

# The "Extraordinary Multiplicity" of Intellectual Property Laws in the British Colonies in the Nineteenth Century

*Lionel Bently\**

*Although a great deal of attention has been paid to the history of intellectual property in Great Britain, very little has been said about the history of intellectual property law in the British colonies. This Article attempts an overview, focusing on the nineteenth century. The author argues that there was no apparent imperial strategy as to the development of colonial intellectual property laws, and that, as a consequence wide variations existed between the laws operative in Britain and the colonies. One exception to this picture existed in relation to literary copyright, where, for reasons that were never clearly articulated, British law had been extended to its colonies from 1814. The overall picture was otherwise one of "legal fecundity," with capacity for variation and experiment by the colonial legislatures constrained more by internalized notions of what was appropriate than by formal, external, limitations imposed from Britain. However, towards the end of the nineteenth century, there appeared a growing desire both in Great Britain, and amongst many of the colonies and self-governing dominions, for a greater level of uniformity.*

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\* Herchel Smith Professor of Intellectual Property Law, University of Cambridge; Fellow of Emmanuel College, Cambridge. My thanks go to Ron Harris for his insightful commentary on an earlier draft of this Article and to all the other participants at the Conference on Copyright Culture, Copyright History held by the Cegla Center at Tel Aviv University, January 2010, in particular, Michael Birnhack, Michael Crystal, Anupam Chander, Yoav Mazeh, Neil Weinstock Netanel, David Nimmer, Brad Sherman, Michal Shur-Ofry, Madhavi Sunder, and Diane Zimmerman.

## INTRODUCTION

The history of intellectual property law in the British colonies during the nineteenth century remains little explored. To date, the field has been examined only by way of specific treatment of individual countries or topics. In this Article, I want to survey the field at a more general level, examining in particular the respective roles of the Imperial and local colonial governments. In so doing, the Article draws attention to four aspects of this history. Part One of the Article suggests that, as with many aspects of British colonialism, there was no grand vision in relation to intellectual property. Indeed, for the most part, the question whether to adopt intellectual property laws, as well as their form, was regarded, at least before 1880, as a matter for the colonial legislatures. The main exception to this related to copyright in books, where imperial legislation prevailed. Part Two of the Article examines why the colonial legislatures should have been given such a high degree of devolution as regards decision-making in relation to intellectual property. The Third Part of the Article observes that despite this tendency to leave matters of trade marks and patents, as well as artistic and other copyrights, to local colonial governments, towards the end of the nineteenth and the beginning of the twentieth century there emerged an interest in uniform law. This move allowed for a reformed imperial copyright system into the early twentieth century, though it was unsuccessful in the patent field. The Fourth and final Part of the Article considers the reasons that might have informed the differential treatment of patents and copyright. Why should copyright, but not patents, have prompted imperial intervention?

### I. THE UNPLANNED CHARACTER OF BRITISH-COLONIAL IP LAW DURING THE NINETEENTH CENTURY

Much of what is to be found in the development of intellectual property laws in the British colonies was uncoordinated and unplanned. All colonies were given some capacity to legislate, though the structures by which such legislation was to be adopted varied amongst the colonies as well as over time. As an inevitable consequence of this devolution, as well as different types and levels of representation, legislation in the British colonies was varied, complex and messy.<sup>1</sup> In particular, as we will see, there was no imperial

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<sup>1</sup> THOMAS RICHARDS, *THE IMPERIAL ARCHIVE: KNOWLEDGE AND THE FANTASY OF EMPIRE* 3 (1993) ("I have found that historians have tended to confer a lot more

law of patents, designs or trade marks. The one obvious exception related to copyright in books, and that exception was accompanied by considerable controversy.

### A. Patents

As is well known, patents for inventions were granted by the English Crown from as early as the fifteenth century, though for the most part these only applied in England (separate patents being granted in relation to Scotland and Ireland). Occasionally, an English patent would be expressed to extend to "His Majesty's Colonies and Plantations Abroad,"<sup>2</sup> reflecting a desire that the grant have imperial application. Nevertheless, by the early nineteenth century serious doubts were expressed as to the effectiveness of any such grant that was intended to apply outside of England and Wales. In evidence to the Select Committee of 1829, the patent agent John Farey suggested that such rights were of limited value and, in many cases, had no legal effect.<sup>3</sup> Consequently, a number of the colonies developed their own locally applicable patent systems.

The 1852 Patent Law Amendment Act transformed the archaic and expensive system of grant of multiple patents in England, Scotland and Ireland into a streamlined and cheaper system for the grant of a single British patent,<sup>4</sup> and discussion occurred within the Patent Office as to whether these patents should be extended to the colonies (the matter having been left open in the Act). The Office decided, in light of the fact that many colonies

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unity on the British Empire than is justified. Most people during the nineteenth century were aware that their empire was something of a collective improvisation.").

2 See CHRISTINE MACLEOD, *INVENTING THE INDUSTRIAL REVOLUTION: THE ENGLISH PATENT SYSTEM, 1660-1800*, at 28 (1988) (reviewing seventeenth century patent grants for Barbados and Jamaica); SELECT COMMITTEE ON THE LAW RELATIVE TO LETTERS PATENT FOR INVENTIONS, 1829, H.C. 332, at 173-75 (examples), 213-16 (forms) [hereinafter 1829 SELECT COMMITTEE ON PATENTS].

3 1829 SELECT COMMITTEE ON PATENTS, *supra* note 2, at 17-18. (John Farey, for example, gave evidence that where the colony had its own legislature, an express Act of that legislature was required before the patent, granted in England, would be enforceable. Farey gave one example of where this had occurred, namely in respect of Hague's patent for expelling molasses from sugar. There were practical difficulties with enforcing an English patent against infringement in the colonies: Farey thought enforcement would need to be in an English court, so such an action would be attended by the extra expense of bringing witnesses from abroad.)

4 Act for Amending the Law for Granting Patents for Inventions, 1852, 15 & 16 Vict., c. 83 (Gr. Brit.).

had, or wished to have, their own patent laws, that British grants should not, in general, be extended. None were.<sup>5</sup>

By 1864, seventeen British colonies had patent laws.<sup>6</sup> Patent Acts and Ordinances were adopted, for example, in New South Wales and Barbados in 1852,<sup>7</sup> Victoria in 1854,<sup>8</sup> India in 1856,<sup>9</sup> Jamaica in 1852 and 1857, Tasmania in 1858, Ceylon and South Australia in 1859, New Zealand and the Cape of Good Hope in 1860, British Guinea in 1861, British Honduras in 1862, Trinidad in 1867, New Zealand in 1870, and Fiji in 1877. The contents of these laws varied enormously. The variations in the colonial patents can be exemplified by a brief review of the contents of the patent legislation (though doubtless further variations operated at the level of practice).<sup>10</sup> Variations existed in all aspects of the law, from the definition of patentable subject matter, duration, scope of rights, procedure, grounds of opposition, grounds of invalidity, definitions of novelty, disclosure requirements, requirements of working and compulsory licences. Most colonies had their own application procedure and law, but a few merely extended the operation of British law to the colony.<sup>11</sup> Some specifically

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5 See ROYAL COMMISSION, REPORT OF THE COMMISSIONERS APPOINTED TO INQUIRE INTO THE WORKING OF THE LAW RELATING TO LETTERS PATENT FOR INVENTIONS, 1864, C. (1st series) 3419, at 30 (Lewis Edmunds) [hereinafter 1864 ROYAL COMMISSION ON PATENTS].

6 *Id.*

7 On differences between the New South Wales statute and the British law, see *Moorewood v. Flower*, (1825-62) 2 Legge's Selection of Supreme Court Cases in New South Wales 1109 (N.S.W.).

8 For cases on the Victorian Act, see *Patent Composition Pacement v. Richmond* (1875) 1 V.L.R. (Equity Section) 50; *Ellis v. Geach* (1873) 4 A.J.R. 163; *M'Lean v. Kettle* (1885) 9 V.L.R. (Equity Section) 145.

9 Rajesh Sagar, *Introduction of Exclusive Privileges/Patents in Colonial India: Why and for Whose Benefit?*, [2007] 2 INTELL. PROP. Q. 164. Sagar argues that the replacement of the 1856 Act with another Act in 1859 reflected imperial interests and undermined the orientation of the 1856 Act towards the encouragement of technology transfer into India. More specifically, Sagar charts the manner in which a local, Indian, novelty test was devised in order to encourage importation of inventions into India, including from Great Britain, by Indians, and that the 1859 Act modified these standards to undermine this goal and in a way which made it easier for British patentees to gain protection in India.

10 Many of the laws allowed for examination, with the assistance of scientific advice, but the legislation rarely indicates the extent of such examination, in particular whether it included examination on grounds of novelty.

11 Ordinance for Granting Patents for Inventions Within This Colony, No. 14, (1862) (H.K.), allowed applications based on the "English" grant, extending the right to Hong Kong "as fully as if the same had been granted with an extension

provided for local law as an alternative to any British grant that had explicitly been made applicable to the colony,<sup>12</sup> while others indicated that British grants made after the introduction of the colonial law were to be of no effect unless they complied with the conditions under the local law — specifically indicating that colonial law was sovereign.<sup>13</sup>

The Statute of Monopolies of 1623 had imposed a statutory limitation on the circumstances in which the English Crown could grant monopoly rights, limiting their validity to grants for "the sole working or making of any manner of new manufactures within this realm . . . so as also they be not contrary to the law, nor mischievous to the state . . . or generally inconvenient."<sup>14</sup> The British patent statutes, of 1852 and 1883, operated with the definition of patentable subject matter derived from the 1623 Act and many colonies followed this lead.<sup>15</sup> There were, however, many variants. The New South Wales Act of 1852 allowed for the grant of exclusive rights to the author or designer of any "inventions and improvements in the arts and manufactures," a definition which suggests something broader than "manners of new manufacture."<sup>16</sup> India and Ceylon

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thereof to this Colony by Her Majesty." *See also* Ordinance No. 3 of 1872 (St. Helena).

- 12 Ordinance to Regulate the Granting of Patents in This Colony, No. 13 of 1861, § 19 (British Guiana) ("Nothing herein contained shall extend to prejudice or affect any Letters Patent heretofore granted in the United Kingdom and made applicable by the tenor thereof to this colony.").
- 13 Patent Law Amendment Act, 1862, 26 Vict., c. 2, § 44 (British Honduras); Act to Provide for the Granting, in This Colony, of Patents for Inventions, No. 17 of 1860, §§ 14, 35 (Cape of Good Hope) (section 35 was entitled "English patents subject to this Act").
- 14 Statute of Monopolies, 1623, 21 Jac. 1, c. 3, § 6. For an account of the patentability components, see JUSTINE PILA, *THE REQUIREMENT FOR AN INVENTION IN PATENT LAW* 25-69 (2010).
- 15 Ordinance to Regulate the Granting of Patents in This Colony, No. 13 of 1861, § 38 (British Guiana); Patent Law Amendment Act, 1862, 26 Vict., c. 2, § 45 (British Honduras); Act to Provide for the Granting, in This Colony, of Patents for Inventions, No. 17 of 1860, § 1 (Cape of Good Hope); Law to Provide for the Granting in This Colony of Patents for Inventions, No. 4 of 1870, § 2 (Natal); Act to Consolidate the Law Relating to Letters Patent for Invention, 1883, § 4 (N.Z.); Act to Regulate the Granting of Letters Patent for Inventions, No. 22 of 1858, § 2 (Tas.); Act to Consolidate the Law Relating to Letters Patent for Inventions, 1965, No. 240, § 3 (Vict.).
- 16 Act to Authorise the Governor General, with the Advice of the Executive Council, to Grant Letter of Registration for All Inventions and Improvements in the Arts or Manufactures, to Have the Same Effect as Letters Patent in England, so far as Regards This Colony, No. 24, 1852 (N.S.W.).

permitted the patenting of "any new manufacture," which was described as including "any art, process, or manner of producing, preparing or making an article, and also any article prepared or produced by manufacture."<sup>17</sup> Fiji allowed for the patenting of "any manner of new manufacture," but "also every new process of manufacture, and every new method of application of known processes, and improvements in any known process."<sup>18</sup> Other laws seemed to have been influenced by the United States' definition of subject matter as "any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement thereof."<sup>19</sup> The Jamaican law (1857), for example, related to "some new and useful art, machine, manufacture, or composition of matter, not theretofore known or used within this Island, or some improvement in any invention or discovery."<sup>20</sup> Similarly, Newfoundland offered patents to those who discovered or made "any new and useful art, machine, manufacture or composition of matter not theretofore known or used."<sup>21</sup> Perhaps most interestingly, the Canadian law contained specific exclusions from patentability: "no patent shall issue for an invention having an illicit object in view, nor for any mere scientific principle or abstract theorem."<sup>22</sup> Many laws permitted annulment of patents whose operation proved contrary to the public interest (or, echoing the Statute of

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17 Act No. 15 of 1859, §§ 1, 38 (India); Ordinance for Granting Exclusive Privileges to Inventors, No. 6 of 1859, §§ 1, 36 (Ceylon); Ordinance for Granting Exclusive Privileges to Inventors, No. 12 of 1871, § 2 (Straits Settlement). In 1872 the Indian Patent Law was extended to include "any new and original pattern or design, or application of such pattern or design to any substance or article of manufacture," though with a term of only three years as opposed to the fourteen years (extendible for a further term of fourteen years) available in the case of patented *inventions*: Act No. 13 of 1872 (India) (adding sections 1a and 4a to the 1859 Act).

18 Ordinance No. 3, 1879, to Repeal Ordinance No. 24 of 1877 and to Make Other Provisions In Lieu Thereof for the Issue of Letters Patent, § 2 (Fiji).

19 Rev. Stat. § 4886 (2d ed. 1878) (U.S.).

20 Act for Amending the Law for Granting Patents for Invention, 1857, ch. 30, § 1, First (Jam.).

21 Consolidated Statutes of Newfoundland (First Consolidation, 1872), Title 15, ch. 54, § 1.

22 Act Respecting Patents of Invention, 1872, § 6 (Can.).

Monopolies, "generally inconvenient"),<sup>23</sup> and a number specifically required a demonstration of "utility."<sup>24</sup>

Most colonies required that the invention be new to the colony. In some cases an invention was treated as novel if it had not been "publicly used" in the colony.<sup>25</sup> This was clearly a very low threshold (at least in comparison to the "worldwide novelty" requirement utilized under Article 54 of the European Patent Convention today, and section 2 of the U.K. Patents Act 1977). By contrast, India required the invention to be new in the sense that it had been used in neither Great Britain nor India, and had not been made publicly known in either Great Britain or India — a much higher threshold.<sup>26</sup> Nevertheless, the law in India specifically excluded the possibility of invention by "importation" of an invention (unless the importer was actually the inventor).<sup>27</sup> Canadian law provided that an invention was patentable where it had not been "known or used by others before his invention thereof" and so long as it had not been "in public use or on sale for more than one year previous to" the application in Canada.<sup>28</sup>

The provisions on "disclosure" and "sufficiency" also varied. British law required a description and title, but had no requirement of best mode.<sup>29</sup>

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23 Act No. 15 of 1859, § 16 (India) (allowing annulment of patents "mischievous to the state, or generally prejudicial to the public"); Ordinance for Granting Exclusive Privileges to Inventors, No. 6 of 1859, § 25 (Ceylon) (providing for orders that a privilege cease where "the [privilege], or the mode in which it is exercised, is mischievous to the State, or generally prejudicial to the public"); Ordinance to Regulate the Granting of Patents in This Colony, No. 13 of 1861, § 11 (British Guiana) (allowing annulment of patents "contrary to law, or prejudicial or inconvenient to Her Majesty's subjects in general"); Ordinance No. 3, 1879, to Repeal Ordinance No. 24 of 1877 and to Make Other Provisions In Lieu Thereof for the Issue of Letters Patent, § 18 (Fiji) (allowing annulment of patents if proved to be "prejudicial to the public interests"); Act to Consolidate and Amend the Laws Relating to Patents for Inventions, No. 78 of 1877, § 33 (S. Austl.).

24 Act No. 15 of 1859, § 15 (India) ; Ordinance No. 3, 1879, to Repeal Ordinance No. 24 of 1877 and to Make Other Provisions In Lieu Thereof for the Issue of Letters Patent, § 4 (Fiji); Ordinance for Granting Exclusive Privileges to Inventors, No. 12 of 1871, § 4 (Straits Settlement).

25 Inventions Ordinance No. 6 (Ceylon), *supra* note 17, § 17 (with an exception for use in breach of confidence).

26 Act No. 15 of 1859, § 19 (India).

27 *Id.* § 17.

28 Act Respecting Patents of Invention, 1872, § 6 (Can.).

29 WILLIAM NORTON LAWSON, *THE PRACTICE AS TO LETTERS PATENT FOR INVENTIONS* 5 (London, Butterworths 1884) (explaining that specification need not "describe the nature of the invention otherwise than roughly, but it ought to do so fairly and honestly"). On deposit of models, see Patents, Designs and Trade Marks Act, 1883,

A number of colonies too seemed only to require a specification, describing and defining the invention.<sup>30</sup> One specified that this was to be a "clear and copious statement in writing . . . particularly describing and ascertaining the nature of the same invention and in what manner it is to be performed . . .".<sup>31</sup> However, many of the common law countries required the use of drawings and the deposit of models. Canadian law, for example, required delivery of "a neat working model of [the] invention on a convenient scale, exhibiting its several parts in due proportion, whenever the invention admits of such model."<sup>32</sup> The law of Jamaica specifically created an exemption from the requirement to deposit models for "ingenious but poor" applicants.<sup>33</sup>

Finally, it is worth noting the variations in term. Most of the patent laws followed the Statute of Monopolies in giving fourteen years,<sup>34</sup> but the New South Wales Act authorized grants of between seven and fourteen years,<sup>35</sup> while Canada offered fifteen.<sup>36</sup> In many cases, the possibility of extension was provided for: in Britain, Ceylon and the Cape of Good Hope, potentially for a further fourteen-year term.<sup>37</sup> Many colonies were concerned that the operation of a patent in the colony would not prejudice trade there compared with the position in other countries, so many laws provided that, with respect

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45 & 46 Vict., c. 57 (Gr. Brit.) (obligation on request to deposit with Department of Science and Art).

30 Act No. 15 of 1859, § 6 (India); Inventions Ordinance No. 6 (Ceylon), *supra* note 17, § 8 (requiring specification to be in writing and to "particularly describe and define the nature of the said invention, and in what manner the same is to be carried out").

31 Ordinance to Regulate the Granting of Patents in This Colony, No. 13 of 1861, § 12 (British Guiana).

32 Act Respecting Patents of Invention, 1872, § 15 (Can.).

33 Act for Amending the Law for Granting Patents for Inventions, 1857, ch. 30, § 4 (Jam.).

34 Patents, Designs and Trade Marks Act, 1883, 46 & 47 Vict., c. 57, §§ 17, 9, 2 (Gt. Brit.); Act for Amending the Law for Granting Patents for Invention, 1857, ch. 30, pt. 1, First (Jam.) (14 years plus possibility of 7 year extension); Ordinance to Regulate the Granting of Patents in This Colony, No. 13 of 1861, § 9 (British Guiana); Law to Provide for the Granting in This Colony of Patents for Inventions, No. 4 of 1870, § 2 (Natal).

35 Act No. 24 of 1852, § 1 (N.S.W.).

36 Act Respecting Patents of Invention, 1872, § 17 (Can.).

37 Patents, Designs and Trade Marks Act § 25(5); Ordinance for Granting Exclusive Privileges to Inventors, No. 6 of 1859, § 6 (Ceylon); Act to Provide for the Granting, in This Colony, of Patents for Inventions, No. 17 of 1860, §§ 21, 25 (Cape of Good Hope).

to inventions from outside the colony, any patent granted was to expire when the first foreign patent for that invention expired.<sup>38</sup>

## B. Trade Marks and Merchandise Marks

Legislation in the field of trade marks came much later domestically than that for patents or copyright.<sup>39</sup> When two bills, one proposing a trade mark registration scheme and the other criminal liability for deliberate trade misrepresentations, were submitted to Parliament in 1861, a Select Committee was appointed to investigate what, if any, legislation was desirable.<sup>40</sup> The Committee, having heard evidence, rejected the idea of registration and instead recommended the adoption of a criminal law regime covering a wide range of deliberate misrepresentations used in trade (including misrepresentations as to trade origin), and not requiring any prior registration by an ostensible owner: the Merchandise Marks Act, 1862.<sup>41</sup> Interestingly, given the evidence of the impact of fraudulent trade practices on the colonies,<sup>42</sup> there was no call for British law to apply or extend to such colonies. Rather, insofar as one of the Bills suggested otherwise, the influential lawyer William Hindmarch sought its correction so that it did not "interfere with the legislatures in the colonies."<sup>43</sup> Consequently, the legislation that implemented the Committee's recommendations, the 1862 Act, was confined in its application to Britain. As in 1852 with patents, so too with trade marks,

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38 Act to Provide for the Granting, in This Colony, of Patents for Inventions, No. 17 of 1860, § 14 (Cape of Good Hope); Ordinance No. 3, 1879, to Repeal Ordinance No. 24 of 1877 and to Make Other Provisions In Lieu Thereof for the Issue of Letters Patent, § 15 (Fiji).

39 Lionel Bently, *The Making of Modern Trade Mark Law: The Construction of the Legal Concept of Trade Mark (1860-1880)*, in *TRADE MARKS AND BRANDS: AN INTERDISCIPLINARY CRITIQUE* 3 (Lionel Bently, Jennifer Davis & Jane C. Ginsburg eds., 2008).

40 SELECT COMMITTEE ON TRADE MARKS BILL, AND MERCHANDIZE MARKS BILL, REPORT TOGETHER WITH THE PROCEEDINGS OF THE COMMITTEE, MINUTES OF EVIDENCE, 1862, H.C. 212 [hereinafter SELECT COMMITTEE ON TRADE MARKS].

41 Merchandise Marks Act, 1862, 25 & 26 Vict., c. 88 (Gr. Brit.).

42 Evidence suggested the colonies were victims to a lot of counterfeiting of products by Britain's European competitors, particularly Germany: SELECT COMMITTEE ON TRADE MARKS, *supra* note 40, at 91 (R. Gilpin, Q. 1939); *id.* at 113 (H. Browning, Q. 2465); *id.* at 22 (Rodgers, QQ. 481-96); *see also* S. AUSTRALIAN ADVERTISER, Apr. 30, 1861 (complaining about sale in Victoria of beer bearing labels *Bass* and *Byass* but not originating from U.K. firm, Bass & Co.).

43 SELECT COMMITTEE ON TRADE MARKS, *supra* note 40, at 141 (QQ. 2971-75).

the adoption of intellectual property laws was a matter for the local government in each colony.

Although in the 1860s the British Government had rejected the idea of a trade mark registry, a number of colonies established their own registration systems. For example, Canada adopted a trade mark registration act in 1861,<sup>44</sup> South Australia did so in 1863,<sup>45</sup> Queensland and Tasmania in 1864,<sup>46</sup> New South Wales in 1865,<sup>47</sup> New Zealand in 1866,<sup>48</sup> New Brunswick in 1867, Mauritius in 1868 and Hong Kong in 1873.<sup>49</sup> It was not until 1875 that Britain itself would make such a move,<sup>50</sup> and it seems likely that the experiences of the colonies provided evidence that the benefits of such registries outweighed their perceived dangers.<sup>51</sup> Thereafter, perhaps less surprisingly, other colonies followed the lead of the Imperial Parliament.<sup>52</sup> However, it is notable that as

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44 Trade Marks and Designs Act, 1861 (Can.); Trade Marks and Designs Act, 1868 (Can.); Trade Marks and Designs Act, 1879 (Can.). See WILLIAM HAYHURST, *INTELLECTUAL PROPERTY LAW IN CANADA: THE BRITISH FEDERATION, THE AMERICAN INFLUENCE AND THE FRENCH FACTOR* 27 (Canada House Lecture Series No. 58, 1995).

45 The Trade Marks Bill passed the Council on October 29, 1863.

46 D.R. SHANAHAN, *AUSTRALIAN LAW OF TRADE MARKS AND PASSING OFF* 6 (2d. ed. 1990). The Royal Assent to the Queensland Trade Marks Act is recorded in *BRISBANE COURIER*, Aug. 26, 1864, at 2. The passage of the Tasmanian Bill is recorded in *The Mercury (Hobart)*, in particular, *MERCURY*, Sept. 22, 1864, available at <http://newspapers.nla.gov.au/ndp/del/page/774799> (Royal Assent); *MERCURY*, July 14, 1864, available at <http://newspapers.nla.gov.au/ndp/del/page/774068> (recording debate on the second reading of the Bill in the Tasmanian Legislative Council); and *MERCURY*, July 30, 1864, available at <http://newspapers.nla.gov.au/ndp/del/page/774240> (describing debate second reading in Legislative Assembly).

47 Trade Marks Act, No. 9 of 1865 (N.S.W.). The Act passed on May 25, 1865 and is set out in *MAITLAND MERCURY & HUNTER RIVER GEN. ADVERTISER*, June 6, 1865, at 2.

48 Referred to, for example, in *Canterbury Frozen Meats v. Christchurch Meat Co.*, [1889] 8 N.Z.L.R. 49, 53 (S.C.).

49 C.D. WILKINSON, *A HISTORY OF, AND TREATISE ON, THE LAW IN HONG KONG RELATING TO TRADE MARKS* (1907); Merchandise Marks Ordinance, No. 8 of 1863 (H.K.). For discussion of the inter-relationship between the law in Hong Kong and that in Britain, see *J. Ullmann & Co. v. Leuba*, [1907] 2 H.K.L.R. 1, 19-20 (S. Ct. H.K.).

50 Trade Mark Registration Act, 1875, 38 & 39 Vict, c. 37 (Gr. Brit.).

51 On these see Lionel Bently, *From Communication to Thing: Historical Aspects of the Conceptualisation of Trade Marks as Property*, in *TRADEMARK LAW AND THEORY: A HANDBOOK OF CONTEMPORARY RESEARCH* 3 (Graeme B. Dinwoodie & Mark D. Janis eds., 2007).

52 Henry Reader Lack would later tell the Herschell Committee that "[m]ost of the colonies have adopted the Trade Mark Act, 1875 in some shape or another."

late as 1888 there was not even a merchandise marks act in India, let alone a trade mark registry.<sup>53</sup> In 1916 P.K. Sen reported in his Tagore Law lectures that in India there remained "no system of registration, nor is there any provision for a statutory title to a trade-mark."<sup>54</sup> Despite attempts to introduce such laws in the late 1870s and first decade of the twentieth century, India remained without a registration system until 1940.<sup>55</sup>

### C. Copyright Law

The Statute of Anne 1710, which famously introduced a statutory right to control the reprinting of books, initially only applied throughout Britain (having been passed shortly after the Act of Union of 1707).<sup>56</sup> Consequently, throughout the eighteenth century the London publishers were disgruntled by the reprinting of works in Ireland, particularly in Dublin.<sup>57</sup> Occasionally, authors or publishers would seek to reinforce their British rights with Crown grants of printing privileges that were expressed to be applicable elsewhere in the Dominions.<sup>58</sup> The poet Alexander Pope's literary executor, Bishop

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COMMITTEE APPOINTED BY THE BOARD OF TRADE TO INQUIRE INTO THE DUTIES, ORGANISATION, AND ARRANGEMENTS OF THE PATENT OFFICE UNDER THE PATENTS, DESIGNS, AND TRADE MARKS ACT, 1883, SO FAR AS RELATES TO TRADE MARKS AND DESIGNS, REPORT, TOGETHER WITH MINUTES OF EVIDENCE, APPENDICES, & C., 1888, C. (2d series) 5350, at 7 (Q. 137). The Victorian legislature was considering following the British registration Act within months: *Registration of Trade Mark*, ARGUS (Melbourne), May 20, 1876.

53 Merchandise Marks Act, No. 4 of 1889 (India).

54 PRASANTA KUMAR SEN, *THE LAW OF MONOPOLIES IN BRITISH INDIA* 301 (1922).

55 ASHWANI KR. BANSAL, *COMMERCIAL'S LAW OF TRADE MARKS IN INDIA* 35-40 (2001).

56 Act for the Encouragement of Learning, 1710, 8 Ann., c. 19. See generally HARRY RANSOM, *THE FIRST COPYRIGHT STATUTE: AN ESSAY ON AN ACT FOR THE ENCOURAGEMENT OF LEARNING, 1710* (1956); MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* (1995); RONAN DEAZLEY, *ON THE ORIGIN OF THE RIGHT TO COPY: CHARTING THE MOVEMENT OF COPYRIGHT LAW IN EIGHTEENTH-CENTURY BRITAIN* (2004).

57 See Colm Lennon, *The Print Trade, 1700-1800*, in 3 *THE OXFORD HISTORY OF THE IRISH BOOK: THE IRISH BOOK IN ENGLISH, 1550-1800*, at 74, 84-85 (Raymond Gillespie & Andrew Hadfield eds., 2006). Importation from Ireland was prohibited in 1739, but attempts to legislate on the issue in Ireland met with no success.

58 Shef Rogers, *The Use of Royal Licences for Printing in England, 1695-1760*, in 1 *LIBRARY* 133, 134-35 (2000) (setting out details of 180 or so licences, and including examples from 1743 that applied to "all our subjects within our Kingdoms and Dominions").

William Warburton, famously obtained a privilege in 1759,<sup>59</sup> though in his correspondence he explicitly denied the effectiveness of such mechanisms.<sup>60</sup>

Following the Union of the two Kingdoms of Great Britain and Ireland in 1800, the Statute of Anne was extended, by the Copyright Act, 1801, so that it applied throughout the United Kingdom and "any Part of the *British Dominions from Europe*."<sup>61</sup> While the Act would thus apply not only to Ireland, but also to Gibraltar (which became part of the British Empire as a consequence of the Treaty of Utrecht, 1713), Minorca (until it was ceded to the Spanish at the Treaty of Amiens in 1802), and possibly Malta (ceded by the French in 1800, but officially only British from 1814), the remainder of the British dominions and colonies were not subjected to the copyright in books until 1814.

In 1814, in a momentous move that barely went noticed, the Literary Copyright Act provided that where a book was first published in Britain, the owner of copyright was able to bring an action against "any Bookseller or Printer, or other Person whatsoever, in any Part of the United Kingdom of Great Britain and Ireland, in the Isles of Man, Jersey or Guernsey, *or in any other part of the British Dominions*, [who] shall . . . print, reprint, or import . . . any such Book or Books . . ."<sup>62</sup> Thereafter copyright for works published in Britain was capable of being infringed anywhere in the British Empire.

Unfortunately, very little is known about the motives for this aspect of the geographical extension of copyright effected in 1814. The Act was an immediate response to the *Report of the Select Committee on Copy Right of Printed Books*, chaired by Davies Giddy (a.k.a. Davies Gilbert),<sup>63</sup> which

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59 In 1759, fifteen years after Pope's death, Warburton also obtained a Royal Licence for the sole printing and vending of Pope's works. See POPE'S LITERARY LEGACY: THE BOOK-TRADE CORRESPONDENCE OF WILLIAM WARBURTON AND JOHN KNAPTON WITH OTHER LETTERS AND DOCUMENTS, 1744-1780, at 192-93 (Donald Nichol ed., 1992).

60 Letter from William Warburton to Mercy Dodderidge (Mar. 8, 1759), in POPE'S LITERARY LEGACY, *supra* note 59, at 105.

61 Thereafter copyright Act, 1801, 41 Geo. 3, c. 107, § 1 (emphasis added). For a discussion, see Ronan Deazley, Commentary on Copyright Act, 1801, in Primary Sources on Copyright (1450-1900) (Lionel Bently & Martin Kretschmer eds., 2008), <http://www.copyrighthistory.org>.

62 Act to Amend Several Acts for the Encouragement of Learning, 54 Geo. 3, c. 156, § 4 (emphasis added). The details of the passage of the Act are obscure: Ronan Deazley, Commentary on the Copyright Act of 1814, in Primary Sources on Copyright (1450-1900), *supra* note 61.

63 SELECT COMMITTEE ON ACTS FOR ENCOURAGEMENT OF LEARNING BY VESTING COPIES OF PRINTED BOOKS IN AUTHORS OR PURCHASERS OF COPIES, REPORT AND MINUTES OF EVIDENCE, 1812-13, H.C. 341.

was primarily concerned with publishers' obligations to deposit books in the eleven designated libraries,<sup>64</sup> a matter which gave considerable irritation to booksellers, who characterized it as a tax and an impediment to learning.<sup>65</sup> While that Report contains no discussion of extending the Statute of Anne to the British Empire, the Committee doubtless drew on an earlier proposal in relation to deposit in 1808. At that time a Bill was presented to the House of Commons that reflected a deal done between the booksellers and those who wanted to retain the deposit system. The deal would have confirmed the deposit obligations, and, in return, extended the copyright term from two terms of fourteen years should the author be alive at the end of the first term, to a single 28-year term.<sup>66</sup> In 1814, it seems, the booksellers' terms were extended: in return for continued deposition obligations, they not only received the longer term (and, if the author survived, a life term), but also the extension of the Act to the Empire.

The imperial scope of copyright law was reaffirmed in the Literary Copyright Act of 1842 — the culmination of Sergeant Talfourd's campaign to extend the term of copyright. Under this Act,<sup>67</sup> if a book was first published in the United Kingdom by an author who was a resident in one of the British possessions, the book would benefit from copyright throughout the British dominions, defined as "all parts of the United Kingdom of Great Britain and Ireland, the islands of Jersey and Guernsey, all part of the East and West Indies, and all the colonies, settlements and possessions of the Crown which are now or hereafter may be acquired." More specifically, section 15 provided that "if any person shall, in any part of the British dominions . . . print or cause to be printed any book in which there shall be subsisting copyright . . . [he] shall be liable to a special action on the case at the suit of the proprietor of such copyright."<sup>68</sup> The effect of this was that if a book was published in Great Britain and registered at Stationers Hall in London,<sup>69</sup> protection was secured for the imperial market.

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64 The Statute of Anne designated nine and a further two had been added in 1801 when the application of the Act was extended to Ireland.

65 Following the decision in *Univ. of Cambridge v. Bryer*, (1812) 104 Eng. Rep. 1109 (holding that the obligation to supply books to the libraries existed even though the work was not registered at Stationers Hall).

66 Bill for the Further Encouragement of Learning, 1808, Bill [314] (U.K.).

67 Literary Copyright Act, 1842, 5 & 6 Vict., c. 45 (Imperial). For the background to the Act, see CATHERINE SEVILLE, *LITERARY COPYRIGHT REFORM IN EARLY VICTORIAN ENGLAND: THE FRAMING OF THE 1842 COPYRIGHT ACT* (1999).

68 Literary Copyright Act, 1842, 5 & 6 Vict., c. 45, § 15 (Imperial).

69 This was required as a preliminary to bringing an action: Literary Copyright Act, § 24.

While copyright was, uniquely of all the intellectual property regimes, imperial in its application, even in respect of copyright there was considerable room for the exercise of colonial variation. This was for three reasons. Firstly, the 1842 Act was soon subjected to a significant modification — the Foreign Reprints Act of 1847. Second, the 1842 Act only applied to books first published in the United Kingdom, and colonies were free to establish their own laws for books first published in their jurisdictions. Thirdly, the 1842 Act only applied to books and music, leaving colonies room to develop their own regimes for the protection of artistic works (engravings, sculptures, drawings, paintings, and photographs), dramatic works and related rights such as copyright-style protection for items of news. Thus, even in the field of copyright, where imperial legislation existed, Charles Tennyson could justifiably claim in 1911 that "within the British Empire there is almost as great diversity of legislation as in the civilized world at large."<sup>70</sup>

### *1. Foreign Reprints*

The Foreign Reprints Act, 1847,<sup>71</sup> was a legislative response to protests from the Canadian colonies about the impact of the 1842 Act.<sup>72</sup> Importantly, the 1842 Act had been accompanied by a Customs Act that required customs authorities to enforce imperial copyright law by preventing the importation of books that had not been printed with the authorization of the copyright holder.<sup>73</sup>

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<sup>70</sup> Charles Tennyson, *The Copyright Bill*, 10 ENG. REV. 126, 131 (1911).

<sup>71</sup> Act to Amend the Law Relating to the Protection in the Colonies of Works Entitled to Copyright in the UK, 1847, 10 & 11 Vict., c. 95 (Imperial).

<sup>72</sup> See JAMES JOHN BARNES, *AUTHORS, PUBLISHERS AND POLITICIANS: THE QUEST FOR AN ANGLO-AMERICAN COPYRIGHT AGREEMENT, 1815-1854*, at 138-52 (1974); CATHERINE SEVILLE, *THE INTERNATIONALISATION OF COPYRIGHT LAW: BOOKS, BUCCANEERS AND THE BLACK FLAG IN THE NINETEENTH CENTURY* 79-86 (2006).

<sup>73</sup> Customs Act, 1842, 5 & 6 Vict., c. 24 (Imperial). The customs authority in India struggled both to understand and implement the duties imposed on it. See India Office Library (IOL), Minute F4/2064 Board's Collections 94616-94687 (1843-44), PC 4549, Collection No. 23. The customs officers in Canada, in contrast, seem to have enforced the copyright rule with unseemly gusto: S.E. DAWSON, *COPYRIGHT IN BOOKS: AN INQUIRY INTO ITS ORIGINS, AND AN ACCOUNT OF THE PRESENT STATE OF THE LAW IN CANADA* 16 (Montreal, Dawson Bros. 1882) ("They examined the baggage of travellers and the packages of booksellers, and seized all United States reprints of English books . . . One official made seizures from the shelves of the booksellers' shops, and threatened domiciliary visits to private houses. On one occasion, vexed at his inability to stop the import of American reprints, he seized the Laprairie steamboat for bringing them over the review with other imports into the city.").

Its effects were soon felt. In 1845, the Legislative Assembly of Nova Scotia raised concerns that, as a consequence, the cost of books had increased because the supply was now restricted to that from the British publishers.<sup>74</sup> It contrasted the prices of books in New York, London and Halifax: Byron's poems, for example, cost 7 shillings and 6d in New York, £1 in London, and £1 and 6 shillings in Halifax: a ratio of 1:3:4. While it might be acceptable in the United Kingdom that book prices were so high because of the "wide establishment of circulating libraries, clubs and reading societies, by which a command of fresh literature is obtained on cheap and easy terms," the impact was altogether more serious on a sparsely distributed population with no circulating libraries. In short, the operation of the new Act was detrimental to "the advancement and refinement of the provincial mind."<sup>75</sup> Moreover, because of Canada's proximity to the U.S., where the rights of British copyright owners were not applicable, American reprints were introduced "in large quantities," and the new law was likely "to encourage an illicit trade, while it yields no protection to the British author or publisher." Overall, the Nova Scotia House of Assembly objected that "public feeling is against it . . . it is regarded as oppressive and impracticable in its provisions."<sup>76</sup> The United Assembly of Canada, too, had in 1843 declared that "a law so repugnant to public opinion cannot and will not be enforced."<sup>77</sup>

The British Government initially rejected the request for alteration in the law. The Board of Trade indicated that moves had been made, by the likes of Murray, to produce cheaper formats for exploitation in the colonies, in particular its new Colonial Library.<sup>78</sup> The Board also argued that the 1842 Act recognized an author's property in his work as a "principle not of expediency but of justice."<sup>79</sup> Nevertheless, the colonies continued to remonstrate, with New Brunswick adding itself to the fray, and John Mackellan of Hamilton in Canada West wrote to the Colonial Office complaining of the "evil influence" of the Act "over the intellectual advancement of the people of Canada."<sup>80</sup> William Gladstone, by 1846 at the Colonial Office, urged the Board to consult

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74 COLONIAL COPYRIGHT, 1872, H.C. 339 , at 1-6 (Display No. 1) [hereinafter COLONIAL COPYRIGHT].

75 *Id.* at 1.

76 *Id.* at 9.

77 *Id.* at 8.

78 *Id.* at 3; SEVILLE, *supra* note 72, at 82-83.

79 COLONIAL COPYRIGHT, *supra* note 74, at 7 (J. MacGregor, Board of Trade, to Colonial Office, November 5, 1845).

80 *Id.* at 11 (Mackellan to Earl Grey, October 15, 1846).

with publishers to try and find some compromise.<sup>81</sup> Ultimately, the Imperial Parliament passed the so-called Foreign Reprints Act 1847, which allowed the suspension of the operation of the 1842 Act as regards "foreign reprints" where a colony made, by local law, reasonable provision for the protection of British authors.<sup>82</sup> Nineteen colonies took advantage of the Act,<sup>83</sup> typically allowing the imports of reprints on payment of a 12.5 percent royalty.<sup>84</sup> Consequently, colonial readers could obtain (unauthorized copies of) books from the U.S., at considerably below the published price (of authorized copies) in Great Britain.

## 2. Local Copyright Laws

Even though there was imperial legislation, this applied only in relation to books (and music) first published in the United Kingdom.<sup>85</sup> Consequently, some colonies passed their own legislation on literary works, that would apply to books that fell outside the imperial regime (for example, because they were published in the colony itself). The earliest such law was that passed by the legislature of Lower Canada in 1832,<sup>86</sup> modeled it seems on the U.S. Act of 1831.<sup>87</sup> This covered any "book or books, map, chart, musical composition, print, cut or engraving," but only conferred copyright where the author was a person "resident in this Province." Protection lasted for an initial 28-year term (from the time of the work's title being recorded with the Superior Court), but with the possibility of renewal for 14 years if the author was alive at the end of that period, and resident in the Province, "or being dead, shall

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81 *Id.* at 10. (James Stephen, Colonial Office, to Board of Trade, June 27, 1846).

82 Act to Amend the Law Relating to the Protection in the Colonies of Works Entitled to Copyright in the U.K., 1847, 10 & 11 Vict., c. 95, § 1 (U.K.).

83 For the list of colonies, Acts and Orders in Council, see COPYRIGHT (COLONIES), 1857, H.C. 303. The colonies were: New Brunswick, Nova Scotia, Prince Edward Island, Barbados, Bermuda, Bahamas, Newfoundland, St. Christopher, Antigua, St. Lucia, Canada, British Guiana, St. Vincent, Mauritius, Grenada, Jamaica, Cape of Good Hope, Nevis, and Natal. Copinger said these covered "all the important colonies with the exception of Australia." WALTER ARTHUR COPINGER, THE LAW OF COPYRIGHT IN WORKS OF LITERATURE AND ART 499 (London, Stevens and Haynes 2d ed. 1881).

84 *E.g.*, Act to Impose a Duty of 20 Per Cent *ad valorem* on Foreign Reprints of British Copyright Works, 1850, 13 & 14 Vict., c. 6 (Can.) (approved by the Order in Council of Dec. 12, 1850); Duty on Foreign Reprints Act, 1868, 31 Vict. c. 56 (Can.).

85 *Routledge v. Low*, (1868) L.R. 3 H.L. 100.

86 Act for the Protection of Copy Rights, 1832, 2 Will. 4, c. 53 (Lower Can.).

87 Act to Amend Several Acts Relating to Copyright, ch. 16, § 2, 4 Stat. 436 (1831) (U.S.).

have left a widow or child or children, either or all then living."<sup>88</sup> Protection was conditioned upon registration of title before publication, and inclusion of notice of published copies.<sup>89</sup> Perhaps interestingly, the Act also conferred explicitly a right of first publication of a manuscript in the Province.<sup>90</sup> Nova Scotia produced a similar Act in 1839,<sup>91</sup> though only expressly covering maps, charts, books and prints (and thus not musical compositions, though this may have been implicit), and giving a more limited term of protection of 21 years from the time of the title's recording in the office of the Secretary of the Province, with a possible 14-year renewal if the author "shall be living, and resident within this Province" (no renewal being provided for "a widow or child").<sup>92</sup> As in Lower Canada, protection was conditioned on registration and notice, but in contrast with the Act in Lower Canada, Nova Scotia law required publication of the registration in a newspaper for 12 weeks, and (but not, it seems, as a condition) the deposit of one copy with each of the two legislative bodies, the House of Assembly and the Legislative Council.<sup>93</sup> The Act also contained a provision protecting manuscripts from unauthorized publication in the Province.<sup>94</sup> When the provinces of Upper and Lower Canada were united in 1840, a new copyright law was adopted in 1841, in almost identical terms to that which had previously been operative in Lower Canada.<sup>95</sup>

In 1842, New Zealand adopted a local copyright law for books,<sup>96</sup> modeled on the British Act of 1814: the author was given an initial term of 28 years

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88 Act for the Protection of Copy Rights, 1832, 2 Will. 4, c. 53, § 2 (Lower Can.). The reversionary term introduced in the Statute of Anne, section 11, was abolished when the Copyright Act of 1814 (U.K.) converted the two fourteen-year terms into a single 28-year term. See Lionel Bently & Jane C. Ginsburg, *"The Sole Right . . . Shall Return to the Authors": Anglo-American Authors' Reversion Rights from the Statute of Anne to Contemporary U.S. Copyright*, 25 BERKELEY TECH. L.J. 1475 (forthcoming 2010).

89 Act for the Protection of Copy Rights, 1832, 2 Will. 4, c. 53, § 3 (Lower Can.) (publication of renewal in newspapers for 4 weeks); *id.* § 4 ("deposit a printed copy of the title" with Superior Court); *id.* § 5 (notice "in the several copies of each and every edition").

90 *Id.* § 9.

91 Act for Securing Copy Rights, 1839, 2 Vict., c. 36 (Nova Scotia).

92 *Id.* § 1 (indicating protected works and term).

93 *Id.* §§ 5, 10 (deposit requirements).

94 *Id.* § 8.

95 Act for the Protection of Copy Rights in This Province, 1841, 4 & 5 Vict., c. 61 (Can.).

96 Ordinance to Secure the Copyright of Books to Their Authors, No. 18 of 1842 (N.Z.), reprinted in COPIES OF THE LAW AND ORDINANCES PASSED BY THE GOVERNOR GENERAL OF NEW ZEALAND, 1841-42, 1844, H.C. 61, at 51.

from publication of a book, but if he was living at the end of that period the right was to continue for the residue of his natural life. The Act contained no explicit restriction on residence, and provided for the payment to a copyright owner who successfully brought a suit against an infringer of double costs (as well as a fixed sum of £50 to be paid to the government). India introduced a Literary Copyright Act in 1847, this time modeled on the British Literary Copyright Act of 1842. The preamble to the 1847 Act explained that

it is doubtful whether the [1842 Imperial] Act . . . has made appropriate and sufficient protection for the enforcement in every part of the said territories subject to the Government of the East India Company of the said right by proprietors thereof, and whether the said Act of Parliament has made provision for the enforcement of the said right by or against any persons not being subject to the jurisdiction of the courts established by Her Majesty's Charter.<sup>97</sup>

The Cape of Good Hope likewise adopted a copyright act in 1873.<sup>98</sup>

### 3. *Beyond Books*

The 1814 and 1842 Imperial Copyright Acts only applied to books and musical works. Other British Acts, giving copyright in engravings and sculpture, had not been extended to the Empire and, in 1862, U.K. law gave copyright in paintings, drawings, and photographs, but through national rather than imperial legislation. The reason for the decision to confine protection to British shores was not made clear, though experiences with the 1842 Act (and its 1847 derogation) may well have been influential. A number of colonies took the initiative and created colonial copyright laws applicable to such subject matter.

Following federation in 1867, Canada reenacted its copyright law, extending its scope to cover artistic works.<sup>99</sup> In 1869, the Victorian

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97 Act for the Encouragement of Learning in the Territories Subject to the Government of the East India Company, No. 20 of 1847 (India). Documents explaining the background to the Act can be found in IOL, F4/2256 Board's Collections (1847-48), vol. 2256, 113858-114023, at No. 113864.

98 Act to Protect and Regulate the Rights of Authors in Respect of Their Works, No. 2 of 1873 (Cape of Good Hope).

99 Act Respecting Copyright, 1868, 31 Vict., c. 54, § 3 (Can.) (protecting any "book, map, chart, or musical composition"; any "original painting, drawing, statuary, sculpture or photograph"; plus "invented" prints or engraving); Act Respecting Copyright, 1875, 38 Vict. c. 88, § 4 (Can.) (protecting "any book, map, chart or musical composition, or of any original painting, drawing, statue, sculpture or photograph . . . any print or engraving"). Moves to extend copyright in India to

Government adopted its own copyright law, and in the 1870s New South Wales and South Australia did likewise.<sup>100</sup> All these laws protected literary, dramatic and musical productions published locally, but also artistic works and designs. Books "first published in the colony of Victoria" were to be protected for 42 years from publication or for the life of the author plus seven years (reflecting the term of the U.K.'s 1842 Act),<sup>101</sup> designs for 2-3 years,<sup>102</sup> but a painting, drawing, sculpture or engraving by a British subject or author resident in Victoria was only protected for 14 years and a photograph for only three years (the latter two terms being considerably less than that of life plus seven years provided in Britain by the Fine Art Copyright Act 1862).<sup>103</sup> In addition, engravings and sculptures, like other works, were required to be registered,<sup>104</sup> and a unique provision allowed for the copying of any painting, drawing, work of sculpture or photograph "in or belonging to the Museum of Industry and Art, the National Gallery or the Melbourne Library."<sup>105</sup> The Victorian Act was followed quite closely in South Australia in 1878.<sup>106</sup> The New South Wales version, passed in 1879, had similar coverage, but was differently organized (designs placed third, rather than first).<sup>107</sup> Western Australia did not adopt an equivalent substantive law until 1895, 59 Vict. No. 24<sup>108</sup>

In addition to adopting copyright laws that imitated the regime in Britain

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artistic works, first in 1864 and then later in the 1870s and 1880s, were unsuccessful. In 1864, the Government of India was urged to take steps for the improvement and extension of copyright. A bill was drawn up proposing "that facilities be given for the protection of copyright in pictures, engravings, prints and other similar productions," but it was not adopted. *See* Statement of Objects and Reasons: Indian Copyright Bill 1885, from the Gov't of India to the Sec'y of State (June 5, 1885) (IOL, L/PJ/6/156, file 1137, para. 1).

100 Copyright Act, 1869, 33 Vict., No. 350 (Vict.); Copyright Act, 1878, 41 & 42 Vict., No. 95 (S. Austl.); and Copyright Act, 1878, 42 Vict., No. 20 (N.S.W.).

101 Copyright Act, 1869, 33 Vict., No. 350, § 14 (Vict.).

102 *Id.* § 3.

103 *Id.* § 32.

104 *Id.* § 38.

105 *Id.* § 56.

106 One variation related to the term of copyright in designs. In addition, the South Australian Act contained no exception relating to the copying of works in the state galleries.

107 Copyright Act, 1878, 42 Vict., No. 20, § 55 (N.S.W.) contained a similar exemption from liability for copying "any painting, drawing, work of sculpture or photograph in or belonging to the Museum Academy of Art or any art gallery wholly or partly endowed from public funds or to the Free Public Library or the Library of the University of Sydney."

108 Copyright Act, 1895, 59 Vict., No. 24 (W. Austl.).

(albeit with modifications), some colonies adopted copyright laws protecting subject matter that was not explicitly protected in Britain. More specifically, from around 1870, a host of different colonies protected news sent by telegraph through *sui generis* laws, conferring protection for a limited time and enforced through penalties.<sup>109</sup> Such proposed laws had been rejected in Britain in 1855,<sup>110</sup> and again at the end of the century. In 1871, however, Victoria adopted such a law on a temporary basis, and South Australia and Western Australia followed suit.<sup>111</sup> By the end of the century such laws had been adopted in Tasmania,<sup>112</sup> New Zealand,<sup>113</sup> Cape of Good Hope,<sup>114</sup> Natal,<sup>115</sup> Hong Kong,<sup>116</sup> and Ceylon.<sup>117</sup> Later still, similar regulations were adopted in Transvaal,<sup>118</sup> the Orange River Colony,<sup>119</sup> the Straits Settlements,<sup>120</sup>

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109 For another "sui generis law," see Copyright in Military Maps, Proclamation No. 24 of 1902 (Transvaal).

110 The Chancellor of Exchequer proposed an amendment to the Newspaper Stamp Act 1855, but in the face of opposition withdrew the proposal. 137 PARL. DEB., H.C. (3d ser.) (1855) 1978, 1984, *passim*. For earlier proposals, also in association with abolition of the newspaper tax, see *On the Taxes on Knowledge*, WESTMINSTER REV., July 1, 1831, at 1, 24-25.

111 Lionel Bently, *Copyright and the Victorian Internet: Telegraphic Property Laws in Colonial Australia*, 38 LOY. L.A. L. REV. 71 (2004).

112 News Copyright Act, 1891 (Tas.).

113 Telegrams Act, 1882 (N.Z.); Electric Lines Act, 1884 (N.Z.); see also *Jones v. Atack*, [1891] 9 N.Z.L.R. 174 (S. Ct. Auckland).

114 Act to Secure the Right of Property in Telegraphic Messages No. 8 of 1880 (Cape of Good Hope).

115 Act to Secure the Right of Property in Telegraphic and Other Messages, No. 36 of 1895 (Natal).

116 Ordinance Concerning the Rights of Telegraphic Messages (1894) (H.K.).

117 Ordinance No. 19 of 1898 (Ceylon). The Ordinance prompted a number of cases: *Capper & Sons v. Wayman*, (1902) 6 N.L.R. 58 (Ceylon); *Capper v. Silva*, (1904) 8 N.L.R. 30 (Ceylon).

118 Telegraphic Messages Protection Act, No. 48 of 1902 (Transvaal).

119 Ordinance to Protect the Right of Authors in Regard to Their Works and to Secure the Right of Property in Telegraphic and Other Messages, No. 294 of 1904, § 37, 7 Government Gazette, June 10, 1904 (Orange River Colony).

120 Ordinance to Secure in Certain Cases the Right of Property in Telegraphic Press Messages, No. 22 of 1902 (Straits Settlements).

the Federated Malay States,<sup>121</sup> Honduras,<sup>122</sup> the Union of South Africa,<sup>123</sup> Palestine,<sup>124</sup> and Kenya.<sup>125</sup>

## II. EXPLANATIONS FOR THE DEVOLUTION OF LAW MAKING

The wide variation in the colonial laws prompts a series of questions. First, why was the devolution of decision-making regarded as acceptable, or even desirable? In an era where much energy is focused on international standardization and harmonization, it seems surprising that so little store was placed in the supposed benefits of uniform law for much of the colonial era.<sup>126</sup> Why did the London Government take such a flexible approach to intellectual property lawmaking in the colonies? And what, if any, were the limits of such devolution?

Firstly, and perhaps most obviously, many in government circles believed that the local government was in the best position to decide on legislative policy.<sup>127</sup> The different colonies had different populations (in terms of size,

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121 Act to Secure in Certain Cases the Right of Property in Telegraphic Press Messages, No. 5 of 1911 (Federated Malay States).

122 Ordinance to Prevent the Improper Disclosure of the Contents of Telegrams, of 1909 (Hond.).

123 Act to Confer Temporary Exclusive Rights in Respect of Certain Telegraphic Messages Received in the Union, No. 26 of 1917 (S. Afr.).

124 Ordinance to Confer Temporary Exclusive Rights in Respect of Telegraphic Press Messages, No. 41 of 1932, Palestine Gazette, Dec. 29, 1932; *see also* CA 66/32 Palestine Telegraphic Agency v. Jaber, [1933] 1 PLR 780. My thanks to Michael Birnhack for these references.

125 Ordinance to Confer Temporary Exclusive Rights in Respect of Telegraphic Press Messages, No. 45 (1934) (Kenya).

126 The usual benefits of standardization are said to be the opening of markets (and thus increased competition in those markets), reduction of transaction costs (an operator need only know one set of rules, and thus needs only one set of legal advisers), and the creation of a level playing field between competitors. For a positive view, see Gerald J. Mossinghoff & Vivian S. Kuo, *World Patent System Circa 20xx, A.D.*, 38 IDEA 529 (1998). For more critical assessments, see Gerhard Wagner, *The Virtues of Diversity in European Private Law*, in THE NEED FOR A EUROPEAN CONTRACT LAW 1 (Jan Smits ed., 2005) (highlighting the costs of legal standardization as well as the benefits); John Duffy, *Diversity in Global Patent Law*, 17 BERKELEY TECH. L.J. 685 (2002) (emphasizing the benefits of diversity, regulatory competition and legal experimentation).

127 Intellectual property was not treated differently from other areas of law: DAVID B. SWINFEN, THE IMPERIAL CONTROL OF COLONIAL LEGISLATION 1813-1865, at 76 (1970) ("Uniformity of law within the Empire was, therefore, only encouraged in certain matters of personal status, and there was never any intention on the part of

wealth, racial makeup, and literacy), different cultures, languages, economies, industries, legal traditions and neighbors. Action might be needed in Britain, but have wholly different effects in a colony. Protection over news might thus, for example, be justified where the costs of transmission were high and the size of the market for newspapers small (as in the Australian colonies), even though such laws might not be suitable in Britain.<sup>128</sup> Protection of books published in Britain might be justified in Ireland, so as to prevent Irish reprints undermining the British market, but more flexibility might be appropriate in relation to Canada (whose North American neighbor did not recognize British copyrights). Protection of patents in a colony might, equally, increase the prices of commodities, placing the colony at a disadvantage vis-à-vis a foreign neighbor (to which the patent would not apply).<sup>129</sup> Moreover, levels of mechanical knowledge varied from place to place, so that it was not possible to assume that an invention that lacked novelty in Britain would also lack novelty in a colony, or vice versa.

These different conditions were recognized as good reasons to leave legislation to the local legislature. For example, when in the 1850s the reform of the process for patent grant was being widely discussed, the barrister and patent law expert, Thomas Webster proposed that the colonies, dominions and possessions abroad should not be included in any British grant, but subject instead to special grants by the Crown or the local

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the British authorities to erect a common body of law for the Empire as a whole. Such a project would have been wholly unrealistic, and attempts to force uniformity on colonies of such differing origins as, say, the Cape and Lower Canada, would certainly have failed if only . . . on account of the opposition which would certainly arise within the colonies themselves. The most that could be hoped for would be that legislation enacted since the colonies' inclusion in the Empire would conform to the English model."); see also Ron Harris & Michael Crystal, *Some Reflections on the Transplantation of British Company Law in Post Ottoman Palestine*, 10 THEORETICAL INQUIRIES L. 536 (2009).

128 Bently, *supra* note 111, at 123-24.

129 Others agreed that it was right that the patent should apply throughout the Empire, and saw dangers if a colony, without having to pay a royalty to a patentee, could undercut a business in Britain. SELECT COMMITTEE OF THE HOUSE OF LORDS APPOINTED TO CONSIDER OF THE BILL, INTITULED, "AN ACT FURTHER TO AMEND THE LAW TOUCHING LETTERS PATENT FOR INVENTIONS;" AND ALSO OF THE BILL, INTITULED, "AN ACT FOR THE FURTHER AMENDMENT OF THE LAW TOUCHING LETTERS PATENT FOR INVENTIONS;" AND TO REPORT THEREON TO THE HOUSE, REPORT AND MINUTES OF EVIDENCE, 1851, H.C. 486, at 151 (Robert MacFie, QQ. 980, 997) [hereinafter 1851 SELECT COMMITTEE ON THE BILL]. MacFie reiterated this view in 1864, 1864 ROYAL COMMISSION ON PATENTS, *supra* note 5, at 119 (Q. 1992).

legislature.<sup>130</sup> Webster thought that the colonies were in the best position to choose for themselves whether to grant such rights and, if so, their scope.<sup>131</sup> There was a real consciousness that this was an important matter of local policy, and that if the colonies were bound by British patents, their industries might be placed in a worse position than competitor colonies where no patents were in operation.<sup>132</sup>

Similar arguments underpinned the decision to temper the rigors of the Imperial Copyright Act 1842 via the Foreign Reprints Act 1847. The Board of Trade regarded the issue as one "both of importance and difficulty." It had looked for a way to modify the law so as "to meet the just demands of the colonists without sacrificing the rights of [British] authors." Importantly, the Board formed the view that "a knowledge of local circumstances and local feeling" was required to resolve the impasse, and thus invited "the Colonial legislatures themselves to undertake the task of framing such regulations as they deem proper for securing at once the rights of authors and the interests of the public."<sup>133</sup> The Colonial Office agreed, Lord Grey stating that "the duty

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130 1851 SELECT COMMITTEE ON THE BILL, *supra* note 129, at 18 (Q. 67); *id.* at 270 (Henry Cole, Q. 1919); *id.* at 281 (M.D. Hill, Q. 2013) (indicating potential problems with patentees failing to work patented inventions); *id.* at 305-06 (Lieut-Col Reid, QQ. 2268-69); *id.* at 318 (R. Prosser, Q. 2388); *id.* at 344 (P.B. Westhead, M.P., Q. 2591).

131 *See id.* at 270 (Henry Cole, Q. 1919) ("[T]he colonies can do their own legislation much better than we can."). Two decades later Webster indicated that this was his own position: REPORT FROM THE SELECT COMMITTEE ON LETTERS PATENT; TOGETHER WITH THE PROCEEDINGS OF THE COMMITTEE, MINUTES OF EVIDENCE, APPENDIX AND INDEX 1871, H.C. 368, at 85 (QQ. 969-70) [hereinafter 1871 SELECT COMMITTEE ON PATENTS].

132 *See* 1851 SELECT COMMITTEE ON THE BILL, *supra* note 129 at 305-06 (Lieut-Col Reid, QQ. 2268-69) (indicating that colonies should have freedom to adopt, modify British patent law, or not have one at all, in response to their own conditions). Nevertheless, Webster's view, though influential, was not the only position. William Carpmael, a leading patent agent, in contrast, saw no reason why patents should not apply in the colonies and expressed the view that the colonies would benefit from such a regime. *Id.* at 43 (Q. 241); *id.* at 65-66 (QQ. 387-99); *see also id.* at 149 (John Fairries, Q. 954); *id.* at 151 (Robert MacFie, QQ. 980, 997) (although he famously opposed patents altogether); TRACTS OF THE LIVERPOOL FINANCIAL REFORM ASSOCIATION, No. 22: LAWS FOR THE PROTECTION AND ENCOURAGEMENT OF INVENTION 10 (London, n. pub. 1849) (proposing patent grant applicable throughout the Empire).

133 Letter from Stafford H. Northcote, Board of Trade to Colonial Office, Oct. 19, 1846, in COLONIAL COPYRIGHT, *supra* note 74, at 13.

and responsibility of enacting laws" on the topic should be left to the colonial legislatures.<sup>134</sup>

A second reason why the British were content to permit local law-making was that there was a degree of confidence that nothing much would go awry as a result of a devolved approach to legislating. This confidence reflected the fact that the colonial legislatures were, in many cases, dominated by British appointees. This was certainly the case in the non-white colonies until well into the twentieth century. And the confidence of the British in the local colonial governments was, by and large, justified. The colonial governments often assumed that what was appropriate in Britain was also appropriate in the colony. For example, when India considered adopting a local copyright law in 1847 (the Imperial law of 1842 being regarded as insufficient), the chief minister involved recommended that the local legislation mirror the imperial, explaining that it would be "improper in a subordinate legislature" to deviate from the imperial regime.<sup>135</sup>

Even where a colony was governed by local, elected representatives (rather than London appointees), many colonies were willing to implement whatever regime was adopted "at Home." Following the Trade Mark Registration Act 1875, trade mark registration acts were passed not just in Cape of Good Hope in 1877,<sup>136</sup> Natal in 1885,<sup>137</sup> Ceylon in 1888,<sup>138</sup> Orange Free State in 1893,<sup>139</sup> but also in self-governing territories such as Victoria, which did so in 1876.<sup>140</sup> South Africa had followed the British reforms with various provincial enactments, and later, with its Union Act 9 of 1916, enacted the Patents, Designs, Trade Marks and Copyright Act based on the British Act of 1905.<sup>141</sup> In 1888, Henry Reader Lack, the Controller of Patents, noted that "Most of the colonies have adopted the Trade Mark Act, 1875 in some shape

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134 Letter from Earl Grey to the Governors of the North American Colonies, Nov. 5, 1846, in COLONIAL COPYRIGHT, *supra* note 74, at 14.

135 Minute of Charles Hay Cameron, Legal Member of the Council (1843-48), and President of the Council of Education (July 5, 1847) (IOL F4/2256 Board's Collections (1847-48), vol. 2256 113858-114023, at No. 113864).

136 Trade Marks Registration Act, No. 22 of 1877 (Cape of Good Hope).

137 Law to Establish a Register of Trade Marks in Natal, No. 4 of 1885 (Natal).

138 Trade Marks Ordinance, No. 14 of 1888 (Ceylon).

139 Law on Registration of Trade Marks, No. 13 of 1893 (Orange Free State).

140 Trade Mark Registration Act, 1876, No. 539 (Vict.). This Act was considered in *Wolfe v. Hart* (1878) 4 V.L.R. 125, where the plaintiff had registered various labels, reproduced in the report; *In re Rowley & Pyne ex parte Dalton* (1883) 9 V.L.R. (Law Section) 307; *In re Eno's Trade Mark* (1883) 9 V.L.R. (Law Section) 335 (with colour illustrations of competing marks).

141 G.C. WEBSTER & N.S. PAGE, SOUTH AFRICAN LAW OF TRADE MARKS para. 1.3

or another."<sup>142</sup> Moreover, when a Select Committee met in 1887 to discuss the reform of the law on merchandise marks, Herbert Hughes, a solicitor and secretary of the Sheffield Chamber of Commerce, remarked that if reforms were made in the United Kingdom, they would probably be reproduced in the colonies: "As regards the Colonies and dependencies, I think their law will probably become a reflex of ours in this particular."<sup>143</sup>

Such was the general assumption in the colonies that what was good for Britain was, *prima facie*, good for a colony, that a person proposing local legislation would usually find readier acceptance if the legislation could be presented as a copy of British legislation.<sup>144</sup> Introducing a Bill proposing a copyright law (which became the Copyright Act 1869) into the Victorian Legislative Assembly, G. Paton Smith, the Attorney General, explained that, while he did so in response to lobbying by a deputation of local creators, the law was needed because the Imperial laws of copyright had "no force here, owing to the machinery for carrying them into effect being most expensive and unsatisfactory." All that was intended to be achieved was to replicate the British law, and he described the Bill as "merely a transcript of the English Acts, with the addition of such provisions as will give speedy and inexpensive remedies to persons whose rights are infringed upon."<sup>145</sup> Even though there is much in the Act that was derived from British laws, there

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(2008) ("The provisions of the 1916 Act were based on those of the British Act of 1905, being in many instances couched in the identical terms.").

142 REPORT OF THE COMMITTEE APPOINTED BY THE BOARD OF TRADE TO INQUIRE INTO THE DUTIES, ORGANISATION AND ARRANGEMENT OF THE PATENT OFFICE, 1888, C. (2d series) 5350, at 7 (Q. 137) [hereinafter 1888 COMMITTEE ON PATENT OFFICE].

143 SPECIAL REPORT FROM THE SELECT COMMITTEE ON THE MERCHANDISE MARKS ACT 1862 (AMENDMENT) BILL, H.C. 203, 1887, at 126 (Q. 2491).

144 *See, e.g.*, BRISBANE COURIER, June 15, 1864, at 3 (reporting the introduction of the Trade Marks Bill into the Queensland Legislative Council on June 14, 1864, and J. Bramston's explanation that it was a "transcript of an English Act"); MAITLAND MERCURY, Apr. 4, 1865 (reporting the introduction of the Trade Marks Bill into the New South Wales Legislative Assembly on March 31, 1865, where Hart described the Bill as "almost a transcript of the English Act"); SYDNEY MORNING HERALD, Apr. 28, 1865 (reporting statement by Alexander Campbell during the Committee stage of the Trade Marks Bill in the New South Wales Legislative Council, describing the Bill as "a faithful transcript, so far as it could be, of the English Act"). As registration had proved highly controversial in Britain, and both the Queensland and New South Wales Bills included provision for registration, calling these measures "transcripts" might seem somewhat disingenuous.

145 8 PARL. DEB., June 9, 1869, 1005 (Vict.) ; *see also id.* at 1837 (second reading). Smith seems to have been particularly concerned that protection be afforded to designers, but also referred to cases of "piracy" of plays.

were also considerable variations and the characterization of the Bill as "a transcript" of the British law should be recognized as a rhetorical strategy designed to ease its passage through the legislature. The legislators in the same colony, Victoria, showed a corresponding reluctance to "innovate": when, in 1871, it was proposed to extend copyright so as to protect news sent by telegraph, a number of Members counseled against adoption of a law that had not been tried elsewhere. Edward Langton, for example, asked other Members to consider "[w]hat was there, in the circumstances of the colony, which rendered it necessary to take a course here which had not been taken in England or America?"<sup>146</sup>

Insofar as coordination of legislation with the colonies was thought desirable, this was often achieved (particularly from the latter part of the century) through cooperative frameworks and informal networks. A circular issued by the Colonial Office might "inform" a colony of a particular change in British law, "inspiring" perhaps a local legislative response, or request information on the protection available to a British citizen, thus suggesting, perhaps, that such protection was necessary or desirable. In the early 1850s, for example, the Lord Chancellor, Lord St. Leonards, sent a circular to the colonies asking for information concerning local laws, and, as we have noted, many responded, bit by bit, by formulating such a law "taking the English Act of 1852 as their model," so that by 1864 seventeen British colonies had patent laws.<sup>147</sup> Similarly, in the early 1860s, Lord Newcastle sent a circular to the colonies with a copy of the British Merchandise Marks Act 1862, requesting information regarding any then-existing colonial trade mark laws. Most of the colonies promised to consider the issue, with many (including, for example, Hong Kong (1863), Natal (1864), Barbados (1864), British Guiana (1864), Ceylon (1865), and Newfoundland (1880)), choosing to adopt similar legislation.<sup>148</sup>

Although copying the British model was so commonplace that the British knew they had little to fear from offering the colonies a degree of legislative autonomy, some colonies could be relied on in this respect more than others. Canada, in particular, was keen to forge its own policies, irrespective of how far the laws deviated from (or even their economic impact on) Britain. Although this was most obvious in the field of copyright, where a statute

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146 95 PARL. DEB. 1876, Nov. 16, 1871 (Vict.), cited in Bently, *supra* note 111, at 122-23.

147 1864 ROYAL COMMISSION ON PATENTS, *supra* note 5, at 30 (Lewis Edmunds).

148 See the survey in GEORGE G.M. HARDINGHAM, TRADE MARKS: NOTES ON THE BRITISH, FOREIGN AND COLONIAL LAWS RELATING THERETO (London, Stevens & Sons 1881).

designed to subject British works to compulsory licensing (on payment of a 12.5% royalty) was passed, but refused royal assent,<sup>149</sup> the Canadian desire to take its own course was true in other spheres of intellectual property law. Referring to the colonial laws of trade marks in 1888, for example, Edmund Johnson observed that the law adopted in the Cape and in the Australian states was "practically . . . our own law," but that "Canada is more independent."<sup>150</sup>

Beyond the intrinsic confidence that the British had in their colonial delegates (and descendants), colonial legislation was subjected to scrutiny by the law officers in Britain. Although largely devolved, colonial lawmaking was subject to imperial control, at least insofar as it could be disallowed as "repugnant."<sup>151</sup> In the intellectual property field, there were very few cases of repugnancy. One arose in the 1870s in relation to copyright reform in Canada. A Canadian Act of 1872 sought to enable Canadian publishers to reproduce British works on payment of a royalty (and thus to compete with imported American reprints). The British refused to give approval, claiming that the new law was in conflict with the imperial regime.<sup>152</sup>

While formal refusal to approve legislation was a possibility, it was more common for the legislative agenda of a colony to be influenced in a less heavy-handed manner. When India sought to reform its copyright, first in 1876 and again in 1885, the negotiations were more gentlemanly, but the effect was the same: even though the Government of India had modeled its proposal on a Bill drafted in Britain (by Lord John Manners), India was asked not to take action until Britain had been able to produce its own reforms (following the review of the law that was conducted by a Royal Commission that had been established in 1875) lest divergences emerge.<sup>153</sup> As is well known, this only occurred in 1911.

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149 The events were described by Dawson in DAWSON, *supra* note 73, at 27-28, 38.

150 1888 COMMITTEE ON PATENT OFFICE, *supra* note 142, at 7 (Q. 137).

151 However, the "legal doctrine of repugnancy" was, according to Frederic Rogers, Under-Secretary of State for the Colonial Office, who had to make such determinations, "in a very uncertain, perhaps I should say shifting state": Letter from Frederic Rogers to Herbert Merivale (May 5, 1858), South Australia, CO 323/87, *cited in* SWINFEN, *supra* note 126, at 62.

152 SEVILLE, *supra* note 72, at 103-06.

153 Letter from Lord Salisbury, Sec'y of State, to Gov't of India (July 5, 1877) (IOL, No. 19 in file for Oct. 22, 1883, L/PJ/6/110); Statement of Objects and Reasons: Indian Copyright Bill 1885, from the Gov't of India to Sec'y of State (June 5, 1885) (IOL, L/PJ/6/156, file 1137, para. 2).

### III. GROWING INTEREST IN UNIFORMITY

The end of the nineteenth century witnessed a shift in favour of uniformity in relation to just about all the fields of intellectual property. If, in 1852, devolution of patent lawmaking was, according to Thomas Webster, a "judicious arrangement," by 1900 it was increasingly viewed as "anomalous."<sup>154</sup> Speaking of diversity in patents, Gerald Balfour, President of the Board of Trade, would remark in 1901 that "[t]he extraordinary multiplicity of colonial patent laws forms one of the most curious anomalies of the British patent system."<sup>155</sup>

In 1887 the first of a number of periodic colonial conferences was held.<sup>156</sup> Earl Stanhope, Secretary of State for the Colonies, referred to the meeting as the "first attempt to bring all parts of Her Majesty's Empire into joint deliberation."<sup>157</sup> The main issues on the agenda were defence and imperial communication,<sup>158</sup> but intellectual property matters were also discussed.<sup>159</sup> As a Merchandize Marks Bill was pending before the British Parliament, Lord Stanley raised this matter, particularly in respect of false indications of origin. All the representatives of the colonies accepted that parallel legislation would be desirable throughout the Empire.<sup>160</sup> Alfred Deakin, future premier of the Australian Commonwealth, and then Chief Secretary of Victoria, also spoke in favour of a uniform patent law, so that a patent could be granted in one colony and be applicable throughout the Empire.<sup>161</sup> He said he thought "it would certainly be a very great advantage to inventors in all parts of the

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154 1871 SELECT COMMITTEE ON PATENTS, *supra* note 131, at 85 (Q. 969) (reflecting on the decision in 1852 and describing it as having been a "judicious arrangement.").

155 *Colonial Patents*, TIMES, Aug, 29, 1901, at 6.

156 PROCEEDINGS OF THE COLONIAL CONFERENCE, 1887, C. (2d series) 5091 [hereinafter 1887 COLONIAL CONFERENCE].

157 Letter from Edward Stanhope to the Governors of the Colonies Under Responsible Gov't, Nov. 25, 1886, in 1887 COLONIAL CONFERENCE, *supra* note 156, at viii.

158 Opening the conference, the Prime Minister, Lord Salisbury, described this as "the real and most important business upon which you will be engaged." 1887 COLONIAL CONFERENCE, *supra* note 156, at 5.

159 *Id.* at xii.

160 See also SPECIAL REPORT FROM THE COMMITTEE ON THE MERCHANDISE MARKS ACT (1862) AMENDMENT BILL, 1887, H.C. 203, at 16 (Q. 261) (Courtenay Boyle), 244 (expressing desire for uniformity of law amongst colonies).

161 1887 COLONIAL CONFERENCE, *supra* note 156, at 380-81; see *id.* at 374-80 (discussing a common law relating to Merchandize Marks).

Empire if the registration of a patent, under satisfactory conditions, in any one part of the Empire held good for the rest of the Empire."<sup>162</sup>

Although little progress was made immediately with patent reform, the matter returned to the agenda early in the twentieth century when Gerald Balfour responded to a Parliamentary question on patent reform by bemoaning the "legislative fecundity" that had given rise to a different patent law in every colony and urging reform of the situation, "which clearly calls for redress." Although it might not have been immediately feasible, he (like Deakin before him) suggested that "the ideal obviously to be aimed at is an Imperial patent covering the whole Empire."<sup>163</sup> That would give "practical expression to the desire for closer union among the scattered units of the empire."

Balfour's idea was discussed further at the Colonial Conference of 1902 and with greater attentiveness in 1907. The 1907 Conference resolved that "it is desirable that His Majesty's Government, after full consideration with the self-governing Dominions, should endeavour to provide for such uniformity as may be practicable in the granting and protection of trade marks and patents."<sup>164</sup>

Further supportive resolutions followed in 1911, but it was not until after the First World War that the matter would receive serious consideration, at a conference in 1922. The progress of the idea of an "Empire patent," and its ultimate failure, has been thoroughly described by law professor, Chris Wadlow, in an article in the *Intellectual Property Quarterly*.<sup>165</sup> For present purposes, the initiative is of interest in that it indicates a desire for greater uniformity precisely at a time when the self-governing dominions enjoyed increasing independence.

Despite the difficult relations between Britain and Canada, the desirability of uniformity in copyright law was also widely expressed at the beginning of the twentieth century. The Gorell Committee, having determined that Great Britain should adhere to the Berlin Revision of Berne, recognized this explicitly: "[I]t seems of the utmost importance that the colonies, as parts

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<sup>162</sup> *Id.* at 381.

<sup>163</sup> *Colonial Patents*, *supra* note 155.

<sup>164</sup> PAPERS RELATING TO A CONFERENCE BETWEEN THE SECRETARY OF STATE FOR THE COLONIES AND THE PRIME MINISTERS OF SELF-GOVERNING COLONIES, JUNE TO AUGUST 1902, Cd. 1299, at 131, *passim* (Board of Trade Memorandum); MINUTES OF PROCEEDINGS OF THE COLONIAL CONFERENCE, 1907, Cd. 3523, at 484-89.

<sup>165</sup> Christopher Wadlow, *The British Empire Patent 1901-1923: The Global Patent that Never Was*, 4 *INTELL. PROP. Q.* 311 (2006).

of the British Empire, should come into line with Great Britain and that, so far as possible, there should be one law throughout the empire."<sup>166</sup>

Coordination with the colonies was left to another conference of colonial representatives in 1910. The conference, which was chaired by Sydney Buxton, President of the Board of Trade, lasted for six days, spread over a month-long period from 18 May to 20 June.<sup>167</sup> The Conference agreed, it seems unanimously, that it would be desirable to have uniformity in the field of copyright throughout the British dominions. In due course, Bills were introduced into the House of Commons in 1910<sup>168</sup> and 1911<sup>169</sup> and the latter received the Royal Assent on December 16, 1911. Some of the most controversial provisions of the Act were specifically included to take account of wishes of the colonies that had been expressed at the Conference the previous year.<sup>170</sup> The Copyright Act 1911 came into force, in the U.K., on July 1, 1912. The colonies were bound by its terms, though they could make local variations as they considered necessary (as India did in 1914<sup>171</sup>); the Self-Governing Dominions, in contrast, had complete freedom. As Thring put it, "full power is given to the Self-Governing colonies to accept or reject the whole or part of the Imperial Act to legislate for themselves or to disturb the uniformity and integrity of Copyright in the Empire in whatever way the Government of each colony may think fit."<sup>172</sup> Although the self-governing dominions had assented to the legislation the previous year, there was a nagging worry that "the unanimity of the Delegates" was "not necessarily the unanimity of the Empire."<sup>173</sup> Thring feared that the Colonies "elated with

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<sup>166</sup> REPORT OF THE COMMITTEE ON THE LAW OF COPYRIGHT, 1910, Cd. 4976, at 29.

<sup>167</sup> BOARD OF TRADE, IMPERIAL COPYRIGHT CONFERENCE, 1910, Cd. 5272 (published summary of conference resolutions); for the unpublished proceedings, see Minutes of the Proceedings of the Imperial Copyright Conference, 1910 (National Archive, CO 886/4). For scholarly analysis focusing on the Australian contribution to the success of the conference, see Robert Burrell, *Copyright Reform in the Early Twentieth Century: The View from Australia*, 27 J. LEGAL HIST. 239 (2006).

<sup>168</sup> Bill to Amend and Consolidate the Law Relating to Copyright, 1910, Bill [282] (Imperial). This was only introduced with a view to consideration. See 23 PARL. DEB., H.C. (5th ser.) (1911) 2588 (Sydney Buxton).

<sup>169</sup> Bill to Amend and Consolidate the Law Relating to Copyright, 1911, Bill [149] (Imperial). After Amendments by Select Committee, Bill to Amend and Consolidate the Law Relating to Copyright, 1911, Bill [296] (Imperial). After House of Lords Amendments, Bill to Amend and Consolidate the Law Relating to Copyright, 1911, H.L. Bill [384] (Imperial).

<sup>170</sup> Herbert Thring, *The Copyright Bill 1911*, 89 FORT. REV. 901, 905 (1911).

<sup>171</sup> Proclamation, Oct. 31, 1912 (India); Copyright Act, 1914 (India).

<sup>172</sup> Herbert Thring, *Imperial Copyright*, 88 FORT. REV. 688, 689 (1910).

<sup>173</sup> *Id.* at 689.

their new freedom" would legislate "rashly and independently."<sup>174</sup> For him, this possibility represented a "real crisis."<sup>175</sup> Significantly, however, although the Self-Governing Dominions were given complete freedom as to whether they adopted the 1911 Act, Australia, Newfoundland, New Zealand, and South Africa were quick to adopt it.<sup>176</sup>

The increased interest in standardized Imperial intellectual property laws, which was exhibited at the end of the nineteenth and the beginning of the twentieth century, is, at first sight, rather surprising. During the nineteenth century many of the (particularly white) colonies had gained increasing amounts of autonomy, and practical independence from Westminster. In the field of intellectual property, the end of the century had seen stormy debates between Canada and Britain over Canada's copyright law and its place in the Berne Convention.<sup>177</sup> Yet, simultaneously, there was widespread interest in uniform intellectual property laws. Indeed, it has been said that "Australia . . . made uniformity across the empire one of the central themes of its copyright policy in the period leading up to the 1910 conference."<sup>178</sup>

The attractions of uniformity were obvious from a British perspective, but less so for those charged with securing the interests of each of the colonies. In 1887, Deakin spoke of the benefits of an imperial patent regime to all inventors in the Empire, but it would have been apparent to him that there were likely to be more patent owners in Great Britain than Victoria. So, while the modern arguments for harmonization go some way toward explaining the increased interest in imperial intellectual property laws, we probably need to look deeper — into questions of political identity and international strategy — to understand these developments.

Robert Burrell has gone some way toward explaining the political strategies and complex mentalities that underpinned colonial interest in uniform imperial law. While it is true that the late nineteenth century witnessed growing calls for autonomy, at least amongst the larger colonies, few amongst the colonial populations, or governments, wanted to break relations with Britain. For some, Burrell recognizes, the opposite was

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<sup>174</sup> *Id.* at 690.

<sup>175</sup> Thring, *supra* note 170, at 910.

<sup>176</sup> Copyright Act, 1912 (Cth) (Austl.); Act Respecting Copyright, 1912 (Newfoundland); Copyright Act, 1913 (N.Z.); Patents, Designs, Trade Marks and Copyright Act, No. 9 of 1916, § 143 (S. Afr.) (bringing U.K. Act into force).

<sup>177</sup> Sara Bannermann, *Berne Buster: Canada and the Berne Convention, 1887-1908* (2009) (unpublished Ph.D. dissertation, Carleton University) (on file with Carleton University).

<sup>178</sup> Burrell, *supra* note 167, at 256.

the case: they "believed in empire."<sup>179</sup> Yet others foresaw a progressive growth in colonial autonomy within a constitutional framework, ultimately resulting in some sort of federation. Despite the denials in 1887 that federation was envisaged, the colonial conferences (at which imperial coordination of lawmaking was discussed) were at least consistent with such a vision of the development of imperial-colonial relations into a federation with a division of legislative responsibilities and competences. Chief amongst the imperial federalists was none other than Alfred Deakin — who in 1887 proposed an imperial patent and, as Prime Minister of Australia in 1910, supported the idea of imperial copyright.<sup>180</sup> A third possible explanation for colonial support of imperial laws could be that colonial negotiators were willing to operate strategically, cooperating on, say, copyright, while negotiating hard on some more important issues, such as tariffs or defence.

A further explanation for the growing interest in uniformity *within* the Empire was the growth in *international* intellectual property relations. During the middle of the nineteenth century international relations in the field of intellectual property were developed through bilateral treaties (treaties of freedom, navigation and commerce, or, after 1844, specific bilateral copyright agreements).<sup>181</sup> However, in the 1880s two multilateral arrangements were adopted, the Paris Convention on Industrial Property of 1883, and the Berne Convention on the Protection of Literary and Artistic Works of 1886. These moves towards international engagement implicated British-colonial relations in interestingly conflicting ways. On the one hand, internationalization seemed to offer a way out from the impasse in lawmaking that had resulted from the entrenched postures of the Canadian and British publishers.<sup>182</sup> International norms would, after all, not be British norms

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179 *Id.* at 257.

180 John Henry Bergne, who negotiated the initial Berne Treaty in 1886 called Imperial copyright "a step in the direction of the Federalization of the British Empire." See J.H. Bergne, *An Act to Amend Title 60, Chapter 3, of the Revised Statutes of the United States Relating to Copyright*, 172 Q. REV. 380, 390 (1891). On Deakin's position, see Burrell, *supra* note 167, at 258, 264.

181 Bilateral copyright treaties were entered by Great Britain under the terms of the International Copyright Act, 1844, 7 & 8 Vict., c. 12 (Gr. Brit.). This Act, which repealed and replaced the 1838 International Copyright Act, covered not merely books, but also works of art. Section 2 conferred the same rights that the work would have benefited from had it been published in the U.K.

182 The Foreign Reprints Act 1847 satisfied neither party: virtually nothing was collected for British publishers, while U.S. but not Canadian publishers had access to the Canadian market. The Canadian publishers proposed to extend the compulsory licence to cover the reprinting in Canada of British works, while the British publishers sought restoration of their "rights" in full. The issue took on

imposed at the behest of British publishing interests, but rather would reflect an "international consensus," indeed, a consensus amongst "civilized" nations. On the other hand, effective negotiation of any treaty by the British government would be significantly enhanced by authority to negotiate for the whole Empire. Britain wanted to negotiate for the colonies, recognizing that to do so would increase its bargaining power significantly (while at the same time highlighting that Britain did not really need to join a convention of non-English speaking states). International negotiation made a single Imperial position attractive. As Australian Senator McGregor explained,

[t]he first principle laid down by the British Act is that copyright is an Imperial matter . . . . The majority of the countries of Europe . . . are in the Berne Convention, and the protection of this Act would extend to our authors and artists in all of the countries which are in the Convention . . . *we have the power of the British Empire behind us when we ask for anything which is just and fair from another country.*<sup>183</sup>

#### IV. THE DIFFERENT TREATMENT OF COPYRIGHT AND PATENTS

Finally, what explains the differences in approach between copyright and both patents and trade marks? With respect to copyright in books, as we have seen, the 1814 Act rendered protection of works published in Britain to be imperial. This, of course, did not prevent the adoption of local copyright regimes for works first published in a colony. By contrast, patents, designs

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a constitutional flavour, the Canadians arguing that the British North America Act 1867 gave it the power to decide for itself, but the British Government took a different view, and twice, in 1872 and 1889, refused Royal assent to Canadian legislation. See DAWSON, *supra* note 73; WILLIAM BRIGGS, *THE LAW OF INTERNATIONAL COPYRIGHT* 587-632 (1906); III ARTHUR BERRIEDALE KEITH, *RESPONSIBLE GOVERNMENT IN THE DOMINIONS* 1217-37 (1912); R.A. Shields, *Imperial Policy and the Canadian Copyright Act of 1889*, 60 *DALHOUSIE REV.* 634 (1980-81); SEVILLE, *supra* note 72, at 78-145.

<sup>183</sup> Second Reading Speech of the Copyright Bill, 1912, 64 *HANSARD* 1334-35 (1912) (Austl.), *quoted in* Kathy Bowrey, *On Clarifying the Role of Originality and Fair Use in Nineteenth Century UK Jurisprudence: Appreciating "The Humble Grey Which Emerges as the Result of Long Controversy,"* in *THE COMMON LAW OF INTELLECTUAL PROPERTY: ESSAYS IN HONOUR OF DAVID VAVER* 45 (Catherine W. Ng, Lionel Bently & Giuseppina D'Agostino eds., 2010) (emphasis added).

and trade marks were treated as local in nature: each colony had to decide whether to offer protection for trade marks, patents or designs.

The different approaches taken seem odd, for a number of reasons. Firstly, from an historical point of view, copyright and patents have much in common. Both developed, it seems, in part from the practice of the Crown granting privileges (which, in both cases, could be more than local in effect). Secondly, even in the nineteenth century, the two systems of protection were usually considered as parallels. So, for example, when the Indian, Canadian and Australian states were linked through federation, in 1861, 1867 and 1900, "patents and copyright" were designated as subjects of federal authority.<sup>184</sup> Both were considered suitable for the same level of regulatory intervention. Thirdly, in contemporary scholarship surrounding European harmonization, copyright is typically figured as the regime with intimate connections to the local culture of a particular country, so that, for example, matters such as copyright exceptions have been regarded as being closely associated with national autonomy and thus somewhat resistant to regional or international norm-setting. By contrast, patent and trade mark law has been regarded as more readily suitable for harmonization. Following this logic, during the nineteenth century one might have expected uniformity, if anywhere, in the laws of patents and trade marks that regulate the more "objective" fields of science and commerce. Why should this differential treatment have occurred? Was it by accident or design? Did it reflect something inherent in the nature of the subject matter?

Certainly there appears to have been a considerable element of arbitrariness in the decision to render copyright imperial in 1814. As we have seen, although the legislation followed a Select Committee investigation, nothing therein related expressly to the decision to extend the application of the Statute of Anne to the Empire. Insofar as any logic may be discernible, the most plausible suggestion is that the "imperialization" of British copyright law was part of a deal that was struck with booksellers to justify the retention of the deposit. Although the reenactment of the provision in 1842 proved controversial with the North American colonies, the British Government indicated it felt uneasy about altering the law, given the fact that the 1842 Act (like its 1814 predecessor) was not a governmental measure. Gladstone explained, for example, that the law had been "adopted by Parliament on

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<sup>184</sup> Indian Councils Act, 1861, 24 & 25 Vict., c. 67, § 43; British North America Act, 1867, § 91 (paras. 22, 23); Commonwealth of Australia Constitution Act, 1900, § 51 (para. xviii). The Canadian federal power was interpreted by some as supplanting British legislative power, but this view was held to be misconceived in *Smiles v. Belford*, [1877] Ont. C.A. 576.

the suggestion of an individual Member of the House of Commons in deference to a strong public sentiment and to the arguments by which it was sustained."<sup>185</sup> By contrast, the Government sponsored the 1852 patents legislation, leaving the decision as to the scope of patents to the Patent Office. It is thus possible to see the initial decision that copyright should be imperial, and patents local, as merely reflecting the particularities of how, when, and by whom key reform proposals were made.

However, as we have noted, in the later part of our period, when imperial uniformity was considered desirable, it was "imperial copyright" that succeeded, while the idea of an "imperial patent" remained some distance from adoption. This might suggest that there were deeper logics at work even in the earlier divergent treatments of copyright and patent. At least four possible reasons suggest themselves.

Firstly, it may be the case that the association between copyright and "the common law," which had been developed during the eighteenth century, informed an assumption that copyright should apply throughout the British Empire. As is well known, the eighteenth century witnessed a persistent debate over whether there was common law copyright, culminating in the House of Lords vote in *Donaldson v. Becket* in 1774.<sup>186</sup> The vote of their Lordships was a rather unsatisfactory way to end a debate in which many ideas had been canvassed widely, and it left a range of matters unresolved. Although the House of Lords rejected the idea of common law copyright in published works (which fell thereafter purely within the regulation provided by the Statute of Anne), it was assumed to have left common law copyright in unpublished works intact.<sup>187</sup> Moreover, as a result of the literary property debate, the Statute of Anne was now characterized by many as a limitation on a common law right rather than (as it might have been) an indication that no such right existed.<sup>188</sup> As a result, copyright — even statutory copyright —

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185 COLONIAL COPYRIGHT, *supra* note 74, at 10.

186 *Donaldson v. Becket* (1774) 17 Hansard (1st ser.) 953, in Primary Sources on Copyright (1450-1900), *supra* note 61; DEAZLEY, *supra* note 56; ROSE, *supra* note 56; BRAD SHERMAN & LIONEL BENTLY, THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW: THE BRITISH EXPERIENCE, 1760-1911, at 11-60 (1999).

187 *Perceval v. Phipps*, (1813) 35 Eng. Rep. 225 (Ch.); *Southey v. Sherwood*, (1817) 35 Eng. Rep. 1006 (Ch.); *Gee v. Pritchard*, (1818) 36 Eng. Rep. 670 (Ch.); *Abernethy v. Hutchison*, (1824) 47 Eng. Rep. 1313 (Ch.); *Prince Albert v. Strange*, (1849) 64 Eng. Rep. 293 (Ch.) (Knight Bruce VC); *Prince Albert v. Strange*, (1849), 45 Eng. Rep. 1171 (Lord Chancellor); *Prince Albert v. Strange*, (1849), 47 Eng. Rep. 1302 (Lord Chancellor); *Tuck v. Priestler*, (1887) 19 Q.B.D. 629; *see also* WALTER COPINGER, THE LAW OF COPYRIGHT IN WORKS OF LITERATURE AND ART 7 (London, Stevens & Haynes 1870).

188 *See, e.g.*, ROBERT MAUGHAM, TREATISE ON THE LAWS OF LITERARY PROPERTY, at

retained a peculiarly common law character. To some, this might have made it a particularly suitable vehicle for imperial extension. The common law was automatically carried to settled colonies, and largely adopted (in the absence of local law) by ceded colonies.<sup>189</sup> Of course, such a "logic" would have been open to challenge, on a number of grounds. For example, even where the common law extended to a colony, that did not of itself imply that the property recognized was imperial rather than local — as later developments in the law relating to passing off as protection of local, territorial, goodwill make clear.<sup>190</sup> Nevertheless, whatever the potential criticisms of the "logic," the association between copyright and the common law may well have been a significant factor informing the decision to apply British copyright throughout the Empire.

Secondly, it may have been that the justifications for protection of copyright pointed towards as "universal" an application of protection as possible, and thus to an imperial regime, whereas the justifications of patents were more closely linked to local economy and society. There certainly is little doubt that throughout the nineteenth century copyright was seen by many as an application of principles of justice which pointed to an author or creator having a property, of some sort, in the product of his or her labour.<sup>191</sup> By contrast, while patents were recognized within legal discourse as property, the justificatory basis for protection was both more readily contested and more local in orientation. As is well known, for much of the nineteenth century, particularly the two or three decades following the middle of the century, the desirability of the patent system was widely debated, and a significant lobby emerged favouring abolition of the patent system.<sup>192</sup> The arguments in favour of patents were pitched frequently in terms of local

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xii (London, Longman, Rees, Orme, Brown & Green 1828); COPINGER, *supra* note 187; *cf.* Information for Alexander Donaldson 60 (1773), in Primary Sources on Copyright (1450-1900), *supra* note 61 (observing that had literary property rights existed at "common law" then they would apply in Ireland, Scotland and the colonies of the United States, and submitting that the absence of such laws in those countries was proof that copyright did not exist "at common law").

189 Richard T.E. Latham, *The Law and the Commonwealth*, in 1 SURVEY OF BRITISH COMMONWEALTH AFFAIRS: PROBLEMS OF NATIONALITY 510, 515, *passim* (W.L. Hancock ed., 1937).

190 *Star Industrial Co. v. Yap Kwee Kor*, [1976] Fleet Street Reports 217 (P.C.); *see* CHRISTOPHER WADLOW, *THE LAW OF PASSING OFF: UNFAIR COMPETITION BY MISREPRESENTATION* 154-55 para. 3-67 (3d ed. 2004).

191 COPINGER, *supra* note 187, at 1, 5.

192 *See, e.g.*, Fritz Machlup & Edith Penrose, *The Patent Controversy in the Nineteenth Century*, 10 J. ECON. HIST. 1 (1950).

benefit, in particular through the idea of some sort of contract-like exchange between the state and the patentee: the patentee disclosing the invention to the public and, in return, being granted a monopoly.<sup>193</sup> Patents, thus conceived, were "acts of state," rather than expressions of natural rights.<sup>194</sup>

Thirdly, and perhaps reflecting the underlying justifications, the conceptual logic of patents seemed more consistent with local scope than perhaps was the case with copyright. The existence of any rights in a published invention depended on an act of registration, whereas registration functioned, in British copyright, as a prerequisite for bringing an action under the statute.<sup>195</sup> The validity of the patent depended on the "novelty" of the invention, a concept which English patent law had characterized as involving a local assessment (so that imported technologies were to be regarded as new in England and, after 1852, Britain).<sup>196</sup> By contrast, in the late nineteenth century, copyright in a work was already linked to the labour of origination (including compilation, transcription and translation), not by reference to the novelty of the output.<sup>197</sup> Moreover, the continued operation of patent was regarded as dependent on local working not only in Britain, but in most countries that had patent systems in the latter half of the nineteenth century;<sup>198</sup> whereas copyright continued to subsist in most unpublished works indefinitely, and in published works even though they were out of print.<sup>199</sup> Given the local character of many of the conditions for the validity of a patent, it is perhaps unsurprising that contemporaries saw real problems with the idea of an "imperial patent" (in contrast to the already familiar, imperial copyright). When Deakin raised the issue at the 1887 Colonial Conference, Samuel Griffith, Premier of Queensland, emphasized the problem entailed by the adoption of a single

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193 *Id.* at 25-28; GEORGE TICKNOR CURTIS, *A TREATISE ON THE LAW OF PATENTS FOR USEFUL INVENTIONS*, at xxiii, xxxv (Boston, Little Brown & Co. 4th ed. 1873).

194 This explains, in part, the development of the rule that one court could not take jurisdiction in relation to infringement of the patent laws of other countries: *Potter v. Broken Hill* (1906) 4 C.L.R. 479 (Austl.).

195 Literary Copyright Act, 1842, 5 & 6 Vict., c. 45, § 24 (Imperial).

196 *Edgeberry v. Stephens*, (1693) 90 Eng. Rep. 1162 (K.B.).

197 *Walter v. Lane*, [1900] A.C. 539 (H.L.).

198 JEROME REICHMAN WITH CATHERINE HASENZAHN, *NON-VOLUNTARY LICENSING OF PATENTED INVENTIONS* (U.N. Conference on Trade & Dev. (UNCTAD) Issues Paper No. 5, 2002) (describing the historical evolution of compulsory licences for non-working of patents from rules on forfeiture for non-working).

199 For an exception, see Literary Copyright Act, § 5 (giving power to the Privy Council to license republication of a book where, after the author's death, the copyright owner had refused to do so with the effect of withholding the book "from the public").

notion of novelty throughout the Empire. Sir John Downer, Premier of South Australia, said that the more one examined the idea of an imperial patent, the more problematic it seemed. What, for example, he asked, would happen if a patent was challenged in Britain on the basis of prior art in Australia?<sup>200</sup>

Fourthly, and more speculatively, the different reactions to the idea of imperial copyright and imperial patent may have reflected the different economies of books and inventions. It seems plausible that the economic networks which copyright supported extended broadly over the Empire, whereas the markets for patented products remained often local. A book published in Britain would have a market in all the British colonies, not only amongst the colonizing population and their English-speaking descendants, but also amongst the growing numbers of English-educated local peoples. Already in the eighteenth century links existed between British publishers and their North American counterparts. In the nineteenth century, British publishers began to adopt a range of strategies for extending the sale of their work in the British colonies.<sup>201</sup> By contrast, inventions that were the subject of patents may frequently have been of more limited geographical potential. An invention for refining sugar, or for mining gold, or one relating to tea processing or felling trees, would have been of primary interest in only a few colonies rather than within Britain itself. British manufacturing interests will have been much more concerned about developments in Germany and the United States, than about those in Australia or Canada. An imperial application for patents may simply not have seemed as important or significant to the relevant British interests, as imperial application of copyright did to British publishers.

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200 1887 COLONIAL CONFERENCE, *supra* note 156, at 381 (Griffith), 383 (Downer).

201 Rimi B. Chatterjee, *Macmillan in India: A Short Account of the Company's Trade with the Sub-Continent*, in *MACMILLAN: A PUBLISHING TRADITION* 153 (Elizabeth James ed., 2002); RIMI B. CHATTERJEE, *EMPIRES OF THE MIND: A HISTORY OF THE OXFORD UNIVERSITY PRESS IN INDIA UNDER THE RAJ* (2006); Priya Joshi, *The Novel, the Colonial Library and India*, in *PRINT AREAS: BOOK HISTORY IN INDIA* 17 (Abhijit Gupta & Swapan Chakrovorty eds., 2004); Lionel Bently, *Copyright, Translations and Relations Between Britain and India in the Nineteenth and Early Twentieth Centuries*, 82 *CHI.-KENT L. REV.* 1181, 1196-205 (2007).

## V. THE SIGNIFICANCE OF THE HISTORY OF BRITISH COLONIAL INTELLECTUAL PROPERTY LAW TODAY

International intellectual property norms have expanded in the late twentieth century, especially via the TRIPS agreement and WIPO treaties.<sup>202</sup> Moreover, unilateral, bilateral and multilateral mechanisms have made both adherence and compliance with international intellectual property norms a practical necessity. As is well known, the United States has threatened to exercise powers unilaterally to alter trade preferences in relation to countries that do not adequately protect U.S. owner intellectual property.<sup>203</sup> Equally well known is the fact that TRIPS provides for a dispute resolution system, which allows complaints to be brought by one state against another where the plaintiff state believes the defendant state is not complying with the relevant norms. Where a country is found by a panel to be in breach of TRIPS (and indirectly Berne and Paris), if no mutually acceptable solution is found, the complainant may be entitled to impose trade sanctions. The overall impact is that any economy which participates in world trade, or trade with the North, now needs to be a party to TRIPS, and any party to TRIPS needs to comply with its terms or face the possibility of sanctions.<sup>204</sup>

The shifts in the nature of international intellectual property norms, coupled with the skewed processes by which those norms were agreed,<sup>205</sup> have caused a number of commentators to liken the processes of international intellectual property lawmaking to "colonialism." Taking that analogy seriously involves asking: what were the processes of lawmaking in the colonial era? This overview suggests that intellectual property lawmaking in the era of British colonization was not quite what contemporary commentators may assume. While political relations between Britain and its colonies may have been underpinned (especially in the early part of the period) by raw military and economic might, the processes of government seem to have been more complex, accommodating a deal of local flexibility.

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202 SUSAN SELL, *PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS* 96 (2003). Sell argues that because of the close links between industry and the U.S. government, and the negotiating power of the U.S. government itself, in TRIPS, "twelve corporations made public law for the world."

203 Trade Act of 1974, 19 U.S.C. § 301 (2006).

204 LAWRENCE LESSIG, *FREE CULTURE* 63 (2004) ("No country can be part of the world economy and choose not to protect copyright internationally.").

205 Peter Drahos, *Global Property Rights in Information: The Story of TRIPs at the GATT*, 13 *PROMETHEUS* 6 (1995); SELL, *supra* note 202.

Substantial devolution existed in relation to patents and trade marks, as well as artistic copyright and rights in news, while the imperial copyright for books enacted in 1814 was undermined by the 1847 Foreign Reprints Act, a substantial concession to colonial criticisms. Lawmaking within the colonies was characterized by imitation and adaptation, drawing models either from Britain or from other colonies. There was no clear imperial plan, and calls for uniformity came as much from colonial governments as from London. Colonial lawmaking was, frankly, much messier and more unpredictable than modern commentators assume.