Copyright in Periodicals in the Nineteenth Century: Genre and Balancing the Rights of Contributors and Publishers

Dr. Elena Cooper, CREATe, University of Glasgow

[Accepted for publication in *Victorian Periodicals Review*]

The nineteenth century, as readers of the *Victorian Periodicals Review* will be well aware, was a time of huge expansion in the publication of reviews, magazines and other periodical works. Less well known, however, is the fact that, during the same period, UK copyright law developed special rules regulating the authorship and ownership of copyright in these genres, balancing the rights of contributors against those of the work's overall "proprietor, projector, publisher or conductor."[1] These rules, enacted by section 18 of the Copyright Act 1842, but which had some precedent in early nineteenth century judicial authority, were also subsequently debated in the latter half of the nineteenth century.

To date, these legal developments have received scant attention in the existing literature: specialists of periodicals have largely ignored copyright issues and scholars of nineteenth century literary copyright have focussed on copyright in books in tracing copyright's expanding duration, scope and subject matter as well as international developments[2] The history of copyright for periodicals in the nineteenth century invites detailed archival work interrogating a number of questions which cannot be addressed by this short article: the relation between the law and publishing practice, the dynamics of author-publisher relations, and the economics of publishing. This essay instead uncovers the views of periodical works revealed in the legislative consideration of section 18 (from a review of nineteenth century parliamentary papers, including Select Committee reports, and parliamentary debates) in addition to key

nineteenth century cases. In a bid to instigate discussion between law and the humanities, I draw attention to the manner in which copyright rules intersected with particular views of the social importance of certain genres, and the different ways in which they each were understood to contribute to the dissemination of knowledge.

Introducing Section 18 Copyright Act 1842

What were the rules contained in section 18, and what ideas underpinned their enactment? The Copyright Act 1842 (which repealed the first copyright Act - the Statute of Anne 1710) was a major development in the legislative reform of literary copyright in the nineteenth century.[3] As Catherine Seville has shown, the 1842 Act was the product of "many complex and conflicting forces" and "there was no single goal for copyright reform".[4] Enacted at a time of radical social and economic change, which had implications for the book trade and the status of authorship, Seville concludes that the 1842 Act neither reflected the primacy of the claims of authors, nor a coherent "substitute rationale," such as the view that copyright was a "rightful return on investment" or an "economic incentive."[5] Rather, all these strands formed part of the backcloth against which the 1842 Act was made.

The 1842 Act protected copyright in "books," defined in a broad manner.[6] However, section 18 contained special rules applying to the following genres: encyclopaedias, reviews, magazines, periodical works, or works published in a series of parts.[7] Section 18, which legislators of the late nineteenth century would repeatedly criticise for being "expressed in language so obscure as to be almost unintelligible," contained two elements.[8] First, section 18 set out a general rule: "property" in all these genres - encyclopaedias, reviews, magazines, periodical works, or works published in a series of parts - would vest in the work's overall "proprietor, projector,

publisher or conductor" (hereafter, for brevity, "the publisher"), where certain conditions were met (explained below).

Secondly, section 18 contained a complex proviso which applied to reviews, magazines or "other periodical works of a like nature" only (and not encyclopaedias). The proviso concerned the right of publishing in separate form, contributions (namely "essays, articles or portions") first published in periodicals: in the 28-year period following first publication, the publisher could only exercise the right of publishing the contribution in separate form with the contributor's consent. After the expiry of 28 years from first publication, the right to publication in separate form would revert to the contributor for the remainder of the copyright term. The proviso did not prevent a contributor from reserving the right to separate publication by contract.

These two aspects to section 18 - the general rule and the proviso - are now considered in turn.

The General Rule in Section 18

The first part of section 18 stated that copyright in a work (or "any volume, part, essay, article or portion" of a work) published in an encyclopaedia, review, magazine, periodical work, or a work published in a series of parts would "be the property" of the publisher, where the following conditions were met: the contributor was employed *and* paid to compose such a work, on terms that copyright would "belong" to the publisher.[9] It is useful to note here that, as Simon Deakin and Frank Wilkinson have shown, the term 'employment' was differently understood in the mid nineteenth century: it denoted any wage-dependent labour of clerical managerial or professional status and was distinct from the notion of 'servant' regulated by 'master' and 'servant' legislation.[10]

How can the general rule in section 18 be explained? The legislative debate of this provision was premised on the assumption that contributors to all these genres were generally well remunerated. As the House of Commons heard in the debates on the Copyright Bill in 1838 (a forerunner to the Bill that became the 1842 Act), many authors "received more for ephemeral works... which had appeared in the reviews and other periodicals" than for their "enduring publications" in the form of books.[11] Similarly, the copyright debates concerning encyclopaedias were all based on the assumption that the contributors were well paid. A statement issued by the publisher Longman & Co in 1838 (published in *The Times*) asserted that contributors to encyclopaedias were "paid...large sums," as did the address of Lord Brougham to the House of Lords in debating the Copyright Bill in May 1842 which referred to "large amounts" paid to such contributors.[12] In fact, historians of authorship and publishing have shown that the rates of pay, at least as regards periodicals, could vary enormously, even as regards the payments made by the same periodical to different authors; while some could earn the "income of a gentleman" from periodical writing, this was far from the case across the board, and "less versatile or fortunate writers did not fare so well."[13] This broader picture, however, did not inform the legislative debates.

Therefore, as Lord Brougham expressed in the debates in the House of Commons in 1842, the thinking behind the first part of section 18 was that as "the author sent in his paper and received payment for it and so... right of property must... undoubtedly become invested in the publisher."[14] This rationale, in turn, was reflected in judicial decisions interpreting the main clause of section 18. Accordingly, the courts interpreted the requirement of payment to the contributor in a strict manner.[15] In *Brown v. Cooke* (1846), the Court of Chancery held that it was insufficient for the

editor only to be paid, and the contributors unpaid.[16] Further in *Richardson v. Gilbert* (1851) – another ruling of the Court of Chancery – it was held that a contract for payment was insufficient; there must have been actual payment to the contributor to fall within section 18.[17]

By contrast, the requirement that terms be agreed with the contributor that copyright would "belong" to the publisher was interpreted in a relaxed manner by the courts; the requirement was usually assumed to be satisfied for paid contributors. In the leading case - *Sweet v. Benning* (1855) - the Court of Common Pleas held this requirement to be implicitly satisfied by the course of dealings between barristers and the *Jurist*, in which barristers contributed case reports in exchange for payment.[18] In *Lamb v. Evans* (1893), a decision of the Court of Appeal, Lindley LJ, referring to *Sweet,* considered that such inferences should be readily made, because "any other inference would be unbusiness-like."[19] The House of Lords unanimously approved *Sweet* in *Lawrence & Bullen v. Aflalo* (1904); while the inference was one of fact, not law, this should usually be made where the other requirements of section 18 – "employment" and payment - were met.[20] As Lord Halsbury L.C. opined, referring to *Lamb,* that was "the way in which business men would look at the question."[21]

These cases, interpreting the main rule in section 18, were rooted in the view that the publication of these genres (encyclopaedias, reviews, magazines, periodical works, or works published in a series of parts) would not be sustainable unless there was protection for the interests of the publisher as "the person who paid the money and incurred the risk."[22] As Lord Halsbury LC explained in *Lawrence*, the "bargain" which section 18 reflected was that, in exchange for payment, the publisher would "stand in the shoes of the actual author." To decide otherwise would mean that the proprietor would get nothing for his money; in Lord Halsbury LC's words, "the

whole object of his publication might be defeated the very next day by the very person to whom he had paid the money."[23]

This way of thinking was linked by one judge to a concept of authorship expressed in judicial authority earlier in the nineteenth century. In *Barfield v Nicholson*, a case decided in 1824, Vice Chancellor Sir John Leach, in considering who was the author and proprietor of a book, *The Practical Builder*, to which the defendant and others had contributed, opined that:

> …the person who forms the plan, and who embarks in the speculation of a work, and who employs various persons to compose different parts of it, adapted to their own peculiar acquirements – that he, the person who so forms the plan and scheme of the work, and pays different artists of his own selection who upon certain conditions contribute to it, is *the author and proprietor* of the work, if not within the literal expression, at least within the equitable meaning of the statute of Anne, which, being a remedial law, is to be construed liberally.[24]

This principle was presented in the late nineteenth century – by Vaughan Williams LJ in *Lawrence* - as one which section 18 "distinctly recognises," in turn providing an authorial justification to the claims of the publisher as the author of, *inter alia,* the overall "plan and scheme" of the work. [25]

The Proviso to Section 18

As I explained above, in the case of magazines, reviews and other periodical works (and not encyclopaedias), despite the vesting of "property" in the publisher, the contributor retained control over the publication of the contribution in separate form:

the publisher required the author's consent during the period of 28 years of publication, following which the right of publication in separate form reverted to the contributor. By contrast, contributors to encyclopaedias did *not* benefit from the proviso: "property" vested in the publisher, without any such qualification.[26]

This different treatment of encyclopaedias, on the one hand, and magazines, reviews and other periodical works, on the other, can be explained by the perceived difference in the nature of the circulation of these genres. Reviews and magazines held the status of high literature at this time; in *A Literary History of England,* Albert C. Baugh notes that a "review" denoted a "survey of politics, literature, science and art," and a "magazine" a "storehouse of literary and antiquarian learning."[27] However, at the same time, these genres were thought to be "ephemeral" as regards the manner of their circulation, meaning the subsequent separate publication of contributions might be appropriate. By contrast, encyclopaedias were the "fixed buildings" of knowledge. According to Longman & Co., which invested in encyclopaedias, separate publication by contributors to encyclopaedias would "occasion a destruction of literary property unparalleled in the annals of literature" and "subvert one of the most valuable branches of the national literature."[28] In their statement published in *The Times,* Longman compared the publisher of an encyclopaedia to a building contractor who "purchases contributions for any great work in architecture": "what would become of such works were those who furnished a brick or a column, a sluice or a drawbridge, to be allowed at the end of 28 years to come and carry it away?"[29]

As we will see, the distinction between the encyclopaedia as possessing a permanency, which "ephemeral" genres such as the magazine did not, remained the guiding assumptions in the copyright debates which followed in the latter part of the nineteenth century. One of the publishers informing debate on the Bills preceding the

1842 Act was Adam Black, the proprietor of the *Encyclopaedia Britannica*. In parliamentary debates in 1838 (on a precursor to the 1842 Bill) Black was reported by the Attorney General to have asserted that, as many of the articles in the *Encyclopaedia Britannica* were "entirely new," the right of separate publication would result in "much pecuniary damage"; indeed, "the whole Encyclopaedia would fall to pieces."[30] Later in the nineteenth century, Black would publish one of its most ambitious new editions: the ninth edition which was begun in 1875 and completed in 1889, comprising a total of 1,600 articles from 1,100 contributors that spanned 20,504 pages contained in 25 volumes. The articles' contributors, experts in their fields, were all paid, the highest pay being to the historian Edward Augustus Freeman, who wrote the article on *England* and was paid £315 (a rate of £4 per page).[31]

We now turn to the debate of section 18 in the later nineteenth century, examining three occasions on which it was considered: first, the Royal Commission's review of copyright law in 1875-78, secondly, the proposals of the Society of Authors of the 1890s, and finally, the proposals of the Copyright Association put forward by Lord Herschell in 1898. As we will see, a key concern articulated in these debates was the reform of the proviso to section 18, to promote the wider dissemination of valuable literature first published in "ephemeral" reviews, magazines and periodicals, by facilitating subsequent publication in separate form.

The Royal Commission – 1875-78

When the Royal Commission came to examine the operation of section 18, in the course of its general examination of copyright conducted between 1875 and 1878, the discussions again took place against a backdrop where it was assumed that contributors to genres such as encyclopaedias, magazines, and reviews were well paid.

T.H. Farrer, Permanent Secretary to the Board of Trade, for example, gave evidence that authors generally received better remuneration for their articles in magazines and reviews, than for books, and the publisher J. Murray spoke of the expectation that publishers ensure that contributors to encyclopaedias were "properly remunerated."[32]

The evidence collected by the Royal Commission on the operation of section 18 focussed on the proviso dealing with subsequent separate publication of contributions first published in reviews, magazines and periodicals. Facilitating separate publication was expressed to be a subject of fundamental social importance; as one member of the Royal Commission explained, "so very much literature is now published in that form, namely, originally in periodical works" that it was "hardly... a point of minor detail."[33] The concern was that obliging the contributor to wait 28 years for the reversion of the right of separate publication was too long. A magazine was, as Frederic Richard Daldy, another member of the Royal Commission, expressed, "a storehouse of literature," and the 28 year period was too long a period to have "much useful literature... lying dead".[34]

Accordingly, those giving evidence pressed for the period after which the right of separate publication would revert to the contributor to be reduced from 28 years to three years, this being the point by "the owner of the review" would have "got all the use that he practically was likely to get out of it."[35] Indeed, Daldy gave evidence that many "liberal minded and honourable" publishers were happy to consent to separate publication by the contributor after a mere twelve month period (for example the *Edinburgh Review* and the *Quarterly Review*) meaning that a three year period was reasonable; the contributor should have that reversion after three years "as a right," not be "reduced to the position of having to ask it as a favour" from the publisher.[36] In particular, reducing the period after which the right of separate publication would

revert to the contributor was seen as important to safeguard the value of the right reverting to the contributor; the majority Report of the Royal Commission noted that the publisher of a magazine might not take proceedings to prevent unauthorised separate publication, especially just before the contributor's right to separate publication was to revive.[37]

Accordingly, the majority of the Royal Commission proposed the reduction of the initial 28 year period contained in the proviso to section 18 to three years, together with the recommendation that the contributor should also be entitled to take proceedings (along with the publisher) to prevent unauthorised separate publication during the initial three year period.[38] A Bill incorporating these proposals was introduced by Lord John Manners in the 1878-79 session, but did not proceed beyond a second reading.[39] Following this, it was not until the 1890s, with the initiatives of the Society of Authors, that the reform of section 18 was considered again.

The Society of Authors' Bills of 1890, 1897 and 1898

The Society of Authors was established in 1884 under the chairmanship of the author Walter Besant and presidency of the poet laureate Alfred Tennyson, and its membership comprised, in the main, established literary authors.[40] The Society's initiatives resulted in a Copyright Bill introduced into the House of Lords by Lord Monkswell in 1890, covering all aspects of copyright.[41] This was followed by a shorter Literary Copyright Bill introduced into the House of Lords by Lord Monkswell in 1897 and again in 1898, confined to remedying the "most serious defects" of literary copyright only.[42]

The Memoranda to each of the 1897 and 1898 Bills considered the reform of section 18 along the lines of the Royal Commission's proposals to be a serious issue

for reform, given the "increasing importance" of magazines as a place in which "literature of high merit" was first published; as the Memoranda explained, "the law with regard to magazine articles… is very important, and becoming more and more important every day..."[43] Accordingly, each of the Bills of 1890, 1897 and 1898, sought to implement the Royal Commission's proposal, retaining a provision along the lines of section 18, subject to two modifications applying to contributions to reviews, magazines and periodicals only: that the period after which the right to separate publication would vest in the contributor was reduced from 28 years to three years, and that a contributor have the right to bring proceedings against unauthorised separate publication throughout the copyright term. [44]

The Copyright Association's Bill of 1898

1898 also saw the introduction of an alternative Copyright Bill introduced into the House of Lords by Lord Herschell. [45] This originated with an initiative from the publisher-dominated Copyright Association, founded "to watch over the general interests of Owners of Copyright property," and represented by its Secretary F. R. Daldy (who had been a member of the Royal Commission).[46] This Bill contained proposals amending section 18, specifying for the first time additional genres to which the rules would apply: dictionaries, along with encyclopaedias, year books and annual registers, were treated together in Clause 6, as contrasted with reviews, newspapers, and magazines, which were governed by the different provisions of Clause 7.[47]

Clause 6 provided that the copyright "in any article or other contribution" which was first published in a dictionary, encyclopaedia, yearbook, annual register or similar work, "shall in every case" belong to the "owner" of such work. There was no

provision for contractual agreements to the contrary.[48] By contrast, clause 7 stated that copyright in "any article or other contribution" first published in a review, newspaper, magazine "or other similar periodical" would be the "property" of the contributor. Clause 7 went on to state that, where the contributor was paid by the "owner" of such review, newspaper, magazine or other similar periodical, then subject to an agreement to the contrary, the "owner" would have the sole right of publishing the article/contribution as part of the same review, newspaper, magazine or other similar periodical for the full term of copyright. However, the contributor would have the right to "print or republish" the article/contribution in any other form after the expiry of three years from the year of first publication. The contributor could also, after registering the contribution at Stationers' Hall, take legal action against infringement of the article/contribution "as a separate work."[49]

Again, the perceived different nature of these various genres as sources of knowledge permeated the debates on their different legal treatment contained in clauses 6 and 7. Edward Cutler QC, who drafted the Bill, explained the guiding principles of these clauses as a distinction between "two classes" of publication: "encyclopaedias and more important and permanent things" were dealt with in Clause 6 as compared with "the more ephemeral class" or "temporary works" dealt with in Clause 7. [50]

Within this classification, the discussion in the House of Lords' Select Committee on the Bill focussed on how various examples would fit into these categories. For example, Cutler QC gave evidence that "encyclopaedia" would include publications such as the *Dictionary of National Biography*, as it was "an encyclopaedia of lives," a characterisation which fitted the wider description of the *DNB* in the press as a "work of erudition" which was "a κτήμα es aεί" (literally, a

building for eternity).[51] By contrast, members of the Select Committee questioned whether a yearbook or annual register, such as *Whitaker's Almanac*, was really a "permanent kind of work" so as to be classified alongside dictionaries and encyclopaedias, a criticism which Cutler QC was ready to accept.[52] Debate also centred on the meaning of "periodical," which was thought to include novels which came out periodically such as Charles Dickens' *Pickwick Papers*.[53] However encyclopaedias which came out periodically, such as *Cassell's Encyclopaedia,* would be governed by the regime on "encyclopaedias" in Clause 6.[54]

There were many complex issues raised by copyright reform more generally. As a result, Lord Herschell's Bill failed, as did the Literary Copyright Bills that followed in 1899 and 1900, each containing variations along the lines of the proposals that had come before.[55] For example, as regards the 1900 Bill, the provision applying to "encyclopaedias, reviews, magazines and newspapers" was confined to paid contributors only, with no mention of "dictionaries." The 1899 Bill, however, included "dictionaries" and no requirement that contributors were paid, again categorising them with "encyclopaedias" in a clause that provided for first ownership of copyright by the publisher for a fixed term of 30 years from publication.[56] The 1899 and 1900 Bills also again placed contributions to a review or magazine under a different regime to encyclopaedias (and dictionaries), with provisions that balanced the rights of contributors against the right of the publisher or owner, through an author's right to republication in separate form, this time arising after a mere two years rather than three.[57]

The repeal of section 18

The proposals put forward during the course of the copyright debates of the late nineteenth century were never enacted, and section 18 was not repealed until the passage of the Copyright Act 1911.[58] While twentieth century developments fall outside the ambit of this special issue, the 1911 Act marked a change in a number of respects; the basic premise was to leave dealings in the copyright of such works to contractual arrangements between the parties, while some of the principles of the old section 18 were reflected in the new legislation. First, "collective works" (which was defined to include dictionaries, encyclopaedias, yearbooks, newspapers, reviews, and magazines), were treated differently as regards reversion of copyright: section 5(2) of the 1911 Act provided a general rule that copyright that had been assigned or licensed would revert to the author's estate 25 years after the author's death, but this did not apply to collective works, to guard against the fragmentation of copyright in such works..[59] Instead, contributors to collective works were free to assign/licence for the whole term of copyright. Secondly, section 5(1) stated that, unless there was an agreement to the contrary, authors of "an article or other contribution" to a newspaper, magazine or similar periodical retained a right to restrain the publication of that article/contribution, otherwise than as part of a newspaper, magazine or similar periodical, even where copyright was owned by the author's employer.

Conclusion

This article has uncovered little-known aspects of nineteenth century copyright history that accompanied the contemporaneous expansion of periodical genres: the development of special copyright rules concerning genres such as reviews, magazines and encyclopedias, which were debated on a number of occasions in the latter part of the nineteenth century. For copyright scholars, this account adds to a broader picture spanning multiple notions of authorship and ownership in nineteenth-

century copyright law. As I have argued elsewhere, the nineteenth century today is usually remembered for dicta tying authorship to the process of making the work (such as the cases of *Nottage v Jackson* (1882-1883) and *Levy v Rutley* (1870-1871)).[60] Yet, aspects of the history uncovered in this article, reveal that the terrain of copyright also encompassed other notions of authorship, in particular the person that formed the overall plan and scheme of a collective work and took the financial risk. These observations highlight the complexity of the terrain of nineteenth-century copyright law.

For humanities scholars working on the periodical press, this account offers different insights. As we have seen, nineteenth-century copyright provisions on collective works were genre specific; they were unlike certain legal provisions on collective works today, based on more abstract definitions.[61] This facilitates the direct engagement by humanities scholars in the ideas underpinning legal provisions; the legal rules examined in this article were all premised on particular understandings about the value of specific genres as sources of knowledge, and how that value might be maximized through copyright rules. Accordingly, provisions facilitating the publication in separate form of contributions to encyclopedias were not proposed; as "fixed buildings" of knowledge, it was thought that subsequent separate publication on the part of the contributor would threaten the existence of encyclopedias. By contrast, facilitating publication in separate form of contributions to magazines, reviews and periodicals, was seen as of great importance; these genres were perceived as great "storehouses" of learning, and their more ephemeral nature meant that facilitating subsequent separate publication was important to prevent such useful literature "lying dead." In enabling interdisciplinary engagement between scholarship in law and the humanities, then, this article may provide fruitful avenues for further

humanities research, highlighting the different ways in which ideas about genre mediated Victorian print culture.

NOTES

1 These rules also applied in the British dominions, in respect of works first published in the UK: Literary Copyright Act 1842, 5&6 Vict. c.45 [hereafter 1842 Act], section 29; *Routledge v. Low* (1868) L.R. 3 H.L. 100. For an example of local colonial legislation embodying an identical provision to section 18 see Copyright Act 1869 (33 Vict. c.250) section 24 passed in Victoria, the first Australian colony to pass a copyright statute.

2 The leading work on the history of the 1842 Act, for example, confines periodical works to three pages in an Appendix to the main text. See Seville, *Literary Copyright Reform*, 247-50. Other leading texts on the history of nineteenth century literary copyright include Alexander, *Copyright Law and the Public Interest* and Seville, *The Internationalisation of Copyright Law*, and these both do not address copyright in periodical works.

3 The Statute of Anne: 8 Anne c.19.

4 Seville, *Literary Copyright Reform*, 1 and 5.

5 Ibid., 5 and 215. Cf. Woodmansee, "The Cultural Work of Copyright," relating the 1842 Act to Romantic aesthetics.

6 "Book" was defined as including "every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart or plan separately published." See section 1, 1842 Act.

7 The words of section 18 were also wide enough to cover books that did not fall within these categories (by the words "or any book whatsoever," which were added by an amendment to the 1840 Bill). The lawyer and treatise writer Walter Arthur

Copinger considered this to be a consequence of poor drafting; the correct interpretation of section 18 was that it applied to the genres listed alone and not books generally. Copinger, *Copyright*, 4th ed., 100. One question that arose was whether newspapers fell within the ambit of section 18; a judicial ruling in the 1880s, supported the view that term "periodical works" "certainly includes a newspaper." *Walter v Howe* (1881) 17 Ch. D. 708, 710, per Jessel MR. However, as explained at n.16 below, the strict manner in which the judiciary interpreted the requirement of "payment" to contributors may have limited the application of section 18 to newspapers in practice.

8 Introductory Memorandum to the Copyright Bill 1897 (HL Bill 79).

9 The interpretation of the word "property" was considered in *Bishop of Hereford v Griffin* (1848) 16 Sim 190, 195-96, where the Court of Chancery accepted the argument put forward by Serjeant Talfourd that the publisher (and so on) only acquired those rights that a contributor had granted, which in the case in question was merely a licence to publish for a particular purpose. See also Seville, *Literary Copyright Reform,* 249. Under section 19, 1842 Act, the "proprietor of the copyright" in any encyclopaedia, review, magazine, periodical work or other work published in a series of books or parts, was "entitled to all the benefits of registration" upon registration at Stationers Hall of the title of such work, the time of first publication of the first volume, part or number, together with the name and place of abode of the proprietor and/or publisher. Registration was a condition precedent to taking legal action, but not the subsistence of copyright. Seville, *Literary Copyright Reform,* 237.

10 Deakin and Wilkinson, *The Law of the Labour Market* 36, 74, 78-9, 106.

11 Mr Williams Wynn M.P., 42 Parl. Deb. (3d ser.) (1838) col. 588; Second reading in House of Commons.

12 “Mr Serjeant Talfourd’s New Copyright Bill”; 63 Parl. Deb. (3d ser.) (1842) col. 792.

[13] Leary and Nash, “Authorship”, 181-82.

14 Lord Brougham, 63 Parl. Deb. (3d ser.) (1842) col. 793.

15 The first draft of the clause which was later enacted as section 18, did not require contributors to be paid (Cl.21, Copyright Bill 1838, No.164 I.489), but all subsequent drafts applied to paid contributors only (Cl. 21 Copyright Bill 1838, No. 461 I.505; Cl.21 Copyright Bill 1839 No.19 1.505; Cl.19 Copyright Bill 1840 No.61 I 415-32; Cl. 19 Copyright Bill 1841 No.6 I.429; Cl. 19 Copyright Bill 1842 No 79 I.501; Cl.19 Copyright Bill 1842 No.139 I.519; Cl.19 Copyright Bill 1842 No. 194 I.537).

16 (1846) 11 Jur 77.

17 (1851) 1 Simons, N.S. 226; 61 ER 130. Consequently, this points to a limitation on section 18’s influence on publishing practice in relation to unpaid projects. See further, Cooper, “Mass Social Authorship.” The requirement of payment also meant section 18 was probably of limited influence in newspaper publishing for most of the nineteenth century. See Slauter, *Who Owns the News*, chap. 5.

18 (1855) 16 CB 459; 139 ER 838; (1855) 3 WR 519.

19 [1893] 1 Ch. 218, 225.

20 [1904] AC 17. For the meaning of ‘employment’ see text to note 10 above.

21 Ibid, 23. Referring to the judges that decided *Sweet*, Lord Halsbury commented that he very much doubted whether “in the whole history of English law it would be possible to find a collection of learned judges of keener intellect and more profound learning…[than] Jervis CJ Maule J and Creswell J”(Ibid., 21).

22 Ibid, 22 per Lord Halsbury.

23 Ibid, 21.

24 S.C. 2 L. J. Ch. (O. S.) 90, 102. Emphasis added. Interestingly, this passage is not contained in the report of the case in the English Reports ((1824) 2 Sim. & Stu. 1; 57 E.R. 245), yet the dicta came to be cited widely in subsequent cases and treatises on copyright, for example Copinger, *Copyright,* 1st ed., 45.

25 *Lawrence & Bullen v. Aflalo* [1903] 1 Ch 318, 331, per Vaughan Williams LJ, who was the dissenting judge in the Court of Appeal ruling in *Lawrence,* with whom the Lords agreed. See also the evidence of J. Murray in Royal Commission, "1878 Report," Q.1296, referring to the publisher of an encyclopedia as "virtually the inventor of the book."

26 This distinction between reviews and magazines on the one hand, and encyclopaedias on the other, was introduced into the Bills in 1842. An early draft from 1838 treated all of these works the same, but merely envisaged that a right to separate publication might be reserved through contractual arrangements between the parties. See Copyright Bill 1838, No. 164 I.489 cl. 21.

27 Baugh, *Literary History*, 1176. The author Matthew Arnold would famously lament the decline of the authority of periodicals (such as reviews and magazines) as high literature, in an article published in *Nineteenth Century* in 1885 (Arnold, "Up to Easter"). In that article Arnold critiqued the low standards of what he termed the "new journalism": the result of the expansion of the popular press in the final decades of the nineteenth century, which was facilitated, amongst other things, by the abolition of Stamp Duty on newspapers in 1855, the growth in the railways and improvement in printing techniques. See Brake, "The Old Journalism," 1-2; and Fox-Bourne, *Progress of British Newspapers.*

28 "Mr Serjeant Talfourd's New Copyright Bill." Briggs notes that Longman published, for example, the *Cyclopaedia* edited by Abraham Rees (which competed

with the *Encyclopaedia Britannica*) and *The Cabinet Encyclopaedia* (1829-1846) edited by Dionysus Lardner. Briggs, *Longman*, 222-24.

29 "Mr Serjeant Talfourd's New Copyright Bill."

30 43 Parl. Deb. (3d ser.) (1838) col. 553.

31 Wells, *Circle of Knowledge*, 17-18, 54. See also Kogan, *The Great EB*.

32 Royal Commission, "1878 Report," Q. 4922 and Q.1296.

33 Ibid. J.A. Froude in cross-examining Sharon Turner. Turner agreed with this statement (Ibid., Q.676). Sharon Grote Turner was a solicitor based in Lincoln's Inn Fields who gave Select Committee evidence later in the nineteenth century as the legal adviser to the Copyright Association (introduced below).

34 Ibid, Q. 973, 999. Daldy was also Honorary Secretary of the Copyright Association (introduced below).

35 Ibid. Q.2866 (question asked by James Fitzjames Stephen to TH Farrer, with which TH Farrer agreed).

36 Ibid. Q. 1000-03, being examined by James Fitzjames Stephen and Anthony Trollope.

37 Ibid, para. 44.

38 Ibid, para. 43-44.

39 P.P. 1878-79 Bill 265.

40 Bonham Carter, *Authors by Profession*, 120-21.

41 P.P. 1890-1 HL Bill 7.

42 1897 HL Bill 79, 1898 HL Bill 6 and the opening of the Memorandum to the 1897 Bill.

43 Memorandum to the 1897 Bill; Memorandum to the 1898 Bill.

44 The three year period was agreed between the Publishers Association, the Copyright Association and the Society of Authors (see Royal Commission, "1878 Report," Q.105 – evidence of F.R. Daldy) but in the course of questioning witnesses in 1898, Lord Monkswell revealed that in fact the Society of Authors was keen to reduce the period further to three years from the date of acceptance of an article, or two years from publication, whichever was earlier. See Select Committee, "1898 Report," Q.184. The key differences between the proposals contained in the later Bills (at cl.16 of the 1890 Bill and cl. 2 and 6 of the 1897 Bill), as compared to section 18 of the 1842 Act were the following. First, all that was required was that contributors were paid and not that terms were agreed as to copyright (though as noted above, in the case law under section 18 such terms were often implied by the courts, so this omission may merely reflect the courts' relaxed approach to this requirement and that matter was acknowledged in the debates on similar provisions in 1899 – see Select Committee, "1899 Report," Q.193 evidence of T.E. Scrutton QC). Secondly, instead of the copyright being the "property" of the publisher (and so on), which might merely amount to a "licence" (see note 9 above), the language of the 1890 Bill perhaps intended to indicate that the proprietor was to be the "copyright owner" as regards copyright in the work as part of the collective work (by referring to the author as the *original* copyright owner), with the author specified as the copyright owner as regards the contribution as a "separate publication." By contrast, the 1897 Bill provided for "ownership" of copyright in the author's contributions by the proprietor in the case of "encyclopaedias or similar collective works" only (cl.6). In the case of contributions to reviews, magazines or other periodicals, copyright would be owned by the author, with the proprietor of the review, magazine or periodical merely acquiring "the sole right of publishing the same as part of the review, magazine or

periodical but not otherwise"(cl.2). Finally, whereas section 18 provided that the publisher (and so on) would acquire "property" in the contributions for a term "as if he were the actual author thereof" (that is, the life of the author plus 7 years, or a 42 years from first publication, whichever was longer), the 1897 Bill instead provided for a fixed term of 30 years from the end of the first year of publication, with the author's copyright in the contribution as a "separate publication" subsisting for a term of the life of the author plus thirty years.

45 Copyright Bill; P.P. 1898 HL Bill 21.

46 Art. 2 of the Copyright Association Constitution and Rules, set out in Copyright Association, "Report."

47 On the protection of newspapers by section 18, see notes 7 and 16 above.

48 This was the first legislative proposal reforming section 18 which encompassed unpaid contributors. For the legal position on mass projects involving unpaid contributors see Cooper, "Mass Social Authorship."

49 Unlike section 18, publication was not restricted to publication in "separate form."

50 Select Committee, "1898 Report," Q.1621,1661.

51 Ibid., Q 562-3; "Dictionary of National Biography," 44.

52 Select Committee, "1898 Report," Q1622-27. Evidence of Cutler QC. Cutler QC did not object to their deletion from Clause 6, though he thought those instructing him (the Copyright Association) would. See Ibid., Q.1629.

53 Ibid., Q.1631.

54 Ibid., Q.1649. See also the discussion at Ibid., Q.1628, 1633-48.

55 Literary Copyright Bill 1899 HL 44; Literary Copyright Bill 1900 HL 18, and 1900 HL 162.

56 This was different to Lord Herschell's Bill, which provided for ownership by the "proprietor" as opposed to the "publisher." That these entities were not always the same was noted in the debates during the Select Committee of 1899. See Select Committee, "1899 Report," Q.300, F.R. Daldy's evidence. Unlike the 1898 Bill, first ownership under this clause of the 1899 Bill could be varied by contractual agreement.

57 Clause 11 of the 1899 Bill provided that the publisher was to own copyright in the review or magazine "as a complete work" for a fixed term of 30 years from publication, as compared to copyright in the "article as a separate work" which was to vest in the author after 2 years had elapsed from first publication. Clause 10 of the 1900 Bill stated that the owner of the review, magazine or newspaper (hereafter "review (and so on)") was to own copyright in that review (and so on) "in the original form of publication only" for the term of the *owner's* life and thirty years thereafter, "in the same manner as if he had been the author," but that the contributor would, after the lapse of two years from publication, be entitled to copyright in the article "as a separate work" for the term of life plus thirty years. Both Bills entitled the contributor to bring infringement proceedings before the two-year period lapsed.

58 1&2 Geo. 5, c.46.

59 This amendment was introduced by Sir J. Simon in the Standing Committee on the Bill's second reading in the House of Commons. See HC Deb. col. 2134 (17.8.1911).

60 Cooper, "Comparative Perspective"; *Nottage v. Jackson* (1882-83) LR 11 QBD 627; *Levy v. Rutley* (1870-71) L.R. 6 C.P. 523.

61 It was therefore unlike some collective works provisions of today, which rely on more abstract definitions, for example 17 US Code s.101, which defines "collective work" as "a work, such as a periodical issue, anthology or encyclopaedia, in which a number of contributions, constituting separate and independent works in themselves,

are assembled into a collective whole." See also the definition of "database" in European Union legislation: Directive 96/9/EC on the Legal Protection of Databases, Article 1(3): "'database' shall mean a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means."

BIBLIOGRAPHY

Alexander, Isabella. *Copyright Law and the Public Interest in the Nineteenth Century*. Oxford: Hart Publishing, 2010.

Arnold, Matthew. "Up to Easter." *The Nineteenth Century* (1887): 638.

Baugh, Albert C. *A Literary History of England,* 2d ed. London: Routledge & Kegan Paul, 1967.

Bonham-Carter, Victor. *Authors by Profession*, vol. 1, *From the Introduction of Printing to the Copyright Act 1911*. London: Society of Authors, 1978.

Brake, Laurel. "The Old Journalism and the New Forms of Cultural Production in London in the 1880s." In *Papers for the Millions: The New Journalism in Britain 1850s-1914*, ed. Joel H. Wiener. New York and London: Greenwood Press, 1988.

Briggs, Asa. *A History of Longmans and Their Books 1724-1990: Longevity in Publishing*. London and New Castle, DE: British Library and Oak Knoll Press, 2008.

Copinger, Walter A. *Copyright in Works of Literature and Art,* 1st ed. London: Stevens & Haynes, 1870.

Copinger, Walter A. *Copyright in Works of Literature and Art,* 4th ed. London: Stevens & Haynes, 1904.

Cooper, Elena. "Copyright and Mass Social Authorship: A Case Study of the Making of the Oxford English Dictionary." *Social and Legal Studies* 24, no. 4 (2015): 509-30.

Cooper, Elena. "Joint Authorship in Comparative Perspective: Levy v. Rutley and Divergence between the UK and USA." *Journal of the Copyright Society of the USA* 62, no. 2 (Winter 2015): 245-276.

Copyright Association, "Report of the Copyright Association for the Year 1874-5." London: Longmans, Green & Co, 1875.

Copyright Commission, "The Royal Commissions and the Report of the Commissioners"; P.P. 1878 C-2036, C-2036-1 XXIV.163, 253.

Deakin, S. and Wilkinson, F. *The Law of the Labour Market: Industrialisation, Employment and Legal Evolution.* Oxford: Oxford University Press, 2005. The modern concept of employment did not emerge until the twentieth century.

"Dictionary of National Biography." *The Athenaeum*, January 10, 1885: 43.

Fox-Bourne, J.R. *Progress of British Newspapers in the Nineteenth Century*. London: Simpkin, Marshall, Hamilton, Kent & Co., 1901.

Kogan, H. *The Great EB: The Story of the Encyclopaedia Britannica.* Chicago and London: University of Chicago Press and Cambridge University Press, 1958.

Leary, Patrick and Andrew Nash. "Authorship." In *The Cambridge History of the Book in Britain,* vol. 6: *1830-1914,* ed. David McKitterick, 172-213. Cambridge: Cambridge University Press, 2009.

"Mr Serjeant Talfourd's New Copyright Bill." *The Times*, May 16, 1838: 7.

Select Committee, "Report of the Select Committee on the Copyright Bill (H.L.) and the Copyright (Amendment) Bill (H.L.)." London: H.M. Stationary Office, 1898.

Select Committee, "Report from the Select Committee of the House of Lords on the Copyright Bill [H.L.] and the Copyright (Artistic) Bill [H.L.] together with the Proceedings of the Committee, Minutes of Evidence and Appendix." London: H.M. Stationary Office, 1899.

Seville, Catherine. *Literary Copyright Reform in Early Victorian England*. Cambridge: Cambridge University Press, 1999.

Seville, Catherine. *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century.* Cambridge: Cambridge University Press, 2006.

Slauter, Will. *Who Owns the News? A History of Copyright*. Stanford: Stanford University Press, forthcoming.

Wells, J.M. *The Circle of Knowledge: Encyclopaedias Past and Present.* Chicago: The Newberry Library, 1968.