an American bill without a manufacturing clause, and that the Chace bill was therefore better than nothing. Bergne was somewhat suspicious of the trade claims, and doubted whether British printers would really suffer seriously.[275]

The Society of Authors' efforts seem somewhat amateurish when compared with those of the American team. Following the bill's success in the Senate, it had been decided to give a dinner to thank American authors for their support for international copyright. Henry James thought the idea generous but ill-judged, since there was as yet nothing to celebrate, and refused to attend. James explained his reasons frankly to his friend Edmund Gosse, who was organising the dinner. Gosse wrote immediately to warn the Society's figurehead, Walter Besant: 'If Lowell & H. James abstain, the only other remarkable American to be

[273] Solberg, *Copyright in Congress*, pp. 240–67. George S. Boutwell, 'Common-Sense and Copyrights' (1889) 148 *North American Review* 327–35. George Haven Putnam, 'Pleas for Copyright' (1889) 148 *North American Review* 464–76.

[274] *Publishers' Circular*, 2 April (Marston's letter), 16 April, 1 May 1888.

[275] *NA* FO 881/5790 pp. 105–18. As evidence to the contrary, note that the Philadelphia Typographical Union No. 2 sent a circular to every Typographical Union in the United States, urging them to support the Chace bill on the grounds that it would transfer work from London to America: *Chace Papers*.

invited is Bret Harte. The rest are bores or mediocrities or both. Do you not think this is very serious?' James tried unsuccessfully to prevent Lowell from 'tumbling into a (however well-intentioned) trap for fatuity'.[276] Lowell spoke and was the main guest of honour. Louise Chandler Moulton and Francis Hodgson Burnett were the next-best Americans that could be mustered, since Harte, Whistler and Frances Marion Crawford were invited but did not attend.[277] The effective pressure was to come from America.

The Simonds Report favourable; but defeat in the House

In his address to Congress in December 1889, President Harrison suggested that the enactment of an international copyright law would be 'eminently wise and just'. Publicity efforts were redoubled. Compte Emile de Kératry, 'the accredited representative to the United States of the Société des Gens de Lettres, the Société des Auteurs Dramatiques, and other Literary Associations of France', was honoured at a breakfast in New York. Eggleston and Kératry both gave speeches.[278] The Leagues were contemplating significant expenditure, including a paid representative in Washington.[279] Early in this first session of the 51st Congress the bill was re-introduced into the Senate by Platt (Chace having resigned his seat) and referred to the Committee on Patents. The text had been carefully revised by the joint Conference Committee of

[276] Quoted Michael Anesko, '*Friction with the Market': Henry James and the Profession of Authorship* (New York; Oxford: Oxford University Press, 1986), p. 165. See also James to Robert Louis Stevenson, 31 July 1888: Henry James, *Letters*, Leon Edel (ed.), 4 vols. (Cambridge, Mass., 1980) vol. III, p. 240.

[277] Incorporated Society of Authors, *Report of the Proceedings at the Dinner given by the Society of American Men and Women of Letters at the Criterion Restaurant, Wednesday, July 26, 1888* (London: Society of Authors, 1888). The dinner, at the Criterion Restaurant, did not go entirely smoothly. J. S. Little (involved in the organisation of the evening) had to write a letter of apology to Oscar Wilde, who had been seated next to someone with whom he was not on speaking terms. Little also reported that the food 'left much to be desired'. Victor Bonham-Carter, *Authors by Profession* (London: Society of Authors, 1978), p. 142.

[278] *Publishers' Circular*, 31 December 1889. Kératry's remarks were quoted in an article by Gilder, 'Our Sins against France' (1890) 17 *Century Magazine* 792–3, and in his own article 'A Plea for Copyright' (1890) 150 *North American Review* 106–9.

[279] Estes seems to have proposed that the Joint Committee be given a budget of $10,000: $2,000 to come from his own Boston International Copyright Association, $4,000 each from the Publishers' and Authors' Leagues. He also hoped for contributions from some of the Western branches of the Leagues – Chicago, Cincinnati, St. Louis. They had spent about $6,000 the previous year. Scribner was resentful that the Boston Association had not previously contributed, and thought their share unfairly small. Dana Estes to George Haven Putnam, 16 September 1889; Charles Scribner to George Haven Putnam, 26 October 1889. *Putnam Papers*.

the Leagues. An identically amended text was introduced by Butterworth in the House on 6 January 1890, and referred to the Committee on Patents. A further copy of the bill was presented by Breckinridge, and referred to Judiciary Committee which reported it favourably on 21 January. The Conference Committee's idea in submitting duplicate bills was to keep the issue bi-partisan (Breckinridge was a Democrat, whereas Butterworth was Republican) and to give the bill a double chance.

Congressman George Adams presented the Judiciary Committee's strongly favourable report on 15 February, with a substitute bill. However, Adams warned Johnson that although there had been a unanimous vote for reporting the bill, some members of the Committee might oppose it on the floor of the House.[280] There was no change in the bill's substance, but it was improved in form, now giving the full sections of Revised Statutes to be amended, and not just the words to be struck out. On 18 February, Simonds submitted a favourable report from the Patents Committee, and a duplicate of the bill presented by Adams. A few days later Platt asked leave to substitute the clearer and tidier Adams bill, and this was granted. The *Century* asked the public to support the cause by putting pressure on Congress. One form letter from the Authors League asked newspapers throughout the country to write editorials in favour of the bill, and editors were asked to write to their congressmen. Another standard letter asked individual recipients to write to their senators in support, and to lobby their local newspapers. The Authors League also wrote enclosing petitions, to be signed and returned to Washington. The Publishers League took similar steps. On behalf of the International Copyright Association Estes sent a circular to every representative and senator in Congress, and wrote to all his members asking them to 'write to several Congressmen taken at random'.[281]

It was not at all clear that the bill would even be called up. The speaker of the House, Thomas B. Reed, was responsible for timetabling. Reed was a good friend of two strong supporters of international copyright – Theodore Roosevelt and Henry Cabot Lodge – although the plain-speaking Reed himself dismissed the cause as a 'fad of the mugwumps'. Brander Matthews had written a further article, showing how far behind other nations America had fallen in terms of its copyright law. Matthews claimed that after this article was given to Reed by Roosevelt

[280] Adams to Robert Underwood Johnson, 16 February 1890: *Johnson papers*.
[281] *Century Magazine*, March 1890. American Copyright League letters, 10 and 27 February 1890, and see also 7 April 1890. International Copyright Association letter, 17 February 1890. *Johnson papers*.

the League was told that it could have any day it wanted for its bill.[282] The House debated the bill vigorously on 1 and 2 May, but the third reading was defeated (125:99). The opposing vote was largely democratic, but was led by the republican Judge Lewis E. Payson from Illinois, one of the centres of cheap publishing. He produced the catalogue of the Seaside Library, claiming that nine-tenths of it was standard literature and attempting to show that the effect of international copyright would be to make these books expensive. Henry Cabot Lodge responded that 97 per cent of the works were by foreigners, giving a false impression to the youth of the Republic, and acting as 'direct and unjust discrimination against the American author'. Payson proposed many amendments, mostly very minor, in an attempt to disable the bill. He objected that there was no clause in the bill which would guarantee reciprocal rights for Americans publishing abroad. Payson also proposed striking out the non-importation clause – a tactic intended to destabilise the coalition of the bill's supporters. In this aim it succeeded, since Adams was willing to accept the amendment, thereby incurring the wrath of the typographers. Febiger had a good deal of work to do to confine the damage to Adams.[283] Unperturbed, Simonds re-introduced the bill with a reciprocity clause on 16 May. It was referred to the Committee on Patents, and on 10 June a long report (the Simonds report) was submitted with the bill.

The Simonds report presented a compelling collection of materials.[284] It set out other countries' arrangements with regard to international copyright. The history of natural right and common law right was reviewed. The position under the American constitution was considered, and its authorisation of copyright 'to promote the progress of science and the useful arts'. The report argued that the current system had exactly the opposite effect, and emphasised the wrong done to American authors and the reading public. Various advocates of international copyright were listed, including President Harrison and ex-President Cleveland. A petition from 144 leading American authors was reproduced, also one from the Western Association of Writers, and one from over a hundred Southern authors. There was a long list of colleges who had petitioned in favour of the Chace-Breckinridge bill, also details of support from educators and librarians. The report emphasised the depth of support among the printing trade groups, reproducing details of the resolutions in favour of international copyright from

[282] Matthews, *These many years*, pp. 227–8. His influential article was 'The Evolution of Copyright' (1890) 5 *Political Science Quarterly* 583–602.
[283] Febiger to Johnson, 5 June 1890: *Johnson papers*.
[284] Reproduced in Putnam, *Question*, pp. 77–130.

The American Publishers' Copyright League, The American Newspaper Publishers' Association, the International Typographical Union and the United Typothetae of America (this last resulting in petitions from 200 local unions, representing 40,000 members throughout the country). Many leading magazines and newspapers had authorised the use of their names in favour of the bill, and these were listed. The report concluded: 'It cannot be possible that the American Congress will, with full knowledge, permit the present procedure to continue.' Nevertheless, no more came of the bill during the first session of this Congress.

In America, reaction to the defeat in the House was one of frustration and embarrassment.[285] In Britain feelings were stronger, and also somewhat confused, since few knew how to assess the consequences of this rejection. Henry James was in London at the time and described its impact:

> That was the great news there, and it has made a very bad state of things – so that I was glad to come away, for a time at least, from the shame and discomfort of it. It seems as if this time we had said, loudly, that whereas we had freely admitted before that we in fact steal, we now seize the opportunity to decide that we *like* to steal. This surely isn't what we really *mean*, as a whole people – and yet apparently we do mean it enough not to care to make it clear that we mean anything else.[286]

Final manoeuvres: the bill passes, despite determined opposition

At the beginning of the second session of Congress, on 2 December 1890, Simonds called up his bill. Circulars from the Copyright Leagues had prepared the ground.[287] The previous day President Harrison's

[285] See Theodore Roosevelt to Brander Matthews, 3 May 1890: 'I feel humiliated as an American citizen over the defeat of the copyright bill and the arguments by which it was brought about.' Lawrence J. Oliver (ed.), *The Letters of Theodore Roosevelt and Brander Matthews* (Knoxville, T.N.: University of Tennessee Press, 1995) p. 14. Henry Cabot Lodge called the defeat 'disappointing to the last degree': (1890) 66 *Atlantic Monthly* 265. One satirical poem, *The Illinois Farmer on Copyright*, targeted the filibustering Payson: *Critic*, 31 May 1890. See also James Russell Lowell to Kate Field, 15 May 1890, published in her weekly magazine of criticism and current affairs, *Kate Field's Magazine* (Washington, 1890).

[286] To W. D. Howells, 17 May 1890: Henry James, *Letters*, vol. III, p. 284. See also: *Athenaeum*, 14, 21, 28 June 1890; *Publishers' Circular*, 1 July 1890; *Author*, July 1890; (1890) 54 *Fortnightly Review* 56–65.

[287] See the American Publishers' Copyright League circular (10 November 1890) sent to 237 booksellers in districts whose congressmen were doubtful. Recipients were reassured as to the effects of the bill on their business, and urged to write to their Congressman. The American (Authors') Copyright League also distributed a further circular (10 November 1890). *Johnson Papers*.

Annual message to Congress had again recommended the passage of legislation. Simonds was granted permission for immediate consideration of the bill, but, constantly interrupted by hostile motions attempting to force postponement, he eventually moved an adjournment. The next day Simonds obtained a further period of discussion. After one motion of opposition was defeated, the bill was passed (139:95). Putnam credited the change of opinion to the Leagues' 'missionary work' during the summer. Robert Underwood Johnson, as Secretary of the Conference Committee, described how he

> organized a systematic appeal to every doubtful Senator, through the newspapers of his State or through constituents or others who we discovered were likely to be influential with him. A meticulous study of each man was made from various points of view, and his classmates, clergyman, former business associates and others were enlisted in the good cause.[288]

The House Act was immediately presented to Senate for its concurrence. There was relief and some surprise at the size of the majority.

Since the Senate had previously passed the Chace bill, it was hoped that it would pass the Simonds bill (which was practically identical) without trouble. However, Senator Frye received a letter from Vickery & Hill, a large printing and lithography business in his constituency, arguing that the bill would give the business of publishing pictures to foreign publishers. Frye therefore intended to propose an amendment extending the manufacturing clause to lithographs, photographs and engravings. Frye cared little about the substantive point, but he was keen to respond to his constituents. The conference committee took immediate steps to organise opposition.[289] Petitions of protest arrived from all over the country. Artists themselves were utterly opposed to it. However, the lithographers had been stirred up, and enemies of the bill were quick to exploit their fear.[290] All this again destabilised and divided the bill's supporters just as discussion was about to resume. A furious telegram of protest was received from the French literary societies:

[288] Johnson, *Yesterdays*, p. 246.

[289] Vickery & Hill to Frye, 17 December 1890. Platt to Johnson, 20 and 24 December 1890. John L. Kennedy to Johnson, 25 December 1890: 'Last Sunday Columbia Typographical Union No. 101 instructed her officers to send a circular letter to every member of the Senate, urging them to favour and pass the copyright bill.' *Johnson Papers*.

[290] Carrol Beckwith (president of the Society of Artists on Stone) called it 'a dastardly amendment': *Times*, 12 February 1891. H. O. Houghton to Johnson, 10 January 1890: 'it is the pirates who are back of it, and are impressing on the chromo man that their business is all going to England if the Copyright passes'. *Johnson Papers*.

'Adoption lithograph tue copyright. Refusons nettement. Avisez Johnson protestons.'[291]

The bill was called up for discussion on 9 February, and Platt reminded the Senate that it was the same in principle as the Chace bill, apart from its reciprocity requirement. The debate spread over several days, and a number of worrying amendments were adopted.[292] Senator Sherman proposed an amendment which (partly due to poor drafting) undermined both international and domestic copyright by providing that foreign reprints of any work (American or foreign) could be imported, subject to duty, but without the author's permission. This was an absolute bombshell, because the 'importation clause' (in fact *preventing* any importation) had been a crucial element in gaining the typographers' support. Platt's explanations of the problem this would pose for copyright and the manufacturing clause did not convince, and the amendment was passed by a single vote. The following day Senator Carlisle (notionally a friend of the bill) proposed a lengthy and highly technical amendment on the importation of foreign editions, intended to implement the policy of the Sherman amendment: it too was approved. However, Senator Reagan's proposal to strike out the deposit and manufacturing clauses was defeated. The Committee of the Whole then reported the bill to the Senate. Platt demanded a vote on the committee amendments as a whole, and these were narrowly defeated (31:29).

Thus the Senate went back to considering the original bill, and the process began again. More amendments were proposed and defeated. An amendment to substitute the President for the Attorney General as the proper authority to announce by proclamation the conditions of reciprocity was agreed to without vote. A modified Sherman amendment was re-introduced and passed: the intention was to allow readers preferring European editions to import these for their own libraries. Frye reintroduced his amendment on lithographing, somewhat modified, which passed. Ingalls proposed an amendment exempting newspapers and periodicals from the prohibition on importation, which was agreed to. Daniel and Pasco both made efforts to defeat the bill by moving to strike out large parts of it, but were unsuccessful. The bill was then read for the third time and passed (36:14).

[291] William Appleton to Johnson, 11 February 1891. Kératry to Johnson, 14 February 1891. 'Lithographic amendment kills copyright. We flatly refuse. Tell Johnson, we protest.' *Johnson Papers*.

[292] Watching from the sidelines, Chace was beside himself with frustration: 'I have watched the progress of our Bill in the Senate with amazement ... I hardly have patience to write about it.' Chace to Lea, 2 February 1891: *Lea Papers*.

The House was duly notified, but did not consider the amended bill until 28 February. Payson again attempted to block the bill, but failed. However, opposition to the Sherman amendment was so strong that this seemed likely to wreck the bill's chances. Many publishers and the printing unions were totally opposed to it, and their influence in the House seemed likely to be decisive. The Joint Committee of the Leagues was also firmly against the Sherman and Ingalls amendments, although they were willing to accept the modified Frye amendment. In Appleton's view, the only hope was to appoint a conference committee of the two houses, and force the Senate to remove the Sherman amendment, Simonds therefore moved that the House nonconcur in the amendments and request a conference. This was agreed.

The Conference Committee was made up of three conferees from each chamber. Initially there was deadlock on the central issues – the Sherman and Ingalls amendments. There was intense lobbying.[293] On 2 March the Committee had to report that the disagreements had not been resolved. Simonds moved that the House insist on disagreement to these amendments and request a further conference with the Senate: this was agreed. The Senate did the same. With only one legislative day remaining in the Congressional session the Copyright Leagues acted boldly to end the stalemate. Senator Hiscock had expressed clear support for the bill, but had refused to back down from the Senate amendment in the Conference Committee. Telegrams were sent to the leading papers in New York City, and printers' unions throughout the State, stating that Hiscock was 'obstructing' the copyright bill. The following day the *New York Times* carried an editorial describing Hiscock was 'the most perverse and the most dangerous' enemy of international copyright. The unlucky Senator was flooded with telegrams from the unions, demanding that he should cease his opposition and support Senator Platt. Thus the deadlock was ended.[294]

A second conference took place at 1 am on the night of 3 March, and a compromise was effected. The committee agreed to recommend receding from the Sherman amendment. Instead, the House's version of the importation clause was adopted (two copies could be imported for use not sale), softened somewhat by removing the requirement that the written consent of the American copyright holder be obtained. A slightly

[293] Theodore Roosevelt to George Haven Putnam, ?1 March 1891: 'Bring every pressure to bear upon the senators, especially Sherman and Carlisle ... Do move Heaven and earth to bring pressure on the senators. I am going to see them now.' *Putnam Papers*.

[294] Johnson, *Yesterdays*, p. 254. Nicholson (*New York Tribune*) to Hiscock, 2 March 1891. Chace telegraphed Sherman begging him not to insist on the amendment: *Johnson Papers*.

narrower version of the Ingalls amendment – one acceptable to the typographical unions – was also proposed. The House agreed the report, but the Senate was at first resistant to receding from an amendment which it had twice approved. Platt emphasised that this would bring about the bill's defeat, since it was now 2 am on the last legislative day of the Congress. The Senate then agreed the bill (27:19), and went on to dispose of three other pending bills.

At 2.25 am Pasco moved to reconsider the vote on the copyright bill, throwing the Senate into utter confusion: the Presiding Officer had to issue repeated appeals for silence so that the Recorder could hear, and the Serjeant-at-Arms had to be called. A vote on Pasco's motion was defeated, but there was no quorum and the Presiding Officer had to issue a call. Fifty Senators answered, but, instead of repeating the vote on Pasco's motion, the Senate considered another bill just received from the House. It was three hours before it returned to the pending motion. In the meantime the international copyright bill had been signed by the Speaker of the House and returned to the Senate, where the Vice-President had signed it. Pasco angrily objected that the bill had been signed while a motion was still pending. The Senate was eventually informed that the Vice-President had signed the bill not knowing that a motion was pending. It was then 6 am, and the Senate recessed, resuming at 9 am on the fourth of March (but still the legislative day the third of March). The pending motion was the first order of business, although there was no quorum until 10.30 am, when Pasco's motion was defeated. The bill was laid before President Harrison, who signed it immediately, using a quill pen made from the feather of an American eagle.[295]

Tactics thus played a huge part in the final passage of the bill, as Putnam acknowledged:

> The successful steering of the bill through the House in the several votes required during the night of the 3d March was largely the work of Henry Cabot Lodge, and was not a little furthered by the friendly co-operation of Speaker Reed ... The greater part of the Senators had been up through a large part of the night, and the friends of the bill were rallied to resist this last assault only by means of an urgent 'whip' delivered in person by Mr. Johnson, Mr. Appleton, and Mr. Scribner, who, acting on behalf of the Copyright Leagues, had, in company with Mr. Platt, Mr. Lodge, and other friends of the bill, kept a continuous vigil over its varying fortunes during the long hours of the night session.[296]

[295] Solberg, *Copyright in Congress*, pp. 300–22. Johnson, *Yesterdays*, pp. 256–9.

[296] Putnam, *Question*, p. 62–3. Roosevelt claimed 'that if Lodge had not insisted with Kennedy who was in charge of the engrossing business, that our Bill should be taken from the bottom of the pile and placed on top it would not have got back to the Senate in time for our purpose. Roosevelt added that the hastening of the bill out of the Senate, which enabled it to be placed out of reach of Mr Pasco's motion to reconsider,

Henry Cabot Lodge was one of the speakers at a banquet the following month to celebrate the passage of the Act, and also the eighth anniversary of the founding of the American Copyright League.[297] Johnson was later reported as saying that the entire agitation of the Copyright League had cost less than $20,000.[298] This was presumably the cash figure, since a great many incidental expenses must have been absorbed by individual campaigners. Far more would have been expended in time and energy, also. As Henry Holt observed, there was now 'more chance of our encouraging a new race of Irvings and Hawthornes and Longfellows and Emersons to bring us back from Anglomania, and many other manias, to a sober working out of our own free ways, and to a new delight in our own free life'.[299]

Implications of the 1891 Act for Britain: the question of reciprocity

These Congressional manoeuvres had been viewed anxiously from Britain. The bill's passage through the House in December was cautiously welcomed, but there was a good deal of concern at the prospect of a manufacturing clause. Printing trade interests pressed for a retaliatory measure imposing similar manufacturing restrictions on American works. Reprisals would have been directly contrary to the 1878 Report of the Royal Commission, and was resisted by authors. The Board of Trade briefed the Cabinet, doubting whether there would be any appreciable adverse effect, and concluded: 'It seems one more case where it is wisest to do nothing.'[300] News that the bill had finally passed reached the *Times* by telegraph, and was greeted with exhilaration in its leader: 'The incredible has come to pass; and the American Copyright Bill has become law.' A steadying line was adopted on retaliation, although the manufacturing clause was acknowledged to be a potential drawback. Most other commentators, notably Sir Henry Bergne writing in the *Quarterly Review*, advised waiting to see the real consequences of

was also due to the promise of cooperation made to Lodge by the Clerk of the Senate.' Putnam to Johnson, 6 March 1891: *Johnson Papers*.

297 Held on 13 April 1891, at Sherry's restaurant New York City, which was known for its lavish and expensive banquets. The menu suggests that this occasion was no exception: *Johnson Papers*.

298 George Iles to Johnson, 24 April 1893: *Johnson Papers*. Johnson seems to have revised the figure down to ten thousand dollars when pressed for exact figures: George Iles, 'Success with Scientific and Other Meetings' (1893) 43 *Popular Science Monthly* 467.

299 Henry Holt, 'Our international copyright law' (1891) 11 *Forum* 438–45.

300 *NA* CAB 37/29/9. The briefing note was signed by Henry Calcraft, a very experienced commentator.

the measure. Cautious views expressed by the Law Officers of the Crown were also reported.[301] The government continued to reserve its position, saying it had not yet seen the Act.

The American Act was due to come into force on 1 July 1891. However, it applied only to foreigners whose state permitted to US citizens 'the benefit of copyright on substantially the same basis as its own citizens', or when that state was 'a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become party to such an agreement'. The existence of either condition was determined by the President by proclamation. Bergne (for the Foreign Office) considered but rejected the possibility of obtaining an Order in Council under the 1886 International Copyright Act:

> it would mean that the United States, in return for their very selfish and unsatisfactory Law, should be admitted by us to full participation in the benefits of the Convention of Berne; and I submit that the provisions they have made for the protection of British authors are not such as it would be 'expedient for Her Majesty to require' for this purpose.

Concern as to whether British law would be reciprocal had surfaced early on. The question was whether the statute required foreign authors to be resident in British territory in order to obtain copyright protection. The matter was still unclear.[302]

The problem stemmed from the 1868 House of Lords decision in *Routledge* v. *Low*.[303] The author in that case had been resident in British territory at time of the work's publication, so a decision as to whether an alien author had to fulfil this residency requirement had not been necessary to dispose of the case. The point had nevertheless been discussed, although the remarks were *obiter*. The Lord Chancellor, Lord Cairns, had expressed an unambiguous view that the statute protected an author first publishing in the United Kingdom whether resident or not. He argued that *Jefferys* v. *Boosey* was a decision on the construction of the Act of Anne, and that the 1842 Copyright Act expressed a less narrow policy. He thus distinguished the case in front of him. Lord Westbury came to a similar conclusion to Lord Cairns, although by a different route. He was openly critical of the reasoning in *Jefferys*.

[301] *Times*, 5 March 1891. J. H. G. Bergne, 'Anglo-American Copyright', (1891) 172 *Quarterly Review* 380–398. *Times*, 20 May 1891.

[302] Memorandum of Sir Henry Bergne, 2 June 1891: *NA* FO 414/104 pp. 1–5. Bergne, advising the Foreign Office, cited Fitzjames Stephen's view (in his 1878 Digest for the Royal Commission) that it was probable but not certain that residence was not required. Bergne concluded that 'That is probably now the state of the law.'

[303] (1868) LR 3 HL 110. See above. p. 197.

Lord Cranworth, who had been one of those deciding in *Jefferys* that residency was a requirement, explicitly kept his judgment open on the point. Lord Chelmsford likewise expressed doubt as to whether the Lord Chancellor's view was well founded. Lord Colonsay abstained from expressing any opinion on the point. The judges were thus clearly split.

Any hope of finessing the point with the Americans was not encouraged by the fact that Lord Monkswell's copyright bill pending in the House of Lords had addressed the problem specifically, with the intention of resolving it. Sir Frederick Pollock, chairman of the Copyright Committee of the Society of Authors, and closely involved in the drafting of Lord Monkswell's bill, explained this publicly in the *Times*. He suggested that a short Act would be required if the bill did not pass – and this was the view of most commentators.[304] Since Lord Monkswell's bill did not progress, it seemed as if a highly specific Act would be needed, which would have provoked unwelcome pressure from the trade for retaliatory provisions. But following some informal diplomacy in Washington (by the publisher Edward Marston) it emerged that the American Government would accept a clear expression of opinion from the legal advisers of the Crown that residence was not required. The American Minister in London, Robert Lincoln, saw Lord Salisbury, to discuss the matter. The Law Officers were, happily, unanimously of the opinion that residence was not a necessary condition, and that simultaneous publication in a foreign country would not prevent British copyright being secured. Salisbury wrote to Lincoln to this effect, and on 1 July the President's Proclamation was made.[305] The Society of Authors celebrated with a dinner on 16 July, with over two hundred present, and Lincoln as the principal guest.

The effects of the 1891 Act: problems for translations

The immediate effect on the printing trade appeared to be slight. It had been predicted that all the publishing houses would rush to open branches in America, but mutual arrangements went on much as they had done. The necessity for simultaneous publication required good organisation on the part of authors and publishers, and there was confusion over the necessary procedures for serials – but these were merely teething troubles. At the end of 1892 the first decrees were entered

[304] Letter from 'A British author': *Times*, 16 April 1891. Pollock's letter: *Times*, 17 April 1891.

[305] C 6425, p. 5. President Harrison's proclamation also covered France, Belgium and Switzerland. For Salisbury's letter to Lincoln see C 7783 (1895), p. 53.

under the new Copyright Act, instituted by Eyre & Spottiswoode against the New York *Recorder* Company and the American Lithographic Company, concerning an engraving entitled 'Little Lord Fauntleroy': perpetual injunctions were granted.[306] An editorial in the *Publishers' Circular* marking the end of the second full year of the American Act's operation indicated that the British book trade had continued much as before.[307]

However, the Act's strict requirements on simultaneous publishing and American manufacture did pose considerable difficulties for those publishing works which required translation. The matter was raised at the Congress of Authors, held in Chicago during July 1893. A pamphlet sent by the French 'Syndicat pour la Protection de la Propriété Littéraire et Artistique', congratulated the American Copyright League on the 1891 Act, but expressed criticism of the effects on foreign works. *ALAI* sent a lengthy communication to the Congress, expressing concern that the American formalities posed an almost insurmountable obstacle, and asking for a month or two's grace. Putnam was convinced by the French arguments, but thought it too early and too dangerous to try for a revision of the Act. He admitted that it was 'almost impossible' for a French or German author to publish either the original or a translation simultaneously with the American publication (given the extra time needed whether for American type-setting in a foreign language or for translation). Putnam argued that the whole of American copyright law ought to be considered by a Congressional committee, and looked forward to a time when there would be no manufacturing clause, and the United States could join the Berne Convention.[308] It would be some time before these visions would be realised.

A further attempt to conclude an Anglo-American treaty

One enduring American grievance was the Canadian Government's refusal to allow US citizens to register for Canadian copyright, on the

[306] The 'Little Lord Fauntleroy' engraving had been exhibited at the Royal Academy Exhibition 1891, and issued as an 'art supplement' to the *Recorder* (entitled 'The Noble Friend') the following February: *Times*, 30 December 1892; *Publishers' Circular*, 7 January 1893; *Law Journal*, 14 January 1893.

[307] *Publishers' Circular*, 1 July 1893. For a bibliographical view of the Act's effects see James L. W. West, 'The Chace Act and Anglo-American Literary Relations' (1992) 45 *Studies in Bibliography* 303–11. Since the Act did not protect previously published works, many established British authors gained little.

[308] *Note sur l'Acte du 3 Mars 1891*: *Author*, August 1893. G. H. Putnam, 'Results of the Copyright Law' (1890) 16 *Forum* 661–23. Books and pamphlets published exclusively in languages other than English were already exempted from duty under the 1890 McKinley Tariff Act, however.

grounds that the 1891 Act and Presidential Proclamation did not constitute an international copyright treaty. The matter arose soon after the 1891 Act came into force, and caused huge embarrassment in Britain – because the Presidential Proclamation had been given on the strength of the Prime Minister's assurance that copyright would be granted to US citizens on substantially the same basis as British citizens. Eventually, the British Government responded that it was open to US citizens to register at Stationers' Hall, and then Imperial copyright would run through the entire empire, Canada included. This did not entirely satisfy the Americans, who would have liked to be able to register for the local Canadian copyright also. In February 1897 Secretary of State Olney complained, in terms which barely concealed a threat to withdraw the benefits of the 1891 Act, that the British remedy was not 'the practical and direct method contemplated by the President's Proclamation and the Act of Congress authorizing it'. He also submitted a draft treaty, which, if concluded, would have obliged Canada to allow Americans to register their copyrights in Canada. The US Government pressed for a response by telegraph.

A draft of the convention was sent to the Canadian Government, which sent no reply until August. Its brief report noted that the Americans were urging as a ground of complaint the treatment which they meted out to others. The solution offered was not a helpful one:

> Canada would be quite willing to amend its Copyright Act, and accord to American authors the privilege of copyright in Canada on publishing only, if a similar favour is conceded to Canadian authors who desire to obtain copyright in the United States.[309]

The Colonial Secretary, Chamberlain, pointed out that the Americans were not asking for this, but wanted simply to be allowed to register copyright in Canada under the Canadian Act on the same terms and subject to the same conditions as British subjects or citizens of Berne Union states. He emphasised the value to British authors of the Anglo-American arrangement, and said that the British government would. proceed with the negotiation of a treaty unless the Dominion government insisted on Canada being excluded from the convention. The Governor General telegraphed an uncompromising refusal.[310]

The Colonial Office and Foreign Office reviewed the situation. The Law Officers of the Crown had been consulted, and they confirmed that US subjects could obtain every privilege open to British subjects by

[309] Report of the Privy Council of Canada, August 1897: *NA* FO 881/71111 pp. 38–9. See also pp. 2–4, and 7.
[310] Earl of Aberdeen to Chamberlain, received 14 March 1898: *NA* FO 881/7771 p. 14.

registering at Stationers' Hall, so the terms of the American Act were satisfied. In the face of Canadian objections it was impossible for the British Government to go further, even at the risk of losing American copyright for British authors. In the face of intransigence on both sides of the US–Canadian border, the matter was allowed to drop.[311]

The scope of America's international copyright law following the 1891 Act

Putnam had been right that the basis of international copyright was far from secure in America, even after the passage of the 1891 Act. Over the next few years the American Copyright Leagues had to file protests against the Hicks Copyright Bill (to bring etchings and engravings under the manufacturing clause), aspects of the Covert Bill (penalties for infringements of photographs) and the Treloar Bill (to extend the list of articles covered by the manufacturing clause to include musical compositions, and require assignment of copyright to a US citizen). The Treloar Bill was called 'dangerous and revolutionary in the extreme' by the (American) *Publishers' Weekly*, and was widely criticised. In 1896 the American Authors' Copyright League was sufficiently concerned to resume collecting membership dues, and issued a circular explaining its efforts. The American Publishers' Copyright League also implemented measures to confirm and extend its own organisation.[312]

But the atmosphere gradually changed. In early 1900 the Senate ordered the Commissioner of Labor 'to investigate the effect upon labour, production, and wages of the International Copyright Act'. The majority of establishments interviewed were firmly in favour of the law, although several suggested amendments: only a small number still remained utterly opposed.[313] In December 1903 the Platt bill was introduced, to alleviate the problems faced if the foreign work needed to

[311] See Salisbury to Ambassador Hay, 12 April 1898: *NA* FO 881/7771 pp. 18–19.

[312] Solberg, *Copyright in Congress*, pp. 328–51. 'Dear Johnson, I judge that we shall be quite unanimous in our prompt and cheerful opposition to the absurd Treloar bill. I should like to know who is behind this wild Missourian in his troublesome undertaking.' G. H. Putnam to Johnson, 28 February 1896: *Johnson Papers*.

[313] Carroll D. Wright, *A Report on the Effect of International Copyright Law in the United States. Made in Compliance with the Resolution of the United States Senate of January 23, 1900* (Washington, D.C.: Government Printing Office, 1901). B. Zorina Khan points out that, in the absence of statistical information, Wright's conclusions were necessarily based largely on the subjective views of the publishers and printers surveyed: 'Does Copyright Piracy Pay? The effects of U.S. International Copyright Laws on the market for books, 1790–1920', *National Bureau of Economic Research Working Paper Series*, Working Paper 10271. Nevertheless, anecdotal evidence and subjective perceptions were telling in terms of contemporary policy making.

be translated, by increasing the period allowed before publication in America. The bill was in fulfilment of a promise made by Putnam to the 1901 Leipzig convention of the International Association of Publishers, to quiet German threats to abrogate its 1893 Convention with America. The typographical unions had fiercely resisted every concession, and Johnson, for the American Copyright League, considered the result far short of optimal. Putnam agreed, but defended it as better than nothing.[314] One objection was that the Platt bill addressed translations only, giving continental works an advantage over those in English. William Heinemann, Vice-President of the Publishers' Association, suggested an increased period of grace for British works also. Putnam later facilitated a meeting in the United States between Heinemann and the heads of the typographical unions. The unions were prepared to contemplate such a measure, so long as any British edition was excluded from the American market in the meantime. However, although the proposal had the support of the Librarian of Congress and the Registrar of Copyrights, it was rejected by the Committee on Patents. The Platt bill passed without it, and came into force in March 1905.

Codification of American law: the 1909 Copyright Act

In its report on the Platt bill, the Committee on Patents had indicated that the codification of copyright law should be attempted. In consequence, the wider state of American copyright law was exhaustively discussed at a series of Copyright Conferences held in New York and Washington. These were attended by a large number of interest groups, and chaired by Herbert Putnam, the Librarian of Congress (and brother of George Haven Putnam).[315] In May 1906 the resulting codification bill was introduced. It retained the manufacturing clause, but did include a 'days of grace' clause, of thirty days. Joint Committee hearings were held on the bill in Washington, and were enlivened in December by Samuel Clemens' first public appearance in what became his iconic white suit.[316] The conferences and hearings did not result in universal

[314] Putnam wrote ruefully, 'This ''arranging with the Unions'' has taken about two years. The Bill as now worded is the most that can at this time be secured.' Putnam to Johnson, 9 January 1904: *Johnson Papers*. G. H. Putnam, 'The Copyright Law of the United States and the Authors of the Continent' (1904) 44 *Critic* 60–4.

[315] For a full account see Fulton Brylawski and Abe Goldman (eds.), *Legislative History of the 1909 Copyright Act*, 6 vols. (South Hackensack, N.J.: 1976). For a summary see Thorvald Solberg, 'Copyright Law Reform' (1925) 35 *Yale Law Journal* 61–4.

[316] Clemens was keen to secure the proposed fourteen-year extension of term. For a petition prepared by Twain in early 1909, but not in fact presented, see Neider, *Autobiography of Mark Twain*, Appendix N.

consensus, and in 1908 a number of alternative bills were presented by various rival interest groups. Agreement on musical copyright was extremely difficult to reach, particularly regarding mechanical reproduction, and delay seemed inevitable. Nevertheless, eventually the necessary compromises and modifications were made. On 4 March 1909, the day before Roosevelt's term expired, a copyright law was rushed through both Houses and passed.[317]

The codification achieved by the 1909 Act represented a great step forward. Of the specific provisions, the extended term and improved remedies deserve recognition. However many remained dissatisfied at the influence which had been wielded by the manufacturing interests, which Putnam (for one) considered not merely disproportionate, but also inappropriate within the field of copyright law. He was pleased to have secured the 'days of grace clause' though, as he told his fellow-publisher, Edward Marston:

> This change will constitute a decided convenience for English authors and publishers, and for American publishers having transatlantic relations. I may remind you that in this respect the English law is now less hospitable or liberal than the American statute. I trust that, with this American precedent, those who are interested in shaping a revised statute for Great Britain will give consideration to the desirability of securing also in the British law a period of thirty or sixty days within which the requirements for bringing the book into publication in Great Britain can be complied with.[318]

Putnam's comment offered a timely reminder to Britain that her own copyright law remained in a fragmented and incoherent state, apparently intractably so.

[317] An old friend of Roosevelt's, Robert Underwood Johnson had foreseen a potential conflict of interest shortly after Roosevelt's presidency began. Johnson wrote a delightful letter to remind Roosevelt that he was a member of the American Copyright League's Council. 'As copyright legislation may come before you for your official action as President of the United States I presume that you will feel like resigning one or the other of these positions. After mature deliberation should you conclude to resign membership in the Council your resignation can be presented at the next meeting of that body. With appreciation of your distinguished services to this cause in the past, I have the honor to be, very respectfully, your obedient servant, Robert Underwood Johnson.' *Johnson Papers*.

[318] Section 21 provided for an ad interim copyright of thirty days from deposit, which had to be made within thirty days of publication abroad. For Putnam's reactions see *Publishers' Circular*, 27 March 1909, and *Memories*, p. 385.

6 Domestic problems

> *The first observation which a study of the existing law suggests is that its form, as distinguished from its substance, seems to us bad. The law is wholly destitute of any sort of arrangement, incomplete, often obscure, and even when it is intelligible upon long study, it is in many parts so ill-expressed that no one who does not give such study to it can expect to understand it.*

This was the frank assessment of the 1878 Royal Commission, following its thorough review of 'Home Copyright'.[1] What is striking about domestic copyright law throughout the second half of the nineteenth century, and even into the beginning of the twentieth century, is how little could be done to address its widely admitted defects. Talfourd's vision even as early as 1837 had been of a grand consolidating bill. He was obliged to curtail his original scheme significantly, and, given the opposition which had been faced, the achievements of the 1842 Act were in one sense considerable. Yet, viewed as a platform which, by default, had to serve for almost seventy years as a basis for Britain's copyright law in a period of rapid economic and intellectual change, the 1842 Act was defective in many ways, and grew yet more so as the century progressed. Fundamental aspects of domestic copyright law were dispersed among numerous statutes which lacked consistency of purpose. Nor was the international sphere adequately addressed, either with regard to Britain's colonies, or to foreign states.

Successive governments' activities were characterised by reaction to problems and demands. To some extent this can be explained by the complex nature of copyright law, which affects a huge range of activities and thus a huge range of interest groups. The intellectual products protected by copyright vary widely, and are produced and exploited in diverse ways. More than this, the idea of protection for intellectual endeavour has to be balanced against the needs of the public, introducing a thematic depth and complexity which gives decisions on even small points a significance which may be both great and unpredictable.

[1] *RC-Report*, 7.

This is true even in a domestic setting, and the problems are magnified in an international context. Even the bravest, most visionary legislators might be forgiven for quailing at the prospect of reconciling in copyright law the different national attitudes to the vast and diverse themes which are touched by it: the nature of intellectual property, popular education, international trade, national character and independence.

Initial responses to the international challenge

Talfourd, who certainly should be counted as a visionary, had included international copyright in his 1837 bill, but had been told that this was a government matter. Indeed, the 1838 International Copyright Act did provide a mechanism for concluding treaties with foreign states, on the basis of reciprocity: yet it achieved only slow and limited success.[2] Although the 1842 Act was largely concerned with domestic law, concern about the presence of foreign reprints on the British market led to tightening of the law. A new £10 fine caught those importing foreign reprints for sale or hire, and the offending books were subject to seizure and destruction.[3] The 1842 Customs Act later imposed a notification system, which required copyright proprietors to take active steps if they wished to have foreign reprints seized at ports. These measures were demanded by domestic interest groups, both publishers and authors. Their concern was to protect the home market, and they sought to do this by essentially local controls, rather than addressing the root of the problem – the lack of international copyright.

The resolutions passed at a meeting of publishers and authors at the Freemasons' Tavern in June 1842 touch on several of the great themes of copyright.[4] The breadth of vision of the first resolution, 'that a right of property in literary production ought to be recognized by all civilized nations', was somewhat qualified by the second, 'that the disregard of that right, by the unauthorized publication of British works in foreign countries, has greatly tended to discourage and depress the book trade of Great Britain'. These two resolutions indirectly express what was to be a recurring tension in the quest for international copyright: recognition of a general right of literary property would benefit owners of such property, but would have consequences for its users. Adherence to a position of fundamental right was often adopted by those seeking to promote or protect their own economic interests. Yet local interests

[2] See above, pp. 46–7.
[3] s.17. Piratical imports which made it through customs became the property of the copyright owner, who could sue for recovery or damages: s.23.
[4] *Publishers' Circular*, 1 July 1842.

would repeatedly be pressed as a reason for qualifying global principle, whether in Britain, Canada or America. Further resolutions at the meeting deplored the effect on the reading public, who had to pay the higher prices the publishing trade found it necessary to charge for 'legitimate' books, given the competition from 'spurious editions' artfully smuggled into the country. Again, this resort to wider arguments would be repeated, sometimes out of genuine concern, but often concealing self-interest: whatever the motive, the problem of resolution remained. Finally, the meeting regretted the lack of results under the 1838 Act, and called for further international copyright negotiations. The resolutions express resentment at interference with previously unchallenged economic interests, and demand action without acknowledging the real difficulty of finding solutions. They reveal a complacency and a parochialism which would persist, and from which international copyright law struggled to emerge.

This was the meeting that Dickens, newly returned from America, was 'too much exhausted' to attend.[5] Like the meeting's resolutions, Dickens' calls during his American trip for international copyright were vulnerable to charges of complacency and self-interest. However much they were wrapped in the language of justice, his demands appeared to many to be for the delivery of a benefit which was presently in the hands of American publishers and readers. Until the reality of the situation was acknowledged, the problem would remain intractable. As the *Athenaeum* pertinently observed:

> The question is one involving the interest of all authors and all publishers all over the world. Let them then elect a committee, and, as no one has time to throw away on other people's affairs, they must subscribe their money, and nominate an efficient and well-paid secretary, whose exclusive business it shall be to put himself in communication with like committees in France, Germany, and America – and the whole of these must conjointly keep up a perpetual fire ... Right and wrong are very pretty subjects for declamation, but if authors and booksellers mean to have justice done, they must put their shoulders to the wheel, and not waste time in praying either to Jupiter or the Board of Trade.[6]

This sort of organised combination eventually brought international copyright to America, though not without significant concessions from all sides. But international cooperation, indeed any sort of cross-boundary cooperation, did not come naturally to these British interest groups. The established publishers were accustomed to controlling the

[5] Dickens to Thomas Longman, 1 July 1842. *Dickens' Letters*, vol. III, p. 253. See above, pp. 165–8.
[6] *Athenaeum*, 9 July 1842.

book trade in their habitual markets, enforcing a host of customs and regulations which tended to restrict competition. They were quick to act against perceived threats, whether internal or external. Authors had been extremely slow to work together. The jibe that Campbell's Literary Union Club was neither literary nor united could serve as an epitome of authors' efforts to combine, at least in the early part of the century.[7] The cohesion evident in the campaigning for the 1842 Act was extremely unusual. The fiasco of the Guild of Literature and Art, and the bad-tempered dispute over the Royal Literary Society were still to come when this Act was passed.[8] Nor did the campaign run smoothly until the publishers' interests were addressed. Nevertheless, authors and publishers continued to regard themselves as separate interest groups, and they were treated as such by government: representatives from both groups would be approached if opinions were wanted. They were often in agreement on aspects of copyright reform, but the fault lines would reappear during difficult times. For example, in 1897 their unity of purpose was insufficient to avert the embarrassing spectacle of two rival copyright bills being pressed, one by the publishers' association and one by the authors' society.

The Society of British Authors and The Association for the Protection of Literature

The *Athenaeum* returned to chivvying later in 1842: 'why not an association of the various classes interested in securing the rights of literary property?' Its basic proposal was relatively limited: that authors and publishers should subscribe to a Society, register and deposit their works, and the Society would take action against infringers. The individual would thus be spared the cost, risk and annoyance of a prosecution, and infringers would learn that it was not worth their while to pirate Society works. But wider possibilities were also floated, such as

[7] *Athenaeum*, 20 March 1830. Campbell's Club was intended to promote cooperative publishing: William Jerdan, *Illustrations of the Plan of a National Association for the Encouragement and Protection of Authors, and Men of Talent and Genius* (London: Stephenson, 1839), pp. 18–28.

[8] The Guild was devised by Dickens and Bulwer-Lytton in 1850, and was intended to provide homes and support for needy authors. However, it failed to attract applicants, who thought the scheme tainted with patronage. The Royal Literary Fund was begun in 1790, and received its charter in 1818. Its aim was to assist needy authors and their dependents. Dickens, Dilke and Forster became dissatisfied with its management, and staged a long campaign for reform, which peaked in 1858 but was eventually soundly defeated by the Managing Committee. For details see Nigel Cross, *The Royal Literary Fund 1790–1918* (London, 1984), pp. 17–21.

the appointment of agents to oversee republication in foreign markets.[9] The idea seems to have been receiving general consideration. Hood sketched such a scheme to Dickens, who was always extremely sore on the subject of piracies, and mentioned that Longman and G. P. R. James were also interested.[10] By the spring of the following year there were two embryonic schemes: one was the Society of British Authors, the other the Association for the Protection of British Literature.

The Society of British Authors scheme seems to have developed from an earlier idea of Charles Mackay's for an association of men of letters for 'mutual support and assistance', to be called the Milton institute. Although Dickens expressed himself sympathetic to the principle, he could foresee such difficulties (such as the clashing personalities of those interested) that at first he refused to join. Little concrete evidence remains of the Society's early history: Walter Besant's 1889 article in the *Contemporary Review* described it, but was based on documents now lost. Although there is no reason to doubt Besant's strictly factual information, his writing did lack objectivity when he was riding one of his hobby horses. In this article the Society of British Authors was used as a feeble comparator with his own, admittedly far more successful, Society of Authors:

> The founders of this combination first met in some informal preliminary manner, of which no record has been kept. They formed themselves, also in some unknown and unremembered manner, into an association, to be called the Society of British Authors; they nominated a Provisional Committee, consisting of the original founders, and they called their first formal meeting at the British Hotel, Cockspur Street.[11]

At this first meeting, 21 March 1843, Thomas Campbell was in the chair. By 8 April, Dickens had been persuaded to join the Society and chair its second meeting, at which nineteen authors were present. They agreed a *Proposed Prospectus* which was printed and sent to the principal authors in the country.

Besant described the prospectus as 'the feeblest and most futile that ever was put together by any body of oppressed and indignant mortals'. The Society's four objects were: to register the names and works of all the authors in the British Empire; to secure the observance of the law for the protection of authors and their property; to obtain such alterations

[9] *Athenaeum*, 26 November 1842.

[10] Alvin Whiteley, 'Hood and Dickens: Some New Letters' (1951) 14 *Huntington Library Quarterly* 399–400. Hood's letters are given in full in Peter F. Morgan (ed.), *The Letters of Thomas Hood* (Edinburgh: Oliver & Boyd, 1973), pp. 505–10.

[11] (1889) 56 *Contemporary Review* 10–27, reprinted in Walter Besant, *Essays and Historiettes* (London: Chatto & Windus, 1903).

of existing laws and the enactment of such new laws, both national and international, as were deemed necessary; to establish correspondence with authors, both at home and abroad, in reference to the objects of the Society, and the great interests of civilization involved in them. Besant's hyperbole was extreme, but there was little concrete or practical here. The poet Thomas Moore described the prospectus as 'about as absurd an affair as can well be conceived'.[12] By the time it appeared, the previously prominent names of Browning, Campbell, Carlyle, Dickens, Forster and Tennyson had disappeared from the list of one hundred authors who had signified their support. Dickens admitted that 'having seen the Cockspur Street Society, I am as well convinced of its invincible hopelessness as if I saw it written by a Celestial Penman in the book of Fate'.[13] There was a further meeting in May, but the Society was effectively dead before it had begun.

Another scheme, driven by the leading publishers, Longman and Murray, at first appeared more promising. Dickens chaired the initial meeting. The first resolution was:

> that it is expedient, with a due regard to the rights of literary property in all nations, to form an Association of Authors, Publishers, Printers, Stationers, and others connected with Literature, Art, and Science, or feeling an interest in their protection, to carry into effect, in the most complete manner, the provisions of the recent Acts in relation to infringement of Copyright and the introduction into England and her Possessions abroad of pirated copies of English works.

The Association for the Protection of Literature was thus established, with a working committee drawn from different segments of the membership – authors, publishers, printers and paper-makers. But there were significant tensions between these. Following a disagreement with Bentley over an American work which the publisher had reprinted, Dilke (the editor of the *Athenaeum*) had written to Dickens declaring his intention to propose 'two principles' at the meeting. One was that a 'main object' of the association should be to advance the cause of international copyright all over the world. The second was 'that as it protests at being robbed, it protests no less against robbing; and therefore pledges itself by all its Members, not to lay violent hands upon the property of any Foreign author whomsoever, without his permission in writing'. Dickens had no reason to object to either principle, but many publishers would have had difficulty subscribing to the second,

[12] Dowden, Wilfred S. (ed.), *The Journal of Thomas Moore*, 6 vols. (Newark: University of Delaware Press, 1983), vol. 6, p. 2337.
[13] Dickens to Charles Babbage, 27 April 1843: *Dickens' Letters*, vol. III, pp. 477–9.

and Dickens was quick to warn Longman of Dilke's plans.[14] At the meeting, the publishers argued against adopting this stringent principle as a fundamental law, supporting the more qualified aim actually agreed, 'for the present at least'. The tension inherent in the resolutions at the Freemasons' Tavern meeting in July 1842 was explicitly faced here, and interest trumped principle. Hood resigned from the Association soon afterwards, suspicious and resentful of the publishers, who he felt were taking credit for his idea. Carlyle wrote supportively to Dickens about the project, but declined membership.[15]

Although intended to include all the interest groups, divisions were obvious even as the Association was established. The activities of the German publisher, Tauchnitz, revealed these fault lines even more sharply. Tauchnitz visited London in 1843, in search of titles for his famous series, *Collections of British Authors*. There was no legal bar to his reprinting British works in Germany, but he was willing to pay for the privilege of calling his edition 'authorised'. Tauchnitz's interest lay solely in the continental market, and he promised that he would not supply British or colonial markets.[16] The notion of selling their continental 'rights' appealed to many authors, especially as the idea was presented with Tauchnitz's great tact; they saw only gains. Some of the publishers, on the other hand, saw these 'authorised' editions as competition for their own editions on the continent. Blackwood, for instance, foresaw difficulties in preventing travellers from bringing such editions home with them, and so feared that their agreement might represent the thin end of the wedge as far as the import of foreign reprints into the United Kingdom was concerned. He did not think that the 'trifle' that would be paid merited such a sacrifice, though the Longmans were more open to the scheme. Tauchnitz's suggestion was discussed by the Association, and after a great deal of discussion, a resolution against the arrangement was passed. Some felt that the publishers were putting their own interests above those of their authors, and a number apparently resigned. The Association never really

[14] Dickens to Longman, 17 May 1843: *Dickens' Letters*, vol. III, pp. 491–2. For a printed memorandum of the resolutions passed see *NA* CUST 33/23.

[15] *Athenaeum*, 20 May 1843. Whiteley, 'Hood and Dickens', pp. 402–3. Carlyle to Dickens, 18 May 1843: 'in the present state of Authorship, perhaps the bringing of Authors together into a room, that they may occasionally look on one another and grow accustomed to one another, is almost all that can be done for that unfortunate class'. Charles Richard Sanders (ed.), *The Collected Letters of Thomas and Jane Welsh Carlyle*, 31 vols. (Durham, N.C.; London: Duke University Press, 1990) vol. 16, pp. 170–1.

[16] See above, p. 49.

recovered the good will of authors, although it continued to function until 1848–49 as 'The Society for the Protection of Literature'.[17]

The Bookselling Question

The tensions boiled up again in 1852, as a result of what came to be known as 'The Bookselling Question'. The book trade was full of customs, which ordered the way business was done. The interests of publishers, retail booksellers and printers were reconciled and regulated by various agreements and understandings, some more formal than others. The established publishers were powerful, and could to some extent enforce these customs, but they were never perfectly secure. The printers were a well-organised labour force, and could stage effective strikes if necessary. Booksellers were less cohesive, partly because they were necessarily in competition with one another, and always at risk from undercutting by rivals. In 1829, following a particularly bad slump in the book trade, an important group of London publishers and booksellers met and agreed rules which controlled both trade and retail prices. These were the Booksellers' Regulations. Members pledged themselves to respect these Regulations, in return for which they received a ticket, and the publishers would supply no one without such a ticket at less than the full publication price. Any bookseller accused of underselling would be reported to the Committee, and, if found guilty, would be deprived of his trade ticket. Undersellers would thus lose all possibility of trade in new books, since anyone else supplying them risked the same fate. The system was never universally accepted, and in good economic conditions was difficult to enforce. Nevertheless, it continued to be used and to a large extent respected by many. In 1850 a new statement of the rules was promulgated by the Committee of the Booksellers' Association.[18]

In 1852 the system came under sustained attack, when John Chapman, a small-scale publisher and specialist importer of American books, objected to his treatment by the Association. Chapman had reluctantly signed the Regulations, and fulfilled them as regards British books. But finding that his American imports did not sell when priced at a discount on the advertised price, and also finding it difficult to determine a firm

[17] James J. Barnes, *Authors, Publishers, Politicians: The Quest for an Anglo-American Copyright Agreement 1815–1854* (London: Routledge & Kegan Paul, 1974), p. 135. The publishers preferred to print off cheap copies on cheap paper while the original type was still standing, and make their own arrangements for export.

[18] For a full account see James J. Barnes, *Free Trade in Books: A Study of the London Book Trade since 1800* (Oxford: Clarendon Press, 1964).

retail price, Chapman decided to sell these imports direct to the public, at cost price plus a commission. He was called before the Committee, and his trade ticket was cancelled. A circular was sent to Lord Campbell, Macaulay, Gladstone and others, requesting their support. The Association quickly responded with its own circular defending the system of regulations on the grounds that the fixed and regular rate of profit produced a certainty which was better for the public, the trade and for authors 'who are better paid in England than anywhere else, chiefly on account of this regular bookselling system, which enables a publisher to judge what he may calculate upon'.[19] The *Times* was critical of 'this anomalous interference with the free course of competition and the natural operations of trade'. Longman and Murray wrote the following day to report that the matter 'has been for some time under the consideration of Lord Campbell and several other literary men, and we wait to be informed of their conclusions'.[20] In fact at this stage no formal arrangement had been made for arbitration, but following this public statement the Committee had little option but to request Lord Campbell to act.

The first hearing was held in April, before three arbitrators: Lord Campbell, George Grote and Henry Hart Milman (the Dean of St. Paul's). The Association sent a large deputation, but since the undersellers were not represented, the hearing was postponed until late May. In the meantime, a good deal of publicity was generated. Chapman invited those interested to a meeting at his house, which Dickens chaired. Wilkie Collins, George Lewes, Charles Babbage, Robert Hengist Horne, Henry Crabb Robinson, Charles Knight, and many others were listed as present. Letters of support were read from those unable to attend, including Carlyle, Gladstone, John Stuart Mill, the economist J. R. McCulloch and Gladstone. The theme of free trade was prominent in their arguments, and the meeting resolved:

> That the principles of the Booksellers' Association are not only opposed to those of free trade, but are extremely tyrannical and vexatious in their application, and result in keeping the prices of books much higher than they otherwise would be, thus restricting their sale, to the great injury of authors, the public, and all connected with literature.

The resolution was signed by those present, and sent to Lord Campbell with a covering letter from Dickens, as Chairman. The meeting was considered a great triumph: Marian Evans (later George Eliot) saluted Chapman with a piano rendition of 'See the Conquering Hero Comes'

[19] John Chapman, 'The Commerce of Literature' (1852) 57 *Westminster Review* 546.
[20] *Times*, 30 and 31 March, 1 April 1852.

when the last guests had departed.[21] Lord Campbell was also sent a remarkable pamphlet, *The Opinions of Certain Authors in the Bookselling Question*, by John William Parker. Parker was a publisher, printer and bookseller with diverse interests. He had withdrawn from the Booksellers' Association in early April, and then sent a circular 'To Authors, and others connected with Literary Property', asking for their views on the underselling of works in which they were interested. Eighty-nine authors replied, almost all supportive of the undersellers.[22] The issue even reached the House of Commons, when Gladstone launched a ferocious attack on the book trade, during a speech nominally on paper duties. Gladstone termed the restrictions 'imprudent and unwarrantable', because they kept the price of books 'enormously high', even though some enterprising booksellers were willing to take less. One week later the arbitrators held that the regulations were 'unreasonable and inexpedient'. The regulations were abandoned, and the Booksellers' Association disbanded.[23]

This episode took place at exactly the time that Bulwer-Lytton was attempting to raise a large sum of money for secret payments to American lobbyists, to promote an Anglo-American copyright law. Dickens was involved in the scheme, and a meeting of publishers and authors was held at his house on 22 May. Aside from the inherent doubts about the soundness of the American scheme, one could understand the publishers' reluctance to open their purses at the request of a man who had recently chaired a meeting at which their business principles had been termed 'tyrannical and vexatious'. Only three days after the arbitration had delivered their profession a most public humiliation, it was unsurprising that some publishers characterised American copyright as purely 'an Authors' question', fearing it would allow authors to cut them out by contracting directly with American publishers.[24]

[21] *A report of the proceedings of a meeting (consisting chiefly of authors)* (London, 1852). More of the letters, and Chapman's full statement, are given in Paul Hollister (compiler), *The Author's Wallet* (New York: Macy & Co, 1934). See also Dickens to John Chapman 7 May 1852, and to Lord Campbell ?8 May 1852: *Dickens' Letters*, vol. VI, pp. 667 and 671. George Eliot to the Brays, 5 May 1852: Haight, Gordon S. (ed.), *George Eliot Letters*, 9 vols. (London: Oxford University Press; New Haven: Yale University Press, 1954, 1955), vol. II, p. 23. Marian Evans was lodging with the Chapmans, and doing literary work for Chapman's *Westminster Review*. She took notes at the meeting.

[22] He was (inter alia) Cambridge's University Printer, and published *Fraser's Magazine*. Extracts appear in a long article, presumably by Parker, which also notes eleven further letters – making a round hundred: (1852) 45 *Fraser's Magazine* 711–24.

[23] Parl. Deb., vol. 121, ser. 3, cols. 593–500, 12 May 1852. *Times*, 18, 20 and 28 May 1852. *Publishers' Circular*, 1 and 16 June 1852.

[24] See above pp. 180–2.

The Bookselling Question demonstrates the enormous power of free trade doctrines, and this influence continued. Copyright was vulnerable to characterisation as a 'monopoly', the more so if there were proposals to 'extend' the monopoly, by increasing its term or coverage. The dispute was also in part an expression of tensions in the book market, which were provoked by social and economic changes. Eighteenth-century readers were concentrated in higher social and income groups, and books were an expensive, hand-crafted, luxury commodity. The nineteenth century saw technological innovations in printing technology (such as the steam press, and stereotyping) which put downward pressure on prices, and introduced new sources of competition. Production rose very significantly during the nineteenth century – and a dramatic increase in production can be seen between 1845 and 1853, the years of tension just discussed.[25] Book prices also reveal marked changes during the period. In the first decades of the nineteenth century, high-priced books still formed the largest percentage share of published titles. But by 1835 medium-priced books were the largest single group, and by 1855 cheap books had overtaken them.[26] Demand was rising too. Although it was not directly related to population growth or the rise in literacy, these were important drivers. The population of Britain in 1801 was somewhat over 10,000. By 1851 it had doubled to over 20,000, and by 1901 it had reached nearly double again, at 37,000.[27] At the end of the 1830s, literacy in England (defined roughly as the ability to sign the marriage register) was just over 50 per cent. By the turn of the century it was approaching 100 per cent.[28]

These were momentous changes in the context of a book market where edition sizes had traditionally been numbered in hundreds, or perhaps a thousand or two for guaranteed best-sellers. New entrants into the market could appear from anywhere. The London trade must have been irritated and alarmed by the activities of the Beadle brothers, whose series of Dime Novels had been launched so successfully in America in 1860. In early 1861 there appeared in London No. 1 of Beadle's *Sixpenny American Library* – the first of a long series of cheap

[25] Simon Eliot, 'Some Trends in British Book Production', in John O. Jordan and Robert L. Patten (eds.), *Literature in the Marketplace* (Cambridge: Cambridge University Press, 1995), pp. 28–32.
[26] Eliot, 'Trends', pp. 39–41.
[27] B. R. Mitchell, *British Historical Statistics* (Cambridge: Cambridge University Press, 1988), p. 9.
[28] David Vincent, *Literacy and Popular Culture* (Cambridge: Cambridge University Press, 1989), p. 22.

reprints.[29] The established publishers did their best to retain their old customs, designed to restrict competition and maintain prices. But they were facing unprecedented challenges from new competition keen to supply the growing markets for cheaper books, and an economic environment ever more hostile to restrictions on competition. These were issues that the 1878 Royal Commission on copyright would consider more fully, although against a strong background presumption that free trade should prevail wherever possible. In the meantime, efforts were largely confined to the consolidation of copyright law, although there were sporadic attempts to address specific pressing problems.

First government attempts at copyright consolidation soon abandoned

In 1857 a government bill consolidating all fourteen pre-existing Copyright Acts, including international copyright, was drawn up. Prompted by the difficulties faced by Customs Officers, who were having to enforce conflicting and contradictory enactments, the main provisions of copyright law were left entirely intact.[30] Given the turbulence between 1857 and 1859 as Palmerston and Derby's ministries alternated, and the serious problems presented by the Indian Mutiny and the China War, it is unsurprising that copyright consolidation was deferred. Another project begun but not completed at this time was the effort to extend copyright protection to paintings.[31] Palmerston's ministry found new security in 1859, however. Gladstone, as Chancellor of the Exchequer, was pressing to reduce taxation. Radicals had long demanded the repeal of paper duties, characterised as a 'tax on knowledge', but moderates also supported repeal.[32] Gladstone's 1860 budget proposals included the abolition of paper duty, but the specific bill was rejected by the House of Lords, ostensibly because of the risk to the revenue during the China War, but in fact more because of a dislike of cheap publications. A furious Gladstone put all of the budget proposals in a single 'omnibus' bill in 1861, daring the House of Lords to reject it. It did not. The book trade was delighted by the elimination of

[29] They seem to have been re-set and printed in London. The rights were eventually sold to Routledge in 1866. For more see Albert Johannsen, *The House of Beadle & Adams and its Dime and Nickel Novels: The Story of a Vanished Literature* (Oklahoma: University of Oklahoma Press, 1950).

[30] Copyright Acts Consolidation Bill 1857. *Publishers' Circular*, 1 August 1857.

[31] In July 1858 Lord Lyndhurst presented petitions from the Society of Arts and the Royal Institution of British Artists, which were referred to a Select Committee.

[32] For more see Collet Dobson Collet, *A History of the Taxes on Knowledge* (London, 1899).

paper duty, although there were concerns at the decision to repeal import duty on books, since it was feared that there would be no incentive for Customs Officers to search for foreign reprints.[33]

Also in 1861 the question of copyright protection for art was revived, when a bill was brought in to give copyright to paintings, drawings and photographs. Eventually successful the following year, it first met a good deal of resistance from those concerned that purchasers of paintings would be unfairly restricted, and from those who feared that other artists would be inhibited as to their subjects. The initial term proposed was life plus thirty years, and it was cut to life plus seven years.[34] The 1862 Fine Art Copyright Act, although important in itself, inevitably increased the complexity of the statutory framework. In February 1864 the Home Secretary was asked about consolidation, and replied that the government did not intend to bring in a bill during the session. Adam Black thereupon announced his intention to bring in his own bill. Black was the Edinburgh publisher who held the copyright of the *Encyclopaedia Britannica*, and of Scott's novels, so he had a keen and practical interest in the matter. Nevertheless, he found the preparation of it 'a much tougher job than I expected'.[35] After one bill was withdrawn, a revised bill was referred to a Select Committee.[36] Its preamble mentioned only the expediency of consolidation, but the bill also sought to address various issues which had been causing difficulty or discussion. The Select Committee was chaired by Black himself, but was eventually forced to admit defeat, noting 'the difficulty and complication of the inquiry involved in the Bill'.[37]

Dramatisation right refused

Consolidation having proved too difficult a task, in 1866 Lord Lyttleton introduced a bill in the House of Lords with the single aim of granting novelists a dramatisation right, but it was opposed by those who

[33] *Publishers' Circular*, 1 March, 2 April, 15 August 1860, 15 January 1861.

[34] 1862 Fine Art Copyright Act. For criticism of the bill as originally framed see D. Roberton Blaine, *Suggestions on the Copyright (Works of Art) Bill* (London: Robert Hardwicke, 1861). The short term proved very unsatisfactory when attempting to negotiate reciprocal protection with other countries which almost all adopted a longer term.

[35] Alexander Nicholson, *Memoirs of Adam Black* (Edinburgh: Black, 1885), p. 221.

[36] Copyright (No 2) Bill (1864). Black presented a petition in its favour from the Edinburgh Chamber of Commerce: *Sixteenth report of the select committee on public petitions*, petition 4528 (19 April 1864), App. 325. Although petitioning had been a crucial mechanism for affecting the bills which led to the 1842 Act, Black's petition was the first on literary copyright since 1842.

[37] Report from the Select Committee on the Copyright (No. 2) Bill (1864).

considered dramatisations legitimate because they were original in character, and it was firmly defeated.[38] The practice of dramatisation had enraged novelists for years, since they lost control of both their plots and any money flowing from their exploitation. In 1861 Charles Reade had pursued the matter to the Court of Common Pleas, seeking an injunction to restrain Conquest's dramatisation of his novel *Never Too Late to Mend*, arguing for statutory and common law rights to prevent dramatisation of novels. He was unsuccessful with this approach at this stage, but was to win by a different route in the end.[39] Reade's next legal action was over a different dramatisation of the same work, stated to be 'founded on Charles Reade's popular novel'. In fact, Reade had anticipated his own novel in a play, *Gold*, which he had published some years before. This play was a copyright work, and it was held that Reade could not have forfeited his copyright simply by using scenes and passages from it in his novel. Reade therefore won on the basis that his play's copyright had been (indirectly) infringed by the defendant's dramatisation of the novel.[40] However, it had also been suggested that printing a novel recast into play form would prevent performance of further unauthorised dramatisation. Reade hoped to test this theory in the trial of the action against Conquest, where the defence was that the new dramatisation was just as much a work of authorship as Reade's original play. Reade had used some passages from *Gold* unchanged in his novel, and these appeared unmodified in the 'new' dramatisation. Nor did it strengthen the defendant's case when during the hearing it emerged that one of the actors in the 'new' dramatisation had previously played in *Gold*, and had inadvertently used some of the play's original lines during the performance. Reade therefore obtained a verdict for £160 in damages on the basis of indirect copying of the original play, but no decision on the contested matter of dramatisation right.[41] *Reade*

[38] The Lord Chancellor, Lord Cranworth, was 'quite certain that its provisions would be as impossible to carry into effect as they were contrary to all reason'. Parl. Deb., vol. 164, ser. 3, cols. 360–4, 14 June 1866.

[39] *Reade* v. *Conquest* (1861) 9 CB (NS) 755, also *Times*, 19 January 1861; *Publishers' Circular*, 1 March 1861. Charles Reade (1814–84) was a fellow of Magdalene College, Oxford, and a barrister (Lincoln's Inn), well before his considerable success as a dramatist and novelist. He retained his fellowship and his rooms in Magdalene until his death.

[40] *Reade* v. *Lacy* 1 J and H 524; *Times*, 18 April 1861. For more on both cases see K. J. Fielding, 'Charles Reade and Dickens – a Fight against Piracy' (1956) 10 *Theatre Notebook* 106–11.

[41] *Reade* v. *Conquest* (1862) 11 CB (NS) 479 (Common Pleas, 9 May 1861 and 17 January 1862). Reports of the case appeared in various journals. The jury's verdict (£160, being eighty performances at 40s.) was upheld: *Times*, 10 May 1861, 18 and 21 January 1862; *Publishers' Circular*, 15 May 1861; *Athenaeum*, 25 January 1862.

v. *Conquest* did cause some authors to issue their own dramatisations in an attempt to forestall unauthorised efforts. Dickens and Wilkie Collins tried this with their joint composition, *A Message from the Sea*, although their success is better attributed to might than to legal right.[42] Notwithstanding, the general view was one of sympathy for authors who suffered in this way, and their grievances were well-publicised. The matter would continue to be pressed.

The greatest concern for publishers at this time was the Canadian situation. Canadian publishers were demanding the right to reprint British copyright works, in return for a royalty. A few publishers and more authors, notably Sir Charles Trevelyan, were willing to concede this, and a set of 'Canadian proposals' had been developed by F. R. Daldy. Others objected strongly to the idea, partly on principle, and partly because of Canada's abysmal record of collecting payments under the 1847 Foreign Reprints Act. The established publishers were extremely reluctant to give up what they considered their right to the colonial market. The matter was discussed at private meetings in 1870, where there were strong disagreements. Again authors and publishers were seen to have different interests. This troublesome but intractable issue, and news that negotiations for an Anglo-American copyright treaty had again failed, led to the formation of the Copyright Association in 1872.[43]

In 1873 John Hollingshead staged an energetic campaign for a dramatisation right, prompted by a further unfavourable ruling on the subject.[44] One of the outcomes of this agitation was the formation of yet another interest group, the Association to Protect the Rights of Authors. In 1875 it issued a long and somewhat diffuse report on the state of the law of copyright.[45] A delegation from the Association pressed Disraeli for the appointment of a Select Committee or Royal Commission.

[42] In January 1861 Dickens threatened legal action over a stage adaptation of *A Message from the Sea*, a joint work with Wilkie Collins, from the Christmas number of *All the Year Round*. The authors' own rudimentary dramatisation of the story had been written and published (presumably only a few copies were printed) in December 1860. Although the case was weak, as Dickens knew well, the proprietor of the Britannia theatre capitulated, withdrawing the production on the first night, with the audience already in the building: *Dickens' Letters*, vol. IX, pp. 363–7. Cannily, Dickens later authorised some performances, having extracted payment.

[43] See above, p. 99.

[44] *Toole* v. *Young* (1873) 9 QB 523. John Hollingshead, *My Lifetime*, 2 vols. (London: Sampson Low, 1895), vol. II, pp. 50–4.

[45] Chaired by Tom Taylor, with Moy Thomas as Secretary, its committee members included Charles Reade and Edward Jenkins. Charles Reade's thirteen letters on copyright, *The Rights and Wrongs of Authors*, date from this time: *Pall Mall Gazette*, July and September 1875.

Pressure was building more widely, and later in the year the government announced its intention to appoint a Royal Commission.

Report of the Royal Commission

The Royal Commission members originally nominated were Lord Stanhope (formerly Lord Mahon, Chairman), Lord Rosebery, Robert Bourke, Sir Henry Holland, Sir John Rose, Sir Charles Young, Sir Julius Benedict, Sir Louis Mallet (Under Secretary of State for India), Sir Henry Drummond Wolff, F. R. Daldy, T. H. Farrer (Permanent Secretary to the Board of Trade), Farrer Herschell QC, Edward Jenkins, Fitzjames Stephen QC and Dr William Smith. Many of these were already established contributors to previous phases of the copyright debate. The death of Lord Stanhope, and the resignation of three of the Commissioners (Rosebery, Farrer and Bourke), caused delay. Lord John Manners was then appointed Chairman. Lord Devon, Anthony Trollope and J. A. Froude were added as Commissioners.

The Commission took evidence for an entire year, meeting two afternoons a week from May 1876 until May 1877. The formulation of the Report took a considerable time: a draft was in the hands of members of the Commission in November 1877, but was not issued until June 1878. Partly this was due to Trollope's absence for six months in South Africa.[46] The result was an impressive document. The main Report itself is less than forty pages, but though succinct it covered the ground fully, with sections on Home, Colonial and International Copyright. It did not shrink from difficult general issues, but also addressed points of detail. The primary recommendation for domestic copyright was that it should be codified:

> we recommend that the law on this subject should be reduced to an intelligible and systematic form. This may be effected by codifying the law, either in the shape in which it appears in Sir James Stephen's Digest, or in any other which may be preferred; and our first, and, we think, one of our most important recommendations is that this should be done.[47]

[46] Blackwood quoted Lord John Manners as saying that Trollope was likely 'to drive them all mad at the weary Copyright Commission, going over all the ground that has been discussed in his absence': Mrs Gerald Porter, *Annals of a Publishing House: John Blackwood* (Edinburgh; London: Blackwood's, 1898), p. 317.

[47] *RC-Report*, 13. One of the Commissioners, Sir James Fitzjames Stephens QC, had produced a digest of the law of copyright, with the alterations proposed by the Commissioners in parallel text. This was attached to the Report. The Commission's Secretary, the barrister Leybourn Goddard, also prepared *An Analysis of the Statute Law of Copyright* which was printed but not published: *NA* BT 22/14/7 R6157/1877.

The Commissioners declined to discuss the history of copyright law, nor were they willing to enter into the debate on the 'principle' of copyright law. However, they were in 'no doubt that the interest of authors and of the public alike requires that some specific protection should be afforded by legislation to owners of copyright'. They recommended that copyright should continue to be treated as a proprietary right.[48]

The Report then turned to specific points. The appropriate term of copyright in books was discussed at some length. A good deal of evidence had been taken on the question, but although there were differing views as to the best method of calculation, there was for the most part agreement that the term should be extended, particularly if this was desirable in order to effect international arrangements.[49] The Commission's recommendation was for a term lasting for the life of the author and a fixed number of years after death, rather than a term counted from publication, or a renewable term. A term of life plus thirty was thought 'on the whole' most suitable, but with the power to adopt a different term by Order in Council in international agreements. A series of author-centred recommendations followed: advising that performing right, dramatisation right, and a right to prevent abridgments, should all be coterminous with copyright in the book.[50]

The existing system of registration was sharply censured: 'We are satisfied that registration under the present system is practically useless, if not deceptive.'[51] Registration was optional, and although it was necessary to register in order to bring an infringement action, this could be done retrospectively. Historically, the Stationers' Company had always been the body legally responsible for registration of copyrights. The 1842 Copyright Act had confirmed the system, and provided for the appointment of an officer for these purposes. Joseph Greenhill was appointed Registrar, effectively for life. Remunerated by the fees payable under the Act, he chose to employ two clerks to assist him. There were many forthright complaints about the inefficiency and expense of the prevailing arrangements, which Greenhill's own evidence did little to

[48] Only one witness had urged the royalty scheme as a practical proposition for domestic copyright. Robert Macfie, who had written on patent law, argued for a right to republish on payment of a royalty of 5 per cent on the retail price: *RC-Report*, 16; *RC-Evidence*, 2706–77. In relation to Canadian and US copyright, however (as has been discussed), proposals for compulsory licences of this nature were more common. Macfie subsequently corresponded with Farrer on various matters raised by his evidence: *NA* BT 22/14/7 R6157/1877.

[49] *RC-Report*, 23–44. [50] *RC-Report*, 67–81.

[51] *RC-Report*, 128–59, at 137. The deficiencies at Stationers' Hall had been evident for some time. The publisher J. C. Hotten observed tartly that 'few persons would like to invest capital upon the faith of such negative information as may be obtained by what is called a search there': *Literary Copyright* (London: Hotten, 1871) p. 44.

rebut.[52] The Report recommended compulsory registration, combining deposit and registration in a single action at the British Museum. This was coupled with a recommendation to confine the deposit obligation to a single copy (of books and newspapers) to the British Museum.[53]

The other two sections of the Report were concerned with colonial and international copyright. The Commission's detailed recommendations on these topics have been discussed in earlier chapters. In brief, for colonial copyright a modified licensing system was suggested, allowing reprinting if suitable supplies were not made available in any colony, subject to a royalty. Colonies without facilities for local printing might continue to import foreign reprints, subject to satisfactory arrangements for collecting a duty. The Commission was prepared to contemplate a manufacturing clause in an Anglo-American treaty, but rejected calls for equivalent retaliatory measures. There was sympathy for French requests for a reduction in the formalities required for copyright protection of foreign works, and for improved protection of translations.[54]

The Report was signed by all the Commissioners but one, although nine of the fourteen signatures were qualified by a dissent, note or separate report. Sir Louis Mallet submitted a substantial separate report of his own, and did not sign the Commission's Report (although he expressed concurrence with many of its recommendations). The dissents concerned a number of important aspects of copyright law. Several Commissioners refused to concur with the recommendation to transfer registration from Stationers' Hall. Others were not convinced that copyright term should be based on the author's life plus a fixed term, preferring a fixed term of years from registration. Sir James Stephen dissented from the specific recommendations on abridgments and rights of dramatisation, arguing that copyright should protect 'money interests only', and not artistic reputation. Trollope and Daldy had specific objections to aspects of the recommendations on compulsory registration. The most fundamental disagreements, however, concerned the recommendation that colonial reprints should be banned from import into Britain. Sir John Rose (formerly the Canadian Minister of Finance),

[52] Greenhill appeared twice before the Commission: *RC-Evidence* 1944–2050, 4611–725. For Greenhill's earlier shortcomings, regarding the delivery of deposit copies to the relevant libraries, see David McKitterick, *Cambridge University Library: A History* (Cambridge: Cambridge University Press, 1986), pp. 566–81.

[53] *RC-Report*, 161–6.

[54] Colonial Copyright: *RC-Report*, 182–232 (and see above, pp. 110–12). International Copyright with America: *RC-Report*, 233–52 (and see above pp. 206–8). Formalities for international copyright: *RC-Report*, 253–93; *RC-Evidence*, 1762–816, 1919–43, 3724–27 (and see above, p. 55).

representing the Canadian interest, opposed the ban on colonial reprints on the grounds that the inequality of conditions between the home and colonial market could not be justified or defended. The committed free traders of the Commission, including Sir Henry Drummond Wolff and Sir Louis Mallet, reached the same conclusion by a different route: they argued that trade in books should be treated as trade in any other commodity, and fall within the ordinary laws of political economy.

Battles of principle

Strong differences of opinion had been obvious as the evidence was being taken. The first witness, Sir Charles Trevelyan, had been involved in the argument over the 1872 'Canadian proposals'. He remained hostile to the 'principle of monopoly', particularly its extension outside the United Kingdom, and continued to favour a general freedom to reprint on payment of a royalty. Trevelyan's view was that the author's best interest lay in the greatest total volume of sales (and therefore in cheap editions), whereas the publisher's interest was in preserving their local market. He thought that the existing system allowed publishers to maintain the price of books at an artificially high level, harmful both to the public and to authors. It was plain from the questions put to Trevelyan that Sir Henry Drummond Wolff was sympathetic to the claim that the public had some right to cheap books, whereas Froude and Trollope could see both the practical difficulties of Trevelyan's proposal and its risks for the author. Clashes continued. William Longman was considerably provoked by questions from Wolff and Mallet, who were exploring his defence of a continued ban on the import of foreign reprints:

> Does not it seem to you to be difficult to reconcile it to one's idea of right and justice to the British consumer, namely, the reader of books in England, that a system should be established, and should have the sanction of an international treaty, supported and supplemented by an Act of Parliament, under which the reading public in America obtain an edition of a work written by an English author, at two dollars, while the English reader has to pay 30*s*. for it?

Wolff was referring here to the 'three-decker': the three-volume format that was *de rigueur* for fashionable novels, issued at a standard price of a guinea and a half. Few individual readers could afford this. Publishers relied on bulk purchases by the circulating libraries to justify the artificial and inflexible format, and made handsome profits from it.[55] Their

[55] Mudie's, the most famous circulating library, had a quarter of a million subscribers at its peak. A guinea-a-year subscription brought the three-decker novel within the reach

ability to do so depended on their power – secured by their copyright – to delay the issue of competing cheap editions until the initial sales in three-decker form had tailed off. American publishers, uninhibited either by copyright law or by custom, were free to reprint in cheap form as soon as the work was issued. This explains Wolff's observation that American readers could obtain a copy for a couple of dollars (or less). It also had the incidental result that whereas a wide constituency of American readers had immediate access to new British fiction, British readers outside the luxury market had to await the issue of a format within their price range; a six-shilling single volume usually came in a year or so, a shilling pocket edition sometime after that, probably. Of course, new fiction was only one part of the publishing market. Different considerations and market conditions governed other sectors, and non-copyright works. The three-decker was only one segment of a complex market, and an atypical one. Nevertheless, though undoubtedly profitable for the publisher, the standard format for new fiction was hard to defend in terms of public interest. There were further sharp exchanges between Wolff and John Blackwood, as Wolff sought to characterise copyright as a 'special' form of property, a 'monopoly', which resulted in 'an artificial system which is prejudicial to the public'. Wolff's clear implication was that a special case could not be made out.[56]

Fuel was poured on this fire by Farrer (Permanent Secretary to the Board of Trade) who had had close official involvement in copyright issues for many years. Appointed a member of the original Commission, he resigned due to pressure of work before it met, preferring to act as an adviser. Farrer gave evidence on several occasions, and was permitted great freedom to structure his extensive contribution. A good deal of his evidence concerned the price of books in various countries, and he went to considerable lengths to attempt to establish that British editions, particularly of copyright works, were more expensive than foreign ones. Farrer argued, as had Trevelyan, that the publisher's interest lay in monopoly and net profit, whereas the public interest would be better served by high volume sales at cheap prices. He also offered detailed figures intended to show that books were sold at a price which far exceeded the cost of production, with consequent detriment to the

of the middle classes. Ironically, it was the market strength of these libraries which brought the format's end in the 1890s: Guinevere L. Griest, *Mudie's Circulating Library and the Victorian Novel* (Bloomington, I.N.: Indiana University Press, 1970), esp. pp. 171–3.

[56] For Trevelyan and the Canadian Proposals see above, pp. 101–2. Trevelyan's evidence: *RC-Evidence*, 1–94. Sir Louis Mallet: *RC-Evidence*, 555. Sir Henry Drummond Wolff: *RC-Evidence*, 535, 543.

wider reading public. Farrer advocated an 'absolute rule' that any edition published with the consent of the author in any part of the world should have free access to the UK market. His vision was of a copyright system co-extensive with the English language, giving the author the benefit of an enormous market, and the reader the benefit of a price proportionately reduced. The mechanism he favoured was a right of republication with a royalty. However, Farrer's views and evidence were fiercely challenged by several Commissioners, particularly Trollope, and Froude.[57] Given these fundamental differences of principle and approach, it is unsurprising that the level of disagreement was reflected in the number of dissents from the final Report.

The Report and minutes of evidence ran to 400 closely printed pages. Initial press reactions to it tended to concentrate on summarising the main recommendations and commenting on these, rather than engaging in the matters of principle. However, both Froude and Farrer sought to continue the debate outside the forum of the Royal Commission. Farrer published an article in the *Fortnightly Review*, originally written as a supplement to his evidence to the Royal Commission, but (clearly to his chagrin) not printed in the Blue Book. He presented and discussed the 'two distinct and opposite theories on the subject of copyright', namely, that copyright should be subject to no limitations, and that it should not exist at all. In attempting to arbitrate between these extremes, Farrer again argued for free access to all markets, and challenged the policy of excluding foreign reprints. Froude's article, in the *Edinburgh Review*, was of an entirely different character. He defended English authors and publishers against the charge that 'the public are defrauded of their legitimate share of instruction and amusement', and in doing so launched a blistering attack on the Board of Trade (and Farrer in particular), mockingly accusing them of having been converted to Socialism. He then tellingly demolished the arguments, put forward by Trevelyan, Macfie and Farrer, for a general licence to reprint subject to a royalty. It was a brilliant and confident onslaught, firmly grounded in knowledge of both the legal history and the practicalities of the publishing trade.[58]

[57] Farrer: *RC-Evidence*, 3928–33. Trollope: *RC-Evidence*, 4983–5007. Froude: *RC-Evidence*, 5081–116. Dr William Smith (editor of the *Quarterly Review*): *RC-Evidence*, 5117–221, 5227–345.

[58] T. H. Farrer, 'The Principle of Copyright' (1878) 24 *Fortnightly Review* 836–51. J. A. Froude, 'The Copyright Commission' (1878) 148 *Edinburgh Review* 295–343. Louis Mallet's views on copyright were advocated by Leybourn Goddard (the Commission's Secretary) at a meeting of the National Association for the Promotion of Social Science: *Law Journal*, 14 June 1879. See also C. H. E. Carmichael, 'What Action should be Taken on the Report of the Royal Commission on Copyright?' (1879) *Transactions of the National Association for the Promotion of Social Science* 195–294.

Fundamentally, however, the fight between Froude and Farrer concerned the nature of literary property, and its proper relationship with the law of copyright. These were seemingly perennial questions with which the Royal Commission's Report did not (perhaps could not) really engage, and which its recommendations did not resolve. Farrer was one of those who saw books as a commodity, and felt that they should be subject to normal economic processes, particularly since there was a public interest in cheap books. Although Farrer was happy to see authors well paid for their work, he did not particularly revere the intangible property which they produced, and in argument tended to assimilate it to the physical property in the books which contained it. Froude, on the other hand, was sharply aware of the difference between intangible and tangible property in this context:

> The paper and print, an author will say, is not my book, but the shell of my book. The book itself is the information in it which I have collected. It is my thought, which I have shaped into form by intellectual effort; it is the creation of my imagination, in which I have embodied the observation and reflection of my entire life.

The conflict between Froude and Farrer mirrors that between Talfourd and the radical opposition to the extension of term in the 1842 Act. Their differing approaches to intangible property lie at the heart of their mutual incomprehension. Neither was prepared to admit that the other had a point.[59]

Just over a year later, Matthew Arnold published an article on copyright in the *Fortnightly Review*, where he did attempt to integrate both positions. Arnold had given evidence to the Commission himself, largely concerning copyright term, although he answered a few questions relating to the pricing of his own books. In his article Arnold discussed the various views of the uthor's right of property, referring explicitly to both Froude and Farrer. Arnold had telling criticisms of both positions, and took neither side. His striking observation was in effect that both sides had missed the point by confining themselves to this ground. Arnold's central proposition was that 'there is a need for cheap books, the need will have to be satisfied, and it may be satisfied without loss to either author or publisher'. Arnold believed that cheap books were a necessity for civilised society, but his position was much more

[59] Froude, 'Copyright Commission', p. 298. Talfourd was very much frustrated by the attitude of radicals such as Thomas Wakeley: 'Is the interest itself so refined – so ethereal – that you cannot regard it as property, because it is not palpable to sense or feeling!' Parl. Deb., vol. 45, ser. 3, col. 927, 27 February 1839. Arnold's evidence was given on 25 January 1877: *RC-Evidence*, 3833–75.

sophisticated than Farrer's or Trevelyan's, however. Refusing to see books as a commodity regulated by purely economic forces, Arnold was willing to trust to 'the deepest and strongest instincts which govern mankind in its development'. Whilst admitting that if authors and publishers responded to the public demand for cheap books, a great deal of rubbish would be produced and read, Arnold was still confident 'that the victory will be with good books in the end'. His position thus acknowledged not only a special quality in such intangibles, but also a public interest in them: though it is a public interest deeper and wider than either Farrer's or Froude's.[60]

Attempts to realise the Commission's scheme

As Arnold pointed out, no one (least of all the Royal Commission) was advocating anything other than a continuation of the same basic principle of a term of years for domestic copyright law. Most campaigners' efforts were therefore concentrated on the implementation of the Commission's recommendations. Edward Jenkins, as MP and now former Commissioner, maintained pressure on the government, bringing in a consolidating and amending bill in December 1878. It was withdrawn when the government announced its intention to introduce its own copyright bill. However, the project faced serious handicaps. As Secretary to the Commission, Leybourn Goddard had written formally to the Treasury explaining that 'Lord John Manners is desirous of having a Bill prepared for presentation to Parliament to Consolidate and Amend the Law of Copyright with a view to carry into effect the recommendations of the Commission', and asking for instructions to be given for the preparation of a bill. The Treasury asked the Board of Trade, which was willing only on the understanding that the bill was in Lord John Manners' personal charge. Henry Jenkyns, the Parliamentary draftsman given charge of the task, wrote despairingly to ask which public department he should correspond with regarding the bill. Lord John Manners replied that it had to be Leybourn Goddard, even though he was not an officer of any such department, because Lord Sandon (the President of the Board of Trade) did not wish to be consulted in the matter.[61]

[60] Matthew Arnold, 'Copyright' (1880) 49 *Fortnightly Review* 319–34. Compare Arnold's serious efforts to discuss society's interest in cheap books with Froude's flippantly acid remark that 'our cousins across the Atlantic would receive more spiritual improvement by keeping the eighth commandment than from the most abundant supply of "Daniel Deronda" or "Cometh up as a flower"': Froude, 'Copyright Commission', p. 308.

[61] *NA* T 1/16077 T7143, T19102, T20760, T451. See also *NA* BT 13/9/15.

Jenkyns eventually sent a draft bill to the Treasury in April 1879, apologetic that pressure of business had caused such a delay, and complaining that the lack of an index had caused great inconvenience.[62] In a private letter he explained that his bill 'will do to criticise and raise questions of principle, but not to bring in, as it is not worked out'. He enclosed a printed memorandum in which he raised many uncertainties, points of difficulty or complexity, and indicated the provisions where objections were predicted. With respect to colonial copyright he considered the difficulties so obvious that it seemed 'hardly necessary to refer to the particular clauses'.[63] The Treasury's file note was likewise despondent: 'The Bill bristles with controversy. Genus *irritabile*, i.e. a hornets' nest.' There was serious objection to any undertaking to legislate without the support of one of the permanent departments of state. The Financial Secretary to the Treasury, Sir Henry Ibbetson, closed the file.

The following year Lord John Manners announced that he intended to bring in a government bill, not with any hope of passing it, but so that it might be circulated in the colonies. His bill, as might have been expected from the Chairman of the Royal Commission, generally followed all of the Commission's recommendations closely.[64] The proposed term was life plus thirty years (although with provision to alter this for international agreements). First publication anywhere in the Dominions would secure copyright, for British or foreign authors. Abridgment, dramatisation and translation were to be infringing acts for the duration of the copyright term. There was to be newspaper copyright for 'compositions of a literary character', though not for news. Copyright term for paintings, sculptures and engravings was to be matched to that for books. A colonial licensing scheme was proposed, but only if supplies were insufficient for general circulation. However, in February 1880 the re-introduction of the bill was postponed, and then Disraeli's government fell. Gladstone made it clear that it was not a

[62] The splendid *Analysis to Index of the Evidence taken before the Royal Commission on Copyright* now found with the Report was prepared later. When it arrived at the Board of Trade in March 1879 Farrer noted, 'Mr Jennett Browne deserves credit and thanks for this. It ought to have been done by the Commission or their Secretary. He undertook it of his own accord and has done it entirely himself.' *NA* BT 22/21/6 R 3355/1879.

[63] *NA* T 1/16073 T7143.

[64] Copyright (No 2) Bill (1879). The main differences from the Commission's recommendations were that the Stationer's Company was not to be deprived of its registration business, nor were the deposit libraries other than the British Museum to be deprived of their privileges.

priority for his new government, although he suggested that a private bill might be brought forward.

The real difficulty with a private bill was the huge scope of copyright law, which was beyond the capacity of any interest group, both financially and in terms of its expertise. There was a good deal of anxiety about Fine Art copyright, which had a shorter term than literary copyright. A comprehensive bill was initiated by a Committee of the Law Amendment Society (under the umbrella of the Social Science Association), which issued a report on copyright. Drafted by Leybourn Goddard, the bill bore the hallmarks of a variety of concerned individuals with particular preoccupations. Extremely complicated and impractical in places, the infringement provisions make especially terrifying reading. The bill was introduced in the House of Commons by Hastings in 1881, but did not progress. The Law Amendment Society then divided the bill, proceeding the following session with a measure confined to the Fine Arts, Music and the Drama. This became the Copyright (Works of Fine Art) Bill 1882, much of it simply extracted from the 1881 bill. Introduced without consultation with the Board of Trade, it failed to progress. Efforts along similar lines in 1883, 1884, 1885 and 1886 also failed. However, a short Act concerning penalties for unauthorised performance of musical compositions did pass.[65]

A different consolidation bill was drafted by Daldy, the Secretary of the Copyright Association. He offered it to the Colonial Office in 1883 as a solution to the then prevailing Canadian difficulties.[66] When consulted, the Foreign Office's forthright response made explicit the difficulties which Britain faced as a result of her fragmented and outdated domestic law:

Lord Granville is of opinion that an amendment and consolidation of British copyright law is highly desirable sofar as this Department is concerned, that is to say, in connection with the negotiation and conclusion of satisfactory Copyright

[65] The Copyright (Musical Compositions) Act 1882. This Act (known as 'Wall's Act') was considered necessary as a result of the activities of Thomas Wall, who exploited the fixed penalty provisions in the Copyright Acts to extract large sums of money from unsuspecting users. See Gavin McFarlane, *Copyright: The Development and Exercise of the Performing Right* (Eastbourne: J Offord, 1980), pp. 79–89. The Act proved singularly ineffective. Scrutton described it as 'a legislative fiasco': T. E. Scrutton, *The Laws of Copyright* (London: John Murray, 1883) p. vi.

[66] Daldy to Sir Robert Herbert, Colonial Office (Private), 9 January 1883; Daldy to Lord Derby, Colonial Office 3 April and 30 August 1883: *NA* FO 414/43 pp. 72–9. See above, pp. 113–14. Daldy was totally opposed to allowing any colony to legislate freely for herself. He saw a consolidated Imperial Act as a means of retaining control whilst allowing colonies a modicum of freedom. He proposed to allow any colony to legislate out of the Imperial copyright regime only by making similar provisions through its own Parliament.

Conventions with foreign countries. The difficulties which are at present experienced in this respect arise chiefly from one of two causes: either Her Majesty's Government are unable, owing to existing British copyright law, to accept the proposals made by other Foreign Governments, which are for the most part based on arrangements which have been concluded between some of the principal European and other States; or the foreign Governments to whom proposals are made by Her Majesty's Government on the basis of existing legislation are unable, owing to the complexity of the latter, to comprehend the precise nature of the engagements which they are asked to undertake, and abandon the subject, as Mr. Daldy states, 'in disgust'; or, as was the case in the recent negotiations with Salvador, because they are unwilling to conclude Conventions of a 'retrograde character'.[67]

The Board of Trade said simply that there was no hope of introducing such a measure in the next session, because of pressure of business. The Foreign Office sent Daldy's bill to the Lord Chancellor, with an enthusiastic endorsement. However, the Lord Chancellor noted that the subject would provoke considerable differences of opinion in and out of Parliament, and the matter was dropped.[68]

The Society of Authors

A new professional body was about to be created, and its influence was to be significant. On 8 September 1883, twelve men met and decided to form a society, 'The Company of Authors'. A temporary sub-committee of five was appointed, with Walter Besant as chairman. By February 1884 they had secured fourteen prominent Vice-Presidents, sixty-eight members, and had drafted a preliminary prospectus. A Council of eighteen was elected, from which later a smaller Committee of Management was crafted. The members of the main Council were chosen for their prestige. Different aspects of authorship were deliberately selected, in Matthew Arnold, Edward Lytton, John Tyndall, Thomas Huxley, Edward Dicey, James Anthony Froude, James Martineau, Henry Manning, R. D. Blackmore, Wilkie Collins, Charles Reade, Charlotte M. Yonge, Herman Merivale, W. S. Gilbert, George Augustus Sala and Richard Burton. Alma Tadema, John Ruskin and William Michael Rossetti represented art, and finally there was Walter Copinger, the expert on copyright law. Because of Besant's persistence, the Poet Laureate, Alfred Tennyson, accepted the post of President, giving the new Society instant credibility. The three main objects, listed in the

[67] Foreign Office to Colonial Office, 15 October 1883: *NA* FO 414/43 p. 79.
[68] Board of Trade to Colonial Office, 24 November 1883: *NA* FO 414/43 pp. 80–1. *NA* FO 881/5528 pp. 41–2.

prospectus, were: the need for the international copyright convention with the United States; the introduction of a bill for the registration of titles and the maintenance of friendly relations between authors and publishers, by means of properly drawn agreements.[69]

The year of the Society of Authors' foundation, 1884, was also the year of the first Berne Conference. In January 1886 the Copyright Association wrote to the Foreign Secretary, Salisbury, asking that the new legislation should address the whole of copyright, not merely those aspects necessary for Britain to join the Berne Union. The letter disclosed a further attempt at cooperation by the constituencies most interested in the subject: 'the Incorporated Society of Authors, the Copyright Association, and the Musical Copyright Association have laid before the Board of Trade a scheme for a Bill embodying that scheme'.[70] The bill was based on the recommendations of the Royal Commission, and E. M. Underwood QC, the Society's Honorary Counsel, had been one of those drafting it. In February Salisbury's government fell, and Gladstone was briefly back in power. The Society of Authors sent a deputation to the President of the Board of Trade, Mundella, again asking for the complete codification and amendment of copyright. Although Mundella told the delegation that nothing would give the government greater satisfaction than to have the law of copyright consolidated, he must already have known of the Foreign Office's decision to restrict the bill's scope to the amendments necessary to permit Britain to sign the Convention. There was no time to do more than rush the International & Colonial Copyright Act through Parliament in time for the September signing of the Berne Convention. Salisbury was back in power in August.

The Society of Authors' Consolidating Copyright Bill 1890

Domestic copyright matters remained largely quiet until 1890.[71] Canada's 1889 Copyright Act caused concern, and activity in the US

[69] Victor Bonham-Carter, *Authors by Profession* (London: Society of Authors, 1978), pp. 119–25. See also S. Squire Sprigge's memoir, *Author*, July 1901. An account of the founding of the Society was read by Walter Besant at its 1892 annual meeting, and an edited version of this appears in the *Autobiography of Sir Walter Besant* (London: Hutchinson, 1902).

[70] *Publishers' Circular*, 15 January 1886.

[71] The Copyright (Musical Compositions) Act 1888 addressed penalties for infringement of performing rights in musical compositions, since the 1882 Act had proved insufficient. The indefatigable Thomas Wall had found a loop hole in the 1882 Act, and was still pursuing music users.

Congress was carefully watched – one of the bills there would become the 1891 Chace Act. The Society of Authors issued a number of pamphlets, publicising various matters of importance to authors. In May 1890 it embarked on a much more ambitious project – a monthly magazine. The opening issue of *The Author* gave prominence to the three 'Objects of the Society'. They were somewhat modified since their first definition in the 1884 prospectus: firstly, the maintenance, definition and defence of literary property; secondly, the consolidation and amendment of the laws of domestic copyright; and thirdly, the promotion of International Copyright.[72] The Society's Copyright Committee, chaired by the lawyer Sir Frederick Pollock, had completed work on a draft bill to amend and consolidate domestic copyright. Lord Monkswell had consented to take charge of it. An experienced government lawyer (formerly both Solicitor-General and Attorney-General), now Privy Councillor, he was known for his landscape painting as well as his law treatises.

The bill was stated to be based on Lord John Manners' 1879 bill, and thus the alterations in it were mostly those recommended by the 1878 Royal Commission Report. It proposed a uniform term of life plus thirty years. Abridgment and dramatisation were to be made infringements. Registration was in effect to be compulsory, except for paintings and sculptures. However, there was no provision for colonial licensing. The *Publishers' Circular* considered the bill 'simple, comprehensive, and thoroughly sensible', and hoped it would be passed by Parliament. Before the second reading the bill's prospects looked promising. However, in March the Chace Act passed. To be eligible for copyright protection under its terms, a foreign state had to offer US citizens the benefit of copyright on substantially the same basis as its own citizens. There were doubts about the British position, and also anxiety as to the likely effect of the American manufacturing clause. This was enough to give the government cold feet. The Secretary to the Board of Trade, Lord Balfour, argued that Imperial and colonial policy was not a matter for a private bill, and cited the very recent passage of the American Act as a further reason for postponement. Since the Board of Trade had serious objections to fifty of the ninety-six clauses, Lord Balfour asked that Lord Monkswell should be satisfied with having explained the principles of the bill.[73] The *Author* at the time expressed the Society's fury, but with fifteen years' hindsight admitted: 'Subsequent events

[72] *Author*, May 1890.

[73] Parl. Deb., vol. 353, ser. 3, cols. 453–4, 11 May 1891. Balfour's position is considerably stronger than the initial briefing notes drafted by Calcraft: *NA* BT 13/28 E9706.

have, it is true, demonstrated this bill to have been cumbersome and inadequate.'[74]

No government measure was forthcoming. The main focus of attention was on Canada. She wished to withdraw from the Berne Convention, and was still pressing strongly for approval of the 1889 Canadian Act, which included a compulsory licensing scheme. The various British interest groups were cooperating closely, via the 'Special Committee on Canadian Copyright'. In the autumn of 1895 Hall Caine travelled to Canada as the representative of the Society of Authors, where he was later joined by Daldy of the Copyright Association. The result was agreement on a draft bill, which, although it eventually came to nothing, eased the tensions considerably.[75] The Society of Authors therefore considered it an opportune moment to return to the question of domestic copyright.

Further failure – the Copyright (Amendment) Bill 1897

In 1896 the Society formed a new copyright law committee, which decided to draft a small amending bill, and to leave the task of consolidation for the time being. Their original intention had been to address only two issues; section 18, which dealt with copyright in encyclopaedias, periodicals and magazines, and the separate publication right. Section 18 had proved extremely difficult to interpret, and had generated a great deal of case law: it was remarked of it that 'a worse drawn or more useless Clause has, perhaps, never been included in an Act'.[76] But the Society then decided to widen the scope of its bill, and called a meeting of other interested parties. Daldy came on behalf of the Copyright Association, and there was now also a newly formed Publishers' Association, represented by C. J. Longman. The first proposal was to address s.18, dramatisation of novels, copyright in lectures, copyright term, abridgment of books and copyright in titles. Copyright in term and the question of titles were dropped, however. Counsel was instructed, and after considerable effort and expense a bill was agreed. There was a good deal of delay, partly because the representatives of the Publishers' and Copyright Associations could not bind these bodies, so all decisions had to be referred back for discussion and approval. Tensions between the interest groups were apparent, even at this stage. The result was the 1897 Copyright (Amendment) Bill. Its main clauses

[74] *Author*, June 1891, see also *Law Journal*, 16 May 1891. *Author*, June 1905.
[75] See above, pp. 127–30.
[76] G. H. Thring, 'Imperial Copyright' (1910) 88 *Fortnightly Review* 688–96.

addressed magazine, newspaper and lecture copyright, abridgments, dramatisation of novels, and also provided for the British Museum to certify the date of first publication of a book. The provisions did not differ materially from either Lord John Manners' 1879 bill, or from Lord Monskwell's previous 1891 bill. Lord Monskwell again had charge of the bill. It was too late in the session for it to pass, but, after a struggle with the Secretary to the Board of Trade who opposed this, it was referred to a Select Committee.[77]

The Select Committee took evidence on a number of detailed points. Bram Stoker, Sir Henry Irving's manager, gave evidence that the practice of dramatisation was on the increase, and that protection was essential. C. J. Longman (Publishers' Association), F. R. Daldy (Copyright Association) and G. H. Thring (Society of Authors) also gave evidence. The bill was revised to take account of their various comments, by Lord Thring. Lord Thring was an extremely experienced parliamentary counsel, parliamentary draftsman, member and then chairman of the Statute Law Committee. His interest must have been welcome (especially to the Society of Authors, since Lord Thring was G. H. Thring's uncle). The result was a bill lightened to deal with only the most pressing and least contentious subjects. Newspaper copyright and registration were dropped, as was the proposal to make magazine copyright retrospective. A clause was added which would have allowed the Act to apply to any colony at its own request, but this was struck out at the request of the Colonial Office. The bill was read for a third time and passed to the House of Commons. The hope was that it would pass in the following session.

In the autumn, however, a serious rift developed between the Society of Authors and the Copyright Association. The Copyright Association proposed gathering all interested bodies to draft a consolidating bill, based on the bill drafted by Daldy some years before, to which he had added from time to time. The Daldy bill was issued as 'confidential', but the Society of Authors objected to 'clauses materially differing from those clauses already approved of by the Copyright Association, in the Society of Authors' Amending Bill, and others that are not in accord with the letter and spirit of the Copyright Commission'. It also thought

[77] The Board of Trade was now claiming it would be quite ready to introduce an amending and consolidating bill when negotiations with the colonies were complete. There was no particular initiative in train with regard to colonial copyright (the issue resurfaced in early 1898). But it was felt that only a government measure would work. See the Board of Trade minute on Monkswell's Bill: 'This subject is so intricate, so controversial, and of so much interest throughout the Empire that it would be impossible for a Private Member of Parliament successfully to grapple with the difficulties.' *NA* BT 13/28 E12852.

the timing inopportune and prejudicial to copyright interests. The Society of Authors therefore refused to join the committee, and called upon the few authors who were also members of the Copyright Association to consider their position.[78]

Open disagreement – publishers and authors offer separate copyright bills

At the beginning of 1898 copyright law was much as it had been at the time of the Royal Commission's 1878 report. This report had just been reprinted, having been out of print for ten years. Parliament was facing the prospect of two rival bills, promoted by warring interest groups. Prospects for the much-needed reform were not bright. Lord Monkswell's bill was reintroduced. Lord Dudley, for the Board of Trade, offered no opposition to its second reading, and thought it greatly improved by the Select Committee. However, referring to the Copyright Association bill about to be introduced by Lord Herschell, he suggested that both bills be referred to the same select committee.[79]

The committee met and took a good deal of evidence, but the task was not complete by the end of the session. The select committee reported that it had been unable to complete its inquiry, recommending only that if a bill was again introduced a select committee should again be appointed.[80] The death of Lord Herschell (whom Birrell called 'the most useful man in the United Kingdom') was an added misfortune. Neither side was offering a workable solution: 'it gradually became clear that the Amending Bill was inadequate to grapple with the confused and complicated question, and that the Consolidating Bill was unsatisfactory in its methods and draftsmanship'. At this point – the summer of 1898 – Lord Thring agreed to draft a bill on behalf of the Lords' Committee. It was decided to revert to a thematic approach, by splitting literary, dramatic and musical copyright from artistic copyright.[81]

Private initiatives fail again

In 1899 the bill dealing with literary, dramatic and musical works was the first to be introduced, again by Lord Monkswell. Both the amending

[78] G. H. Thring, 'Recent Attempts at Copyright Legislation' (1898) 63 *Fortnightly Review* 461–7. *Author*, January 1898.
[79] Copyright (Amendment) Bill 1898 [HL]. Copyright Bill 1898 [HL]. See also Lord Monkswell's, 'Copyright Reform' (1897–98) 23 *Law Magazine* 195–209.
[80] Report from the Select Committee of the House of Lords on the Copyright Bill [HL] and the Copyright (Amendment) Bill [HL] (1898).
[81] G. H. Thring, 'Lord Monkswell's Copyright Bill' (1900) 73 *Fortnightly Review* 454–63.

and the consolidating bills had been withdrawn in its favour, and the Society of Authors had given its support. The bill's principal propositions were largely familiar ones: copyright term was to be the author's life plus thirty years; translation, abridgment and dramatisation were to be infringing acts; it addressed republication rights, copyright in lectures, the enforcement of performing rights, and also proposed a new twelve-hour newspaper copyright.[82] Lord Monkswell also introduced the Copyright (Artistic) Bill, which covered the ground taken by Lord Herschell's consolidating measure of the previous session, which had in turn been based on a manifesto issued by the Royal Academy in 1879. A contentious point in this bill was whether the copyright in artistic work should go to the purchaser in the absence of explicit agreement, or whether it should remain with the artist. The Royal Commission had been narrowly in favour of letting the copyright go with the sale, but Lord Monkswell's bill left the copyright with the artist, because in practice he felt that artists would not be able to bargain to retain it otherwise.[83]

Both bills were referred to the same select committee, where it emerged that the Board of Trade had asked the barrister T. E. Scrutton (another expert on copyright) to report on the draft bill, and it had already been redrafted to take account of his comments.[84] A great deal of evidence was taken, covering diverse and detailed points of copyright law and practice. The discussion of the proposed 'Canadian Compromise' revealed considerable entrenchment by the publishers on both sides.[85] Again the select committee was unable to complete its task. The literary copyright bill was reported with amendments, but they did not recommend that it should proceed further in the current session, 'having regard to the numerous difficult and contentious matter with which it deals', which included international and colonial copyright.[86] The evidence on artistic copyright was reported, though incomplete, in case a further select committee was to be appointed. The subject remained in the public eye however. Augustine Birrell QC, Quain Professor of Law in University College, had been giving a course of lectures on copyright throughout 1898 which were published and widely reviewed. Birrell's

[82] Copyright Bill 1899 [HL].
[83] Copyright (Artistic) Bill 1899. See also Lord Monkswell's letter to the *Times*, 4 May 1899.
[84] Scrutton was particularly critical of the decision simply to enact parts of the Berne Convention as law, which he complained was framed in diplomatic language and not legal language: *NA* BT 13/30 E13734.
[85] See above, pp. 133–4.
[86] Report of Select Committee appointed to consider the Copyright Bill [HL] and the Copyright (Artistic) Bill [HL] (1899).

Edinburgh Review article discussing the latest bill would have been extensively read. Great consternation was caused by the Court of Appeal's decision in *Boosey* v. *Whight*, confirming that perforated sheets were not sheets of music, so reproduction of these for the Aeolian and other mechanical musical instruments was therefore lawful. A meeting of music publishers was held, a number of eminent composers wrote letters of support, and a decision was taken to draw up a report with a view to action in the next session of Parliament.[87]

Both bills were introduced again in March. The Copyright bill 1900 was almost word for word the same as the bill as amended by the House of Lords select committee. However, the international copyright clauses had been redrafted by Lord Thring, with the advice of the Foreign Office. Following discussion of the 'Canadian Compromise' the previous year, the colonial copyright provisions had been amended. They sought to address an inequality which had been particularly felt in Canada. As Lord Monkswell explained:

> The present law gives an advantage to the English publisher over the colonial publisher, for while the English publisher is empowered to flood the colonies with an English copyright edition, the colonial publisher is expressly forbidden to import into England his own colonial copyright edition. This Bill proposes to place the English publishers under the same restriction as the colonial publishers are now under, and I am pleased to find that the English publishers concur in the change, and think it is only right that it should be carried into effect.

It is difficult to imagine a printer of the old school, such as Murray or Thomas Longman III, thinking this 'only right', since in the 1870s Longman was unable to tolerate even the idea that any of his copyright works should be issued 'by a colonist'. Indeed, Murray's evidence to both the 1899 and 1900 select committees indicated his underlying resistance to the proposed course, in which he rather ungraciously acquiesced. However, these publishers were from a different generation. The Monkswell proposal indicates not only a change in publishers' attitudes, but also a less paternalistic view of colonial relations more generally.

The government, however, was distinctly cool in welcoming the bill. Lord Balfour, for the Board of Trade, noted that the 1898 version of the bill had been sent to the colonies for their observations, and though no other bill should progress until answers had been received.

[87] Augustine Birrell, *Seven Lectures on the Law and History of the Copyright in Books* (London: Cassell and Co., 1899). Birrell was in favour of a 'life plus' term, and thought translation and dramatisation rights should be protected: (1900) 191 *Edinburgh Review* 141–56. *Boosey* v. *Whight* [1899] 1 Ch 836, affirmed [1900] 1 Ch 122. [AQ: Please clarify whether [1899] should be (1899) as given in the table of cases.]

Lord Selbourne, for the Colonial Office, also objected that the bill had material changes and would have to be sent again to the colonies. Lord Thring expressed some bewilderment at these reactions, since the colonial clauses were virtually the same, and in any event were clearly advantageous to the colonies. The bill was referred to a select committee as desired, but its prospects looked doubtful at best. The Copyright (Artistic) bill had been entirely redrafted by Lord Thring, and differed a good deal in substance from the previous bill. It was much less restrictive, and was drafted to take greater account of those interested in the production and sale of works of art. It too was referred to the same committee.

The select committee was enlivened by the evidence of Samuel Clemens, or 'Mark Twain', who shook everyone up by advocating a form of perpetual copyright, conditional on the issue of a cheap edition.[88] He was somewhat foggy regarding details of his scheme, and, when challenged, described the proposed life plus thirty term as 'qualified perpetuity itself'. He admitted his proposal was largely a symbolic gesture: 'it is merely an ornamental piece of sentimentality, my maintaining that copyright should be perpetual on the great grounds of right and justice'. He was later to advocate an extension of the American term, and it was perhaps this Parliamentary experience which kept it in his mind. His own account of the exchange, written some years later, differs from the Parliamentary Papers in a number of significant respects.[89]

The remainder of the evidence given was rather more prosaic. Henry Clayton, as Chairman of Music Sellers' Sub-section of the London Chamber of Commerce, expressed concerns about the 'Aeolian question', following *Boosey* v. *Whight*. He wanted the Court of Appeal's decision reversed, as did Edward Cutler QC, who had appeared (on the winning side) in the offending case. Those representing interest groups

[88] Report and minutes of evidence from the Select Committee of the House of Lords on the Copyright Bill (HL) and Copyright (Artistic) Bill (HL)(1900). Clemens had explored these issues in 1898, in the form of a Socratic dialogue entitled, 'The Great Republic's Peanut Stand'. The manuscript was never published, but was unearthed comparatively recently: Siva Vaidhyanathan, *Copyrights and Copywrongs* (New York; London: New York University Press, 2001), pp. 69–78.

[89] Clemens made similar points at the 1906 Congressional hearings, referring at some length to his encounter with Lord Thring: E. Fulton Brylawski and Abe Goldman (eds.), *Legislative History of the 1909 Copyright Act*, 6 vols. (South Hackensack, New Jersey, 1976), vol. IV, pp. 116–21 at pp. 118–20. See above, p. 251. Lord Thring seemed to Clemens to be 'a most striking example of how unintelligent a human being can be when he sets out to discuss a matter about which he has no personal training and no personal experience': Charles Neider (ed.), *The Autobiography of Mark Twain* (London: Chatto & Windus, 1960), pp. 281–3.

from the arts were also heard: decisions as to appropriate control of commissioned works after sale continued to cause difficulty. Sir Edward Maunde Thompson, Director and Principal Librarian of the British Museum, expressed concern that the new deposit clause was not as effective as its equivalent under the 1842 Act. Two Canadian witnesses gave evidence. The first was Professor James Mavor, Vice-President of the Canadian Society of Authors, who discussed the pending Canadian Copyright bill (which was to become the 1900 Fisher Act), emphasising how moderate its provisions were. The Canadian publisher, George Morang, spoke briefly to explain that Canadian publishers, printers and authors were supporting the Canadian bill. He also said that the Lord Monkswell's bill had been carefully read, and was approved of. John Murray complained that the Canadian bill had a manufacturing clause, whereas the publishers had wanted to see Canadian copyright protection extend to sheets produced in England and imported into Canada. However, Murray indicated that the publishers would not raise any very strong objection, 'because their great desire is to see the matter settled'.

Both bills were reported with amendments in July. Lord Monkswell emphasised that there was no need to refer the bill to the colonies again, since the only clause affecting them was one which they very much desired. Although the copyright bill passed the House of Lords it was too late for it to pass the House of Commons, and it was withdrawn in early August. The government was asked if it would consider introducing legislation on the lines of the bill, but Lord Balfour refused to make any commitment, and also claimed that the government had no information as to how the bill was viewed in the colonies.[90] At the committee stage of the artistic copyright bill Lord Monkswell acknowledged that it could not pass during the session, but it would be printed and circulated for criticism.

Stagnation continues: 1900–08

Once private interest had failed to carry the 1900 bills, further progress seemed improbable, given continuing government resistance. The Society of Authors kept the matter in the public eye with a number of articles in significant general periodicals. The appropriate term of copyright was discussed in the *Academy*, which had written to a number of authors enquiring whether it should be perpetual. Bernard Shaw's pithy response that perpetual copyright was 'a piece of rapacious

[90] There was in fact plenty of evidence (*Times*, 9 June, 5 and 10 July 1900), but not of the required official nature.

impudence' developed into an extended argument with G. H. Thring. John Murray wrote to the *Times* to complain about deposit copies, 'a tax we feel and resent', provoked by Maunde Thompson's request for the British Museum's privileges to be reinforced. This reopened the public debate as to whether the other deposit copies should be retained (as in Lord Monkswell's bill) or abolished as the Royal Commission had recommended.[91] However, none of this generated sufficient momentum to overcome the inertia which had taken hold, particularly given Canada's continuing demands for the power to legislate on copyright for herself.[92] Although in 1901 the King's speech announced that legislation had been prepared for amending the law of literary copyright, and the President of the Board of Trade promised to bring in a bill at an early date, nothing happened. In March 1902 a deputation from the Society of Authors, the Publishers' Association, the Copyright Association and the Music Publishers' Association was received by the President of the Board of Trade, Balfour, who assured them that if Canadian objections had been removed that a bill would be introduced in the next session.[93] Systematic pirating of songs by street hawkers caused real concern to the music publishing industry, and a short act was passed in 1902, although this proved inadequate.[94] The following year Scrutton's standard textbook on copyright law was updated, its preface noting: 'The publication of this Edition has been delayed in the hope that Parliament might undertake a systematic revision of the Copyright Laws ... but nothing further has happened, or seems likely to happen.'[95]

The problem continued to be with the colonies, mostly Canada. First publication in Canada offered Americans simple access to Berne Convention privileges, whereas the highly restrictive American law offered no equivalent advantage to Canadians. Sir Henry Bergne, now chairman of the Society of Authors, told its 1905 General Meeting that:

> it had been impossible with any advantage to bring forward the question of domestic copyright during the past year, and that even if a favourable

[91] Thring, 'Lord Monkswell's bill'; Lord Thring, 'The Copyright Bills 1900' (1900) 47 *Nineteenth Century* 1005–18; *Academy*, 2, 9, 30 December 1899, 6 January 1900; *Times*, 18, 21 and 23 May 1900. See also Warwick H. Draper, 'Comments on Lord Monkswell's Bills' (1901) 17 *Law Quarterly Review* 39–55.

[92] See above, pp. 135–6.

[93] R. J. L. Kingsford, *The Publishers' Association 1896–1946* (Cambridge: Cambridge University Press, 1970), p. 19.

[94] Musical (Summary Proceedings) Copyright Act 1902, which was of little effect. Attempts to pass private bills failed in 1903 and 1904, and eventually the government acted: Musical Copyright Act 1906.

[95] T. E. Scrutton, *The Law of Copyright*, 4th ed. (London, William Clowes, 1903), v.

opportunity occurred, there were many difficulties surrounding its discussion, especially those connected with the position of the self-governing colonies.

He was obliged to make an almost identical point in 1906.[96] In February 1907 the President of the Board of Trade refused to give any undertaking as to the early introduction of copyright legislation. At the end of the year the Board of Trade held a meeting with senior figures from the Society of Authors, explaining that any comprehensive legislation would involve repeal of the 1842 Act, and would therefore raise questions of Britain's right to deal with self-governing colonies. This the Society of Authors dreaded, not so much because of the value of the colonial markets, but because of the likely effect on Berne arrangements, and most particularly on the understanding with the United States.[97] However, the government's hand would be forced in 1908 by the Berlin revision of the Berne Convention.

Impact of the Berlin agreement

The Berlin conference was not uncontroversial even in Britain. A number of hostile questions were asked in Parliament: Ramsay Macdonald, for example, objected that only a limited amount of information had been given to parliament about the proposed amendments before the conference, and others wished to know whether any alterations would be submitted to the House of Commons before being accepted.[98] The Society of Authors was one of the parties who sent a copy of the Berne Bureau's proposals early in 1908. Sir Henry Bergne's report on them was adopted by the Society, and forwarded to the Board of Trade. In June the president of the Société des Gens de Lettres, Lecomte, visited England seeking the Society's support for various proposals, including a life plus fifty term. The Society arranged an introduction to the President of the Board of Trade.

The month-long Berlin conference generated a significant revision of the Berne Convention, now in a single consolidated text. The enjoyment and exercise of rights under the Convention were no longer to be subject to any formality, and a minimum term of the author's life plus fifty years was agreed in principle. Until all states had adopted this period, however, term was to be regulated by the law of the country where

[96] *Author*, May 1905, April 1906.
[97] Parl. Deb., vol. 170, ser. 4, col. 40, 27 February 1907 (question to the President of the Board of Trade, Lloyd-George). Meeting December 1907: *NA* BT 209/690 R15507.
[98] Parl. Deb., vol. 194, ser. 4, col. 749, 19 October 1908. Parl. Deb., vol. 196, ser. 4, col. 872, 16 November 1908.

protection was claimed, and could not exceed the term fixed in the country of origin. Translation rights, and rights to prevent dramatisation and novelisation, were also agreed.[99] The celebrations were muted though, following the sudden death in Berlin of the most senior British delegate, Sir Henry Bergne. It was a real sadness to many: his contribution to international copyright had been quiet and diplomatic, but very significant. Once the other British delegates had returned, the Society's secretary had an interview with one of the officials at the Board of Trade. It was decided to form a joint committee, consisting of representatives of the Society of Authors, the Musical Publishers' Association, the Publishers' Association and the Copyright Association, to meet and, if possible, agree a common policy. Eventually, all were willing to support the terms of the Berlin revision, the music publishers' concerns having been withdrawn for the sake of uniformity.[100]

The Gorell committee

Details of the proceedings of the conference, and the various proposals, were published in February.[101] Lord Gorell chaired a departmental committee to advise the government on the legislation required to give effect to the Convention. In addition to the government members, there were well-informed representatives from a wide range of the interested constituencies. The committee sat sixteen times, and heard forty-five witnesses. Almost all of the witnesses represented an interest group, and many of these had submitted a memorandum summarising their views. The organisation and professionalism of these interest groups is striking, since many of them were relatively new. Much of their evidence reflected the pressures of new technologies of various sorts. The Berlin revision forced consideration of issues such as mechanical reproduction rights. It is significant that ten representatives of makers of, or dealers in, mechanical musical instruments were heard. The inclusion of actual works of architecture (as opposed to architectural plans) was also a novel prospect for British law, and a good deal of evidence was heard on this; the Royal Commission had recommended against their inclusion previously. Evidence was also taken from representatives of the *Société des Auteurs, Editeurs et Compositeurs de Musique*, and from the president of *ALAI*.

[99] See above, pp. 74–5. [100] *Author*, July 1909.
[101] Miscellaneous No. 2, Correspondence respecting the revised convention of Berne, Cd 467 (1909).

The committee's report was issued in December. It began with the observation that it would be highly desirable to take the opportunity to put British law 'on an intelligible and systematic footing', 'common so far as practicable to the nations which join in the Convention'. The report then addressed each article of the revised convention in turn, and the changes necessary to put it into effect. On virtually all issues the committee recommended adoption of the convention's approach. There had been a good deal of evidence taken as to the appropriate length for copyright term. The vast majority of witnesses had been in favour of the life plus fifty year term; the Federation of Master Printers were alone in thinking the extension unreasonable. The committee also recommended making the extension retrospective, the position where the right had been assigned to be settled by agreement, or if necessary by an arbitrator nominated by the Board of Trade. On the other major change, the abolition of formalities, the committee was again willing to concur, 'having regard to the great importance of international uniformity, and also to the useless nature of the present formalities'. The report concluded with an explicit expression of approval of the Berlin revision, which was thought to mark 'a very great advance' on the original Berne Convention and the Acts of Paris.[102]

The committee deliberately did not make any report on colonial copyright, knowing that it was intended to call a conference of the representatives of the colonies. However, the committee did comment that 'it seems of the utmost importance that the Colonies, as parts of the British Empires, should come into line with Great Britain, and that, so far as possible, there should be one law throughout the Empire'. This Imperial Copyright Conference was held in May 1910, and a substantial measure of agreement emerged from it. It recommended that the Convention should be ratified by the Imperial Government on behalf of the various parts of the Empire; and that with a view to uniformity of international copyright reservations should be kept to a minimum. The two central principles of the Berlin revision, on formalities and term, were endorsed.[103] It was obvious also to this conference that a coherent and uniform Imperial copyright law was urgently needed. The President of the Board of Trade, Sir Sydney Buxton, introduced a bill at the very

[102] Report of the Committee on the Law of Copyright, Cd 4976 (1909). Four members appended notes to their signatures. E. Trevor Ll. Williams and Joynson-Hicks were both opposed to the extension of term, and Clayton was unhappy at the retroactive application of it. Joynson-Hicks was also opposed to the inclusion of architecture, as was Scrutton.

[103] No ratification was to be made on behalf of a self-governing Dominion until its assent to ratification had been received, and provision was to be made for the separate withdrawal of each self-governing Dominion. See above, pp. 141–2.

end of the session in July 1910, so it could be circulated and discussed both at home and in the colonies.[104]

Copyright Bills 1910 and 1911

G. H. Thring said of the 1910 bill that 'it was more of a revolution than a codification'.[105] Opinion on it was generally favourable, although it took a little time for the interest groups to digest its implications. The *ALAI* Congress in September expressed its warm approval of the bill in general, although it did have some concerns on points of detail which it submitted to the government in a report. For the Society of Authors, MacGillivray (who had given evidence to the Gorell committee on the Society's behalf) drew up report indicating how far the draft bill satisfied the Society's recommendations. There was a similar report from the Publishers' Association.[106] An account by the American publisher G. H. Putnam was reprinted in Britain. He regretted the effect on American publishers if Canada enforced a manufacturing clause, but admitted frankly that they were hardly in a position to protest as long as America retained her own manufacturing requirement.[107] John Murray published a long article strongly critical of the bill. He was particularly unhappy at the prospect that each colony could in theory enact its own manufacturing clause. He was also concerned at the proposed power to licence reprints. This was drafted to allow the Comptroller-General of patents to licence reprints if the reasonable requirements of the public were not being satisfied, either because the work was being withheld from the public, or because of the price being charged for it. Many others were to be sharply critical of this provision, which G. H. Thring termed 'preposterous'.[108]

The Board of Trade dealt patiently with the representations, communications and deputations. When it reappeared in 1911 the bill was significantly redrafted to take account of them. However, Buxton

[104] Copyright Bill 1910. Parl. Deb., vol. 19, ser. 5, cols. 1945–50, 26 July 1910. Buxton issued the results of the colonial conference at the same time: Dominions No. 3, Imperial Copyright Conference, Cd 5272 (1910). His briefing memorandum for the Cabinet is *NA* CAB 37/103/31.

[105] G. H. Thring, 'The Copyright Bill 1911' (1911) 89 *Fortnightly Review* 901–10.

[106] *Author*, November and December 1910. See also 'The Copyright Question' (1910) 212 *Edinburgh Review* 310–27; 'Copyright Law Reform' (1910) 213 *Quarterly Review* 483–500; *Athenaeum*, 15 October 1910.

[107] *New York Post*, 24 December 1910, reprinted *Publishers' Circular*, 21 and 28 January 1911.

[108] *Publishers' Circular*, 11 February 1911. Thring, 'Copyright Bill 1911'.

admitted that there had been 'acrimonious correspondence' on the colonial questions:

> I am told in this matter we ought to insist on absolute uniformity throughout the whole Empire. Even if we desired to do so, it is clear that, whatever may have been the case in the 'forties, under present conditions we have no means of exercising such coercion as that, even if we desired to. But there is no such desire on our part, nor, as far as I am able to judge, on the part of the Colonies, to arrive at any conclusion on this matter except with the object of obtaining the utmost uniformity for Imperial copyright.[109]

There was a good deal of opposition in the House of Commons, and several members who supported the bill overall objected to the compulsory licence clause. Joynson-Hicks, one of the members of the Gorell committee who had not agreed with the extension of term, again argued that the proposed term was too long, and pressed for a manufacturing clause. There was a proposal from Edgar Jones for a deposit copy of every book in Welsh, for the recently founded Welsh national library. The bill was referred to the standing committee, and there it was significantly changed. The extended term was subjected to the qualification of compulsory licensing after twenty-five years (or thirty for subsisting copyright works). The power to grant compulsory licences for withholding work was given to the Judicial Committee of the Privy Council, and not to the Comptroller-General of Patents. An attempt by Joynson-Hicks to insert a manufacturing clause, applicable to any country which imposed one, was eventually defeated. The committee stage did not begin until the end of July. Again there was a great deal of noisy opposition, and claims that the bill would prevent cheap literature. Almost every clause was opposed, sometimes for the weakest of reasons. Eventually the bill was read for a third time and passed to the House of Lords.

At its second reading there Lord Gorell welcomed the bill, but noted the changes made to it, which he said were not entirely in accord with the views of the Gorell Committee: 'In some respects it seems as if there had been rather less appreciation of property in brain product than was thought to be right by the Committee and than was proposed in the Bill as originally introduced.' He mentioned particularly the provisions for compulsory licences. Lord Gorell concluded that the bill deserved to pass as a great consolidation measure, but thought that it still required careful consideration on many details. During the debate there was real concern over the provision for deposit copies, and the publishers' complaint that everything was demanded whether it was actually useful

[109] Parl. Deb., vol. 23, ser. 5, col. 2589, 7 April 1911.

or not.[110] The matter was again discussed at the report stage, although eventually the position was left unchanged. Compared to its journey through the House of Commons, though, the bill had a relatively easy passage.

Success but not triumph

The 1911 Copyright Act came into force on 1 July 1912, with ratification of the Berlin revision of Berne imminent. It represented a vast improvement on what it had replaced, but the hesitancy of the colonies was a concern which continued for a number of years. George Haven Putnam, speaking as a tireless campaigner for copyright reform in the United States, gave the Act only qualified praise:

> The framers have succeeded in getting rid of many of the incongruities and inconsistencies of the earlier statute but they have, in my judgment, still failed to secure for the British Empire a scientific system of copyright. Under the present policy of the Empire, the so-called independent colonies, whose copyright systems had heretofore been subordinated to the Imperial authority and which had, therefore, with Great Britain become parties to the Convention of Berne, are now to be left free to institute separate copyright territories to control by their own local regulations.[111]

Putnam's worst fears concerning the fragmentation of copyright were not realised, but the development of copyright law in an international context continued to be slow, fragmented and troublesome. This was so even in the face of the considerable pressure for change generated by technological developments, and by the demands of an increasingly global marketplace. With such an array of national and international interests to be reconciled, stemming from diverse legal, economic and cultural starting points, it is perhaps unsurprising that significant tensions still remain unresolved. International conventions and agreements have delivered a considerable measure of harmonisation, but the underlying pressures are not thereby dissipated entirely: technological advances continue, creative forms develop further and copyright law is expected to respond. Its success in doing so has to be assessed, and many commentators are critical of the balance between interests which

[110] Parl. Deb., vol. 10, ser. 5, cols. 47–8, 31 October 1891. On deposit copies see the memorandum to the House of Lords from The Publishers' Association: *Publishers' Circular*, 18 November 1911. For the full story, and the correspondence, see R.C. Barrington Partridge, *The History of the Legal Deposit of Books* (London: Library Association, 1938), pp. 107–9.

[111] George Haven Putnam, *Memories of a Publisher* (New York; London: Putnam, 1915), p. 389. *Law Journal*, 8 and 29 June 1912.

copyright currently delivers. Yet contemporary reformers also understand that immense hurdles have to be faced before any changes can be agreed, particularly if the proposal involves a radical reappraisal of principle. Too often the result has been a series of piecemeal compromises born of weary pragmatism. Although a paradigmatic system for copyright is conceivable, the historical evidence shows that its practical achievement has so far proved impossible.

7 The colours of cyberspace

John Wurtele Lovell: a pirate's history

The copyright industries protest that the black flag still flies in cyberspace. The International Intellectual Property Alliance estimates 'conservatively' that the US copyright industries suffer annual global trade losses of $25–30 billion, not including internet piracy. In 2003 their estimated figure for books alone was over $600 million. The Alliance does acknowledge 'vast progress in global copyright law reform' as it 'celebrates' the 10th anniversary of the TRIPS agreement. It welcomes the WIPO internet treaties, but warns that 'government policy makers must create the political will to enforce their new laws aggressively'.[1] The future has yet to happen. But there are historical models.

The 1891 US Copyright Act in effect put an end to the career of one of the most flamboyant American 'pirates', John Wurtele Lovell. His father was John Lovell, the Canadian printer who had so enraged the London publishers with his local reprints. In 1872 John Lovell had built a huge printing factory at Rouse's Point, just on the American side of the Canadian border. Works were typeset in Montreal, printed in America, then re-imported for binding and sale in Canada. This elaborate journey ensured that Lovell could reprint British works without breach of Imperial copyright.[2] His son John W. Lovell, aged only 21, was put in charge of the Rouse's Point enterprise. It employed 500 people, and was the largest printing and publishing establishment north of Albany, New York. But John W. Lovell had even bigger dreams. In 1876 he moved to New York City, took American citizenship, and started up a new business. He began in partnership with Graeme Mercer Adam, another well-known Canadian publisher who had strong views on the question of Canadian Copyright. But by 1877 the young Lovell was in business on his own, reprinting in cheap format any non-American-copyright title

[1] Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2004 Report*: http://www.iipa.com/. IIPA Press Release, 7 October 2004.

[2] He did have to pay $12\frac{1}{2}$ per cent duty on the imported works. See above, pp. 99–100.

he pleased, ignoring the 'courtesy of trade' which would have given priority to the work's established publisher.[3]

Lovell's aggressive techniques paid off, and his business went from strength to strength. In 1882 he started 'Lovell's Library' of paperbacks, selling for as little as 10c. The quality of type and paper was better than other reprinters were offering, and the format was convenient for readers. By 1890 this series had almost 1,500 titles, and he had many other series. Lovell carried huge stocks of these cheap books, claiming to sell as many as 7 million copies annually. Known as 'Book-a-Day Lovell', he was cordially hated by the other publishers, but seemed not to care. He argued that his activities encouraged home manufacture, and promoted competition, so were good for the masses. The business had expanded beyond New York: first to Boston and Chicago, and then, in 1888, to London. Lovell's representative there was Charles Wolcott Balestier, a young American author who had, as one of his many literary activities, edited Lovell's cheap illustrated miscellany, *Tid-Bits*.[4]

Balestier soon made friends with London's literary figures. Ambitious and focused, he worked hard to familiarise himself with the local book-market, and succeeded in gaining within months a depth of knowledge which thoroughly impressed authors, at least. His personality seems to have been an extraordinarily winning one. Gosse wrote:

> He was able to preserve in a very remarkable degree his fine native taste in literature, while conscientiously and eagerly 'trading' for his friends in New York in literary goods which were not literature at all.[5]

Gosse claims the credit for having drawn Balestier's attention to 'a new Indian writer, Rudyard Kipling', just arrived in England in the autumn of 1889. Balestier is alleged to have replied impatiently; 'is it a man or a woman? What's it's real name?' But within days the ever-alert Balestier had made contact with Kipling, and before long added him to his list of

[3] Lovell's advertisements sometimes paraded the disadvantages of copyright law. See for example his Red Line Editions of the Poets (12mo., $1 in cloth, $1.25 for full gilt): 'In most cases the works will be found more complete than the Foreign edition, as, on account of the copyright on many of the Poems not having yet expired, the English publishers are prevented from printing all the poems of many of the best authors. In the case of still living authors, care will be taken to add any new poems that they may publish to each new edition issued.'

[4] For accounts of John W. Lovell's activities see Madeline B. Stern (ed.), *Publishers for Mass Entertainment in Nineteenth Century America* (Boston, Mass: Hall & Co., 1980), pp. 199–209; John Tebbel, *A History of Book Publishing in the United States, Volume II: The Expansion of an Industry 1865–1919* (New York; London: Bowker, 1975), vol. II, pp. 344–52.

[5] Edmund Gosse, 'Wolcott Balestier', (1892) 43 *Century* 924.

'personal conquests'.[6] Kipling's *Soldiers Three* (1888) was reprinted by Lovell as an 'Authorized Edition' in 1890. It carried as its frontispiece a facsimile reproduction of a letter from Kipling giving his endorsement, but also protesting at the 'system'.[7]

Balestier's knowledge and influence was doubtless a factor in the most unusual publishing history of Kipling's novel, *The Light that Failed*. A copyright edition of this, with eleven chapters and a happy ending, was deposited in the British Library on 7 November 1890. Kipling had agreed that Lovell should have the work for single volume production, if he filed for American copyright and deposited a copy in the Library of Congress. This was done on 12 November 1890. The American text was entirely unrevised from the British copyright edition, although a completely new chapter seven was inserted, making twelve in all. Serial rights to this version were sold to *Lippincott's Monthly Magazine*, where it appeared in January 1891. On 26 November 1890 a longer version of the text, with a heavily revised tragic ending, was registered at the Library of Congress as a separate work. Lovell was given sole American rights to publish this new fourteen-chapter version, termed an 'authorised edition'. In London Kipling negotiated terms with Macmillan, who were given a fifteen-chapter version, identical to the American 'authorised edition', but with a new inserted chapter eight. Its preface stated that 'this is the story of *The Light that Failed* as originally conceived by the author'. It was published in March 1891, after the Lippincott serialisation. Kipling's aim in multiplying his texts in this way must have been to draw the fire of the American pirates: enticing them with novelty, whilst reserving the 'authentic' text until the initial

[6] Gosse, 'Balestier', 925.

[7] 'Your country takes the books of all of the other countries without paying for them. Your firm has taken some books of mine and has paid a certain price for them though it might have taken them for nothing. I object to the system altogether but since I am helpless, authorize you to state that all editions of my property now in your hands have been overlooked by me.' Rudyard Kipling to the John W. Lovell Company, [1890]: Thomas Pinney (ed.), *The Letters of Rudyard Kipling*, 6 vols. (Basingstoke: Macmillan, 1990–2004), vol. II, p. 31. Earlier in the same year Lovell had published Kipling's *Plain Tales from the Hills*. Kipling was enraged when a rival American publisher gave away the work free (in book form) with his newspaper. Harper & Bros. offended in a similar way. They had paid Kipling for serial rights to a number of stories, then published them in book form also, as *The Courting of Dinah Shadd and Other Stories* (1890). The outraged (but legally impotent) Kipling allowed Lovell to publish a rival collection of twelve stories entitled *Mine Own People* (1891). A letter from Kipling (in facsimile) was included: 'A little less than half of these stories have been printed in America in book form without my authority and under a name not of my choosing. I have been forced in self-defence to include these tales in the present volume which has my authority. I owe it to the courtesy of my American publishers that I have had the opportunity of myself preparing the present book.'

enthusiasm had worn off. It seems to have been a wise strategy. The first American piracy, by M. J. Ivers & Co, appeared in January 1891, only days after the Lippincott serialisation was published. But although the unauthorised 'happy ending' text was widely reprinted, the authorised 'sad ending' version was not.[8]

The United States Copyright Act was passed in the early days of March 1891, and came into force on 1 July. Kipling's new works, at least, could now enjoy copyright protection in America. Balestier and Kipling remained close. During 1891 they co-wrote a work of fiction, *Naulahka: A Story of East and West*. Kipling authorised Balestier (rather than his recently appointed agent, A. P. Watt) to deal entirely freely with his own share in the story.[9] Shockingly, Balestier died of typhoid fever in Dresden in December 1891, still not quite thirty. So he never saw *Naulahka* complete and in print. The story was serialised in the *Century* (November 1891–July 1892), then appeared in single-volume format simultaneously in Britain and America (April 1892). Although the formality of simultaneous publication was essential to ensure British and American copyright, this comparatively uncomplicated production schedule contrasts starkly with the convolutions necessary to provide even limited shelter for *The Light that Failed*.

The chief 'pirate' publisher, Lovell, thus found himself in an environment with newly rigorous legal rules. How long he had been expecting this change is a matter for conjecture. He had in the past been quite ready to express support for a 10 per cent royalty on reprints, although he was accused of failing to deliver on this promise with the majority of the authors he published.[10] His preferred business practice had always been to pay a fixed sum for use of those British plates that he particularly wanted. In March 1888 the Chace bill, providing for international copyright subject to a manufacturing clause, had passed the Senate for the first time. Although the bill got no further in that Congress, its progress may have been a factor in Lovell's decision to post a representative in London. It has been suggested that Lovell saw the 1891 Act on the horizon, and, hoping to avert financial disaster, sent

[8] James McG. Stewart, *Rudyard Kipling. A Bibliographical Catalogue* (Toronto: Dalhousie University Press, 1959), pp. 81–8; Syed Shafqyat Towheed, 'Copyright and Literary Authority, 1880–1914', PhD thesis, University of Cambridge (2000), pp. 82–9. Such tactics may still be necessary. In 2004 Gabriel Garcia Marquez was forced to accelerate the release of his novel, *Memories of My Melancholy Whores*, when thousands of pirate copies were put on sale in Columbia. Like Kipling, Garcia Marquez altered his final chapter, in an act of protest and retaliation.

[9] Kipling to Balestier, 20 August 1891: Pinney, *Kipling letters*, vol. 2, p. 42.

[10] Raymond Shove, 'Cheap Book Production in the United States, 1870–1891', MA thesis, University of Illinois (1937), p. 75.

Balestier to propitiate aggrieved British authors by negotiating agreements with them.[11] This is to credit Lovell with more prescience than most commentators possessed, and he had been prepared to purchase advance sheets well before this time. More straightforward reasons for Lovell's decision would have been his constant desire to expand his business, and the knowledge that an agent on the spot would be well-placed to strike early deals. As for Balestier himself, Henry James suggested that he had rather finer motives:

> The Copyright Bill had not been passed, and it appeared to him that there might be much to be done in helping the English author in America to a temporary *modus vivendi*. This was an idea at the service of which he put all his ingenuity – an ingenuity sharpened by his detestation of the ignoble state of the law.[12]

Certainly, Balestier did much for Lovell's public image in Britain. One delightful story is that on the day he arrived in London Balestier obtained a copy of Mrs Humphry Ward's *Robert Elsmere* from Mudie's Library, and sent it to America within hours, thus securing for Lovell an amazing coup, and making him her first American publisher.[13] In fact the novel was already a great success on both sides of the Atlantic by this time. Detailed figures reveal sharply different measures of 'success' in the two markets, however. In Britain the novel was first issued in the traditional three-volume form, in February 1888. Priced at a guinea and a half (31s. 6d), three-deckers were bought largely by libraries, so the sale of 3,500 copies in this format (by early June) indicated a hugely popular work. In July the one-volume 6s version appeared, and 38,000 copies were sold in Britain in little over a year. Again this would have been thought a great achievement. The publisher, Smith Elder, had

[11] Towheed, 'Copyright', p. 95.

[12] Henry James' biographical sketch, Wolcott Balestier, was printed as a preface to the volume of Balestier's short stories which appeared after his death: *The Average Woman* (New York, 1892), pp. vii–xxviii at xv. When the 1891 Copyright Act passed, the Society of Authors stated publicly that a British Act would be needed to guarantee the Americans the reciprocity required. Balestier disagreed, and thought it would raise a 'howl and hullabaloo'. He wrote to Robert Underwood Johnson, Secretary of the American Authors' Copyright League, asking him to intervene. 'Of course the single, solacing, settling word in these circumstances, would be some assurance from President Harrison that he would issue the proclamation anyway if we would keep still, and not go monkeying with the buzz saw, and you are the man, of course, to obtain such an assurance from him ... In any case, it would be wholesome for someone who could speak with authority (someone not too unlike you and very unlike me) to suggest to Besant to sit tight and trust to luck.' Balestier to Johnson, 30 May 1891: *Johnson Papers*. For the problem see above, pp. 245–7.

[13] Tebbel, *History: I*, p. 347; Stern, *Publishers*, p. 347. The claim is presumably that he was the first authorised publisher of her works in America to be an American (unlike Macmillan) – although the foundation of the claim is somewhat weak, given Lovell's Canadian origins.

originally offered £250, the copyright to revert to Mary Ward once 1,500 three-deckers were sold – this eventuality being considered most unlikely. In the end they paid her £3,325 on these two formats, plus £150 in royalties on 1,000 copies of a two-volume Library Edition. The British publisher Macmillan (which had issued Mary Ward's previous works) gave £75 for the colonial edition, plus £25 for the right to export copies of this to the United States. By November 1888 Macmillan had sold so many of these that they volunteered a further £250, out of sheer embarrassment.[14]

American sales during this period were enormous: it was estimated that 100,000 copies of *Robert Elsmere* had been sold there since its first appearance in mid-summer, a figure three times the British equivalent. Lovell sent a £100 (about $500) ex gratia payment for his edition, which, although something, was not much. High demand had led to stiff competition among the American reprinters, who were issuing cheaper and cheaper copies in tens of thousands. These sold for as little as 4 cents, and were even given away free with Maine's 'Balsam Fir Soap'. Mary Ward was appalled by these vulgarities, and resented her inability to protect her literary property. Although she appreciated Lovell's gesture, she told her father, 'I don't feel called upon to be very grateful.'[15] Balestier arrived in London in December, well after the initial explosion of popularity. The best he could do was to sooth Mary Ward's feelings, and thereby hope to secure his boss an advantage in future dealings. Lovell had already offered £4,000 for all the rights to her next novel, but he was one of many interested. The American cash was tempting, but generally the offers were for advance sheets for American serial publication. Mary Ward was not a quick writer, and her health was poor, so she was reluctant to submit to the relentless pressures of the timetable such an undertaking would have required. By early December 1890 only two volumes of her new novel, *David Grieve*, were finished, and her British publisher George Smith advised waiting to see what American copyright legislation would really mean. It was still unclear when, or even whether, international copyright would come into operation. The Simonds Bill had just passed the House, and, given that the Senate had previously passed the Chace bill, prospects looked reasonably favourable. Even in this climate of uncertainty Mrs Ward's next novel was a

[14] John Sutherland, *Mrs Humphry Ward* (Oxford, Oxford University Press, 1990), pp. 130–1.

[15] Mary Ward to Thomas Arnold, October 1888, quoted Sutherland, *Mrs Humphry Ward*, p. 129. See also Mrs Humphry Ward, *A Writer's Recollections* (London, 1918), pp. 247 and 252; Janet Penrose Trevelyan, *The Life of Mrs Humphry Ward* (London, Constable, 1923), pp. 74–8.

prize worth competing for. There were inconclusive negotiations with a number of American publishing houses, and with Macmillan. Once the bill passed the Senate in March 1891 Mary Ward considered herself in such a strong position that she told Smith she was looking for £7,000 for the American rights. Astonishingly, Macmillan was willing to pay this as an advance, although the work was still three-quarters incomplete, and no one had yet been allowed to read any part of it. Smith himself paid an advance of only £1,750 for the British rights – an indication of the relative profits expected from the respective territories.[16]

Lovell's business ambitions had continued to spiral upwards. In the absence of international copyright law, vicious competition prevailed between the reprinters. Lovell's idea was a book trust: a combination of the cheap publishers which would stabilise prices and control discounting practices, leaving a larger pool of profits for all to share. Not everyone liked the plan. But Lovell had the financial muscle to buy out publishers who were reluctant, or at least to acquire the rights to their plates. He soon claimed to control the plates of more than three-quarters of the trade's yearly output in paper-covered books, and more than half of cloth-bound books (with the exception of text books).[17] When he began publishing he had over 3,000 sets of plates in his possession, with as many as twenty complete sets for authors such as Dickens and Thackeray. The United States Book Co. was incorporated in July 1890, issuing stock and bonds to a value of $5,000,000. Lovell began to flood the country with the widest range of 'series' ever seen in the industry, supported by teams of well-trained salesmen. Nevertheless, new editions continued to appear, and the stock holders were faced with assessments rather than the 12 per cent dividend they had been promised. Complaints about greed and mismanagement grew. In 1893 Lovell was voted out of his nominal post as Vice-President and dismissed as manager. A receiver was called in, and although there was an attempt to struggle on, the company was bankrupt. Lovell himself was unrepentant, blaming the passage of the 1891 International Copyright Act, and the general panic of 1893.[18]

[16] Sutherland, *Mrs Humphry Ward*, pp. 137–8; Jenifer Glynn, *Prince of Publishers: A Biography of George Smith* (London: Allison & Busby, 1986), pp. 179–97. To save money it was common for works to be put into type only once, with the plates being sold to several publishers, each of whom would issue their own edition differing only in paper, binding and imprint. For *Robert Elsmere* there were said to be four sets of plates but at least double that number of imprints: (1888) 34 *Publishers' Weekly* 950.

[17] (1890) 37 *Publishers' Weekly* p. 460.

[18] Tebbel, *History: I*, pp. 348–52; Stern, *Publishers*, pp. 307–10; Shove, 'Cheap Book Production', pp. 98–105.

The market for books was increasingly global, and popular success of a different order became possible. For British authors, the passing of the 1891 Act altered radically the legal context in which their works could be exploited. Simultaneous publication now secured copyright in both Great Britain and the United States, something which offered increased protection in the marketplace not only to the author, but also to the publishers in both countries. The stakes – and the potential returns – were considerable. As has been seen, Macmillan was forced to offer £7,000 to secure Mary Ward's first American copyright. Authors looked to the established publishers. J. M. Barrie was another who, thanks to Balestier, Lovell had published in America before the Act. But it was Charles Scribner who became Barrie's American publisher after the Act; issuing a new edition of his works, with revised texts and prefaces, to take advantage of the new copyright law. One of the first works to show how extensive the rewards could be was George Du Maurier's *Trilby* (1894). Du Maurier was best known as an artist, whose caricatures for *Punch* were famous. He began writing only at the end of his life, when his vision was failing. *Trilby* was his second novel, and he sold it outright to the Harpers for $10,000. The heroine is the beautiful Trilby O'Ferrall who works as an artist's model in Paris's Latin Quarter, where she falls under the evil hypnotic powers of the pianist Svengali. Published first in serial form, the exotic combination of elements sent circulation figures shooting up. A legal dispute with the artist James McNeill Whistler delayed the story's issue in book form, but generated marvellous publicity. By February 1895 *Trilby* had sold 200,000 copies in book form in America. Sales of the book and box-office receipts from a melodramatic dramatisation were said to have brought in $1 million by the end of 1895. Generously, Harper's rewrote the original agreement, returning the dramatic rights to Du Maurier, and granting him a royalty on sales. *Trilby* has been labelled the original 'best-seller'. Certainly, such financial success – accruing to author and publisher – would have been inconceivable before the 1891 Act. And although *Trilby* may perhaps be claimed as the first international blockbuster, it was only the first of many such trans-Atlantic successes, of which Barrie's *Peter Pan* was another.[19]

Admittedly, not every single author was in a position to reap such rewards. But the new legal environment offered security for all. Authors no longer had to resort to elaborate stratagems such as Kipling's, nor did

[19] For full details, and more on *Trilbymania*, see Catherine Seville, 'Peter Pan's Rights: "to die will be an awfully big adventure"' (2003) 51 *Journal of the Copyright Society of the USA* 1–77.

they require the patience of Mary Ward. A little over a century later, we are facing similar challenges. The question now is, how much security should be guaranteed to copyright holders by the regulatory mechanisms in cyberspace? 'Piracy' can be detected almost everywhere – particularly if the term is defined to include the photocopying and downloading habits of the average teenager. Technology permits these users to be consciously engaged in the practice of copying; unlike the readers of Lovell's Library, say. Modern users enjoy the immediate benefits of their actions, so attempts to curb their practices meet resistance. The law has a responsibility to redefine the regulatory boundaries, and do so in a way which recognises and balances the various interests appropriately. If it does not do so, the market will step in to defend the strongest economic interests, putting long-term cultural goals at potential risk. To allow this would be to raise the white flag in place of the black one. We would do better to design a new ensign for cyberspace: a banner which acknowledges the past, but around which everyone can agree to rally. This, however, is easier said than done:

> Exclusive protection by a State of the immediate interests of its subjects – of its authors, publishers, and printers – and legislation and administration immediately directed to the welfare of its industry and commerce, proceed from a comparatively simple policy; but the establishment of sound principles of protection, which shall secure the greatest ultimate benefit to all classes of the community, is a matter which requires deep consideration and intelligent foresight.[20]

Choosing new colours: principles and techniques

The natural law model of copyright regards authors as *possessing* a natural right – a property right – in their creative productions. Policy-based models *grant* a more limited property right, and in doing so may either deny the existence of any natural right, or may intend to replace or modify it. These different approaches entail different presumptions and decisions as to the aims and extent of copyright law, and result in different outcomes for the copyright systems which they engender.[21] Since there are endless possibilities for combining detailed decisions within these frameworks a potentially infinite number of copyright systems could be designed.

[20] William Briggs, *The Law of International Copyright* (London: Stevens & Haynes, 1906), p. 83.

[21] Then again, it might fairly be said that the various copyright regimes are remarkably similar, given their different philosophical underpinnings. The differences are more acute in particular areas, such as moral rights.

In determining what should be protected by copyright law, both natural law and policy-based models have in common that they protect only productions actually in existence, not those still latent. In a natural law model, the instant of the work's creation is also the instant when copyright commences. In a policy-based system, grant of copyright might perfectly well be made dependent on some formality; registration was a common requirement in the past. But it is now a basic principle of the Berne Convention that no such formality is permitted. In both the natural law and Berne Union models, copyright law bites on a copyright work at the moment of its creation. The pressure of the natural law model's conception of copyright works, and arguably its persuasiveness, can thus be seen as expressed, indirectly, in the many alternatives adopted by the Berne signatories. Although statutory law has abrogated common law rights in almost all cases, it has not entirely erased the influence of the arguments used to justify them.

In the context of contemporary intellectual property systems, the dominance of the Romantic creative model – particularly its development in the 'author paradigm' – has been criticised both for excluding creative contributions which do not sit easily within its framework, and also for undervaluing the public domain, to the detriment of future creators.[22] If this criticism is to be addressed, the definition of the objects (and objectives) of statutory copyright protection must be considered a crucial preliminary task: the boundaries of and qualifications to that legal protection should only be determined in the light of these decisions. Yet this task cannot be achieved through the compilation of an exhaustive list of objects which merit protection; even if such a list could be assembled, it would be incomplete in the next moment. A less prosaic approach is needed: one which acknowledges the richness and variety of the contemporary creative field. This represents a considerable challenge, which has not been truly faced as yet. Instead, new objects are squeezed into existing categories within the copyright field, usually on the basis that they can be regarded as in some way analogous to the objects already there.[23] Or, modifications may be made in response to the demands of interest groups, though such concrete demands are difficult to weigh against the more abstract requirements of the whole. Sometimes, the copyright regime has been used simply as the most

[22] See Siva Vaidhyanathan, *Copyrights and Copywrongs* (New York; London: New York University Press, 2001), pp. 11–15.

[23] For a striking discussion of this process of assimilation in relation to aboriginal works see Brad Sherman, 'From the Non-original to the Ab-original', in Brad Sherman and Alain Strowel (eds.), *Of authors and Origins: Essays on Copyright Law* (Oxford: Clarendon Press, 1994), pp. 111–30.

convenient vessel, it being regarded as less resistant to intrusion than the other intellectual property regimes; thus computer programs and industrial designs have both sat more or less uncomfortably in its boundary regions.

The difficulty lies rather deeper than these surface expressions of the problem. The objection should not be simply that copyright law is marred by the dominance of the author paradigm, since this can be seen a symptom rather than a cause. If there is prevailing inability to express a satisfactory definition of the creative, it is unsurprising that matters are even less clear after its translation into copyright law. Attempts to produce a simple template to justify inclusion in the copyright scheme are likely to prove futile. There is also a risk of confusion between the law and the entities on which it operates. Although copyright law defines the objects of copyright protection, it does not define the creative.[24] Statute law has the potential to respond to changing perceptions and priorities, but the will has to be found to examine and challenge existing choices in a sufficiently wide context. The decision to make statute law the governing system is only the first step in addressing the issue, and not the complete answer.

Those active in the nineteenth-century copyright debates refused to accept the solutions and definitions then offered by copyright law, and sought to change them. Their conceptions of copyright producers and copyright works were not, they felt, always adequately expressed in copyright law. With regard to international copyright, they perceived a gap between existing copyright protection and their paradigm of copyright protection, and sought to close it. Thus the 'ideal' realm for copyright material, as understood by both its producers and users, may have boundaries different from those set by prevailing substantive copyright law. The objects of copyright will always resist comprehensive definition, and will change with time. Statute law ought to acknowledge this, and should respond with appropriate fluidity. To some extent it already does so. The categories of literary, dramatic, musical and artistic works are currently widely defined, and there is no attempt to impose judgments of 'value'.[25] Films, sound recordings and photographs are defined with the intention of including as yet unknown technologies. Copyright statutes have also been found sufficiently elastic to permit the

[24] For reflections on this topic in relation to artistic works see Anne Barron, 'Copyright Law and the Claims of Art' [2002] *Intellectual Property Quarterly* 368–401.

[25] Several of these categories owe much to nineteenth-century legislation. The 1833 Copyright Act gave a distinct performing right to dramatic works, extended to musical works by the 1842 Copyright Act. The 1862 Fine Arts Copyright Act gave a short term of protection to paintings, drawings and photographs.

inclusion of computer programs, databases and broadcasts. Then again, there are complaints that the scheme lacks flexibility: within the existing definitions it is hard to protect the formats of television shows, for example. At the boundaries of these categories there have been difficulties: should a circuit diagram be protected as an artistic work, a literary work or both simultaneously? These questions multiply further with multimedia works. However, such questions do not really challenge the customary structure of copyright law, even if changes to definitions may result from the answers given in response. More fundamental criticisms of the current copyright system remain to be addressed.

A repeated criticism is that the customary model of copyright law implicitly takes as its paradigm a single author, and has habitually resisted the inclusion of anything which cannot be reduced or assimilated to this pattern.[26] Concepts of collaborative authorship, or joint (or even non-) ownership, do not sit comfortably within the current legal framework. The informality of the web challenges traditional authorship norms. The common misconception that all web texts are 'free' is reinforced by the absence of an artefact – the book. There is also the different but related problem of what we understand to be originality, and the assumptions which underlie that understanding. Many of these assumptions are now being disputed, whether by explicitly articulated denunciations, or simply by conduct.[27] Via this route we return to the debate as to the nature of literary property: what could sensibly be designated copyright *property* in the context of, say, aspects of shared cultural heritage, such as folk tales? Many other forms of writing exhibit cognate properties. Texts interconnect with others, sometimes with a pervasiveness which seriously challenges the notion of a single, distinct literary 'object'. Texts are seen to be received in different ways by different cultures and different times, a phenomenon which undermines conceptions of literary transcendence and authorial autonomy – conceptions which literary copyright law in effect tends to endorse.

[26] 'Contemporary intellectual property law is constructed around the notion of the author, the individual, solitary and original creator, and it is for this figure that its protections are reserved.' Bellagio Declaration, in James Boyle, *Shamans, Software and Spleens* (Cambridge, Mass.; London: Harvard University Press, 1996), p. 195. See also Keith Aoki, '(Intellectual) Property and Sovereignty: Notes Towards a Cultural Geography of Authorship' (1996) 48 *Stanford Law Review* 1293–355; Peter Jaszi, 'Toward a Theory of Copyright: The Metamorphoses of "Authorship"' (1991) *Duke Law Journal* 455–502.

[27] Copyright law readily protects lyrics and melody, but has been slow to recognise copyright in rhythm alone. For the argument that this imposes a cultural bias against Afro-American music see David Sanjek, 'Sampling and the Creator', in Martha Woodmansee and Peter Jaszi (eds.), *The Construction of Authorship* (Durham; London: Duke University Press, 1994), p. 353.

Copyright law cannot afford to ignore these criticisms. If alternative creative forms are presenting significant challenges to previous paradigms, the statutory structure should be capable of accommodating them, at least potentially. It is a striking comment on the flexibility and responsiveness of the current model of proprietary protection for computer programs that the free software movement expresses such hostility to it, and seeks alternatives outside copyright.[28] It is not necessary for current statutes to continue to adopt value systems appropriate for different times, or to force copyright into the straitjacket of a single overarching principle. Nor is it right to look on indifferently as interest groups settle matters between themselves, negotiating Byzantine provisions at the fringes of the statute without regard for their overall context.

Copyright law can be seen as a mechanism which regulates the legal protection of one part of the creative environment. That we have a choice as to the nature and workings of that mechanism increases its significance enormously. Copyright law in effect crystallises certain creative values. It allows us to view a projection, if a somewhat shadowy and reflected one, of what we currently value in the creative. A crudely defined model of copyright will have implications for the creative milieu which it (in theory) seeks to encourage and protect. For instance, some have argued for an entirely market-driven model of copyright, which would grant only and exactly the protection necessary to ensure the continuing production of copyright works. Others have argued that copyright owners should have an absolute right to control access to their works in perpetuity.[29] Either approach represents an over-simplistic

[28] The open source community argues that allowing programmers to read and modify the source code results in quicker, better development than the traditional closed model.

[29] Talfourd claimed that he had 'always asserted the justice of restoring perpetual copyright', though he admitted that this was impractical. He attacked his opponents' assumption 'that there is a paramount right in the body whom they call "*the Public*" ', and hence their view 'that any term of exclusive right which may be awarded to the author, is mere matter of grace and bounty; in derogation of this right of the public; and which it is the duty of those who guard the interest of the public to render as short as they can, so that they leave sufficient inducement to an author to compose and to publish'. T. N. Talfourd, *Three Speeches Delivered in the House of Commons* (London: Moxon, 1840), pp. xv–xvii. T. E. Scrutton was one of those who argued for a utilitarian formula: *The Laws of Copyright* (London, John Murray, 1883), pp. 3 and 8. It seems ironic, given the immense efforts made to extend copyright from its eighteenth-century term, that many contemporary commentators argue that it is now far too long. 'Copyright should subsist only for twenty years, with a broadly defined fair use protection': Boyle, *Shamans*, p. 172. The matter of term reached the US Supreme Court in *Eric Eldred, et al.* v. *John D. Ashcroft, Attorney General* 123 S Ct 769 (2003). See Catherine Seville, 'Copyright's Bargain – Defining our Terms' [2003] *Intellectual Property Quarterly* 320.

response to the creative field, and if such models were allowed to govern its legal regulation, disharmony or even rupture would be likely. Authors, owners and users of copyright works might attempt to adapt their behaviour to the prevailing legal environment. But, since the distance between society's perceptions of value and those expressed in such a law would be considerable, ways would be found to evade or ignore it. If a one-dimensional or out-of-date model is allowed to govern the mechanism for regulating our best creative products, we deserve the creative environment which results.[30] A more complex model is required: one which is capable of acknowledging a number of differing and perhaps conflicting requirements in its general scheme, and of reconciling or adjudicating them as necessary in the specific case.

Copyright law should have an integrating function, which, logically, should precede any specific outcome. The diversity of copyright works demands a wide and complex range of responses, but the hardest task lies in the definition and balancing of the underlying needs and tensions, and not in the working out of their possible applications once these aspects are decided. Changes made to the microstructure should not be made without thought for the superstructure. Creativity is an elusive quality. The anatomies of originality and novelty are likewise mysterious. Although baffling, these structures continue to be highly valued. The rapidly growing creative economy is not only of financial significance. It has powerful human significance, because creative works satisfy intellectual and emotional needs that other products cannot. Such needs may be individual and personal, or national, or global. The introduction of vast historic themes into the copyright debate was not accidental, nor was it merely a debating strategy. The history of the nineteenth century shows that the legal rules controlling copyright works could have powerful consequences beyond their immediate realm: creating favourable and unfavourable conditions for authors, assisting or hampering the distribution of books to particular audiences and markets, promoting or discouraging various branches of the book trade. It is unwise to enact a copyright law which does not take account of wider issues, whether historical, political, economic or cultural. The specific requests of interest groups must be assessed within these contexts.

[30] For example, as has been seen, the United States discovered that her refusal to grant copyright to foreigners had the unexpected effect of making it more difficult for American authors to sell their works, thus discouraging the production of native literature. A similar phenomenon was seen in Britain, particularly in the 1830s–1850s, when the lack of international protection for French plays allowed them to be pillaged freely for the London stage. The chilling effect on native drama was recognised at the time. An adaptation of a proven foreign success could be knocked out in a few days, and sold far more readily than original plays by British nationals.

Such comprehensive frames of reference are troublesome to work with. There is a strong temptation to reduce copyright law to a simple formula: based perhaps on its term, or on the notion of 'equitable' remuneration, or some other superficially appealing linear equation. Copyright protection resists such efforts. It is more accurately and helpfully conceived of as several constellations of rights, each of which interact dynamically with others. The task is then to capture this effect in statute law. The process of reification – of making the intangible tangible – may be somewhat impressionistic. It is necessary to accept that the rendering of intangible property in the copyright law context will inevitably be inadequate. Perhaps its elusiveness should even be welcomed, as inherent in the creative. Copyright law can only reflect the essence of creative works imperfectly: it is to a great extent dependent on their prior existence. Once copyright law's area of coverage has been defined, it becomes somewhat easier to describe the legal nature and characteristics of copyright works, and to visualise the space which such works inhabit. But creators and users stubbornly (and rightly) refuse to regard the spaces occupied by copyright law and by creative works as in any sense identical, or even co-extensive. The way in which the law tends to value copyright works in largely economic terms, even though creators may esteem moral rights more highly, is but one example of this. Copyright law is necessarily an imperfect realisation of the space inhabited by creativity: it is a translation, not a mapping, and its rules function as boundaries defining only some of the contours of that space. Nevertheless, it is important to attempt to render the vision of appropriate protection into statutory form, and to revisit the resulting scheme as often as is necessary.

So far UK copyright law has failed to deliver much in the way of vision – even if this is for reasons which are entirely understandable – being too often contingent in its response. If this is not addressed, the law will continue to respond for the most part on a micro scale, or, worse, will inadvertently put in place mechanisms which are perhaps irreconcilable with the nature of copyright itself. Any automatic recourse to a system of compulsory licensing would be one such mechanism, as would be the promotion of licensing schemes which did not properly acknowledge the particular character of the copyright product. To allow these to operate as *de facto* solutions would be to abdicate responsibility for a properly conceived copyright system. Any suggestion that a stream of royalties can be regarded as strictly *equivalent* to the reproduction right (rather than as an optional alternative to assist the producer in the

exploitation of the work) is to replace copyright with a different legal model.[31]

The right to prevent copying has so far been central to the theoretical model used, whether as a consequence of natural or of positive law theories. Although royalty systems have frequently been proposed, in practice they have been used only as a limited response to local problems, and recognised as such.[32] In the past their lack of success has been in part attributable to the impossibility of effective collection. This problem is somewhat alleviated in the digital environment, and rights management systems seek to take advantage of this. Nevertheless, the nature of the legal protection offered thus far acknowledges, even if somewhat indirectly, that copyright works have inherent qualities which cannot be straightforwardly valued in economic terms. The wider benefits which society derives from copyright works are likewise impossible to quantify even in general terms, since they permeate the culture thoroughly, but almost imperceptibly. Attributing the benefits flowing from a particular work is no easier. Resistant to measurement though these qualities may be, they are important, and require suitable defence. If the right to a revenue stream ever displaces the reproduction right, the nature of copyright protection will be radically altered.

One message to be drawn from the nineteenth-century legislative history is that copyright works came to be seen as in some way connected to fundamentally important aspects of society: for example, because of their potential influence on the provision of popular education, and on the definition of cultural identities. Hence was created the link to independence, both for the individual reader and for nations. A crucial element of this was the changing market for literary works. The reading public was expanding fast. The book trade responded by seeking new markets, and becoming increasingly international in its outlook. If competitive forces were not to run freely, arguments of considerable weight had to be brought to bear. Copyright law was one of the few mechanisms which could check the progress of the most powerful

[31] 'Copyright is of fundamental importance both for the individual owner of the right and for society generally. To reduce it to a purely economic right to receive royalties dilutes the essence of the right and is, in principle, likely to cause potentially serious and irreparable harm to the right holder.' T-184/01 *IMS Health Inc.* v. *Commission of the European Communities* [2001] ECR II-3193, para. 125.

[32] The 1878 Royal Commission was pressed by several witnesses to adopt a royalty system instead of copyright, on the grounds that this was 'expedient in the interest of the public, and possibly not disadvantageous to authors'. The Commission refused to do so: 'copyright should continue to be treated by law as a proprietary right, and ... it is not expedient to substitute a right to a royalty defined by statute, or any other right of a similar kind'. *RC-Report* 16–17.

publishers, as they sought to confirm their tenure in their traditional markets, or to substantiate their claims to new territory. This expansion and globalisation inevitably generated conflict. Markets previously unexplored, or in the unchallenged grip of one party, were now contested by many. Predictably, the language of copyright was prayed in aid. British publishers argued that literary property should be protected all over the world, in part because this was a necessary antecedent to their traditional, mercantilist view that they had a right to the markets for British copyright works wherever they were sold. Such entrenched assumptions were to be sharply challenged. It was copyright's potential impact on these powerful societal levers – both economic and non-economic – which allowed the context of the legislative debate to become so expansive.

Copyright law is important not only for its role in defining which works will be legally protected, but also for its function in regulating access to the market. In the absence of international copyright law, competitive forces were left to determine which works reached readers, and local publishing interests on the whole prevailed in local markets (at least those which supported a publishing industry at all), even though the trade in foreign reprints was very significant in some places. As has been seen, however, alterations to the legal environment, whether by national statute, case law or international treaty, could disrupt this rather precarious balance. The consequences of these alterations, both for book trade practice and for the literary marketplace, were sometimes profound. Throughout the nineteenth century, any decision as to whether a particular work was worth publishing in a particular market had to be made in the light of the prevailing rules of international copyright law, which were neither comprehensive nor stable. Thus copyright law's influence was felt by the reader. This is not to say that other factors, economic and non-economic, did not also affect publishing decisions; they certainly did. But defects in international copyright law could be blamed, especially if criticisms were expressed as a matter of public rather than private interest. Commentary on the perceived hardships and deficiencies of the publishing environment was often presented in terms of the effect on the user, even when the complaints were a matter of keen interest to the publishers or creators who made them.

In this way the user became a crucially important figure in the arguments concerning copyright's function. However, users did not necessarily articulate their own needs; this was often done on their behalf, or in their name. And although the power of the market gave substance to the figure of the user, the different natures of the particular markets did not seem to affect fundamentally the requirements claimed for their

respective users. In all of the national debates on copyright law the needs of the reading public came to be seen as significant, even vital. Readers were thought to deserve access to appropriate books at a reasonable price, and to have a right to read not only their own national literature, but also the best literary products of other nations. These points were made in British debates, against the background of an economic policy founded on free trade principles. The same points were made in America, in the context of a protective economic system. Canada's approach lay somewhere between the two, but again the requirements of readers were stressed. These concerns for the potential consumers of copyright works were expressions of a preoccupation which emerged in all geographic areas of the debate.

Concern for the reading community was not in itself new. In 1774 Lord Camden had objected to perpetual copyright on the grounds that it would favour the established publishers, to the detriment of the public:

> All our Learning will be locked up in the Hands of the *Tonsons* and the *Lintots* of the Age, 'till the Public become as much their Slaves, as their own Hackney Compilers are'.[33]

Macaulay's hostile characterisation of copyright as a monopoly resembled this position, and was intended to block a similar proposal: 'Copyright is monopoly, and produces all the effects which the general voice of mankind attributes to monopoly.' He was opposing the extension of copyright term proposed in Talfourd's 1841 bill, on the grounds that any benefits to the author could not justify the astronomical selling prices which Macaulay predicted would be the inevitable result. The additional 'taxation' on the public could not, he felt, be defended. The risk of suppression of individual works was considered to be another serious danger. Macaulay admitted frankly that he regarded copyright privilege in much the same way as he regarded the East India Company's monopoly on tea, or Lord Essex's monopoly of sweet wines.[34] For him, learning too was essentially a commodity. For this reason alone, denying the public access to it by means of a copyright 'monopoly' would be imprudent and wrong.

Gradually, the need for public access to copyright works began to be presented in a somewhat different light. It became less a matter of preventing monopoly and exclusion, and more a perception that citizens had a positive claim to affordable, quality reading matter. The Nova

[33] The case was *Donaldson* v. *Becket*. For Lord Camden's speech see *The Cases of the Appellants and Respondents in the case of Literary Property before the House of Lords* (1774).

[34] 'Copyright is monopoly, and produces all the effects which the general voice of mankind attributes to monopoly.' Parl. Deb., vol.55, cols. 347–8, 5 February 1841.

Scotia Assembly complained in 1845 that the system of copyright was inhibiting the introduction of libraries in the Province, because the non-pirated books available were prohibitively costly, leaving the reading public deprived of material. Comparable concerns are articulated today. Campaigners have complained that current copyright law deters the preservation of and public access to materials of historic or artistic interest, particularly if the material is of little commercial value.[35] In 1852 Gladstone told the House of Commons that the bookselling trade was 'a disgrace to our present state of civilization', because its structure and habits acted as disincentives to purchase books, forcing prices up to the extent that 'educated persons' were compelled to turn to book clubs 'to satisfy ... their own demand for that mental food'.[36] He portrayed the benefits to be gained from widespread access to books as not merely personal, but societal. In 1880 Matthew Arnold argued that in a civilised nation there was a need for cheap books, which could be satisfied without loss to either author or publisher. He warned that if the book trade did not acknowledge these 'natural facts' there would be 'an explosion of discontent likely enough to sweep away copyright'.[37]

Such concerns continue to be expressed, and with considerable force. Many contemporary commentators have argued that the public domain is threatened by the prevailing system of increasingly exclusionary private ownership, warning of the consequences for future creators and for society in general.[38] Copyright policy-makers ought to be capable of responding to such criticisms, and re-examining its priorities. The nineteenth century saw a transition from national to international publishing markets. It can be argued that the expansion towards worldwide markets associated with the digital environment is not fundamentally different in nature. At the minimum, although there may be a change in scale, sufficient similarities remain for comparison to be worthwhile. One potential advantage of the new global internet space is that it allows some of the assumptions underlying the existing system to be tested and challenged in a virtual environment. Experiments in production and distribution are facilitated by it, since they may be engaged in more cheaply than those involving non-digital manifestations of products.

E-publishing presented an apparently momentous challenge to established publishing practices. Looked at in one way, e-publication

[35] For example, in *Eldred* v. *Ashcroft*, Brief Amici Curiae Of The American Association Of Law Libraries, American Historical Association, American Library Association and others (2002).
[36] Parl. Deb., vol. 121, ser. 3, cols. 593–9, 12 May 1852.
[37] 'Copyright' (1880) 49 *Fortnightly Review* 319–34.
[38] See, for example, Boyle, *Shamans*, pp. 135–9.

can be seen as a revolutionary and democratic paradigm shift, which puts publishing power in the hands of the people, and threatens the customary 'gatekeeper' role of the traditional publishers. Internet publication offers the opportunity to escape some of the constraints imposed by the physical print medium. Printing and distribution costs are dramatically reduced. Digital works may include audio and video content, may be interactive, and are easily customised or updated.[39] The appeal of the new medium seemed self-evident, and, as the technology became more widely available commercially, an explosion in e-publishing sales was predicted. Some commentators forecast the imminent demise of the book, and with it the downfall of the established publishing giants.

Such forecasts have not been realised. Although there has been some change, the world is not unrecognisable. In practice, much that is now published on the web would have been, in essence, familiar to nineteenth-century publishers. Digital technology is frequently used simply to supplement the physical book. No longer constrained by the costs of type-setting, storage or printing, consumers can be offered 'on-demand' access to texts which would otherwise have been uneconomical to produce, or which have gone out of print. The text itself remains unchanged, however, and may even be supplied in book (or printable) form.[40] Other publishers may offer their works in parallel formats, physical and digital,

[39] The adjectives 'customised' and 'updated' carry positive messages, for users at least. Yet the underlying activity they describe may be seen by the author as 'distortion' or even 'theft'. The digital format facilitates not only copying but also adaptation and manipulation of works. The legitimate boundaries of such activities are still being negotiated. For an early (but still helpful) perspective see Jane C. Ginsburg, 'Putting Cars on the "Information Superhighway": Authors, Exploiters, and Copyright in Cyberspace' 95 *Columbia Law Review* 1466–99.

[40] The relationship between the text and its physical expression in print has always challenged copyright theory. Those arguing for a common law model regard the text as autonomous, to be treated as inalienable private property. This approach sets the text apart from the commodity in which it is embodied – the book. This in turn justifies the special treatment of copyright works, which are positioned as an exception to the ordinary rules of market exchange. Others argue that once a work is printed it becomes public property, except to the extent that the state chooses to make it private in order to forward its wider purposes, such as the encouragement of learning. From this point of view the attempt to characterise text as solely the autonomous creation of its author is founded in fantasy. This fiction is reified by copyright legislation which grants authors not only a property right in their labour which is unparalleled, but also residual rights of control which would not be tolerated in relation to other forms of labour. Contemporary copyright law has to a large extent endorsed this view of the author's labour as somehow exceptional, and of the book as a special commodity. Maintaining this illusion is even more tricky in the digital age, when the physical book may well have disappeared, leaving us with only the 'vaporous cargo' of ones and zeros. John Perry Barlow, 'Selling Wine without Bottles: The economy of Mind on the Global Net', in Peter Ludlow (ed.), *High Noon on the Electronic Frontier: Conceptual Issues in Cyberspace* (Cambridge, Mass.; London: MIT Press, 1996), 10.

which complement rather than substitute for one another. In these cases the digital pricing structure is likely to be set at levels which do not undermine physical sales, a strategy which recalls the nineteenth-century British publishers' caution regarding the issue of cheap editions.

As compared to traditional publishing, e-publishing offers swifter access to the market, and promises authors an increased share of the available royalties: 50 per cent is a common figure, whereas 15 per cent is considered handsome in the print world. Costs are so low that some e-publishers relinquish the gatekeeper role entirely, and allow authors to publish at their own discretion. Nevertheless, although there have been attempts to cut out the publisher entirely, these have not met with widespread success. In theory, self-publishing – particularly if access to the work is extremely cheap or even free – gives exposure to a wider range of authors, eliminates the biases of publishers and editors, and puts the power of selection in the hands of the public. However, this strategy carries the risk that potential readers will be put off by the volume and 'noise' of poor-quality material. Many sites offer editorial guidance and recommendations, perhaps based on sales information previously collected. Some web publishers have resumed a gatekeeper role, selecting their new publications on the basis of quality. A system which permits unfettered access to the market produces its own effects and biases, some of which may be unexpected or unwelcome, as the nineteenth-century evidence shows. Flawed texts, and poor-quality print and paper were the result in Canada and America, as rival publishers scrambled to supply the lowest end of the market. Publishers were reluctant to risk the outlay on a superior edition, only to find themselves undercut by free-riders. The race to find the lowest common denominator threatened the reading public's choice.

In terms of copyright protection, again there are significant parallels between the traditional and the digital publishing environments. The digital medium has the potential to allow publishers to prevent reproduction far more effectively than is possible in the physical environment. Access to e-publishing sites may be permitted only when a range of security measures have been negotiated. Some e-books are ferociously protected by encryption processes, to prevent even small-scale copying. Yet if customers are repelled by such techniques, the potential benefits of such control may be more than offset by the harm done to the product market. Some e-publishers instead make a feature of the fact that they do not attempt to prevent copying. Their strategy is to stress the advantages of using their site, and to price their digital products considerably below their physical equivalents, thus encouraging the purchase of legitimate copies. The sharing of copies between friends can

then be regarded as a welcome form of targeted advertising, likely to generate revenue from increased sales volume, and so preferable to a total prohibition on reproduction. Similar issues were raised in the nineteenth-century debate over foreign reprints: was it better to seek to exclude rival copies entirely, or simply to drive them out of the market by offering a more attractive product?[41]

Other areas of copyright law have faced analogous challenges, and have had to address comparable questions. MP3 technology, somewhat like e-publishing, has been characterised as a splendid new weapon to redress the balance between the public and the iron-fisted recording industry, by transferring the power of digital music distribution to consumers and (to some extent) to artists. Napster and similar peer-to-peer music-sharing schemes seemed to be a new phenomenon, offering apparently free music for users. Not only users embraced these practices. A number of creators regarded wide dissemination of their works as more desirable than control over individual copying. They reasoned that although some users might be driven to purchase works if all copying is prohibited, it is clear that others will not. Whereas if copying is freely permitted, some of those who would initially have refused to buy may choose to do so subsequently, perhaps to obtain the work in a more convenient or desirable format.[42] The argument is thus that by allowing at least some free access to their copyright works, creators will gain a larger market overall, and will also enjoy other less tangible benefits, such as publicity and popularity. A version of this reasoning was used against Dickens, when he complained that the absence of international copyright had led to the unchecked distribution

[41] For example, the German publisher Tauchnitz founded a successful business on his 'authorised editions' of British authors, even though he had no copyright in Germany at first, so had to compete with rival reprints. Price was an important factor. See above, p. 259. Compare the British publishers' efforts to supplant cheap but illegal American reprints of British works in the colonial markets. Here they had the advantage of Imperial copyright, but their title selection and pricing policy was so unattractive to readers that extensive smuggling continued. In 1847 the ban on imports was replaced by a system of protective duties. See above, pp. 80–3.

[42] Digital technology permits the copyright holder new flexibility in the range of formats offered. As Goldstein observes, 'The significance of Napster and its progeny is not only that tens of millions of computer users copied untold numbers of songs for free, but that tens of millions of music lovers revealed their preference for a new model for distributing music that enabled them to acquire only the songs they wanted – and not the ten or twelve tag-alongs always included on a CD – from a far broader array of works, old and new then will ever be available at a retail outlet, all with the convenience of Internet downloading.' Paul Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Juke Box* (Stanford, Calif.: Stanford Law and Politics, 2003), pp. 187–8. The big media companies who hold copyrights were surprisingly slow to turn their 'problem' into an opportunity, by licensing legal download sites.

of his works throughout America without his consent, and without recompense.[43] One recurring contemporary retort was that Dickens owed his unparalleled popularity to precisely this lack of legal restraint, and that he should in fact be grateful for it.

Such an analysis offers a wider redefinition of 'recompense', to include indirect economic benefits. It does not, however, address or even acknowledge the problematic absence of consent. A model which offers only economic rewards which are hard to quantify will seem a poor substitute in the eyes of creators accustomed to choice and control in the exploitation of their works. Even so, some creators may be content to cede control over copying in return for other benefits which they value: such as merchandising sales, or publicity. The existing legal framework permits such choices, and certainly should do so: although protection is offered, there is no compulsion to use it to the full in every case. In comparison, a totally deregulated environment is likely to reduce choice. The difficulty with weakening legal restraints on copying, on the basis that an economic reward for the creator will ultimately result, is that it allows the market to value the work. Nineteenth-century experience shows that this approach is not equally suitable for all types of copyright works, and may also have unintended consequences for the wider cultural environment.[44]

[43] As Dickens noted sarcastically in a letter to Forster: 'The Americans read him; the free, enlightened, independent Americans; and what more *would* he have? Here's reward enough for any man.' 3 May 1842, *Dickens' Letters*, vol. III, p. 232.

[44] On this subject see, famously, Stephen Breyer, 'The Uneasy Case for Copyright: A Study in Copyright in Books, Photocopies, and Computer Programs' (1970) 84 *Harvard Law Review* 281–351. Professor Breyer used examples from the nineteenth-century book publishing market in America to support his argument that the abolition of copyright protection would not necessarily seriously injure book production – at least in certain sectors of the book market. He noted that nineteenth-century American publishers would pay for advance sheets, so valued a lead time which allowed them to be first in the market. Such publishers retaliated against subsequent publishers with undercutting 'fighting editions'. Breyer concluded that 'the case for copyright in books considered as a whole is weak' and that abolishing protection would not produce a very large or very harmful decline in most kinds of book production, whilst benefiting some readers by producing lower prices, and increasing circulation (at 321). Breyer suggested that the case for copyright in books 'rests not upon proven need, but rather upon uncertainty as to what would happen if protection were removed' (at 322). He argued that this placed a heavy burden on those seeking to extend copyright protection. My work offers more detailed material against which such propositions may be tested. Although some nineteenth-century Canadian publishers sought a copyright-free environment, others feared a downward spiral towards the most inferior editions possible (see above, p. 107). On the evidence of the American experience, their fears were justified, at least with respect to works which could be sold in large quantities. On the whole, only the established Eastern publishers paid royalties to foreign authors, and only to a handful of these. The explosion of cheap printing in the mid-West from the 1870s brought such unwelcome competition that the Eastern publishers began to

Such examples show that not everything in the copyright environment has changed beyond recognition since the nineteenth century. Market behaviour and market forces are sufficiently constant that historical parallels can offer valuable precedents for present consideration. Society's relationship to copyright works has not remained unvarying, though. Changes in perception are evident: for example, with regard to the needs of the user of copyright works. There have been significant technological developments, which offer exceptional access to copyright works, and can facilitate effortless copying of them. The impact of these technologies is self-evidently not confined to these purposes, but is felt widely throughout society. Regulations affecting the use of such technology should be considered not just from the point of view of copyright law, but in the context of wider information policy, where due weight can be given to concerns regarding freedom of speech, privacy, and so on. The economic significance of the copyright industries, which may represent as much as 5 per cent of the GDP of developed nations, gives these deliberations added importance. In addition, as protective boundaries are drawn and defended by the players in these valuable markets, questions of competition law may follow.[45] Since copyright is now sited in such a complex social and legal environment, it is reasonable to question whether the existing legislative framework can deliver what is needed from it.

Recent legislative initiatives have focused on amending the familiar copyright system, rather than attempting to define and establish a completely new model. Existing concepts (and interests) are now so far entrenched that radical options probably do not offer an achievable

advocate international copyright law (see above pp. 209–10). See also Barry W. Tyerman, 'The Economic Rationale for Copyright Protection for Published Books: A Reply to Professor Breyer' (1971) 18 *UCLA Law Review* 1100. Digital copying has reduced the initial publisher's 'lead time' to a matter of moments. Breyer's reply to Tyerman looked to a hypothetical future where book publishing would have been universally replaced with digital storage and retrieval: copyright would become irrelevant under such circumstances. 'As long as economies of scale are such that only one information system would serve an area, the need to contract with the author for the storage of his work would prove to be a sufficient safeguard for his securing adequate compensation.' Perspicaciously, he also considers the potential problems if 'computerized information systems exist side by side with a market for ordinary books'. Stephen Breyer, 'Copyright: A Rejoinder' (1972) 20 *UCLA Law Review* 82. For Justice Breyer's recent thoughts on copyright see *Eric Eldred, et al.* v. *John D. Ashcroft, Attorney General* 123 S Ct 769 (2003).

[45] Complaints that grants of monopolistic rights are being abused may be found throughout the history of the book trade. In the late 1570s and early 1580s some printers became so frustrated with the perceived misuse of privileges that they began to forge copies of privileged books. Parallels with the modern situation may be readily drawn. See Joseph Loewenstein, *The Author's Due* (Chicago; London: University of Chicago Press, 2002), pp. 31–4.

alternative. More range and capacity could in theory be delivered by way of modifications to the existing system, but only if there is the determination to do the necessary work. Doubt on this matter is reasonable. In the past it has proved extremely difficult to deliver substantial and objectively validated reform using this approach. One of the difficulties is that current legislative models are perceived to respond only to the largest and loudest interest groups, thereby failing to recognise both the proper claims of emerging groups, and wider public needs. Litman has noted how Congress 'got into the habit of revising copyright law by encouraging representatives of the industries affected by copyright to hash out among themselves what changes needed to be made and then present Congress with the text of appropriate legislation'.[46] This 'habit' developed because Congress was generally indifferent to the issue, and had to be pushed into action by the interest groups. Without agreement from the affected parties, passing copyright legislation was desperately hard work, and Congress had little incentive to struggle. As Senator Morrill told Putnam in 1873, 'When you gentlemen are agreed among yourselves, bring in your bill and this committee will see that the measure is properly reported for the action of the two Houses.'[47] Legislation generated by such a system is likely to reflect the needs of the interest groups represented, typically by strengthening their privileges. If care is not taken to ensure that the wider interests of society are also considered, there are dangers of imbalance and incoherence.

The role of the legislature, in overseeing and moderating the various demands, in considering the widest possible picture, is thus crucial. Again the nineteenth-century experience is illuminating. In America, Congressional indifference to the larger significance of international copyright protection allowed particular interest groups to block action for decades. Even when the authors' and publishers' associations were agreed on the need for an international copyright law, a manufacturing clause had to be conceded in order to gain the (indispensable) cooperation of the typographical unions. Some of the leading campaigners expressed frustration that tariff and trade issues became so enmeshed with copyright law.[48] However, it was simply no longer possible to

[46] Jessica Litman, *Digital Copyright* (Amherst, N.Y.: Prometheus Books, 2001), p. 23.
[47] See above, pp. 204–5.
[48] Writing about the 1908 Copyright Bills (from which emerged the US Copyright Act 1909) George Haven Putnam observed: 'It is the contention of the Copyright Leagues that such protection as the legislators may think proper to concede to manufacturing and mechanical interests ought to be provided for in a tariff Act and not be permitted to confuse a copyright law.' *Author*, April 1908. Putnam resented the influence of these interests: 'In the committee rooms no less than twenty-three organizations were represented whose interests were concerned with one division or another of the

regard copyright as a matter solely for the producers of copyright works, and their publishers. The campaigners themselves had argued for change on the basis that copyright policy affected the entire American people, so it was somewhat inconsistent for them to seek to exclude the 'trade' voice entirely. Copyright's area of influence could not be so readily circumscribed. Similar patterns can been seen in Britain, where a range of individuals, interest groups, Select Committees and a Royal Commission attempted to render copyright coherent and rational. As a matter of practical legislative politics it proved extremely difficult to put their recommendations into effect. Interest groups of all sorts continually challenged and disrupted their plans. As in America, government support was elusive. Copyright legislation caused great controversy and had far-reaching implications. Governments quailed at the prospect of thoroughgoing reorganisation or reconstruction, preferring to confine themselves to limited problems which could be addressed in the context of the existing structure.

Nevertheless, the high-level questions need to be addressed. One essential matter is copyright's coverage. Does copyright law protect all the works which this society currently values? New technologies will continue to spawn new products, and these should be appropriately safeguarded. If the incentive to produce these works is not adequately maintained by copyright law, these types of creativity may be hampered. Alternatively, other available means of protection will be used, perhaps contract law, or the law of confidence.[49] Neither of these routes offers the opportunity to consider the merits of protection, a task which copyright law should be willing and equipped to face squarely. Another more nebulous question is whether current practices of authorship are

manufacturing of copyrighted articles. The chairmen of the committees gave to the representatives of these interests a much fuller measure of time and consideration than they were prepared to extend to the authors, artists, or composers, or to the publishers who acted as the business representatives of these producers of copyrighted property': George Haven Putnam, *Memories of a Publisher* (New York; London: Putnam, 1915), p. 385.

[49] Other non-legal mechanisms may perhaps be used. Again there are nineteenth-century illustrations. There were no performing rights in dramatic works before 1833, so authors on the whole did not publish their plays, instead sequestering their manuscripts, and rehearsing under conditions of secrecy. This informal means of enforcing order worked reasonably effectively in London, but less so in the provinces. Another example much-debated in the nineteenth century is the protection of titles. These remain unprotected by copyright, but the film industry manages to secure rights in them, using trade practice reinforced by contract. The Motion Picture Association of America maintains a register of film titles dating from 1925. Although it does not have force of law, industry practice accords its considerable status. Barriers to entry into the film industry are of course far higher than those affecting the literary world.

adequately acknowledged.[50] Much written material is now produced in circumstances which render the authorship collective, collaborative and often corporate. Current technologies facilitate and heighten this effect. Yet Jaszi makes the vivid complaint that the American law tends to treat 'joint authorship' 'as a deviant form of individual ''authorship'''. English law is vulnerable to the same criticism.[51] The legal anxiety is explicable. Joint authorship has the potential to complicate property matters to the point where it becomes impractical to exploit the work. Instead, agreement may be reached as to 'division' of (the proceeds of) authorship, and such agreements may be enforced by contract. Perhaps modern copyright law should look to accommodate the notion of collaborative authorship. The issue deserves consideration, at least.

Once the rules as to the subsistence of copyright are established, it is the definition of infringement which will determine whether and under which circumstances users have access to them. Strong divergences of opinion are likely. Users of a copyright work will tend to have a dissimilar perspective to that of its creator, or present owner. Those who work in copyright-related industries may have a different view again. Historical examples abound. Yet the pattern of responses is far more

[50] Again there are historical parallels. Writing in 1936, the Marxist literary critic Walter Benjamin observed: 'For centuries a small number of writers were confronted by many thousands of readers. This changed towards the end of the last century with the increasing extension of the press, which kept placing new political, religious, scientific, professional and local organs before the readers. An increasing number of readers became writers – at first, occasional ones. It began with the daily press opening to its readers space for ''letters to the editor''. And today there is hardly a gainfully employed European who could not, in principle, find an opportunity to publish somewhere or other comments on his work, grievances, documentary reports, or that sort of thing. Thus, the distinction between author and public is about to lose its basic character. The difference becomes merely functional; it may vary from case to case. At any moment the reader is ready to turn into a writer.' Walter Benjamin, 'The Work of Art in the Age of Mechanical Reproduction' in Hannah Arendt (ed.) and Harry Zohn (transl.), *Illuminations*, (London, 1992), p. 225. The move to digital reproduction allows users now to adapt materials with great ease, and there is resistance to labelling them 'real' creators. A vast range of compositional possibilities lies within the grasp of anyone interested, whether or not they possess the traditional skills of a composer. Sampling, for example, undermines the traditional mystique attached to the composer and to composition. See also, Celia Lury, *Cultural Rights: Technology, Legality and Personality* (London; New York: Routledge, 1993).

[51] Peter Jaszi, 'On the Author Effect: Contemporary Copyright and Collective Creativity', in Martha Woodmansee and Peter Jaszi (eds.), *The Construction of Authorship* (Durham; London: Duke University Press, 1994), p. 51. Arguably the refusal to accommodate collaborative authorship operates as a form of dispossession, by requiring participants to deny their contributions in order for protection to function effectively. In Britain, courts are prepared to recognise joint authorship if the facts of the case merit it: *Cala Homes (South) Ltd* v. *Alfred McAlpine Homes East Ltd (No.1)* (1995) FSR 818; *Ray* v. *Classic FM PLC* [1998] FSR 622. But compare *Hadley* v. *Kemp* [1999] 4 EMLR 589 with *Beckingham* v. *Hodgens* [2003] EWCA Civ 143.

fluid and complex than one generated by these perspectives alone. There are many parties who perceive themselves to be affected by copyright infringement, and entitled to consideration. Even within any general categorisation there may be many views, sometimes sharply in conflict. Some of these groupings may be highly regimented, whereas others are more loosely defined. Clusters of opinion frequently interact and overlap, since most of those interested can choose to regard themselves as members of a number of sets. Such volatility adds to the complexity, but has a positive side: participants may as a result be willing to acknowledge and take account of other perspectives, and to moderate their own demands in consequence. The 1888 compromise between American authors, publishers and typographical unions is a case in point.[52]

The ultimate resolution of these conflicts should be achieved as part of copyright's strategic task. Before the Berne Convention, national legal systems were free to adopt dissimilar approaches in response, and these could be deeply entrenched: on the protection of abridgments, translations and dramatisations of works, for example. Some accommodation might be achieved by bilateral negotiations, but only multi-lateral harmonisation could remove inconsistencies in the general pattern of protection. Many differences were resolved during the extensive negotiations which preceded the Berne agreement. Crucial though it was, however, the standardisation of the legal environment has certain negative consequences. Firstly, having once achieved such a level of agreement, there is reluctance to jeopardise it: whether by reopening settled issues, or by challenging time-honoured approaches. There is great (if often unspoken) pressure to assess new challenges entirely within the framework of the established model. Also, the very success of the harmonization efforts has inevitably reduced the scope for differences of approach: although these were potentially destructive of international protection, the disagreements did provoke discussion of fundamental questions. Ironically, therefore, the relatively homogenous environment which has been accomplished may tend to obscure the structural and definitional problems which still remain.

One such persistent difficulty is the extent to which the public should be granted rights to use copyright works belonging to others. The tension is not new, but the changes in the technological environment give its presentation novelty. Digital technology allows unprecedented levels of copying. Yet it is far easier to detect digital copying than physical copying. Some websites require payment before access to a digital

[52] See above, pp. 232–5.

copyright object is permitted. Such systems can also promote the integrity of the text, and guarantee rights of attribution. The US Digital Millennium Copyright Act encourages the use of such technologies, as do the WIPO internet treaties, and the European Union's Information Society Directive. In some situations, and used as an option, such approaches may be tremendously valuable. But there is a danger that contract, and market mechanisms, will replace the role hitherto played by copyright law. Given the considerable bargaining power of the larger copyright holders, there is a risk that a limited range of standard contractual templates will regulate relationships between the creators, owners and users of copyright works. Appealing though a 'free' market seems in theory, the nineteenth-century experience should again remind us that the 'custom of trade' may produce unexpected and undesired side effects. Put another way, the promotion of rights management systems may improve enforcement of the existing system, but will not *per se* contribute to the coherence or intelligibility of copyright law. Market power will work to the advantage of those that have it, and the result will be only one form of balance between the competing interests. Unless, that is, there is more clarity as to the nature and extent of the rights which are being managed.

Even the TRIPS agreement, which came too early to offer any specific response to the digital challenges, is regarded by some as a form of cultural imperialism.[53] The effects of harmonisation measures which respond only to the loudest and strongest are likely to be felt in society as a lack of diversity. This effect is not confined to situations involving the demands of copyright owners. During the nineteenth century the freedom to copy British copyright works was claimed repeatedly on behalf of American and Canadian users. Yet once the potentially disadvantageous effects on local creators and users began to be perceived, the claims were modified. Unconstrained copying offered tempting immediate benefits for publishers and readers, but made it more likely that publishers would prefer British works over the local product. Commentators in both America and Canada noted the disadvantages under which local authors laboured, and expressed concern that the established messages of British culture might inhibit the emergence and dissemination of national alternatives.

[53] The criticisms are not confined to the subject matter of copyright works. 'Curare, batik, myths, and the dance ''lambada'' flow out of developing countries, unprotected by intellectual property rights, while Prozac, Levis, Grisham, and the Movie *Lambada!* flow in – protected by a suite of intellectual property laws which in turn are backed by the threat of trade sanctions.' Boyle, *Shamans*, p. 125, and see also the Bellagio declaration, pp. 192–200.

This experience remains acutely relevant today, when copyright laws are commonly disregarded by many users. Some are simply ignorant of the law and its purposes. Many others do not accept that their particular act of copying is wrong, or that their individual actions cause any real injury to the copyright holder. Some will argue that their copying is a public good:

> Pirates *share* warez to learn, trade information, and have fun! ... A pirate is somebody who believes that information belongs to the people. Just as a book can be zeroxed or placed in a library to be shared, pirates provide a type of library service ... By providing a user-friendly network of information sharers, we increase computer literacy which is in everybody's mutual interests.[54]

Attempts to restrict copying may be viewed with resentment, particularly if the copyright holders are perceived to be extracting a return from the works which is regarded as excessive, or if the control exercised is felt to be disproportionate: few users shed tears for the major players in the recording industries, or for the leading competitors in the software business.[55]

The challenge is to devise a functioning and contemporary rationale for copyright law, with which all parties can connect. Consumers have welcomed digital technology, and have rapidly become accustomed to the facilities and opportunities which it presents. In relation to a range of

[54] (1989) 1 *Pirate*, reprinted in Peter Ludlow (ed.), *High Noon on the Electronic Frontier: Conceptual Issues in Cyberspace* (Cambridge, Mass.; London: MIT Press, 1996), pp. 109–11.

[55] Vast numbers of technical breaches of copyright law remain undetected or are simply ignored by copyright holders because enforcement costs cannot be justified. Ordinary members of the public therefore develop a disregard for copyright law, and are confused and annoyed when the more high-profile copyright-holders insist on their strict legal rights. The Recording Industry Association of America (RIAA) has achieved notoriety for its pursuit of American music file-sharers. The International Federation of the Phonographic Industry (IFPI) has taken legal action against file-sharers in Canada and Europe also. Attempts at copyright enforcement can reach ludicrous and oppressive levels. In *Mattel, Inc.* v. *Walking Mountain Productions* 353 F 3d 792 (CA 9th Cir. 2003), an artist was sued for including copyright Barbie dolls in his parodic photographs. Purchases by Mattel investigators comprised at least half of the photographer's total sales, and his income from the project was merely $3,659. His defence that this was fair use of Mattel's copyright work succeeded. The District Court concluded that Mattel's litigation contravened the intent of the Copyright Act and awarded the defendant his legal fee of $1.8 million. Both US and UK copyright law provide exceptions for fair use/fair dealing with copyright works. In practice, however, the holders of IP rights may have (or may attempt to exercise) considerable control over the use of their works. Increasingly, this power is being used in efforts to control uses (referential, cultural, ironic, parodic) which might be regarded as innocuous or even beneficial to society. These tensions in the practical application of the law further undermine the public's already fragile appreciation of the positive aspects of copyright law.

now-common transactions, notably the copying of music, text and software from the internet for personal use, the current legal approach appears to many users to be at best unpersuasive, often irrelevant, and sometimes utterly indefensible. Copyright creators and owners have valid concerns which must be addressed. It seems unlikely that this rupture between users and copyright law can be healed by means of still more restrictive laws, particularly if they require draconian enforcement. Nevertheless, without some legal disincentive to accept what is easily accessible, the 'free' and pervasive dominant culture will prevail. An unregulated, market-driven society risks lack of diversity in the short term, and potentially could jeopardise its long-term cultural future. An umbrella of regulatory protection seems essential, not merely to protect copyright owners, but to safeguard the wider interests of society.

The legislative task is a considerable one, but it should not be shirked. Historical evidence highlights the risks of doing so. There are many interests to be considered, and many 'rights' to be acknowledged. Negotiation between interest groups is likely to undervalue not only the individual user of copyright works, but also society at large. In a global society our legislative viewpoint should be commensurately comprehensive. A system of copyright protection requires people to pay for certain types of creativity. Partly this acknowledges the legitimate rights of the creators of such works, but the requirement should also be justified by reference to the general public good, broadly regarded. Such needs are hard to define, and impossible to quantify, but this is inescapable. Only in a legislative forum can sufficient perspective be achieved even to attempt such an undertaking. Copyright law's great strength is that it implicitly recognises and protects the creative spirit. It should be recognised that this spirit will defeat any attempt to define it fully and for all time. Copyright law should aim to offer a fair and flexible framework to safeguard copyright works, one which also takes account of the long-term horizon. Protection and access are both essential elements of this structure, and fundamental realignments (say of the relationship between owners and users) should not be undertaken lightly. Constant equilibrium is unlikely, and the law will need to adapt thoughtfully as modes of creation and methods of exploitation develop. Changes to the framework, even if structural, should not necessarily be regarded as failures of the original design.

The prospect of revising copyright law to take practical account of these considerations is admittedly a daunting one. The alternative is to allow the market to determine which cultural productions are to be judged of importance at any given moment. During the nineteenth century, recognition of the dangers of this approach led to the

development of a substantial body of international copyright law. These models remain pertinent. If copyright law is perceived to be remote from the environment which it seeks to nurture, that environment will instead use its own mechanisms for valuing the creative. If such mechanisms are allowed to prevail, whether within the framework of copyright law or outside it, society as a whole is vulnerable if the body of individual judgments proves to have unpredicted or undesirable consequences.[56] Given the importance of copyright works – in all contexts – this risk must be deemed intolerable.

[56] Lessig has made a similar point regarding constitutional values in cyberspace: 'If we do nothing, the code of cyberspace will change. The invisible hand will change it in a predictable way. To do nothing is to embrace at least that.' Lawrence Lessig, *Code and Other Laws of Cyberspace* (New York: Basic Books, 1999) p. 109.

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