EDITED BY

Uma Suthersanen and Ysolde Gendreau

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A SHIFTING EMPIRE

100 Years of the Copyright Act 1911

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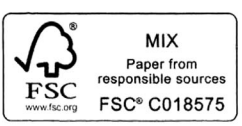

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Introduction: Albion's legacy?

Uma Suthersanen and Ysolde Gendreau

> The only reason for going back into the past is to come forward to the present, to help us to see more clearly the shape of the law today by seeing how it took shape. (*Victoria v Commonwealth* (1962) 107 CLR 529, at 595 per Windeyer J.)

This volume embarks on a global journey, starting from Britain and visiting many other shores. It specifically surveys the impact and evolution of the British Imperial Copyright Act 1911 within such countries that were part of the British Empire. It offers a bird's eye perspective of why and how the first global copyright law launched a new order, which is often termed as the 'common law copyright system'. The collection of essays in this volume draws upon some of the best scholarship from Canada, Australia, Singapore, Jamaica, Israel, India, South Africa and New Zealand. The authors, academics and practitioners alike, situate the Imperial Copyright Act 1911 within national laws, both historically and legally. The aim of the chapters is to query the extent to which the ethos and legacy of the 1911 Copyright Act remains within indigenous laws.

There is a lingering view that, with the advent of decolonization from the 1940s onwards, British imperial law has been totally eradicated within national systems. This is basically true, and begs the question: is there any point in revisiting the past and tracing the genesis and transplantation of the 1911 Copyright Act? It stands to reason that the copyright landscape in most nation states starts from a point in space and time that is disconnected from the genesis of the nation itself. This is partly due to the fact that the concept of copyright itself has followed a meandering journey, incorporating new bases and diversifying into several legal families. It is easy to fall into the school of thought that tends to view the national laws of ex-colonies as quixotic, indigenous versions of yesterday's empires.

And yet, the editors of this book would argue that the legal reality is perhaps more nuanced and complex, and deserves exploration. Each

nation has its own distinct legal rubric, which cannot be interpreted as being a distilled and localised version of the copyright laws imposed on them during the nineteenth and twentieth centuries.

A more rational approach is to accept that most countries have undertaken their copyright journeys based on three legally contextualized maps. First, national laws began, and were subsequently and continuously revised to correspond with the shifting international norms. The evolution of all legal systems is slow, and this particular journey had its initial stirrings in Venice around 1470. It was subsequently influenced by the colourful and chaotic era of printing privileges throughout Europe, until the 'modern' Statute of Anne 1710 took copyright's journey into a different legislative landscape. This landscape, which continues till today, is populated not only with guilds, publishers and printers, but also with authors. The journey became somewhat troubled by growing trading and imperial territorial concerns, especially with the growing rate of piracy. This resulted in numerous bilateral copyright treaties in the eighteenth and nineteenth centuries, which finally culminated in the first international copyright agreement in 1886. International norm setting still continues with countries mapping their national legislation to match the rules set out in the 1994 Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), the two 1996 World Intellectual Property Organization (WIPO) treaties on copyright, performances and phonograms and most recently (and controversially) the 2011 Anti-Counterfeiting Trade Agreement. These conventions and agreements are, in turn, based upon centuries of domestic jurisprudence adopted and applied in the major actor states, such as France (in relation to the Berne Convention, for example), and the United States (in respect of the TRIPS Agreement, for example).

Second, many laws are also mapped out to conform to regional and domestic interests, needs and temperaments, thus creating a copyright diversity in terms of protected subject matter and scope of protection, outside international norms. This second map is closely linked to the third and final map which charts nations' legal journey out of the shadows of empires. Birnhack's chapter, for instance, describes how Israel has begun revising its copyright traditions by adapting and incorporating, in certain areas, a more instrumentalist US approach. Daley's chapter on Jamaica is illustrative of the difficulty a nation faces when it wishes to embark on a new journey, in order to protect its own creative industries. The chapter by Agitha and Gopalakrishnan reveals how India is firmly sailing away from English law towards a framework more suited to its more complex needs to protect its world famous

entertainment industry, while ensuring affordable access to and cost of educational and cultural goods. Similarly, Ng-Loy's chapter on Singapore reminds us that all countries, after going through an almost obligatory anti-copyright phase, tend to go into reverse gear and embrace international copyright norms, once an optimal level of development is reached.

As some chapters show, the mapping journey enables us to appreciate how legal 'traditions' are born and mapped, and even steadily adhered to, despite the passage of time, as in South Africa. Other chapters reveal a silent tension as emotional sentimentality towards the 'old' common law rules set down under the Imperial Copyright Act struggles with a more robust need to adopt fresh sentiments set down under the 'new' copyright order, as represented chiefly by the United States. Such tensions are revealed in the jurisprudential concerns as to the ambit of originality, the feasibility of moral rights in a digital age, and the perennial debate as to whether we need to mould the 'fair dealing' defence along the lines of 'fair use'. These issues are adroitly dealt with in almost all the chapters, which show how tenacious older rules are, even in more modern, technological settings. One clear nostalgic journey taken by some authors, including Ricketson on Australia, concerns the length of the taut and slender 1911 Copyright Act. Is life so complicated today, Ricketson asks, that we need such massive copyright statutes?

Other chapters, conversely, reveal a struggle to discard the 'imperial norms' of the 1911 Copyright Act, as well as to resist 'neo-imperial norms' under the TRIPS Agreement, modern US copyright law, and even Britain's new heritage of a copyright system tempered by 'civil law' notions. This struggle to find a new copyright landscape is evident in all the writings herein. McLay's chapter, for example, cogently sets out New Zealand's dilemma in leaving the British copyright mould, and forging a new path. Gendreau's chapter shows us how a nation, with a mixed copyright legal heritage, manages to resist the tidal forces of history, law and international politics to steer a 'common/civil law' approach.

Has the sun finally set over the British copyright empire? Suthersanen laments in her chapter that the United Kingdom has probably lost her copyright navigational map, having succumbed to an extended period of legal storms while slowly manoeuvring across the EU legal ocean. Nevertheless, despite the fact that all the stories within this volume represent a different legal evolution, it is still possible to say that they all are part of the British copyright legal family. It is also possible to say that they all have a different view of the legal landscape for tomorrow. Is Britain still influential in these other copyright worlds? The answer

appears to be: 'Yes, of course. Sometimes, her law is very influential. But you know – perhaps we need to embark on our own courses now.'

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1. The first global copyright act

Uma Suthersanen

INTRODUCTION

Cries for copyright reform in the nineteenth century emerged from various domestic quarters in Britain, including authors and publishers, who were concerned with the growing piracy of English language works. Legislators had begun to heed their opinions on the dismal state of literary property. The chief concern was that copyright law had become too complicated. Nevertheless the process of consolidation and reform of the copyright law in Britain dragged on interminably from the first efforts in the 1830s to 1911.[1] Why was this so?

This question is explored through a contextual analysis of the period that preceded the adoption of the 1911 Copyright Act. The first part of the chapter looks at the evolution of British authors and publishers as important and influential socio-economic classes. As their influence rose, so did their lobbying for domestic and international copyright reform. Much of the discussion concerning the reform of copyright law was also expressed in terms of the British Empire and the need to contain piratical acts which arose from the expansion of trade within colonial markets.

Another suggested reason for the delay of the enactment of the 1911 Copyright Act was the need for the British government to come to terms with its role as an international legislator for a global British polity. Britain had to accept not only her international obligations, but also

[1] For a discussion covering all the relevant reports, bills and reports covering this period, see generally J. Feather (1994), *Publishing, Piracy and Politics: An Historical Study of Copyright in Britain*, New York: Mansell; C. Seville (2009), *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century*, Cambridge: Cambridge University Press; For primary sources of legislation and correspondence during the nineteenth century, see L. Bently and M. Kretschmer (eds), *Primary Sources on Copyright (1450–1900)*, www.copyrighthistory.org/.

to determine how the Empire's unitary copyright area was to be diplomatically and legally maintained, especially in light of the problems arising from international markets. This perspective places Britain's concerns on trade as being as important as, if not more so, the codification and rationalization of domestic copyright law.

The chapter continues to survey examples of such imperial and trade concerns by briefly looking at the Anglo-Canadian relations dealing with copyright reform and the various legislative attempts to resolve this relationship while acceding to domestic reform pressures. In respect of the latter, authors (as collective management organizations and authors' societies) and their publishers would emerge, by the end of the nineteenth century, as important non-state actors pressing domestic reform through the international copyright law fora and vice versa. The conclusion turns to discuss the post-1911 copyright era in the United Kingdom. By concentrating on the reasons for the decline of a coherent copyright framework within the United Kingdom, we can be gentle judges when we note that her law today is a pale successor to the Imperial Copyright Act.

I. THE PUSH FOR COPYRIGHT REFORM

A. Domestic Authorial Power

Domestic United Kingdom copyright law during the eighteenth and nineteenth centuries was, perhaps, a subtle reflection of the interests of dominant groups within the United Kingdom. Britain had already, prior to the nineteenth century, a large reading public devoted to the novel. Despite the low level of education in the mid-eighteenth century, novels were a widely consumed commodity, especially with the rising popularity of the circulating libraries and the inculcation of the reading habit among women.[2] Realistically however, the market was confined in terms of consumption – books were still limited to the upper and commercial middle classes. The booksellers operated as a cartel and thus remained

[2] M. Plant (1974), *The English Book Trade: An Economic History of the Making and Sale of Books*, 3rd edn, London: Allen & Unwin, pp. 57–58; see also J. Rose (2003), *The Intellectual Life of the British Working Class*, New Haven, CT: Yale University Press, who similarly charts the reading habits of the working class and suggests that their lack of education did not preclude a voracious appetite for classical literature such as Shakespeare, Scott and Milton.

very much in power.[3] Authorship remained a struggling profession up to the end of the eighteenth century and copyright law reflected this imbalance of power in terms of authors vis-à-vis booksellers and printers. The 1709 Statute of Anne did not confer a bundle of rights under the heading of 'copyright' but rather rights to print and reprint books. Moreover, as some historians have argued, the Statute was not a law conferring authorial rights but rather a regulatory measure promoting competition among printers and booksellers.[4] Authors of other genres of creative work had to wait patiently as the legislature passed piecemeal statutes in a niggardly fashion for engravings, sculptures, fine arts, dramatic works, etc.[5]

By the turn of the century, several socio-economic milestones were reached in terms of the book-publishing scene, including the end of patronage of authors and the rise of the reading habits of the middle and lower classes. In respect of the demand for novels alone, between 1837 and 1901, approximately 50 000 novels were published in Britain, thus replacing poetry as the most important form of literature produced by British writers.[6] The century also witnessed the emergence of a new professional and socio-economic class, partly supported by the reading public – the writer.[7] This was coupled with the expansion in the types of books written which, besides novels, included histories, geographies, biographies, religious works and political treatises.

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[3] C. Seville (1999), *Literary Copyright Reform in Early Victorian England: The Framing of the 1842 Copyright Act,* Cambridge: Cambridge University Press, ch. 5.

[4] R.L. Patterson (1968), *Copyright in Historical Perspective*, Nashville, TN: Vanderbilt University Press; M. Rose (1993), *Authors and Owners: The Invention of Copyright* Cambridge, MA: Harvard University Press.

[5] For example, the Engraving Copyright Act was passed in 1734 after pressure from artists, including William Hogarth, the Sculpture Copyright Act in 1798, and the Dramatic Copyright Act in 1833. For a list of statutes passed in relation to different works, see *Primary Sources on Copyright (1450–1900)* (above, n. 1).

[6] R.K. Webb (1958), 'The Victorian Reading Public', in Boris Ford (ed.) *From Dickens To Hardy*, Penguin, p. 205; J. Sutherland (1995), *Victorian Fiction: Writers, Publishers, Readers*, Basingstoke: Palgrave Macmillan, p. 152.

[7] The dismantling of the patronage system and the recognition of the importance of the public had already been noted in the eighteenth century by authors, such as Oliver Goldsmith who stated that authors no longer depended on the 'Great for subsistence, they have no other patrons but the public, and the public, collectively considered, is a good and generous master'. O. Goldsmith (1762), *The Citizen of the World and the Bee*, p. 233 (Austin Dobson (1934) (ed.), London: Everyman's Library).

Armed with this new economic power, authors began to deploy appropriate rhetoric to emphasize their noble art of writing. No longer were they part of a writing profession labouring under a master (patron)-servant (writer) relationship but they were true professionals, with a right to remuneration from their writings.[8] Unsurprisingly, one consequence of the rising professional authorial class was the push for reform of domestic copyright law. British authors such as Wordsworth, Dickens and Coleridge drew national attention to their need to obtain a sustainable remuneration from their writings through the copyright system.[9]

The push for reform by the authorial classes also coincided with another call within Britain – the need to extend the territoriality of British copyright law throughout the British Empire and beyond, in order to protect the British book trade.

B. Pirates in a Borderless Global Market

The advent of industrialization and the ensuing technological advances in the printing and dissemination of works led to a paradoxical situation for authors and copyright owners. On the one hand, such improvements meant increased print runs, improved sales of books and the availability of new markets for new writers. This would lead to higher and more sustainable returns for the profession and the publishing industry. On the other hand, faster and cheaper printing technology meant higher rates of piracy.

Eighteenth-century history had already shown that one way to control piracy was to extend the territorial effects of the law. The long war that was waged between English and Scottish booksellers in that century was partly fuelled by the latter's refusal to accept that Scotland should behave as an English 'colony', or to accept the 'English' common law notion of perpetual copyright.[10] The final resolution of this battle was settled eventually in *Donaldson v Beckett* which was heard in the House of

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[8] By the end of the eighteenth century, copyright had yet to impact upon authors' lives in terms of remuneration. Most authors were paid a lump sum for their work as opposed to sales-based royalties. Moreover, authors were required to assign their copyrights to their publishers.

[9] P. L. Shillingsburg (1992), *Pegasus in Harness: Victorian Publishing and W.M. Thackeray*, Charlottesville, VA: Virginia University Press, p. 68; S. Eilenberg (1992), *Strange Power of Speech: Wordsworth, Coleridge and Literary Possession*, New York: Oxford University Press, p. 204.

[10] *Hinton v Donaldson*, 1 Jul 1773, Scottish Court of Session. See Deazley, R. (2008), 'Commentary on *Hinton v. Donaldson* (1773)', in *Primary Sources on Copyright (1450–1900)* (above, n. 1).

Lords – whose jurisdiction was the only one at that time which extended over the whole of the United Kingdom.[11] The decision was a mixed blessing – while it confirmed the territoriality of the Statute of Anne 1710 over Scotland, it also paved the way for a more liberal domestic printing market.

Consequently, concerns as to halting unauthorized reprinting shifted to those copies made outside Britain's territorial shores. By the nineteenth century, concerns were already being raised in relation to European pirates.[12] For example, Parisian and Prussian printers were noted for supplying British tourists in these countries with cheap reprints of the latest publications in Britain. London publishers struggled, to no avail, with the practical consequences of attempting to bar individual tourists from importing single copies of pirated books as part of their personal luggage. A similar story arises in relation to the Irish printing press, which fought a battle against the imposition of English copyright law in order to prop up its reprinting economy.[13] Soon, foreign editions infiltrated bookshops and circulating libraries.[14]

The Irish problem was solved when copyright was extended territorially to Ireland by the incorporation of Ireland, under the Acts of Union 1801, into the United Kingdom.[15] However, the consequence of strengthening copyright rules in one region was to drive the reprint trade elsewhere. The emigration of Irish printers and booksellers to the United States coincided, then, with the founding of the United States publishing industry.[16] Once again, the question of how British publishing and authorial interests could be protected in overseas territories arose.

The first United States federal copyright statute was passed in 1790, but it failed to extend copyright protection to foreign authors. Under this and subsequent copyright statutes, United States publishers were free to reprint British books. Between 1800 and 1860, almost half of the

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[11] *Donaldson v Beckett*, (1774) 2 Bro. P.C. 129; (1994) 17 Hansard Parl. Hist. 953. See also A. Johns (2009), *Piracy: The Intellectual Property Wars from Gutenberg to Gates*, Chicago, IL: Chicago University Press, ch 6, especially pp. 121–124.

[12] Feather (1994) (above, n.1), p. 150.

[13] Johns (2009) (above, n. 11), ch 7, especially pp. 145–174.

[14] J.J. Barnes (1974), *Authors, Publishers and Politicians: The Quest for an Anglo-American Copyright Agreement 1815–1854*, London: Routledge & Kegan Paul, p. 95.

[15] J. van Horn Melton (2001), *The Rise of the Public in Enlightenment Europe*, Cambridge: Cambridge University Press, pp. 140 *et seq.*

[16] Feather (1994) (above, n.1), pp. 150–151; Johns (2009) (above, n.11), p. 174.