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INTRODUCTION

The subject of this book is Serjeant Talfourd's back-bench attempt to reform the law of copyright, an attempt which eventually produced the Copyright Act of 1842. The idea of reform is potent in the history of England in the nineteenth century. It would be impossible to write a general history of the period without giving an account of the major constitutional reforms concerned with popular representation, which eventually transformed parliament. Yet other contemporary legislative reforms are arguably as striking, both in terms of their volume, and in terms of the changes which resulted. The many attempts to improve the law and its mechanisms make this period a significant one for legal history. In the decade following the 1832 Reform Act, approaches to government in the widest sense were re-examined and transformed. This process had protean qualities: striking though the direction and velocity of the immediate changes could be, they often represented only the first phase of lengthy trajectories.

Nevertheless, it would be foolhardy (and unduly Whiggish) to regard these changes as inevitable; they were the product of many complex and conflicting forces. Although nineteenth-century legislators did create a battery of significant reforms, the antecedents and characteristics of individual measures varied considerably. To take the example central to this book, the changes to copyright law which resulted from the 1842 Copyright Act were not overtly typical of a reforming brief. However, the efforts to promote the various copyright measures (which began in 1836) were profoundly affected by the prevailing mood of reform, and the methods and mechanisms associated with it. Talfourd had originally envisaged a thoroughgoing consolidation of all aspects of copyright, an aim which might have been thought consistent with general reforming objectives. Such an assumption ignores the

complex and varied character of reforming activity at this time. Copyright instead became characterised as harmful by a significant body of popular opinion, and a campaign of resistance was organised. After a lengthy battle, the bill's sponsors were forced to settle for the compromise effected by the 1842 Act.

Although it is possible to reduce the principle of reform to little more than a Benthamite slogan, this is to ignore the subtlety and pervasiveness of the concept. The Great Reform Act of 1832 has (and had) a well-developed popular image as the keynote reform of the period. Its symbolic importance was certainly considerable. In terms of practical results, however, the 1832 Act's reputation bears only limited examination: later reform Acts, and related legislation, were arguably more significant.[1] Inevitably, the close link between the legislative and constitutional aspects of parliamentary reform ensured ample publicity for any statutory changes in this area. This should not be allowed to obscure the many other social and economic reforms of the period, which often required implementing legislation.[2] In addition, there were deliberate attempts to render the law itself more coherent and accessible; specific legislative reforms covered many aspects of practice and procedure.[3]

[1] For details of these see, for example, John Cannon, *Parliamentary reform, 1640–1832* (Cambridge, 1973); Michael Brock, *The Great Reform Act* (1973); Norman Gash, *Politics in the age of Peel* (1953); Francis B. Smith, *The making of the second Reform Bill* (Cambridge, 1966); Norman Gash, *Pillars of government and other essays on state and society, c. 1770–c. 1880* (1986); Andrew Jones, *The politics of reform: 1884* (Cambridge, 1972); Martin D. Pugh, *The making of modern British politics, 1867–1939* (1982).

[2] For example, the Municipal Corporations Act 1835 began a process of local government reform which continued throughout the century. In another sphere, the New Poor Law Amendment Act 1834 made controversial changes intended to reduce expenditure. Other measures addressed a range of issues including public health and education, and also dealt with more general matters such as financial and administrative efficiency. Geoffrey B. A. M. Finlayson, 'The politics of municipal reform, 1835', *English Historical Review* 81 (1966), 673–92; Gillian Sutherland (ed.), *Studies in the growth of nineteenth-century government* (1972); Derek Fraser (ed.), *The new poor law in the nineteenth century* (1976).

[3] For example Peel's Acts, which consolidated the criminal law and reduced the use of capital punishment. A considerable programme of reforms resulted, both before and after the 1832 Reform Act. For confirmation see Holdsworth's catalogue of statutory changes (vol. XIII, ch. 4) which details an extraordinary list of interventions, large and small. Sir William Holdsworth, *A history of English law*, 16 vols. and index (1903–52); Leon Radzinowicz, *A history of English criminal law* (1948); William R. Cornish and Geoffrey de N. Clark, *Law and society in England, 1750–1950* (1989).

The notion of law reform is certainly not peculiar to the nineteenth century. It has always been necessary for the law to respond to society's needs, sometimes willingly, sometimes under pressure. Nevertheless, this period provides a unique presentation of this process. We are repeatedly offered a vision of reform as the 'spirit of the age', with conscious emphasis on utility, efficiency and humanitarianism. Such generalisations are in some ways helpful, yet can become parodic if attention to detail is lost. On a more technical level, it should be observed that the governments of this period were ground breaking in their extensive resort to statute law. The job of developing and adapting the law to a changing society had previously been left largely to the courts, which had gone about their task with subtlety and quiet skill. The process of legal reform by judicial precedent is a slow but constant process, usually gradual, and necessarily piecemeal. In this it is quite different from statute, which can change the face of the law in an afternoon. For grand schemes of consolidation or codification, statute law is essential. Talfourd's plans for copyright reform were, therefore, dependent on the passage of a bill.

The legislative history of literary copyright in England may be summarised fairly briefly. The sixteenth-century licensing system was born of Tudor desires to control the press. In 1557 Mary granted the Stationers' Company a charter, which allowed its members an effective monopoly on legal printing.[4] The system was remarkably resilient, and even survived throughout the Civil War, in form if not in fact. In 1662 Charles II restored the licensing system to strength, again with a view to maintaining Crown power over the press, but let it lapse in 1679. After a brief revival under James II, in 1695 parliament finally refused to extend the life of the licensing system, and chaos in the book trade was threatened. After repeated trade efforts, in 1710 the first English copyright statute was passed, often referred to as the Act of Anne. Described as an 'Act for the Encouragement of learned Men to compose and write useful Books', this gave a fourteen-year

[4] An entry in the Stationers' Registerer originally indicated that the book had been properly licensed, but soon came to indicate a quasi-proprietary right to the 'copy'. Thus 'copy' came to mean the sole right of printing publishing and selling (hence 'copy-right'), although the word is also used to refer to the work incorporated in the manuscript, and to the physical copy. For a fuller account see John Feather, *A history of British publishing* (1988).

term to all books registered with the Stationers' Company, with an additional fourteen years if the author was still living at the expiry of the first term. Although the right was granted to 'authors and their assigns', in practice it was invariably held by the bookseller. It was at first thought that the Act of Anne offered rights which were supplementary to a perpetual common law right of literary property, but in 1774 the famous case of *Donaldson* v. *Beckett* decided otherwise. The decision was followed by a long period of stagnation, broken in 1814 by a new Copyright Act which set the term at twenty-eight years, or the author's life if this was longer. It was this Act that Talfourd sought to change.

It is easy enough to describe copyright reform in a way which would suggest a parallel with a general Whiggish trajectory of reform. It is possible to see the 1814 Act as a breakthrough in terms of the author's place in copyright law, because for the first time the author's lifespan is an important element in the calculation of term. On this line of reasoning, the 1842 Copyright Act provided further improvement, setting the term to the author's life plus seven years, providing this was not less than forty-two years in total. The 1911 Copyright Act, enacting the Berne Convention's minimum requirement of the author's life plus fifty years, might then be the pinnacle of a reform movement to provide author-centred copyright legislation, where entrepreneurs at last rate second to the creative individual. However, such an analysis would be dangerously wrong, revealing sharply the dangers of isolating the law from its context. The influence of the reform movement was powerful, but not so crude.

Certainly many of the mechanisms of protest used in the parliamentary and other reform struggles were used again in the copyright campaign; both sides sought to lobby MPs and other influential figures, newspapers and the periodical press provided publicity, and the use of petitions was crucial. Yet there were other, distinct, sources of pressure. It is important to realise that the resistance to the early copyright bills came largely from print workers and publishers, because the changes to copyright were perceived as a threat to the print trade. It took time for this simple trade dispute to escalate, but eventually the debate encompassed a wider and far more explosive mixture of issues, including taxes on knowledge, popular education and free trade. Some of these issues had been linked to copyright previously, notably

copyright and censorship; other themes, at least in their presentation, were new.

As has been suggested, in some ways copyright law was an ideal target for reform. It was fragmented, incomplete, sometimes unclear, and it lacked the international dimension which was needed more and more urgently. The rapid changes in social and economic conditions were having a profound effect on the book trade. Markets were increasing significantly, but so was competition: the book trade had to adapt if it was to survive. Authors too were changing: their status increased as the popular market grew. Copyright was the bargaining counter which passed between the artist and the entrepreneur. A re-examination of copyright's aims and mechanisms might well have been timely.

Yet it is here that further parallels may be drawn between parliamentary reform and copyright reform. The process of parliamentary reform continued for decades, as different ideological models jostled for political primacy. Although a series of compromises were achieved, the concept of effective representation remained a matter of fierce disagreement. Similarly, there was no single goal for copyright reform, and even if agreement had been reached as to copyright's purpose, there was no obvious or guaranteed method of achieving this. Talfourd himself was certain that the author's role should be pre-eminent in literary copyright, and he tried to maintain this principled stance. Others disagreed fundamentally. Copyright was characterised by some as a state-sanctioned monopoly, and Talfourd's proposals came to be perceived as contrary to Benthamite doctrine. The complex and technical bill was judged largely on the single issue of copyright term, and the deeper issues of principle were put aside. Trade and radical interests were more numerous, more vocal and more organised than Talfourd's supporters, and they prevailed.

Talfourd argued indefatigably that genius should be prized above all else, and that the immeasurable, indefinable needs of culture should prevail over what he termed the 'freezing effects' of the radicals' position. In a post-reform parliament, few MPs felt able to argue for what was perceived as special treatment for authors, particularly in a trade-related matter. The bill's sponsors, caught in a storm of lobby groups, understandably salvaged the best compromise they could. It is arguable that Talfourd's vision

– of copyright as a recognition of cultural worth and not a commodity – deserved closer attention.

THE 1842 ACT – PASSAGE AND POSITION

The 1842 Copyright Act was the product of five years of heated public and parliamentary debate. It resulted in an extension of term: copyright was to last for the author's lifetime plus seven years, or for a minimum of forty-two years from the date of publication. The 1814 Copyright Act had provided for a twenty-eight-year term, or the author's lifetime if this was longer, so the change is now regarded as of little real significance. Brief histories of copyright often gloss over the 1842 Act altogether, although the introduction of a post-mortem term may be noted. Much more attention is paid to the eighteenth-century great cases, *Millar* v. *Taylor*, and *Donaldson* v. *Beckett*. Such treatments underestimate the historical significance of the 1842 Copyright Act, and in particular the circumstances surrounding its passing.

The struggle to pass a copyright Act began in 1837, when the first bill was introduced by Serjeant Talfourd. Versions of the bill were presented every year after this, under the gaze of two monarchs and two prime ministers, until 1842. The bill became hugely controversial, and provoked great public interest. It was perceived as being of great significance, as several influential groups became involved in either promoting or blocking its passage. Some of these groups included those directly affected by changes to copyright law, such as publishers, print workers and authors. However, the bill was also regarded as having considerable political significance, because of the wider issues raised. The various bills were therefore very heavily and noisily contested, both in and out of parliament. A striking feature of the campaign was the use of petitions, both mass petitioning to oppose the measures, and more selective petitions in support. Analysis of these, and other lobbying measures, reveals the contemporary mechanisms of popular protest.

A reassessment of the 1842 Act's place in copyright history is therefore overdue. The Act formed the basis of modern copyright law: it provided the groundwork for the domestic aspects of the 1911 Act, and this foundation was to a significant extent carried

forward in the 1956 and 1988 Acts. In addition, there were consequences for the lobbying groups, and these, too, had an effect on the development of copyright, albeit rather more indirect.

That conventional approaches to copyright do not acknowledge the wider significance of the 1842 Act is in part due to their particular and limited aims. Standard copyright works, such as Copinger, have only brief space for history.[5] Understandably they focus on contemporary positive law, and its direct and practical consequences in case law. Feather's historical study of copyright in Britain provides a helpful narrative that does explore the circumstances surrounding copyright, in particular its interaction with the book trade.[6] However, this history, too, has limitations of space and dimension, imposed by the decision to cover copyright law from its origins to the current governing Act. The linearity of these approaches obscures the extent to which nineteenth-century domestic copyright interconnects with contemporary issues – and results in an underestimation of its importance.

Other accounts of copyright are provided by related historical disciplines, particularly the history of aesthetics. Here the focus on the author, and the imposition of a Romantic trajectory, can sometimes act to distort and simplify situations where obscurities and difficulties remain. The post-structuralist approach to authorship adds a further agenda, hostile to positivity and dominant meaning, which cuts across any familiar history of copyright law.

This book aims to provide a more rounded account of the 1842 Act, situating it in the many contexts in which it operated, and freeing it from the linearity imposed by standard accounts. This is achieved through a comprehensive analysis of a wide range of contemporary sources, a luxury permitted by the choice of a limited time period. The remainder of this introductory chapter presents the main themes and problems of copyright law during this period, and provides an overview of the bill's progress. The book is then structured to reflect the adversarial nature of the debate: the first half is concerned principally with opposition and opponents, the second half with those in favour of Talfourd's proposals. The bills themselves were long and detailed. Some of

[5] Edmund P. Skone James *et al.*, *Copinger and Skone James on copyright*, 14th edn (1998).
[6] John Feather, *Publishing, piracy and politics* (1994).

the clauses underwent considerable change as the bills developed, whether for political or legal reasons. Talfourd's original plans included revision and clarification of various matters which, although of practical and legal significance, were generally regarded as specialist and technical. These included some striking ideas (such as a 'fair use' clause), many still of interest and relevance today. A detailed account of these is given in Appendix II. However, attention was largely focused on a few of the most disputed clauses: as will be seen, these achieved a more general currency, both in debates and petitions. There is an extended discussion of the mechanisms available to and used by each side.

Mass petitioning was one of the main weapons used against the bill, provoked by the radicals' characterisation of copyright as a monopoly which acted as an intolerable fetter on the diffusion of knowledge. This technique is examined first in its parliamentary context. The petitions themselves are then explored in detail. These show that the book trade's hostility to copyright extension came from both print workers and publishers, and highlights the differences in their mechanisms of protest. The organised and well-established trade bodies proved to be of great importance. Analysis of the petitions also reveals a progressive widening of the debate beyond trade boundaries, adding to its political significance. Heavy-weight parliamentarians became more embroiled in the debate as a result. Contemporary newspapers provide reports of the proceedings and act as a benchmark of public opinion.

Authors did not have the ready-made organisational structures of the print trade, and had to rely on individual campaigners. However, the literary world was cohesive in its own way, and eventually roused itself to make full use of the levers available to it. Although discreet lobbying was preferred at first, authors helped to disseminate the debate through the printed word. As the stakes grew higher, they overcame their distaste for the public petition, and provided Talfourd with an array of petitions which rivalled the trade's for completeness, although not in number. The copyright issue drew the literary world together in a way not seen before.

The detailed narrative is important in itself, and allows consideration of how far the 1842 Act provided a resolution to the conflict between these two entrenched sides. Parliament was set a considerable task. The importance of copyright in the international

context was becoming clearer, and the commercial implications of legislation were considerable for trade both at home and abroad. The links between copyright and wider topics such as free trade and education did not make the process of reconciliation any easier. Copyright became caught between those who valued intellectual property only prosaically and those who wished to associate its intangible qualities with the intangible in literature.

In addition, since Talfourd's Act had such influence on modern copyright law, it is appropriate to assess the legislative foundation it provided. In particular, it is necessary to consider what, if anything, the 1842 Act contributed towards a functioning and resilient rationale for copyright law. The book will conclude with an attempt to set this question in its theoretical context.

COPYRIGHT – ITS NATURE AND HISTORY

Copyright is a broad and flexible form of intellectual property. It covers, for instance, an enormous range of subject-matter. In the United Kingdom, contemporary copyright law protects what might be regarded as the 'conventional' forms of aesthetic expression – literary, dramatic, artistic and musical works – although these categories include some perhaps unexpected items, such as photographs and computer programs. Broadcasts, recordings, films and published editions are likewise protected. These additions reflect the acute sensitivity of copyright to certain areas of technology, particularly those which relate to recording and copying. This is to be expected, given copyright's nature and history.

The pressure for a general right to prevent the copying of works grew out of the development of the printing-press. Early demands came from printers and publishers, and not from authors. Rights to print tended to be granted by the Crown, and for individual works or types of work. The Crown could use these grants as a form of control, and clearly saw and exploited the possibilities of censorship. Eventually, demand by the Stationers' Company for a general right resulted in the Statute of Anne 1710. This gave the 'sole right and liberty of printing books' to authors and their assigns, for fourteen years from first publication; although if the author was still living at the expiry of this period, the right was 'returned' to him for a further fourteen years. These provisions

reveal some of the drafting difficulties which arise in any attempt to frame a general copyright law: the subject-matter has to be determined, as does the term; and the definition of an infringing act has to be clear.

Without these basic parameters a right to prevent copying is of little use. The problem lies in the decisions made as to how to set them. The decisions taken depend on the view taken of the purpose and nature of copyright, a view which is in turn dependent on a sense of the place and worth of the artistic objects of protection. The answers to these questions are not uncomplicated, and broaden the context of the discussion to include contemporary issues and ideas. The Act of Anne's preamble appears to give a simple solution – 'the Encouragement of learned Men to compose and write useful Books' – but in fact the answer is much more complex.

The twentieth century has come to regard copyright as, broadly, an economic right. In fact, twentieth-century law is heavily based on nineteenth-century law, with the obvious changes needed to take account of developments in technology. The nineteenth century saw one of the fullest discussions of the problems of domestic copyright law, provoked by Serjeant Talfourd's repeated attempts to shepherd a comprehensive copyright bill through parliament. Talfourd was a key figure. This book will examine the process of evolution which eventually resulted in the Copyright Act 1842. It also aims to show how the wider social, economic and philosophical forces present in the first half of the nineteenth century changed the nature of copyright, transforming it from a parochial system of rather limited significance, into a highly prized economic right. This newly defined copyright would come to stand as the basis for twentieth-century copyright law, and helped to provide impetus for the discussion of international measures.

How, then, should copyright be defined? In a legal context, it is often helpful to consider the various elements of a right; its subject and duration, for instance. The initial definitional problem for any copyright law is its subject-matter. The Act of Anne refers only to books, whereas modern copyright statutes cover many forms of expression. In the eighteenth century, books remained the single most important product in this area, and there was little attempt to widen the range of copyright.