1 Introduction

International copyright: gazing into cyberspace

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Synopsis and guidance

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

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

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

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

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

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

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

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

Visions of copyright 1837–1911: coming full circle?

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

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

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

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

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

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

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

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

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

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

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