1. The first global copyright act

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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

very much in power. 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. 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.

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. The century also witnessed the emergence of a new professional and socio-economic class, partly supported by the reading public – the writer. 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.


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).


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. 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.

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. The final resolution of this battle was settled eventually in Donaldson v Beckett which was heard in the House of
Lords – whose jurisdiction was the only one at that time which extended over the whole of the United Kingdom. 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. 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. Soon, foreign editions infiltrated bookshops and circulating libraries.

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. 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. 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

bestsellers in the United States were reprinted without authorization from English novels. Price was an important element – compared to a legitimate English edition, an American pirated edition was approximately one-tenth of the total cost. Thus, a ‘London reader who wanted a copy of Charles Dickens’s *A Christmas Carol* would have to pay the equivalent of $2.50 in 1843 [while a]n American Dickens fan would have to pay only six cents per copy’.\(^\text{17}\)

The complaints were not merely couched in financial terms. British authors had begun to demand the introduction of moral rights as piracy of their works increased in the expanding global market. The 1837 Clay Report in the United States, for instance, included a petition by several British authors whose complaint was that British authors were ‘exposed to injury in their reputation and property’ and that their works were:

liable to be mutilated and altered, at the pleasure of [American] booksellers, or of any other persons who may have an interest in reducing the price of the works, or in conciliating the supposed principles or prejudice of purchasers in [the United States].\(^\text{18}\)

The United States was an important territory in terms of the colonial market in books. As Johns notes, piracy had also been a part of the global world order since the eighteenth century. The difference with the United States was in terms of manufacturing and economic strengths:

In the eighteenth century, international reprinting had flourished, to be sure, and conflicts over cross-border ‘piracy’ had flared up repeatedly. But in each case the struggle had been between a major power and a relatively minor rival on its periphery: between England and the Scottish reprinters, between Britain and the Irish, between France and the Swiss, or between rival German states. Now, for the first time a clash over reprinting was about to be triggered between two major industrial powers ... When Americans reprinted, what they reprinted came largely from the world’s financial, imperial, and manufacturing center, London. And London publishers were already accustomed to


seeing their reach in global terms. In terms of capital, organization, and markets alike, their interest stretched across the colonial and Anglophone world.19

Legal reform was not merely required to appease the domestic authorial classes, or to stop the importation of pirated copies. It was now also required in order to maintain a cohesive and uniform legal order within the British Empire. And to protect her trading interests.

C. Imperial Commerce

One major reason for the delay of the 1911 Copyright Act was that Britain was deeply concerned with its imperial mandate and the reaction of some of the colonies to the revision of copyright law. There was a driving imperative, on her part, to maintain a uniform and harmonized copyright regime throughout the British Empire.20 It is suggested that this may have been due to the dual role which Britain hoisted upon herself during the eighteenth and nineteenth centuries, that is, to act not only as a sovereign state which protects its citizens’ needs, but also as an imperial parent. It has been argued that the British Empire was, in its time, ‘the biggest Empire, ever, bar none’.21 At the end of the nineteenth century, the Empire ruled over a quarter of the globe’s population and covered more than 12 million square miles.22 It left an imprint on our world in terms of language, economy, society and politics. The Empire set up administrative, social and legal systems in its colonies and dominions which imported the English language, English forms of land

20 Some legal historians adopt the view that colonial interests and their views (particularly those of Canada) were of more importance than Britain’s national needs or even its international obligations. B. Sherman and L. Bently (1999), The Making of Modern Intellectual Property Law: The British Experience, 1760–1911, Cambridge: Cambridge University Press, pp. 136–137, citing S. Nowell-Smith (1968), International Copyright Law and the Publisher in the Reign of Queen Victoria, Oxford: Clarendon Press; and R. Deazley (2008), ‘Commentary on the Royal Commission’s Report on Copyright (1878)’, in Primary Sources on Copyright (1450–1900) (above, n. 1).
22 Approximately over 400 million people within a quarter of the planet’s total land area, ibid, p. 240.
tenure, Scottish and English banking, the common law, representative assemblies and capital markets.23

Part of this mandate included her trading investments and relationships with her overseas territories, upon which she was highly dependent.24 Nineteenth-century domestic concerns about consolidation and rationalisation of copyright law were perhaps easily outweighed, time and time again, by the Empire’s commerce, which included the nascent publishing industry, which was the successor to the bookseller trade. The continuing effects of this transplantation of imperial commercial values and laws continues as evidenced by a 1998 study which emphasized the effects of British commercial laws in ‘common-law countries’. The survey, which focused on 49 countries in the world in terms of their legal regulation of corporate interests, concluded that ‘common-law countries have the strongest, and French-civil law countries the weakest, legal protection of investors’.25

Continuing in the footsteps of their predecessors, the publishers fought a front line battle for reform of domestic law. A new step for them was to also embark on an equally fierce war with respect to the United States and the colonies, namely, Canada, the Indian States, Australia, New Zealand, Singapore, Egypt and the South African colonies. Although the British International Copyright Act 1844 had made mass importation of foreign reprints unlawful,26 the perceived threat of piracy from other colonial markets was great enough for the publishers to inaugurate The Publishers’ Association in 1895. This newly formed group then proceeded to set up a Colonial Piracies Sub-Committee with the task of monitoring suspected pirate shipments of books from Australia, New Zealand, the South African colonies, the Indian States, Singapore and

25 The survey included Australia, Canada, India, Ireland, Israel, Kenya, New Zealand, Singapore, South Africa, United Kingdom and United States, which were all, barring the United Kingdom, at one time or another under the British imperial mandate. See Rafael La Porta, et al (1998), ‘Law and Finance’, 106 (6) Journal of Political Economy 1113.
26 7 & 8 Vict., c. 12. The previous International Copyright Act 1838 was amended in 1844, to bring it into line with the 1842 Talfourd Act, incorporating all the rights within the latter, including dramatization of novels. See discussion below.
Hong Kong. These geographical and political zones were its primary markets, and the regulation of copyright rules was often seen as being more linked to the colonial book market than domestic concerns, especially when viewed against the reform landscape of other intellectual property laws. As Bently notes, ‘there was no imperial law of patents, designs or trade marks. The one obvious exception related to copyright in books, and that exception was accompanied by considerable controversy’.28

In addition to economic success, Britain had begun by the late Victorian era to adopt a geopolitical paternalism towards some of her colonies. It was deemed time for a shift in government policy towards a more pro-colonial, and hence more pro-Empire, approach. Historians argue that the British Empire should be understood as being a single trans-continental political community29 that ‘sought to globalize not just an economic but a legal and ultimately a political system too’.30 The mood of colonial unity and imperial government could be summed up thus: ‘If Greater Britain in the full sense of the phrase really existed, Canada and Australia would be to us as Kent and Cornwall.’31

Any legal reform undertaken had to conform to this sense of a uniform imperial legal and commercial order.

II. IMPERIAL DUTIES AND DOMESTIC NEEDS

A. Declaration of Independence in ‘Kent’

Canada is an example of how the United Kingdom tried, with mixed success, to integrate her domestic needs for reform and consolidation

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30 Ferguson (2004) (above, n. 20), p. 371. The 1911 Copyright Act was not the first copyright law to extend British copyright interests on the colonies. See also the Copyright Act 1842 (5 & 6 Vict., c. 45) and the Colonial Copyright Act 1847 (10 & 11 Vict., c. 95), discussed below in relation to Canada.
with her mandate to forge an imperial copyright legal order. It was a
dominion under British sovereignty, subject to British copyright policies,
and exposed, more than any other Empire outpost, to cheaper unauthor-
ized editions from the United States. A rise in the purchasing power and
reading ability of the Canadian population made it a highly attractive area
to control.

The British 1842 Copyright Act was the first statute to establish a
unitary albeit limited copyright area (in relation to literary works)
throughout the British Empire. It decreed that books first published in the
United Kingdom would gain copyright protection throughout the
Empire’s dominions. Works first published in the United Kingdom
further gained protection in the colonies through the Colonial Copyright
Act 1847 that allowed the importation of literary works into the
colonies, subject to a fee being paid to the British publishers. The
problem brought about by this, and other, legislation was simple and
acute: namely, British editions were expensive to purchase as compared
to the cheaper United States reprints. As Seville notes:

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.

The unintended effect was that the Canadian provinces began to threaten
to undermine the imperial unified copyright area by issuing indigenous
laws to deal with the issue. The first shot across the bow was the British
government’s proposal to suspend the prohibition on imports under the

32 For a concise and clear history of the Canadian market dilemma regarding
imperial copyright laws, see Barnes (1974) (above, n. 14), ch. 7. For the
post-Imperial legal situation, see Y. Gendreau, Chapter 9, in this volume.
33 Copyright Act 1842, 5 & 6 Vict., c. 45, s.29. The Act did not, however,
protect books published outside UK – see G. McClay, Chapter 2, in this volume.
34 10 & 11 Vict., c. 95.
35 Copyright Amendment Act 1842, ss. 15, 17; Customs Act 1842, 5 & 6
Vict., c. 47, s.24.
37 Ibid, p. 10.
38 For a synopsis of the political climate and correspondence during this
period between the Canadian legislators, Gladstone (as President of the Board of
Trade and as Colonial Secretary), and the British government departments, see
pp. 84–86.
1842 Copyright Act, and to replace it with what was argued to be a more just system – a system whereby colonies would compensate British authors. This piece of legislation proved unpopular, as although importation of foreign editions was permitted, local reprinting was banned and this affected the local Canadian publishing industry. The Canadian Parliament responded by passing its own version of a copyright law that allowed the reprinting of books in Canada. The terms of the law, however, were clearly in conflict with prevailing imperial legislation and were not sanctioned by the Imperial Government. More legislative shots were made including a Canadian statute in 1875, which allowed British publishers to gain a Canadian copyright only by publishing in Canada, the Imperial International Copyright Act 1886 which allowed colonial publication to give rise to copyright throughout the empire, the 1889 Canadian Copyright Act (again unapproved by the Imperial Parliament) incorporating a compulsory licensing scheme, and the 1900 Canadian Act giving notice of her intention to self-govern. All were short-lived respites for both Canada and the United Kingdom.

For the former nation, the need for autonomy in law-making was clear as being a logical step to the 1867 Canadian Confederation. Once again, Seville notes the following in relation to the passage of the 1911 Imperial Copyright Act:

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.

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39 Foreign Reprints Act 1847, 10 & 11 Vict. c. 95.
41 Canadian Copyright Act 1868.
42 Canadian Copyright Act 1875. The provision was similar in legislative effect to the manufacturing clause provision in the United States Chace Act 1891.
44 Seville (2009) (above, n. 1), p. 28. The implementation of the 1911 Copyright Act in the various ex-colonies and dominions is set out in the individual chapters in this volume.
In turn, Canadian efforts to secure a more equitable copyright regime to suit her interests and industries had a considerable effect in the subsequent negotiations within the international copyright conferences in Berne, and eventually upon the structure of the Imperial Copyright Act 1911.

As for the United Kingdom, the ambivalent responses to Canadian legislative overtures shows that the British government was struggling to resolve its dual role as protector of the commercial needs in its imperial territories as well as overseer of its domestic publishing industry. By the turn of the century, Britain’s pressing need was to rectify an anomaly that had arisen from her participation and accession to the 1886 Berne Convention on Literary and Artistic Property. In short, Britain’s own copyright law, in the nineteenth century, was in danger of being non-compliant with the Convention.45

B. International Obligations

By the middle of the nineteenth century, after decades of combating cross-border importation and piracy of books in Europe, major European publishers and authors’ societies began to search for an international solution, with a set of coherent and codified copyright norms. Although bilateral agreements between England, France, Belgium and the Netherlands had partly worked in limiting piratical acts, the web of trade bilateral agreements with reciprocity clauses to protect works across borders had been difficult to negotiate and complex to maintain. Moreover, British law had explicitly excluded the protection of translations under the International Copyright Act 1844, which allegedly protected foreign works on a reciprocal basis.46

In 1878, the Société des Gens de Lettres de France held an international congress, under the presidency of Victor Hugo. It achieved two things. First, it formulated an international basis for universal protection of authors’ rights. Second, it created the International Literary Association (later, ALAI), whose purpose was to promote rights of authors by seeking an international treaty to this end. After much deliberation, lobbying and inter-governmental conferences, a draft convention had been drawn by 1883, and by 1886, nine countries, including Britain, signed what was to be known as the Berne Convention.47

Britain’s diplomatic stance during the Berne Convention conferences can only be described as being ‘ambiguously hesitant’. She started off negotiations as a reluctant participant, but this was to change to active participation towards the end of the conferences. The indecision was due to two reasons. First, Britain was dismayed at the prospect of the absence of the United States from the Berne conferences. The Report of the Royal Commission 1878 had made clear that when considering the question of ‘International Copyright’, it was ‘impossible to exclude from examination the present condition of the copyright question between Great Britain and the United States’.

If the United States was not going to adhere to any international agreement on reciprocal treatment of foreign authors, what trade or copyright advantage would domestic British authors have by joining the Berne Convention? This was partly solved when the United States was persuaded to send a delegate with observer status to the 1885 conference. A full solution for the protection of British authors would arrive when the United States Congress enacted the International Copyright Act 1891 (the Chace Act). Concerned about the threat from British publishers, the American publishing industry and printers’ unions demanded, and obtained, a compromise in the form of ‘manufacturing clauses’, which disqualified the United States from adhering to the Berne Convention until 1988.

A second plausible reason why the British government repressed its participation in the international proceedings was the fear that an international copyright treaty would lead to a change in the domestic (and imperial) legislative framework in relation to the protection of foreigners and other international norms. This was currently governed under the 1844 International Copyright Act, which exaggerated the scope

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50 Under this Act, foreign authors received copyright protection when the US President proclaimed that their home country provided American citizens with ‘the benefit of copyright on substantially the same basis as its own citizens’ or that such a country was a party to an international agreement that provided reciprocal copyright protection to its members and to which ‘the United States may, at its pleasure, become a party’.
of domestic British copyright. The Act promised reciprocal protection for works that were clearly not protected under statutory copyright law.\textsuperscript{52} Britain may have changed her stance partly due to domestic authorial and publishing pressures on various Government departments, all of whom argued that involvement in the Berne conference would simultaneously aid authors’ trade and allay piracy concerns.\textsuperscript{53} The authors argued that if a Union was formed comprising of countries adhering to an international copyright standard:

a literary country like England should assist in its formation, otherwise a basis of Union may be formed to which we cannot assent. We should then be left out, and if, as will probably be the case, existing Treaties be denounced, English works will not have copyright anywhere but in the British dominions to the great detriment of the owners.\textsuperscript{54}

In the end, the British Government was one of the initial signatories of the Berne Convention on 9 September 1886. The signing of the Berne Convention did bring matters to a head in relation to domestic law. Despite the fact that British law could have conformed to its international obligations by the amendment of the 1844 International Copyright Act, British delegates negotiating at the Berne conferences strongly suggested to the government that signing the new international copyright convention should provide a platform for the reform of the domestic copyright regime. Absent such an approach, the delegates argued that:

British Copyright Law would still remain to the foreigner a sealed book, and even with the most careful amendment, some portions of it might be found to be in conflict with the International Convention.\textsuperscript{55}


\textsuperscript{54} Letter from Frederick Daldy (Secretary of the Copyright Association) to Robert Bourke (Undersecretary to the Foreign Office), 25 July 1885, as cited in Deazley, R. (2008) ‘Commentary on International Copyright Act 1886’, in Primary Sources on Copyright (1450–1900) (above, n. 1), note 65 and text attached.

Radical reform of the law would align Britain’s international obligations with its domestic laws and curtail the unjust treatment of foreign subjects.\textsuperscript{56} Perhaps, in anticipation of the inception of a new international copyright era, the British International Copyright Act 1886 was passed, which abolished the requirement to register foreign works and introduced an exclusive right to import or produce translations. British copyright law was now extended to works produced within the imperial copyright area.\textsuperscript{57}

Yet, this 1886 law still failed to adequately address the colonial copyright question, although it recognized that colonial publication gave copyright protection throughout the British Empire. Moreover, despite Berne Union membership and the concession made by the United States with the passing of the US Chace Act, the British Government remained paralyzed in relation to its domestic copyright reform.

C. Examining the Domestic Crisis

It is not strictly true to claim that no attempt had been made to reform domestic copyright law in the nineteenth century. A comprehensive start was the 1842 Copyright Amendment Act (the Talfourd Act), which is often cited as the first piece of legislation put forth by and for authors due to the statute’s rather revolutionary approach in aligning the term of copyright with the lives of authors.\textsuperscript{58} Although great strides had been achieved with the Talfourd Act, it was clearly not sufficient, as was noted 30 years later in the Report of the Royal Commission on Copyright 1875. First of all, it was a consolidating act only in terms of literary copyright, and remained so until repealed by the 1911 Copyright Act. All other areas of copyright works, especially artistic and musical works, remained governed by a Byzantine patchwork of statutes. Second, while there was some discussion as to whether the issue of international reciprocity should be broached within this Act (and there were draft provisions to this effect), any agreement on this highly contentious matter remained elusive.\textsuperscript{59}

The task of the 1875 Royal Commission was to ‘obtain a clear and systematic view’ and to forge coherence into the law. Part of this mandate

\textsuperscript{57} International and Colonial Copyright Act 1886, 49 & 50 Vict., c. 33.
\textsuperscript{58} See generally, Seville (1999) (above, n. 3).
\textsuperscript{59} Besides which the 1838 International Copyright Act gave power to grant copyright to foreign authors from states which offered reciprocal protection, but this depended largely on bilateral treaties, Seville (2009) (above, n. 1), pp. 8–9.
included the solving of both ‘colonial copyright’ and ‘international copyright’ which were seen as separate problems and distinct from the third dilemma, namely domestic copyright law. In respect of the latter, the report noted that in England alone, copyright principles resided in 14 Acts of Parliament passed between 1735 and 1875, dealing with different branches of copyright. This, in turn, was exacerbated by a parallel regime of common law principles that were ‘nowhere stated in any definite or authoritative way’. The Royal Commissioners were not shy in denouncing the situation:

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. The common law principles, which lie at the root of the law, have never been settled.

The main recommendation of the Commission’s report, published in 1878, was that domestic copyright law should be completely re-shaped and reduced to an ‘intelligible and systematic form’. Following the report and the joining of the Berne Union, there was no respite in the number of draft bills that were pressed onto the British government from 1886 onwards. Many of these bills were forwarded by the increasingly growing copyright actors in Britain, including the Association for the Protection of the Rights of Authors (founded in 1875), the Society of Authors (founded in 1883–1884), the Associated Booksellers of Great Britain and Ireland (founded in 1895) and the hitherto mentioned Publishers’ Association (founded in in 1896). These stakeholders heralded international copyright law and policy as a cultural heritage guardian, protecting local stakeholders such as indigenous British writers, publishers and printers. They also saw it as a crucial means to secure their economic interests extra-territorially against foreign imports from Empire territories and the ex-colonies.

The Report was however ultimately futile as noted by Deazley:

The [1878] Report affirmed that copyright should continue to be regarded as a property right, and acknowledged the need for reform and consolidating

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60 Report of the Royal Commission on Copyright 1878, C. 2036, paras. 4 and 7–9.
61 Ibid, para 7.
legislation. Beyond that, however, the Commissioners were in considerable disagreement as to copyright’s purpose and proper scope, with few of the Report’s major recommendations receiving the unanimous support of the same.63

Consolidation bills, which tried to implement the Royal Commission’s recommendations, were routinely delayed or opposed by the government. The rationale offered was that many of these bills affected Britain’s international obligations and the Empire’s relationship with the United States and her colonies. Opponents to domestic reform argued that a consolidating domestic copyright law would lead to self-governing dominions passing their own indigenous versions of the imperial law, as Canada had proved itself capable of doing. This would, the argument continued, threaten the notion of a unified imperial copyright area and the notion of a single imperial political and legal unity.64 Ironically, proponents for copyright reform along the lines set out in the Royal Commission’s Report employed the very same rhetoric of ‘uniform Imperial copyright law’ and argued that any domestic reform would have to be aligned with the ‘colonial issue’ so as to maintain uniformity of legislation throughout the Empire.65

What then made the British government shift its position and finally codify the copyright law in both Great Britain and its Imperial area? It was the 1908 Berlin revision of the Berne Convention. The amendments arising from that revision were far reaching and included uniform international rules on the term of protection, photographs, translations, sound recordings and the requirement of automatic protection upon fixation. Moreover, it was obvious that copyright reform and legislation in Europe had moved at a far faster pace than in the Empire. With the passing of the Berlin revision, there was simply no other recourse than to set about the task of reforming colonial and domestic copyright law in, what was by now, a shrinking and fading Empire.66

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64 Moreover, the spectre of each self-governing territory implementing a US-style manufacturing clause was real. E.J. Macgillivray (1912), The Copyright Act, 1911, Annotated, London: Stevens & Sons, 1912, p. iii.
65 Take the example of Edward Jenkins, a Liberal politician who had actively promoted the establishment of a Royal Commission, of which he was a member subsequently. Jenkins, however, remained attached to his view that copyright law was primarily an imperial issue, and nothing more – Feather (1994) (above, n. 1), pp. 183–185.
D. An Imperial Copyright Law

The 1908 Berlin revisions led to the establishment of the Gorell Committee in Britain in 1909. The Committee issued its recommendations swiftly, advocating the adoption of the Berlin revisions of the Berne Convention. The underlying reason was the need for international comity and uniformity.\(^{67}\) The Committee did not address the question of colonial copyright but noted the need for a unitary imperial law:

> 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.\(^{68}\)

In order to settle the colonial legislation question, an Imperial Copyright Conference was held in 1910, calling together Colonial delegates. The Conference passed resolutions approving the Berlin revisions and recommended an Imperial Copyright Act, which would apply to the whole of the British Empire. The Act would allow self-governing dominions the choice to adopt the law. A safe harbour for British subjects was placed within the Act: if the dominion did not afford satisfactory protection to the works of British subjects elsewhere, then the residents in that dominion may be excluded from the enjoyment of imperial copyright.

Despite its tumultuous passage through the House of Commons,\(^{69}\) the Imperial Copyright Act received royal assent on 16 December 1911 and entered into force on 1 July 1912.\(^{70}\) It created a unitary imperial copyright area, covering the United Kingdom, the Isle of Man, the Channel Islands, the colonies, a number of protectorates and the self-governing dominions of Australia, Newfoundland and South Africa. It consolidated a ‘glorious muddle’\(^{71}\) of 22 different British statutes passed between 1735 and 1906,\(^{72}\) and provided a more ‘intelligible and systematic’ structure that survives in many countries to this day. It applied to works first published within the imperial area or produced by a person

\(^{68}\) Report of the Committee on the Law of Copyright 1909, Cmnd. 4976.
\(^{70}\) 1 & 2 Geo. 5, c. 46.
\(^{71}\) The ‘glorious muddle’ metaphor is attributed to Lord Monkswell, Sherman and Bently (1999) (above, n. 19), pp. 128, 135.
\(^{72}\) It should be noted that it did not repeal all previous statutes; the Musical Copyright Acts of 1902 and 1906 remained in force until repealed by the later Copyright Act 1956.
who was a British subject or was resident within this area.\textsuperscript{73} Self-governing dominions (Canada, Australia, New Zealand, South Africa and Newfoundland) were free to enact their own versions of the Copyright Act 1911 with the adaptations necessary ‘to the circumstances of the dominion’.\textsuperscript{74} Whether they did so, and to what extent, can be studied in the following chapters dealing with a majority of these very same territories.

III. LOSING HER WAY: BRITISH COPYRIGHT LAW FROM 1911 TO 2011

After the passing of the 1911 Copyright Act, the copyright landscape within the United Kingdom changed considerably. It had begun to incorporate modern legal principles in order to combat technologically-driven piracy. It also started to accommodate the United Kingdom’s new position as a waning, though not totally impotent, power in international copyright circles. The latter was due to several influences, and we discuss three primary causes: (a) the emergence of non-state actors within the ever-expanding ‘copyright industries’; (b) the continuous revision of the 1988 copyright statute; and (c) copyright reform in the European Union (EU).

A. Non-State Actors in International Copyright Law

Traditionally, international law and politics rested within the domain of sovereign states. However, with the advent of ‘globalization’ (whatever this will mean to the reader), new actors entered the international arena. Such non-state actors have not totally usurped the position of the state; but in certain matters, such actors wield enough power to structure international law, which in turn, is implemented into domestic law. The term non-state actor is wide enough to encompass the private corporate sector, non-governmental organizations (NGOs) and trade representatives.\textsuperscript{75}

\textsuperscript{73} Copyright Act 1911, s. 1.
\textsuperscript{74} Copyright Act 1911, s. 25(1).
\textsuperscript{75} See, for example, S. Sell (2000), ‘Structures, agents and institutions: private corporate power and the globalisation of intellectual property rights’, in R. Higgott, G. Underhill and A. Bieler (eds), Non-State Actors and Authority in the Global System, London: Routledge, pp. 91–106.
And so it came to pass, that such non-state actors began to wield more and more influence in respect of copyright law, which grew in the twentieth century to encompass more than just books and musical works and sculptures. New subject matters under consideration at successive meetings of the Berne Union included cinematographic works, (Berlin Act, 1908), broadcasts (broadcasting right, Rome Act, 1928) and sound recordings (recording right, the Brussels Act, 1948). The concerted activities of authors and rights holders in the growing copyright world, together with newly formed trade groups, representing new copyright industries, led to a dilution of state activity and power. This phenomenon also saw a growing importance of international fora such as the World Intellectual Property Organization (WIPO), the United Nations Educational, Scientific and Cultural Organization (UNESCO) and recently, the World Trade Organization (WTO).

Take the example of the International Federation of the Phonographic Industry (IFPI). The organization was founded in 1933 to specifically lobby and promote copyright laws broadly in favour of the recording industry, at an inter-governmental level. As a key non-state actor in copyright negotiations, it has been highly influential in promoting international copyright laws, which are aligned with its own industry’s business and piracy strategies. IFPI’s international lobbying successes include, for example, the Rome Convention 1961 and the Geneva Convention 1971.

Coupled with the growth of the copyright industries, was the rise of collective bargaining and lobbying power, as represented by another new group of non-state actors, namely collective managements organizations (CMOs). Essentially, collective management of copyright is a system under which a copyright owner assigns or licences his rights to an organization and authorizes it, on her behalf, to grant licences to potential users.

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76 Economic industries can be loosely defined as those institutions which primarily focus on economic activities which are based on authors’ and performers’ works and rights such as the publishers, sound recording producers, film producers (including broadcasters), and more recently, internet-based publishers and disseminators.


78 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations 1961, which established minimum international norms for the protection of sound recordings, live performances and broadcasts.

79 Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms.
users of his work and to collect income due thereof. The collective power of these organizations within the European Union and global market cannot be underestimated. The monopolistic position of a national CMO in a specific area of copyright is ordinarily further strengthened by the national group’s membership of an intricate global CMO network. This membership allows reciprocal relationships with other national CMOs, so that these organizations can monitor and license each other’s repertoires on a worldwide scale. Practically, this also results in a sophisticated and co-ordinated lobbying activity that influences both market and governmental policies in international and national copyright laws.80

These are just two examples of how non-state actors have diluted the influence that any one state can have on domestic copyright reform, dependent as these laws are today on international copyright norms. As previously emphasized, state activity remains high in some areas, notably in relation to the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs Agreement), under the aegis of the WTO. Yet even in this sphere, the United Kingdom’s voice is lost amongst the cacophony which calls for stronger copyright protection, led increasingly by European Union legislators.

B. Reform Ex Ante Lex Europa

With the growth of non-state actors’ intervention in international copyright law, British copyright law changed considerably in the next four to five decades, as a reaction to developments in international copyright law. Copyright law in the United Kingdom entered into an introspective era.

80 In order to facilitate cross-border lobbying efforts, most national CMOs belong to international umbrella organizations. The more prominent of these organizations include the Bureau International des Sociétés Gérant les Droits d’Enregistrement et de Reproduction Mécanique (BIEM), the International Federation of Reproduction Rights Organisations (IFFRO) and the International Confederation of Societies of Authors and Composers (CISAC), who all, along with other CMOs, enjoy NGO observer status at WIPO meetings. For the behaviour of CMOs in the EU, see M.M. Frabboni (2009), ‘Collective management of copyright and related rights: achievements and problems of institutional efforts towards harmonisation’, in Estelle Derclaye (ed.), Research Handbook on the Future of EU Copyright, Cheltenham, UK and Northampton, MA, USA: Edward Elgar, pp. 373–400; U. Suthersanen (2000), ‘Collectivism of copyright: the future of rights management in the European Union’ in E. Barendt and A. Firth (eds), The Oxford Yearbook of Copyright and Media Law, Oxford: Oxford University Press, pp. 15–42.
The two major reforms were made in 1956\textsuperscript{81} and 1988.\textsuperscript{82} A historically noteworthy aspect of British copyright law-making is the presence of committees or commissions, and these two acts were no different in that the laws were preceded:

by an independent committee or commission chaired by a relatively neutral figure such as an eminent judge, which heard and weighed evidence (of course often contentious in nature), and then made what appeared at least to be neutral and balanced assessments and recommendations, leading to wide-ranging overall legislation that tended to stand unaltered (but adaptably so) for periods of thirty to forty years.\textsuperscript{83}

The 1952 Gregory Committee\textsuperscript{84} was appointed to inquire into the effect of technological developments on 1911 Copyright Act. The recommendations were, on the whole, incorporated into the 1956 Act, and films and broadcasts were protected in their own right under the law. The Act also established the Performing Right Tribunal, which had been recommended since the 1930s due to the monopolistic character of the CMO in charge of collection of music royalties.\textsuperscript{85} The 1956 Act also brought Britain into line with the subsequent Berne Convention revisions, and took into account United Kingdom’s accession to another new copyright agreement – the Universal Copyright Convention.

The changes wrought within these Acts were, to some extent, still influential in the previous Empire countries, most of which were ensconced in the British Commonwealth (now known as the Commonwealth of Nations). The 1959 Australian Spicer Report noted that in considering the reform of the Australian Copyright Act 1912, the first issue was:

\ldots whether the provisions of the [UK] Copyright Act, 1956 should in substance form the basis of an Act to be passed by the Commonwealth

\textsuperscript{81} Copyright Act 1956, c. 74.
\textsuperscript{82} Copyright, Designs and Patents Act 1988, c. 48. Despite its name, the Act deals primarily with copyright and (unregistered) design right.
\textsuperscript{84} Report of the Committee on the Law of Copyright 1952, Board of Trade, Cmd. 8662.
Parliament or whether an entirely different Australian Act should be framed. We have already indicated some of the advantages which flow from the existence of a form of legislation common to both countries.86

Canadian legislators too were mindful of the Gregory Report when it came to their turn to scrutinize the viability of the Canadian Copyright Act 1921. The 1957 Ilsley Report noted the following:

In particular we have had invaluable assistance from the report of a committee appointed by the President of the Board of Trade of the United Kingdom in April, 1951, ... referred to sometimes herein as the Gregory Committee ... We have, of course, carefully studied the Copyright Act of the United Kingdom which was passed on November 5th, 1956 ... Indeed we have delayed this report until we could get the benefit not only of perusal of the reports of these debates but of study of the new United Kingdom Act as finally passed.87

One can deduce that the United Kingdom still wielded some influence and power over its former colonies up till the 1960s. This may be partly due to the fact that the 1956 Copyright Act retained the spirit, if not the structure, of the Imperial Copyright Act 1911. Committee reports during this period show an attempt by the British legislators to continue the ethos of the nineteenth century in that copyright reform was not about revising specific areas to cater to specific lobbying efforts. Instead, it was a more holistic, and noble endeavour. Reform, if it was to occur, should entail wholesale reform of the entire sphere of copyright law. And it certainly was not about discrete items of the law, such as duration of copyright or databases.

All this was to no avail as within three decades of the 1956 Act, Britain embarked on another major journey in terms of her copyright law. The Copyright, Designs and Patents Act 1988 was preceded not only by a committee report (1977 Whitford Committee88), but also by two Government consultation documents (1981 Green Paper89 and the 1986

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86 Report to Consider what Alterations are Desirable in the Copyright Law of the Commonwealth 1959, para. 23.
88 Copyright and Designs Law: Report of the Committee to Consider the Law on Copyright and Designs 1977, Cmd 6732.
White Paper\(^{90}\). And yet, despite the numerous hearings and consultations and the United Kingdom’s legendary law-making conventions and traditions, the eventual Act was not a success as a piece of legislation. However, had this been the end of the reform process, such complaints would have been easily resolved, with time. But this has not been the case. In short, the copyright framework in this country has become unwieldy, incoherent, ageing and replete with either obsolete provisions (some which date from the 1911 Copyright Act) or inconsistent provisions.\(^{91}\) The chaotic nature of the Act is the unsurprising result of the numerous revisions and additions that the statute has suffered continuously, without respite, from 1989 to 2011. Indeed, it has altered so markedly from the original statute that the government’s intellectual property office advises us that: ‘To differentiate it from the original, the act is now referred to as the Copyright, Designs and Patents Act 1988 (as amended).’\(^{92}\)

This is not an Act to follow or copy or be influenced by. As one commentator points out, the original 1988 Copyright, Designs and Patents Act represented fundamental copyright principles in about 30 sections; those sections, however, have ‘become exceptionally messy thanks to their frequent adjustment in compliance with the European Union requirements’\(^{93}\).

C. *Lex Europa*: A Neo-Imperial Copyright?

There has been no attempt by the EU legislators to harmonize national copyright legislation amongst the 27 EU member states. This is in contrast to the substantially harmonized laws in the areas of patent, design and trade mark laws.\(^{94}\) This does not imply that a relentless

\(^{90}\) United Kingdom, Department of Trade, Intellectual Property and Innovation, London: HMSO, 1986, Cmd 9712.


\(^{93}\) MacQueen (2007) (above, n. 82).

\(^{94}\) Patent law is harmonized through the European Patent Convention (EPC), which is legally speaking, not strictly part of EU law, but is an international convention. It has other members, in addition to all 27 EU member states. EU member states’ trademark and design laws are harmonized by the following legislation: Council of the European Union (Council Regulation (EC) No 40/94
The first global copyright act

harmonization exercise has not been underway for the last 20 years. The fact that EU member states’ copyright laws differed so substantially on fundamental aspects, such as criteria of protection, moral rights and term of protection, led, not unreasonably, to the belief that some harmonized rules were imperative to ease pan-EU transactions. The solution would have been to write a harmonizing Directive, accompanied by a Community Regulation, introducing the concept of ‘Community copyright’. This, after all, was the modus operandi with respect to the harmonization of trade marks and designs, an exercise that introduced two unitary rights – the Community trade mark and the Community design right. One can only speculate that the reason for not applying the same to copyright was the fear that a political impasse would result when legislators attempted to overcome the different cultural and constitutional bases underpinning the copyright/droit d’auteur systems within the EU.  

Hence, an alternative route was pursued, whereby elements of copyright law would be harmonized, as and when the European Commission was of the view that there was a pressing economic need for harmonization in a certain area. The result is that harmonization of EU copyright law has been painstakingly and excruciatingly slow, cumbersome and complicated. This process has been exacerbated in the last two decades by the growing membership of the European Union.  

The current ‘EU copyright framework’ comprises of seven directives, most of which deal in an ad hoc manner with narrow spheres within copyright law: computer programs, rental and lending rights, term of
protection, databases, direct broadcasting by satellite, cable retransmission rights, artists’ resale right, minimum economic rights (which align the EU member states with international copyright law) and a list of defences, all of which, save one, are optional. These revisions are made through directives, rather than through a single regulation. What this means in practice is that member states repeatedly slice through and amend their domestic laws, which inevitably increases the complexity and incoherence of national laws. In a few important cases, national laws differ markedly from each other and from the language employed within the EU directive. This is especially true in relation to the list of exceptions and limitations set out in the Information Society Directive which leaves it up to member states to pick and choose their own mixture.


99 A directive requires EU member states to achieve a particular result through implementation; a regulation is self-executing and does not require any implementation measures. A simple and concise explanation of these measures can be read at the EU Law official web site: eur-lex.europa.eu/en/editorial/toc_r1.htm.

100 For a criticism on this aspect of the Directive, see IViR Study On The Implementation And Effect In Member States’ Laws Of Directive 2001/29/EC On The Harmonisation Of Certain Aspects Of Copyright And Related Rights In The Information Society, available at ec.europa.eu/internal_market/copyright/studies/studies_en.htm. For a comprehensive account of how different the laws of member states are in relation to the EU implementation of the WIPO internet treaties, see B. Lindner and T. Shapiro (eds) (2011), Copyright in the Information Society.
In other cases, the silence of the directives in respect of important measures (such as the ‘take down notices’ in relation to infringement on the internet) has resulted in a plethora of varying national laws. And finally, important elements of copyright law, such as ‘originality’, are statutorily defined but are only strictly applicable, under EU legal principles, to the subject matter being harmonized. Thus, since 1991, British courts have been theoretically bound to apply the EU test of the ‘author’s own intellectual creation’ in respect of three types of subject matter (computer programs, photographs and databases). On the other hand, British judges continue to apply the traditional common law test of originality (namely a work must not be copied and must show skill, labour or judgement) to all other types of subject matter. It cannot be sensible for a country to be in the unenviable situation of having two concepts of ‘originality’ resounding within her copyright law.

CONCLUSION

Thus, we disembark at the end of Britain’s lengthy global law-making voyage. Despite its noble beginning, the British-consolidated copyright framework has now become increasingly criticised for being unwieldy, complicated and incomprehensible. Since the 1988 Act, there have been two major reviews of copyright law and recommendations as to how
it should be moulded. There have even been calls for a complete re-structuring and writing of the present 1988 Act, in a manner reminiscent of the pre-1911 era:

As we move inevitably towards deeper harmonisation of copyright in Europe, it would make sense to reform the structure of United Kingdom law to enable it to accommodate such reforms. To do so would involve something of a return to the structure of the 1956 Act, with ‘Part 1’ and ‘Part 2’ works.

Law-making in a piecemeal fashion was the British legislative signature in the eighteenth century. This piecemeal approach is, disappointingly, becoming part of the British law-making process again, as the United Kingdom struggles to incorporate in a staggered fashion, the continuous stream of EU copyright directives. It is clear, at least from the British position, that the nineteenth-century approach had led to a more coherent copyright framework. This conclusion may not find support within other scholarly writings. After all, the history of nineteenth-century copyright law shows that the process of consolidating British law had a long gestation period. Bills had already emerged as early as in the 1830s in an effort to realign both national and international copyright principles.

Nevertheless, one point should be emphasized. Copyright reform in the nineteenth century, leading up to the Imperial Copyright Act 1911, was not driven by single issues or discrete lobbying groups. Yes, it is true that there was authorial and publishing pressure, but nevertheless these non-state actors had yet to play an influential role in domestic or international law making. Instead, much of the century’s debates on reform revolved on imperial governance and international comity.

For a government entrusted with an Imperial mandate to govern, the process of reforming domestic copyright law in the United Kingdom was to align its domestic interests with its interests in the colonies and in the international markets. I would submit that the Imperial Copyright Act 1911 was the first global law written and administered by the United Kingdom. The statute was, conceptually, the first multilateral agreement, and if we push the analogy further, the forerunner of the TRIPS Agreement. It represented a ‘state of perfection’.

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It was the model domestic copyright law, in terms of structure, coherence and codification of the various strands of legislative interventions in the area of artistic and literary copyright since the 1710 Statute of Anne. Moreover, it embodied the modern version of copyright law, as it had become institutionalized in the international copyright agreements.\textsuperscript{106}

One can only hope, perhaps too optimistically, that this will not be the last global law written by the United Kingdom.