

INTERNATIONAL COPYRIGHT: STRUCTURING "THE CONDITION OF MODERNITY" IN BRITISH PUBLISHING

N.N. FELTES*

International copyright law, originating in the French revolutionary laws of 1791 and 1793, made no distinctions between French and foreign authors and freely granted French copyright to foreign works.¹ In the ensuing years, only Belgium followed the revolutionary French example of unilaterally protecting works published abroad.² Consequently, the number of bilateral agreements between individual European states, dealing particularly with translation rights, grew in the first half of the nineteenth century. By 1886, only Greece, Monaco, some of the Balkan states, and Asian and American states, including the United States, were without any international copyright agreements.³ While the network of bilateral copyright arrangements which existed prior to 1886 was extensive, the protection it offered to authors in foreign countries was neither comprehensive nor systematic.⁴ The pressure for a universal law of copyright, however, arose less out of a desire for juridical consistency than from the material contradictions of time and place for which "modernism" was the resolution elsewhere on the ideological level. This can be seen in the events leading up to the Berne Convention of 1887.⁵

In September 1858, a congress on Literary and Artistic Property was held in Brussels which passed resolutions constituting "a rudimentary outline of a programme for a universal copyright law."⁶ During the Paris Exhibition in 1878, the French *Société des gens de lettres* held an international literary congress, presided over by Victor Hugo.⁷ This congress passed further resolutions on international copyright and founded an International

* Professor of English & Social & Political Thought, York University. B.A., 1953, Notre Dame University; M.A., 1957, University College, Dublin; B. Lit., 1959, Oxford University.

¹ SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986*, at 5 (1987).

² *Id.* at 22.

³ *Id.* at 30.

⁴ *Id.* at 39.

⁵ DAVID HARVEY, *THE CONDITION OF POSTMODERNITY* 218 (1989).

⁶ RICKETSON, *supra*.note 1, at 42.

⁷ *Id.* at 46.

Literary Association to protect literary property and to organize regular relations between literary societies and writers of all countries.⁸ Over the next few years the ALAI⁹ held annual congresses and in 1883 it persuaded the Swiss government to sponsor a conference in Berne for the "formation of a Union of literary property."¹⁰ This conference produced the draft of a "Universal Literary Convention, Scheme of Proposals,"¹¹ which became the basis for the successful negotiations between governments at the Berne Diplomatic Conferences of 1884, 1885, and 1886.¹² Meanwhile, in 1837 and 1844 the British Parliament had passed successive acts to protect books published in the United Kingdom and other artistic works imported from those countries which afforded reciprocal protection to British publications. By 1886, copyright agreements had been established by Orders in Council with sixteen European states.¹³ As the negotiations proceeded in Berne during the 1880s, Britain, a participant at the Conferences, passed an act in anticipation of the International Copyright Act of 1886 that empowered the Queen to issue Orders in Council embodying the chief features of the new convention.¹⁴ The United States, on the other hand, had sent only observers to the Berne conferences,¹⁵ and while never joining the Convention, passed the "Chace Act" in 1891. This act granted copyright to authors of certain specified nationalities (including British subjects) whose work was first or simultaneously published or "manufactured" in the United States.¹⁶

The forces that drove the multilateral initiatives towards international copyright are perhaps not immediately clear. Nor does the jocular label, "piracy," meaning simply "free-booting with reference to literary property,"¹⁷ provide a sufficient explanation. "Piracy," as Brander Matthews wrote, "is a term available

⁸ *Id.* at 46-47.

⁹ The International Literary Association changed its name to International Literary and Artistic Association (*l'Association littéraire et artistique internationale*), commonly known as ALAI. *Id.* at 48 (footnote omitted).

¹⁰ *Id.* at 49 (quoting *Association Littéraire et Artistique Internationale—Son Histoire, Ses Travaux* (1878-1889), in BIBLIOTHÈQUE CHACONAC 122-23 (1889).

¹¹ RICKETSON, *supra* note 1, at 50.

¹² See RICHARD ROGERS BOWKER, COPYRIGHT, ITS HISTORY AND ITS LAW 311-21 (1912); WILLIAM BRIGGS, THE LAW OF INTERNATIONAL COPYRIGHT 237-39 (1906); RICKETSON, *supra* note 1, at 41-71.

¹³ WALTER ARTHUR COPINGER, THE LAW OF COPYRIGHT 567, 578-80 (3d ed. 1893).

¹⁴ *Id.*

¹⁵ RICKETSON, *supra* note 1, at 56.

¹⁶ BRIGGS, *supra* note 12, at 640-50; COPINGER, *supra* note 13, at 567, 578-80.

¹⁷ BOWKER, *supra* note 12, at 251.

for popular appeal but perhaps lacking in scientific precision"¹⁸ since most countries, while protecting works by their own authors, did not regard the unauthorized publication of foreign works as unfair or immoral.¹⁹

The exigencies of book production in the 1880s and 1990s were the determining factors in the pressure for international copyright. In his evidence before the Royal Commission on Colonial and International Copyright in 1876, Sir Charles Trevelyan made two statements which he presented as universal truths, but which clearly reflect the broadest historical pressures. Distinguishing the author's own pecuniary interest in his work from that of his publishers, Trevelyan stated that "the interest of the author consists simply in the remunerative sale of his works anywhere and everywhere, it matters not by whom, provided he gets his fair remuneration. But the interest of the publisher is quite different, it is local."²⁰

And in the same testimony, Trevelyan remarked: "[I]t is of great consequence that books should reach the body of the people fresh and fresh."²¹ A recently published book might be good, even "a classic," but its goodness would be enhanced, Trevelyan's archaism emphasizes, if it were "not deteriorated or changed by lapse of time; not stale, musty, or vapid."²²

Trevelyan does not seem aware of his own assumptions about the contradiction between ubiquity and locality, or those in his notion of literary "freshness." Yet, it is precisely these conflicting ideologies of space and time that are the larger determinations of the debate over international copyright. For example, it was said to be a general feeling in the United States that international copyright was simply a scheme whereby British publishers might capture the American book market.²³ It was obvious, however, that any British publisher, even after 1891, "had to calculate costs, freight charges, insurance and import duty before deciding whether the American international copyright act was in any way beneficial to a particular book."²⁴ Earlier struggles con-

¹⁸ Brander Matthews, *The Evolution of Copyright, in THE QUESTION OF COPYRIGHT* 29 n.1. (London, G.H. Putnam ed., 1891).

¹⁹ RICKETSON, *supra* note 1, at 18.

²⁰ *Report of the Commissioners Appointed to Make Inquiry with Regard to the Laws and Regulations Relating to Home, Colonial and International Copyrights: Minutes of Evidence, Session 17 January—16 August 1878. XXIV, PARLIAMENTARY PAPERS, REPORTS: COMMISSIONERS, INSPECTORS AND OTHERS* 260 [hereinafter *Report of the Commissioners*].

²¹ *Id.*

²² The Oxford English Dictionary (2d ed. 1989) (defining "fresh").

²³ S.S. Conant, *International Copyright*, 40 MACMILLAN'S MAG. 153 (1879).

²⁴ SIMON NOWELL-SMITH, *INTERNATIONAL COPYRIGHT LAW AND THE PUBLISHER IN THE*

cerning copyright in England had been determined by an insularity which confined the issues to the nature of a book or text and how that might most profitably be exploited in an English market. But by the late nineteenth century, the constraints of English space and (so to speak) Greenwich time had been superceded. As David Harvey has recently pointed out, "modernism"—the general ideological level of the capitalist social formation—assumes as one of its missions "the production of new meanings for space and time."²⁵ Railways, transatlantic steamships and telegraphy are the most obvious instances of the material pressures for new meanings for space and time in early modern book production. Simply to consider space raises concrete questions of domicile and nationality, whether of author or of publisher. Such questions may include the different kinds of geo-political borders, not only the Atlantic Ocean or the English Channel, but the long Canadian-American land boundary. Augustine Birrell, for example, wrote with mock querulousness about the Canadian "piracy" of English books for the American market: "So far as the United States were concerned, our authors had no remedy but abuse—but Canada, was it not, as it were, our own kail-yard? Did not the Queen's writs run there, and so on?"²⁶ And J. A. Froude wondered who could collect the sort of minimal royalty that was suggested as a "free trade" alternative to copyright in different countries under different governments, given the impossibility of collecting royalties on the introduction of foreign editions into the British Colonies.²⁷ Again, there was the problem of sheer geographical size in organizing existing or potential markets in these colonies. As one American wrote:

Your Mudie can mail books at a cheap rate to subscribers in every part of the United Kingdom, and get them back from the farthest limit within a week or ten days. But a Boston or New York library could not lend books to subscribers in Nevada or Dakota, thousands of miles away.²⁸

The size of the United States, as well as its socio-political and ideological divisions, engaged the question of copyright in yet another way:

REIGN OF QUEEN VICTORIA 77 (1968). See generally Arnold Plant, *The Economic Aspects of Copyright in Books*, 1 *ECONOMICA* 167-95 (May 1934).

²⁵ HARVEY, *supra* note 5, at 216.

²⁶ AUGUSTINE BIRRELL, *SEVEN LECTURES ON THE LAW AND HISTORY OF COPYRIGHT IN BOOKS* 213 (London, Cassel 1899).

²⁷ J.A. Froude, *Report of the Copyright Commission*, in 148 *EDINBURGH REV.* 329 (1878).

²⁸ Conant, *supra* note 23, at 153.

[T]wo years since certain persons in the West—publishers of Chicago and St. Louis—vindicated for themselves the original freedom of citizens of the United States to reprint the works of Englishmen, and they reduced their prices to make a market The publishers of Chicago threatened to destroy the trade of the publishers of New York At present the publishers of the older cities are principally, if not solely, affected, and it is they who have made the discovery that the question of International Copyright has become “pressing.”²⁹

Similarly, international copyright dictated that the dimension of time was no longer to be structured simply as duration—the length of copyright and its relation to an author’s lifetime which would allow him a fair reward and produce a profit for the publisher. Furthermore, not only “freshness” but staying power (or “shelf-life”) were commercial values. As J. A. Froude argued, “Books of real worth survive the copyright period, and, the verdict of continued demand being finally passed, they carry with them their own commendation and become the property of the public.”³⁰ Unprecedented speedy communication could not only “boom” a book, but could introduce pressures on the time another book might need to become a critical and financial success. Politically, issues of precedence of date of publication, or alternatively, of simultaneity of publication, were crucial. For time and space were often intimately connected in copyright law. After the Chace Act, a book needed to be published in both countries simultaneously to conform with both United States and British copyright law.³¹ Not even an author’s twelve-month residence in the United States could earn him copyright protection for a work without him first obtaining United States citizenship.³² Later, measures were adopted to grant *ad interim* copyright for a book first published abroad while it was being manufactured in the United States.³³

The Berne Convention and the international copyright legislation which preceded it restructured the accepted understandings of time and space in the interest of capitalist publishing.

²⁹ L.H. Courteney, *International Copyright: II. An Englishman’s View of the Foregoing*, 40 MACMILLAN’S MAG. 163 (1879). For a survey of the geographical and demographic determinations of late nineteenth-century American publishing, see WILLIAM CHARVAT, *The People’s Patronage*, in *THE PROFESSION OF AUTHORSHIP IN AMERICA, 1800-1870: THE PAPERS OF WILLIAM CHARVAT* (Matthew J. Bruccoli ed., 1968).

³⁰ Froude, *supra* note 27, at 314.

³¹ NOWELL-SMITH, *supra* note 24, at 65.

³² *Id.* at 34-35.

³³ *Id.* at 65-66.

The Convention established a "Union," ensuring reciprocity in the treatment of authors, or most often, of publishers (the author's "lawful representatives") within the signatory nations. The Union proclaimed that it should "enjoy in other countries for their works, whether published in one of those countries or unpublished, the rights which the respective laws do now or may hereafter grant to natives."³⁴ The Berne Convention established that:

The country of origin of the work is that in which the work is first published, or if such publication takes place simultaneously in several countries of the Union, that one of them in which the shortest term of protection is granted by law The enjoyment of these rights . . . cannot exceed in the other countries the term of protection granted in the said country of origin.³⁵

The spatial and temporal dimensions of copyright and their interaction were thus recast. What characterizes this early modern social reconstruction of space and time in book production and distribution is a new ideology: the reduction of space (place of publication, nationality of author, etc.) to a category contingent on time (time of publication, duration of property rights, etc.), a change which facilitates the rapid turnover of capital. The old forms of spatialization in publishing had inhibited processes of change, underwriting the timelessness of a publisher's "list," or of the "hundred best books," in the face of entrepreneurial publishing practices. The Berne Convention established the precedence of time over space in publishing; it valorized not only "timing," but also Trevelyan's unspoiled "fresh and fresh," or what Froude less enthusiastically called the "prevailing and passing delirium,"³⁶ so as to hasten capital turnover. As David Harvey argues, "those who define the material practices, forms, and meanings of money, time, or space fix certain basic rules of the social game."³⁷ The rules fixed by the Berne Convention overcame those spatial barriers and temporal understandings which impeded the turnover of publishing capital. The institutional context was thus established for ideological, "literary" values which came to be associated with, for instance, the best seller, in competition with fixed investments in publishing "lists." As Har-

³⁴ Articles of the International Copyright Union 20, 35 (London, Longman's Green 1887).

³⁵ *Id.*

³⁶ Froude, *supra* note 27, at 342.

³⁷ HARVEY, *supra* note 5, at 226.

vey writes, "The incentive to create the world market, to reduce spatial barriers, and to annihilate space through time is omnipresent . . . Innovations dedicated to the removal of spatial barriers . . . have been of immense significance in the history of capitalism, turning that history into a very geographical affair."³⁸ Harvey's methods open the possibility of a detailed analysis of spatial and temporal practices of modern capitalist publishing. His "grid of spatial practices,"³⁹ for instance, allows one to analyze spatially the ideological position of late Victorian publishing: the Berne Convention as a "representation of space," a signification that allows "such material practices to be talked about and understood," or Free Trade as a "space of representation," a "mental invention," allowing one to "imagine new meanings or possibilities for spatial practices."⁴⁰ Harvey's use of "Gurvich's typology of social times" enriches the concepts of "list" and "entrepreneurial" publishing.⁴¹

The debate in Britain during the time of the Royal Commission on Copyright in 1875-76, had presented just these issues in its entrenched ideological positions. The Commission included among its members Fitzjames Stephen, and in its second year, J. A. Froude and Anthony Trollope. But the commissioners whose participation best reveals the ideological issues were the two civil servants from the Board of Trade, Sir Louis Mallet and Thomas Henry Farrer. In an article in the *Edinburgh Review*, Froude called the controversy over international copyright "the battle of the Board of Trade."⁴² Both Commissioners from the Board of Trade were doctrinaire free traders: Mallet ("a Cobdenite pur sang," according to a friend)⁴³ was, after Cobden's death, "the chief official representative of free trade opinion,"⁴⁴ and Farrer, Permanent Secretary to the Board of Trade, was "a free-trader of unyielding temper" who was by far the most powerful member of the Inquiry. Farrer's "unseen and quiet influence," was so effectual that "between 1872 and 1886 almost all the reforms of and

³⁸ *Id.* at 232. This whole section, especially this paragraph, is heavily influenced by Harvey's discussion on space and time. *See id.* at Part III.

³⁹ *See id.* at 220-21 (drawing on HENRI LEFEBVRE, *LA PRODUCTION DE L'ESPACE* (1974)).

⁴⁰ *Id.* at 218-19.

⁴¹ *Id.* at 218-25.

⁴² Froude, *supra* note 27, at 309.

⁴³ Bernard Mallet, *Introduction to SIR LOUIS MALLET, FREE EXCHANGE* at vi (London, Kegan Paul, Trench, Trubner, 1891). Translated, a Cobdenite pure blood. Cobden was the Commissioner prior to Mallet.

⁴⁴ XII THE DICTIONARY OF NATIONAL BIOGRAPHY 872 (Sir Leslie Stephen ed., Oxford University Press 1901).

additions to our system of commercial law were only brought about with the concurrence of the secretary of the board of trade."⁴⁵

Farrer was not to be so influential in the matter of copyright, and the circumstances of his defeat are historically significant. He did not sit on the Inquiry during its second session in 1876. He did, however, appear as a witness five times, was thoroughly interviewed by Mallet, and on his final appearance, was asked to submit a written summary of his evidence and suggestions.⁴⁶ Like Mallet, Farrer saw free trade as "merely the unshackling of powers which have an independent existence." "All it can do, and that all is much, is to leave the powers of nature and of man to produce whatever it is in them to produce unchecked by human restrictions."⁴⁷ And, again like Mallet, he asserted that a literary work produced by men and women with little or no copyright privileges would somehow be a "better" work.

At times during the Inquiry, Mallet's questions were so doctrinaire that the publisher, John Blackwood, who was called as a witness, could not understand him. When Mallet asked Blackwood about extending "the area of consumption and of profit" while reducing "the term of protection" so as to "obtain the same results in stimulating authors to their best efforts," Blackwood, balking at "the sort of abstract question," simply answered, "I cannot follow that."⁴⁸ While Farrer was more subtle in his presentation of the logic of political economy, even Herbert Spencer, another witness, considered Farrer's references to the issue of rival editions as "free trade" and his habit of calling copyright "monopoly" to be "question-begging."⁴⁹ Locked in his abstract categories, Farrer persistently argued for a tight restriction on "the abstract principle of monopoly" in copyright,⁵⁰ saying that the ideal copyright system "should be co-extensive with the English language, giving the author the benefit of an enormous market and the reader the benefit of a price proportionately reduced."⁵¹ He claimed, like Mallet, that free trade in books would improve the quality of literary production: "on the

⁴⁵ XXII *id.* at 627.

⁴⁶ *Report of the Commissioners, supra* note 20, at 581.

⁴⁷ T.H. FARRER, *FREE TRADE VERSUS FAIR TRADE* 86 (London, Cassell, Petter, Galpin & Co. 1882).

⁴⁸ *Report of the Commissioners, supra* note 20, at 303-04.

⁴⁹ *Id.* at 540.

⁵⁰ *Id.* at 406, 460.

⁵¹ *Id.* at 468.

whole we must trust to the public demand purifying itself."⁵² When Fitzjames Stephen asked him if the remuneration of English authors should be increased, he stipulated that they must be "good English authors," although he agreed that there could not be any "definite or assignable relation between the money payment made to an author and the permanent value of his book."⁵³ And under pressure from Stephen over his attempt to distinguish "good" authors, Farrer simply reasserted the free trade logic of his position, that "the author's remuneration must depend upon the public demand for his book."⁵⁴

Only Mallet and Farrer attempted to make a case before the Commission of Inquiry that laws of international copyright would influence the quality or value of the literary works produced. As Froude said, "The movement against copyright has originated with, and been carried on by, two or three speculative gentlemen in a Government department, who cannot reconcile the existing book trade with the orthodox theory of the nature of value."⁵⁵ Stephen's cross-examination made it clear that their case was founded only on abstract political economic opinions about what might be "good" or "very rubbishy" in literature, based on analogy to the production of simple commodities.⁵⁶ After the Commission's Report, Farrer wrote in the *Fortnightly* (in a sort of confused rebuttal of the Arnoldian view of "the literary") that the "essence of a book" lies in the "facts" or "ideas" it contains, rather than in its "form" or arrangement of these facts, whereas copyright law protects not the "facts" but the "form of words": "Original thought and observation, the highest form of mental labour, go unprotected, whilst literary manufacture, a very inferior product of the intellect, alone obtains protection."⁵⁷

Copyright thus has "a tendency to encourage bad writers at the expense of good ones," Farrer wrote.⁵⁸ "It tends to make books bad, numerous and dear."⁵⁹ But what the insular, outmoded free trade discourse of Sir Louis Mallet and T. H. Farrer could not accommodate, and what overrode their opposition, were the concrete spatial and temporal particularities of the book

⁵² *Id.* at 520-21.

⁵³ *Id.* at 520.

⁵⁴ *Id.*

⁵⁵ Froude, *supra* note 27, at 339 (emphasis in original).

⁵⁶ *Report of the Commissioners*, *supra* note 20, at 520; T.H. Farrer, *The Principle of Copyright*, 30 FORTNIGHTLY REV. 842-43 (1878).

⁵⁷ Farrer, *supra* note 47, at 843.

⁵⁸ *Id.* at 848.

⁵⁹ *Id.* at 846.

trade at the turn of the century. When Farrer speaks of an ideal copyright system, "co-extensive with the English language," he ignores the historical determinations of any such system. Indeed, while he means to encourage the "extension" of the market for books, his allusion to "the English language" is in fact, parochial, recalling the island language rather than its concrete, historical (not to say imperial) extensions beyond geographical, social, and political boundaries, and its interaction with foreign languages. To create a world market in English books required the reduction of spatial (not just "trade") barriers. The doctrines of free trade had become, by the 1870s and 1880s, so abstract and so removed from social and economic practice, that the Royal Commission on Copyright, for all the confusion and disagreement in its Report, rejected unequivocally a free trade in books which excluded International Copyright, despite the influence exerted by the free trade dogmatists of the Board of Trade. Simplistic ideologies of supply and demand could not dictate to the modern market in books, however much they might dictate a particular ideology of literary value. International Copyright, in fact, structured a new world market for English books, requiring ideologies of value to accommodate the work of not only familiar local writers, but also foreign writers—indeed, of "international" writers.