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COPYRIGHT LAW

VOLUME II: APPLICATION TO CREATIVE INDUSTRIES IN THE 20TH CENTURY

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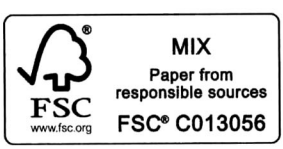

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Internationalization, Technology and the March of Property

Introduction

The Surge of Capitalism

The second half of the nineteenth century released in Britain and the United States an extraordinary surge of capitalist energy, as the barons of enterprise, supported by a willing middle class, sought profit in every form of production. Railways criss-crossed both countries, conquering distance and integrating economies. Steel ships powered by steam, and later internal combustion, replaced canvas-rigged sailing vessels and carried exports to expanding markets. Chemical, electrical, petroleum and steel industries, giants born from scientific discovery, made possible miraculous infrastructure developments that changed the landscape of the industrial world. Later came the invention of the telephone and production of the motor car. Applications for patents soared as productive enterprise increased the thirst for innovation.

In Britain, the wonders of domestic growth were often identified with the acquisition of colonies, and many saw in the nation's leadership of industrial production the justification for possessing the world's greatest empire, brimming with markets and sources of supply. Americans mostly considered empire a kind of succubus, draining a nation's moral and material energies. But differences over the merits of colonial expansion were easily forgotten in capital's headlong rush to conquer the earth.[1]

In a climate of prodigious economic energy, the trend towards more invention and more production could not fail to affect the narrow world of copyright, until now defined by the accommodations of authors and publishers. Writers and composers learnt to feel aggrieved. Why should they be excluded from the fruits of material progress? As markets for books expanded worldwide, should they not reap an increasing reward? The invention, towards the end of the nineteenth century, of machines for recording sounds, and playing recordings, fuelled their sense of grievance. If an invention allowed manufacturers to profit from the use of their works, then were they not entitled to share in the profits?

By the beginning of the twentieth century, advocates of authors' rights loudly vented their bitterness. Machines for playing sound recordings, usually called phonographs,[2]

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[1] Rudyard Kipling's poem 'The White Man's Burden', published in 1899 (see Chapter 5, this volume), referred to US imperialism in the Philippines. The United States annexed the Philippines from Spain in 1898, after the Spanish-American War, and waged war on Filipino independence forces under Emilio Aguinaldo until he declared allegiance in 1901. Americans tended to be contemptuous of British imperialism but the majority viewed US annexation of Spanish territory in a different light. Many, however, such as Mark Twain, who initially supported war against the Spanish, opposed US adventurism. Twain helped found the American Anti-Imperialist League in 1898.

[2] Thomas Edison made the first phonographic recording in 1877 and patented his invention in 1878. Edison's sound recordings were made on cylinders. Emile Berliner, a German who became a US

were transforming society in the United States, Great Britain and Europe. Millions bought phonographs and listened to records at home or at public entertainment venues. Popular music, and other types of recorded entertainment, changed attitudes and influenced social mores. The manufacturers of phonographs and records made fortunes from popular demand for music but they paid nothing to the lyricists or composers who created the works they recorded.

Contending in a world devoted to material gain, the proponents of authors' rights determined that principles of copyright must extend beyond the production of books, drawings and sheet music to embrace any use of copyright works that created profit. The phonographic industry used copyright material to make profit and authors asserted a right to control the use of material. In the acquisitive spirit of the age, they made clear that they intended to control the use of material by any new industry. Control would be exerted not to preserve artistic integrity but to secure a share of profits.

The Age of Property

One historian has divided the years between 1850 and 1914 into consecutive periods of unequal length, calling the first the age of capital and its successor the age of empire (see Hobsbawm, 1989, 1996). Others see a half century or more in which the march of science and growth of material welfare are accompanied by a deadly rivalry of European nations arguing over possessions and resources in other continents. Rivalry ends in the dark night of the First World War and so too belief in the inevitable victory of rationalism and the curative value of twin godheads, profit and progress.

The period 1850–1914 may also be called, and more precisely, the age of property. Nations concentrated their energy on production, trade and acquisition, activities that depended on legal recognition of definable subject matter – in short, property. They made property of foreign territory as readily as, a few generations earlier, they had made property of West African captives transported across the Atlantic to work as slaves. They made property of the products of their new territories and they converted those products, and other materials, into still more items of property to be delivered to the domestic market or exported.

Acceptance of legal precepts of private property, and the individual's moral entitlement to lawfully acquire property without limitation, united the legislatures and voting populations of both Great Britain and the United States. Voters might disagree on religion, imperialism, working conditions or methods of production, but most recognized the right to private property as the guarantor of present and future progress.

Political instincts were shaped, especially in the United States, by three centuries of Calvinist theology. The Calvinism spread to America by Puritan emigrants from England

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citizen, invented the gramophone disc record in 1888 and henceforward gramophones were classified as machines that played disc records. Berliner founded the US Gramophone Company in 1892 and sister companies were incorporated in Great Britain and Germany in 1897 and 1898. Disc recordings proved far more popular with the public than cylindrical records and Edison ceased manufacture of phonograph cylinders in 1929. The terms 'phonograph' and 'gramophone' were, however, often used interchangeably. In the United States, record players were more often referred to as phonographs. In copyright debates in the United Kingdom in the years leading up to the passing of the Copyright Act 1911, record players were commonly called phonographs. In the UK after the First World War, the term 'gramophone' replaced 'phonograph'.

taught men to disavow political absolutism and to harness earthly resources for useful purposes. For generations, gentlemen politicians felt the obligation to confirm, by private effort, their election for salvation, and they shaped the polities of two nations. The idea of an individual's freedom to determine truth encouraged belief in political equality and the urgent necessity to demonstrate personal worthiness encouraged belief in the rightness of industry.

Societies on both sides of the Atlantic came to revere material gain, even if prosperity seemed mostly to benefit a small minority of society. Ownership identified a citizen as a useful creature and long before the nineteenth century philosophers of liberty like John Locke had supplied the justification for ownership on any scale. If a person laboured, so the person deserved to own the fruits of labour, and if labour involved the expropriation (or alienation) of land, so that person deserved to possess, or own, the land.

Moral certainty about the necessary connection between property and progress inspired a seemingly irresistible drive to privatization. Individuals and nations sought to annex more land, create more possessions and produce more goods. In theory, property rights could apply to anything that could be defined. It is scarcely surprising that when new technologies promised new ways of disseminating copyright material, the authors' rights movement insisted on the author's right to annex as property modes of dissemination unrelated to the publication of books or sheet music.

However, the age of property is so-called not only because millions chose to follow a gospel of private appropriation and the pursuit of wealth. Others, thinkers and revolutionaries, resisted, with their own materialist theories, the dominant materialism of the age. They opposed the appropriation credo and created contrary intellectual movements that, in varying degrees, influenced later opponents of extensive intellectual property rights.

Opposition to Property

From the late eighteenth century, the Industrial Revolution attracted the criticism of social theorists who declared that the growth of industry resulted from exploitation. Critics refused to support an economic system that produced wealth and human misery in gross measure.[3] Beginning with the French social thinker Henri de Saint-Simon (d. 1825), a line of utopians and revolutionaries from Robert Owen in Britain (d. 1858) to the Frenchmen Charles Fourier (d. 1837) and Louis Blanc (d. 1882) identified themselves as *socialists*, or those who believed in either collective ownership of the means of production or equitable distribution of ownership.

[3] The idea that material progress relied on social exploitation came to underpin critiques of colonialism, which saw the partial benefits of imperialism (the spread of education, the rule of law and so on) as the positive by-products of an enterprise motivated by the desire of colonial powers – or their citizens – to appropriate for private profit. In recent decades, proponents of the special rights of Indigenous peoples refined such critiques, arguing that appropriation of Indigenous lands by 'invader' powers resulted in a new form of society: one that substituted property relations for what Karl Marx (in the *Communist Manifesto*) called 'idyllic relations', replacing societies allegedly based on co-existence with nature with ones that demanded appropriation of resources, production and supply predicated on consumption. Exploitation is seen as the motif of such society and property the expression of this motif. Displacement – and destruction – of Indigenous peoples unable, or unwilling, to conform to the demands of invader societies is seen as the consequence of heedless application of the ideology of material progress.

Anarchists as diverse as Pierre-Joseph Proudhon (d. 1865) and Mikhail Bakunin (d. 1876) went further than the socialists and rejected altogether enforceable authority. Proudhon regarded property as an obstacle to free and beneficial social organization. Bakunin argued that capital and all its manifestations or products were intrinsic to political power and must be destroyed. However, during the later nineteenth century, democratic politics nullified the revolutionary potential of the different species of socialist or anarchist doctrine. Then, as now, prosperity and peace seemed to cauterize disaffection and vanquish impulses to political extremism.

One political theory – communism – asserted the consequences of property accumulation with such menacing precognition that its principles and prophecies could be neither accommodated nor disregarded by liberal society. Its founding genius, Karl Marx, published the *Communist Manifesto* and *Das Kapital* in 1848 and 1867.[4] He argued that the bourgeoisie's ownership of the means of production enabled it to generate and control capital, and reap the benefits of its use (see Chapter 1, this volume).

Ownership accrued to a minority and to survive the vast mass of population, the proletarians, were forced to sell their labour – the source of ownership according to John Locke – to the capitalist. The capitalist, the owner, took advantage of unequal bargaining power and exploited them. Private property created prosperity for the bourgeoisie and excluded the proletariat from material benefit. Marx informed his readers that the consequence of exclusion is revolution.

Marx and Copyright

The Marxian critique of property relations is relevant to analysis of copyright because it contradicts the assumption of *entitlement* that buttresses conventional arguments in favour of copyright. If, as Marx suggested, the creation of private property is an act of exploitation, then, from the perspective of social equality, entitlement to copyright protection does not exist. The contrary argument asserts that production increases social welfare and that copyrights stimulate production because legal protection against imitators creates incentive to invest.

Policy-makers and politicians favoured the second position with little hesitation, but in the modern history of copyright law-making, the undertow of Marxist thought is discernible in theoretical resistance to the expansion of copyrights. Modern arguments about copyright pay little attention to the question of the law's necessity and focus instead on its scope. Conventional arguments for copyright limitations are not difficult to reconcile with Marxian reasoning.

If ownership is a device for controlling the means of production, then more copyright restrictions dilute control. It follows that restrictions on the length of copyright or the extent to which copyright holders can demand payment for use have the effect of increasing public access to material. Framed as a contest between private control and public access, the battle over copyright scope returns attention to the question of entitlement.

To what is the owner entitled, and on what basis? These are the great unanswered questions of copyright law. In the nineteenth century, dogmatism about the necessity for more copyright

[4] *Das Kapital*, vol. 1 by Marx published in 1867; vols 2 and 3 by Friedrich Engels published in 1885 and 1894.

laws did not dispel doubts about their true value.[5] In the twentieth century, the great period of copyright expansion, legislators considered the question of justification to be settled, though copyright proponents did not produce evidence to show that laws created productive incentive.[6] If nothing else, however, the Marxist critique of property informed some of the arguments of the minority who, in the twentieth century, argued against the progressive expansion of copyright law.

Authors' Rights

The champions of authors' rights believed in the social consequences of ownership as sincerely as Marxist abolitionists. They insisted on the moral character of literary property, even as they spoke of exclusive rights that would grant authors monopoly control over production. And they were rewarded for their efforts. In the 1880s, various European nations came together to consider proposals for authors' rights and in 1886 signed the Berne Convention for the Protection of Literary and Artistic Works (see Chapter 15, this volume). The provisions of the Convention still underpin international copyright law and its acceptance fulfilled the hopes of many European writers, above all the great French novelist Victor Hugo.

Hugo is the spiritual author of the Convention. He founded the Society of French Writers with Honoré de Balzac in 1837 and in 1878 helped to establish the International Literary and Artistic Association.[7] As honorary president, he lent his prestige to the Association's efforts to establish an international convention to protect the rights of authors and artists. His reputation helped to attract the participation of governments and the collaboration of officials and artists produced the Berne Convention. Though he insisted that authors' rights were subordinate to public needs, and made sober legislative proposals for the protection of writers, he also insisted on their primary contribution to the life of nations (see Chapter 3, this volume). Authors are the progenitors of culture. Hugo's supporters declared that unless authors were rewarded, preferably in the coin of monopoly, culture would die.

Governments flocked to accept a self-serving credo expressed in the language of moral necessity. By the beginning of the twentieth century, the French concept of droit d'auteur, encompassing an author's moral right to extensive legal protections against piracy or any unauthorized use of material, held sway over the hearts and minds of interested legislators in Europe and the United Kingdom.

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[5] Ethical objections to private property also entered public discourse about property rights in the nineteenth century. The utopian socialists, and anarchists such as Pierre Proudhon, attacked on moral grounds the exclusionary character of private property. In 1891, the Catholic Church published the papal encyclical *Rerum Novarum* (on the rights and duties of capital and labour), which defended private property ('when a man engages in remunerative labour, the impelling reason and motive of his work is to obtain property, and thereafter to hold it as his very own') but condemned exploitation (see Chapter 4, this volume).

[6] See Atkinson (2007), which examined copyright law-making in Australia and the United Kingdom to determine whether laws were intended to, or did, encourage production. Laws were passed to benefit and accommodate productive interests, not to create incentive to produce. All copyright industries arising in the twentieth century flourished without copyright protection. They secured protection for strategic reasons and to optimize profits.

[7] Association Litteraire et Artistique Internationale (ALAI).

The Convention established standards of copyright protection that, once implemented by member countries, created uniform norms across the conforming nations. An author domiciled in one conforming nation could expect another conforming jurisdiction to accord identical legal treatment to the author's work. The normative function of the Berne Convention and acceptance of the principle of national treatment[8] have been its principal strengths, enabling Berne delegates to generate, via standards, international copyright law. New norms, or amendments to the original Convention text, were agreed periodically at amendment conferences held on an as-needs basis. Ratification required a member nation to give effect in legislation to the minimum standard specified in the amended Convention text.

In 1886, the Convention delegates agreed, in addition to the principle of national treatment, that copyright subsisted for 50 years after the death of the author and member nations should not make legal recognition of copyright dependent on the author carrying out formal actions such as registration. Consistent with the concept of droit d'auteur, copyright subsisted upon creation of a work. From a theoretical perspective, the Convention's most important contribution perhaps lay not in the creation of minimum standards, as influential as these became, but in its categorical definition of copyright subject matter.

The Convention text created the category of copyright 'works' and vested in the author control over the uses of works. In this way, the text demanded for authors something not previously contemplated in common law countries: exclusive control over every mode of copying, adapting, translating or disseminating any original output in the 'literary, scientific and artistic domain'.

In its own language, the Convention conferred the exclusive right to control output 'whatever may be the mode or form of its expression'. Literary property embraced much more than 'books', the old, circumscribed category of copyright subject matter, and, similarly, the categories of artistic, musical and dramatic works encompassed any format in which they could be produced or transmitted.

Unifying Law

The Berne Convention generated renewed energy for authors' rights in common as well as civil law countries. In the United Kingdom, the cause never enjoyed the suasion of its counterparts in the civil law countries, especially France. However, Thomas Noon Talfourd's passion in moving the copyright bill of 1841, and the support he received from poets and writers, showed depth of feeling against perceived indifference to the poverty and hardship of writers and artists.

In the opinion of British politicians, copyright law performed the useful function of controlling the production of books and their supply throughout the empire. From the time of the first copyright statute until Hugo's era, all shades of British political philosophy rejected sentimental claims for greater authorial privilege. Then a new class of author emerged in Russia, France and England, novelists of extraordinary psychological insight documenting

[8] The national treatment principle allows a treaty signatory to award a foreign national more generous rights than those allowed its own nationals by the country of the foreign national. The reciprocity principle does not: a signatory cannot provide more generous treatment to a foreigner than that provided to its nationals by the foreigner's country.

with profound imaginative sympathy the agonies of Europe's social transformation.

Hugo was one such writer, whose greatest work, *Les Misérables*, portrayed the lives of the poor and wretched of Paris and surrounds, and explored especially the theme of redemption. In the 20 or more years before the signing of the Berne Convention, when he and ALAI pressed most actively for authors' rights, opinions in Britain changed. Many saw the great novelists as olympic figures divining the spirit of the age, and politicians, impressed by the prestige of Hugo's name, flocked to support his cause.

In the meantime, lawyers, and a few legislative reformers with little feeling for literature, began to follow the lead of Talfourd. The stuttering movement for copyright law reform in nineteenth-century Britain began a few years before agreement of the Berne Convention. In 1875, the British government, faced with the continuing problem of American piracy of British books, and the Canadian market's reliance on US copies, convened a royal commission to inquire into the nation's copyright law. That law, according to the Commission, was 'destitute of any sort of arrangement'. The principal copyright legislation, the 1842 Copyright Act, gave publishers control over the production and distribution of books, but otherwise obscure statute piled upon statute, each dealing with distinct subject matter and sometimes in contradictory terms.

The Commission delivered its report in 1878, finding that the copyright laws of Britain were in urgent need of consolidation and improvement (see Chapter 13, this volume). The report noted that to resolve the problem of American piracy, Britain should enter into a copyright trade agreement with the United States allowing for mutual recognition of copyright. Few recommendations were unanimous. Many were contested because the commissioners disagreed on questions of trade and economics and their application to copyright law. The only economist among the commissioners, Sir Louis Mallet, formally dissented from the Commission's decision to reject the Board of Trade's submission proposing the abolition of copyright (see Chapter 14, this volume).

The majority of commissioners (including the writer Anthony Trollope) were influenced by the Association for the Protection of the Rights of Authors and affirmed that copyright must be a proprietary right. As well as refusing the Board of Trade's abolition proposal, they rejected a scheme for statutory royalties to remunerate authors. The 1878 Royal Commission report is important not because of its direct influence – in the absence of pressing necessity, government neglected copyright law reform for the rest of the century – but because it helped to prepare the way for the authors' rights movement.

The lobbying of the Association for the Protection of the Rights of Authors, the insistent demand for proprietary rights and the call for a uniform streamlined law implanted in the mind of British officialdom seeds of receptiveness. When the time came, government needed little coaxing to support the expansionary programme that would be adopted at Berne. If a date is needed for the beginning of political assent in Britain to the programme of the authors' rights movement, that date is 1878.

In the common law world, the infrastructure of an international copyright regime began to emerge soon after the signing of the Berne Convention in 1886. In the same year, the British parliament passed the International Copyright Act, which implemented obligations under the Convention and abolished registration requirements. In 1891, the US Congress passed the International Copyright Act (the Chace Act), which extended US copyright protection to foreign authors.

Independence of the United States

The United States, however, stood apart, and would not join the Berne Union until more than a century after its inception (in 1989). From the late nineteenth century, US copyright policy, like that of the United Kingdom, expressed the purposes of government departments determined, in a contentious world, to secure the best commercial conditions for the nation's publishers, authors and purveyors of recorded music. Britain accepted the rhetoric of authors' rights, willingly implementing the compulsory provisions of the Convention, and ruthlessly enforced preferential trade rules throughout its empire.

The United States chose to avoid involvement in international law that embraced an expansive vision of authors' rights (one inspired by natural law conceptions and their corollary moral rights). Accepting the prescripts of Berne would nullify the benefit of the insular copyright policy that permitted US publishers to freely copy foreign books and sell copies cheaply to the public. The Chace Act worked increasingly to limit the effect of this policy and US policy-makers were conscious that the unflagging growth in domestic enterprise and output would eventually cause the United States to demand that foreign jurisdictions ban the piracy of exported American copyright products. Mutual protections would then be desirable.

But the need for mutuality lay some distance in the future. The primary concern for US copyright holders remained the domestic market. To encourage uniformity in geographically proximate markets – none of them (other than Canada) English-speaking – and to spread the message that copyright law is an economic instrument, a creature of statute rather than natural law, the US government entered into bilateral and multilateral trade agreements with South and Latin American countries.

In the Americas, opportunities for treaty-making independent of Berne abounded.[9] A multilateral copyright treaty agreed at Montevideo in 1889 established a South American precedent, albeit ill-starred, for mutual upholding of copyrights.[10] The United States signed copyright conventions in Mexico City (1902) and Buenos Aires (1910), the first with all the countries of Central America other than Panama and the second with most of the countries of South and Central America (although Mexico joined in 1964).

The Buenos Aires Convention on Literary and Artistic Copyright, purportedly abolished formalities as a requirement for the recognition of copyright and enjoined member states to recognize each others' copyrights, provided that copyright holders imprinted on works published the term 'all rights reserved'. The United States, however, applied the proviso abolishing formalities inconsistently, continuing to enforce the registration requirements of

[9] From the late nineteenth century until 1950 South American nations agreed the following copyright conventions: Treaty of Montevideo on Literary and Artistic Property of 1889, Mexico City Pan-American Convention of 1902, Rio de Janeiro Pan-American Convention of 1906, Buenos Aires Pan-American Convention of 1910, Caracas Agreement of 1911 (Bolivarian Congress), La Habana Pan-American Convention of 1928, Second Treaty of Montevideo on Intellectual Property of 1939, Washington Pan-American Convention of 1946.

[10] Treaty of Montevideo on Literary and Artistic Property 1889. The treaty provided for application of the law of the complainant's country of origin (or place of first publication) and enforcement according to the law of the place of judgment. By the time of the Second World War, non-South American members included France and Spain but the treaty's influence never grew as it might have done. The country-of-origin requirement and the non-participation of the United States stymied its growth.

US copyright law. But the flouting of the convention hardly mattered: it functioned principally to benefit US exporters who sent books, sheet music and, later, records to a sizeable body of consumers in the southern continent.

US practice at the beginning of the twentieth century thus mirrored its practice at the century's close. The US government energetically concluded copyright trade deals with various nations that facilitated the smooth flow of copyright goods from the United States to willing importers. At the same time, it never lost sight of its larger interest in ensuring that international copyright law did not function in ways inimical to US economic concerns.

The acute strategic awareness of US government agencies, which, for a century, had advanced US economic interests more skilfully than counterparts in countries bothered about international copyright rules, led later to the creation of the Universal Copyright Convention (1952) and the suborning of international copyright policy to the aims of the World Trade Organization (1994).

Imperial Copyright

As treaty-based systems of international copyright law began to develop from the end of the nineteenth century, the United Kingdom, though keenly adhering to the Berne Convention, also encouraged acceptance of uniform rules for the distribution of books and other copyright material throughout its empire. These rules gave effect to imperial copyright legislation, which itself substantially satisfied the demands of British publishers, who, long before the American Revolution, insisted that British possessions accept exclusively the supply of books published in Britain.

In the early twentieth century, few autonomous British possessions (dominions such as Australia and South Africa) cavilled at accepting the prescripts of publishers mediated by the imperial government. The empire became an insular trade zone in which British publishers controlled the distribution or supply of books, and from which these publishers could effectively exclude English language competitors – independent prospective publishers in the imperial possessions and the piratical publishers of the United States.

The imperial copyright system is chiefly of interest today for two reasons. The first is that the longevity of its governing principle[11] showed that the existence of international copyright law does not preclude the existence of legally sanctioned international restrictive trade practices governing the distribution and sale of copyright material.

The second is that it prefigured the modern association of international copyright law with international trading rules. Although the partial harmonization of copyright and trade law under the auspices of the World Trade Organization (WTO) supposedly facilitates uniform treatment in the supply and sale of copyright material,[12] critics argue that ideals of fairness

[11] Import controls, or parallel importation restrictions, were preserved in the copyright legislation of many former British imperial possessions for most of the twentieth century. Some copyright legislation retains import control provisions even in the twenty-first century. They allow domestic copyright holders (often agents of foreign producers) to prevent competitors from undercutting them by supplying the domestic market with cheaper legitimate product obtained from foreign markets. The result is price discrimination and restrictive supply arrangements – to the detriment of domestic consumers.

[12] The WTO administers the Trade Related Aspects of Intellectual Property Rights Agreement, which establishes minimum levels of protections members must give to the intellectual property of

and mutual benefit, supposedly integral to both imperial and WTO systems, are not obviously motivating factors in the creation of international trade rules that benefit the copyright producers of a primary trade power – in the case of imperial copyright the United Kingdom and in the case of the WTO the United States.[13]

Authors' Rights Curtailed

The framers of the Berne Convention sensibly provided for revision of its terms, or their supplementation, at conferences of members, who effected changes by unanimous resolution. Revision conferences ensured the vitality of the agreement for over 80 years. The last of seven conferences took place in Paris in 1971, as did the first in 1896 (usually referred to as a conference 'completing' the first Berne conference). Interim meetings were held in Berlin (1908), Berne (additional protocol in 1914), Rome (1928), Brussels (1948) and Stockholm (1967).[14]

Victor Hugo and his collaborators considered recognition of authors' rights a moral necessity but their motives were also mercenary. They wanted copyright laws to give creators the right to authorize – or refuse – the production of books, sheet music or phonograph records, and to vest in authors control over the performance of plays or music. Such rights enabled creators to bargain more effectively for reward, but they did not alter the substance of bargains struck between most copyright holders and the publishers of books and sheet music.

The balance of economic power still tilted in favour of publishers who knew that economic necessity forced most writers and composers to agree oppressive contractual terms in order to enter the market. They doubtless welcomed the increased scope of copyright enjoined by the Berne Convention. It offered new ways to profit from copyrights, and most authors were willing to assign their copyright to publishers.

But a new industry that, ironically, began to grow from roughly the time of the signing of the Berne Convention looked with increasing disfavour on a new demand – that the Convention declare that copyright extend to 'indirect appropriations' of musical works. By the early twentieth century, the phonographic industry had grown rich by making, without consent of the copyright holder, sound recordings of performances of musical works – and selling millions of records to the owners of phonographs (or gramophones, as record players would become known).

Composers of music – the owners of copyright in the musical works 'appropriated' – received no payment from the phonographic industry for the use made of their works. In England,

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other members. It thus prescribes a uniform system for the trade of intellectual property (IP) products. Significantly, the TRIPS Agreement also establishes standards and procedures for enforcement of IP rights and resolution of disputes over compliance and enforcement.

[13] For discussion of imperial motives in the creation of import controls in Australia and other British dominions, see Atkinson (2007). A significant body of texts, most published between 1995 and 2005, has examined US influence over the development of international trade and enforcement rules for the distribution of IP goods. Two of the more influential authors are John Braithwaite and Peter Drahos (who has published a number of related works). See, for example, their study *Global Business Regulation* (2000).

[14] The text was amended in 1979, though not by conference.

they registered a protest in the courts and were rebuffed. In 1899, in *Boosey* v. *Whight*,[15] the High Court determined that perforated paper rolls fed into an Aeolian, a mechanical wind instrument resembling a piano, functioned as part of the instrument and were not sheets of music under the 1842 Copyright Act (see Chapter 28, this volume). Justice Stirling said that perforated music rolls were 'used simply as parts of the machine for the purpose of the production of musical sounds' and the Act merely granted the right of 'multiplying copies of something in the nature of a book' (p. 539).

In short, the framers of copyright legislation did not intend copyright to apply to mechanical processes. Had they done so, they would have declared in the 1842 Act that barrel organs or music boxes could not play musical works without the consent of composers. Outraged, the authors' rights movement attacked the judgment in *Boosey* and insisted that copyright must apply to all modes of mechanical reproduction.

The Berlin Revision Conference

In 1908, the Berne Union convened a revision conference in Berlin, altering the Convention in a number of important ways.[16] The most significant change agreed declared that authors should possess the right to authorize mechanical recording of musical works and the public performance of the embodied works. The phonographic industry responded by pressing, with furious urgency, arguments against this manifestation of authors' rights.

The industry's leaders felt aggrieved on two grounds. First, they disputed the proposition that copyright properly subsisted in products resulting from mechanical processes for capturing, or 'fixating', copyright works in material form. Second, they were concerned that one or two phonographic companies would drive the others out of business by purchasing the majority of valuable copyrights and creating a production monopoly.

By force of argument, or weight of economic power, the industry's representatives persuaded delegates at the Berlin conference to qualify the author's right to control mechanical reproduction. The amended Convention text stated that author's must control the mechanical reproduction and performance of musical works but also provided that legislatures could make grant of the mechanical right subject to 'reservations and conditions'.

The success of the phonographic industry in persuading the Berne Union to qualify its assertion of a mechanical right for authors symbolized the beginning of the transformation of copyright law into an instrument of industrial power. At the Union's 1928 Rome revision conference, the radio broadcasting industry, thanks to the advocacy of Australian and New Zealand delegates, would secure a similar limitation. At that conference, the Union agreed to qualify the proviso asserting the author's right to authorize broadcasts of works, permitting member nations to limit in legislation the scope of the broadcast right. In time, a separate convention on so-called 'neighbouring rights' would define producers' copyright, or the

[15] 1 Ch 836.

[16] Changes included provisos that translations, adaptations, arrangements of music and other transformative reproductions of literary and artistic works were now to be protected as original works. Members were forbidden from making the grant of copyright dependent on formalities. The revision also confirmed the principle of national treatment. The Convention stipulated a 50-year posthumous term for copyright works, although members were not obliged to give effect to the proviso in domestic law. The amended text recognized also a new category of 'cinematographic work'.