

COPYRIGHT IN PUBLISHED EDITIONS: A HISTORY OF A DECLINING RIGHT

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The right to published editions was introduced in the Copyright Act 1968 (Cth) in order to prevent the unfair copying of typographical layouts of published editions of books in the public domain. The initial rationale, its actual effectiveness, and its relevance today has attracted very little attention among commentators. Historical analysis shows that the right was introduced into Australian copyright law without much discussion or engagement. Even today it is difficult to find evidence that there was ever an actual need for a right of this nature in Australia, or that it has had any positive effects on the local publishing industry since. This article demonstrates that despite its original intention, some industries today have moved to exploit the right by reinterpreting it to protect their own financial interests. This article concludes with some lessons that could be learned from the history of published edition copyright in the context of current copyright policy discussions — particularly in relation to the newly proposed rights for news publishers.

I INTRODUCTION

The right to published editions was first introduced into Australian copyright law in 1968, and 2018 marked the 50th anniversary. Under the current *Copyright Act 1968* (Cth) (*‘Copyright Act’*), the right to published editions is classified as ‘subject-matter other than works’, along with sound recordings, cinematographic works, and television and sound broadcasts (also known as ‘neighbouring’ or ‘related’ rights).¹ The right to published editions exists separately from copyright to the work included in the edition,² and prevents unauthorised persons from making facsimile copies of the published editions of literary, dramatic, musical,

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1 *Copyright Act 1968* (Cth) pt IV (*‘Copyright Act’*).

2 *Ibid* pt III.

or artistic works.³ The right lasts for 25 years after the first publication,⁴ and is generally owned by the publisher.⁵

Today, little is understood about this right, its origin, effectiveness, and importance for the Australian publishing industry. Most commentators provide only basic remarks about the origin and rationale of the right,⁶ explain its difference from copyright in an underlying work,⁷ and comment on its scope⁸ and infringement issues.⁹ Few authors have engaged in a more in-depth discussion related to the published editions copyright.¹⁰

The aim of this article is to address this gap in knowledge by examining the technological, economic and political circumstances that led to the introduction of the right in the first place. It will also examine how the right has sometimes been misinterpreted to serve other purposes, and what role it has played since the introduction of the internet.

Historical analysis will help us understand the risks and dangers involved in introducing an exclusive new right into copyright law. It will demonstrate the shortcomings of the lawmaking process in Australia, and how lawmakers can introduce rights even if the need in the local market has yet to be proven. It will show that, despite the best intentions of lawmakers, rights may in time fail to serve their intended purpose. Instead, these rights can be manipulated by other industries seeking to protect their own interests, causing unintended consequences in the market. This situation puts a burden on courts to limit the rights in accordance with their initial scope. Historical analysis will also show how rapid development of technology may lead to a quick loss of the initial rationale of the

3 Ibid s 88.

4 Ibid s 96.

5 Ibid s 100. The Act also defines who qualifies for the right: at ss 84 (definition of ‘qualified person’), 92; when the right is infringed: at ss 101–3; and what exceptions apply: at s 112.

6 See, eg, FE Skone James and EP Skone James, *Copinger and Skone James on the Law of Copyright* (Sweet & Maxwell, 9th ed, 1958) 81; Mark J Davison, Ann L Monotti and Leanne Wiseman, *Australian Intellectual Property Law* (Cambridge University Press, 3rd ed, 2016) 227–8 [6.2.2.4]; Sam Ricketson, Megan Richardson and Mark Davison, *Intellectual Property: Cases, Materials and Commentary* (LexisNexis Butterworths, 5th ed, 2013) 228–9 [4.75].

7 See, eg, John Adams, ‘Originality in Copyright: A Solution to the Database Problem?’ in Paul Torremans (ed), *Copyright Law: A Handbook of Contemporary Research* (Edward Elgar, 2007) 1, 10–11; James Lahore, *Intellectual Property Law in Australia: Copyright* (Butterworths, 1977) 69 [344].

8 See, eg, Ricketson, Richardson and Davison (n 6) 230–1 [4.77]–[4.78].

9 See, eg, Gerald Dworkin and Richard D Taylor, *Blackstone’s Guide to the Copyright, Designs and Patents Act 1988: The Law of Copyright and Related Rights* (Blackstone Press, 1989) 30–1; Andrew Stewart, Philip Griffith and Judith Bannister, *Intellectual Property in Australia* (LexisNexis Butterworths, 4th ed, 2010) 239–40 [8.21].

10 See, eg, Tariq A Baloch, ‘Typography in Law: From Mechanics to Aesthetics’ (2001) 12(3) *Entertainment Law Review* 78, 81; Kate Haddock and Peter Banki, ‘Copyright in the Published Edition of Works’ (1992) 5(8) *Australian Intellectual Property Law Bulletin* 81; Judith Bannister, ‘Published Edition Copyright: A “Rather Curious Copyright” in an Age of Electronic Publishing’ (1997) 15(1) *Copyright Reporter* 22; Louise Longdin, ‘“A Very Peculiar Copyright”’: Typographical Arrangements of Published Editions’ (2000) 6(4) *New Zealand Business Law Quarterly* 313.

right and make it redundant. Since removing outdated exclusive rights from the statute is notoriously difficult, such redundant dead-law provisions add further unnecessary complexity to the copyright statute.

This discussion becomes especially relevant bearing in mind recent policy proposals to introduce new publishers' rights in Europe. During the last decade, a few European countries (notably Germany and Spain) have introduced exclusive new rights to newspaper (press) publishers, that were supposed to enable publishers to control and monetise the dissemination of press articles by online intermediaries — especially search engines and social media sites.¹¹ Recently, a new right to press publishers has been introduced across the European Union.¹² As a result, Australian news publishers might be inclined to initiate similar legislative proposals in Australia. It should be kept in mind here the lessons from the history of publishers' exclusive right to published editions that exists under current Australian law.

To address the research questions above, Parts II and III of this paper will examine the technological, economic, social and political circumstances that led to the introduction of the right to published editions in the United Kingdom ('UK') and Australia. It will first look at the UK where the right was initially advocated and introduced, before looking at the Australian jurisdiction where the right was transposed from the *Copyright Act 1956* ('UK Copyright Act') into Australian law.¹³ Part IV will analyse the impact that the right had on the book publishing industry in the last decades of the 20th century. Part V will discuss how other industries such as newspaper publishing tried to exploit it to protect their economic interests, particularly in the secondary licensing markets. Part VI will provide an overview of how publishers tried unsuccessfully to revitalise the right by arguing it should be extended to the online environment. Finally, Part VII will discuss the historical lessons that we can learn from the right in current copyright policy debates.

11 This is known as the *Leistungsschutzrecht: Urheberrechtsgesetz* [Act on Copyright and Related Rights] (Germany) 9 September 1965, BGBI I, 1965, 1273, §§ 87(f)–(h). The Spanish ancillary right was adopted in 2014 and the amended art 32.2 of the *Texto Refundido de la Ley de Propiedad Intelectual, Regularizando, Aclarando y Armonizando las Disposiciones Legales Vigentes Sobre la Materia* [Consolidated Text of the Law on Intellectual Property, Regularizing, Clarifying and Harmonizing the Applicable Statutory Provisions] (Spain) came into force on 1 January 2015. See Lionel Bently et al, 'Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive' (Study No PE 596.810, Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, September 2017) 31–3; Raquel Xalabarder, 'The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish Government: Its Compliance with International and EU Law' (Working Paper No WP14-004, Internet Interdisciplinary Institute, October 2014).

12 *Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC* [2019] OJ L 130/92, arts 15–16.

13 *Copyright Act 1956*, 4 & 5 Eliz 2, c 74 ('UK Copyright Act').

II THE INTRODUCTION OF PUBLISHED EDITIONS COPYRIGHT IN THE UK

I will start this section by looking at why the right to published editions was introduced in the first place. Throughout the 20th century, the UK publishing industry experienced its best as well as most challenging years.¹⁴ ‘Universal literacy, and a general rise in disposable incomes and living standards ... created new opportunities for publishers’.¹⁵ At the same time, ‘the trade was under an apparently continuous assault from multiple innovations in communications technology — recorded sound, radio, television, the internet — each of which in turn threatened the market for fiction and general non-fiction’.¹⁶ Other technologies such as photocopiers (that were replacing laborious manual copying in libraries and educational institutions) and photolithography were also causing concerns for publishers.¹⁷ In this article I will focus on the impact of photolithography and the legal developments that it brought.

In the mid-20th century, photolithography was gradually replacing traditional letterpress technology.¹⁸ Although it was first invented in the beginning of the 19th century, it began being adopted for commercial use in the beginning of the 20th century.¹⁹ Letterpress technology involved a laborious process whereby a ‘compositor’ or ‘typesetter’ composed the text by setting each letter and each line individually, and it was not suitable for dealing with non-Western alphabets, graphic illustrations and special symbols.²⁰ The adoption of photolithography technology (also referred to as ‘offset lithography’ or ‘offset printing’) promised a much easier combination of text, illustrations and special signs, and much faster and cheaper page layout setting. In the photolithographic process, printing plates are produced by using a photographic procedure, which makes it possible to develop plates directly from letter matrices, therefore eliminating all use of metal type. When offset lithography was eventually adopted by the printing industry, it was often used to reprint books for which no type or plates were available.²¹

14 John Feather, *A History of British Publishing* (Routledge, 2nd ed, 2006) 150.

15 *Ibid* (citations omitted).

16 *Ibid*.

17 Board of Trade (UK), *Report of the Copyright Committee* (Cmd 8662, 1952) 17 [43] (‘Gregory Report’). Subsequently, this has led to the legal dispute *The University of New South Wales v Moorhouse* (1975) 133 CLR 1.

18 Jim Hart, ‘New Wave Seventies’ in Craig Munro and Robyn Sheahan-Bright (eds), *Paper Empires: A History of the Book in Australia 1946–2005* (University of Queensland Press, 2006) 53, 54–5.

19 *Gregory Report* (n 17) 17 [43].

20 Feather, *A History of British Publishing* (n 14) 213–14. For a more detailed explanation of letterpress technology, see Helmut Kipphan (ed), *Handbook of Print Media: Technologies and Production Methods* (Springer, 2001) 45–6.

21 Paul A Winckler (ed), *Reader in the History of Books and Printing* (Information Handling Services, 1978) 126.

Large established British publishers immediately understood the potential and the risks associated with this new technology. They realised that the technology could facilitate quick entry to the market for new publishers (including those that may use it to reprint published works — especially those already in the public domain), without the need to invest in their own typographical arrangements. In the beginning of the 20th century, the market for cheap reprints of books was huge. First editions of novels were normally expensive and were bought primarily by libraries.²² For bookshops, ‘the mainstay of the trade was the cheap reprint’ sold in a single volume.²³ Texts both under copyright and in the public domain were issued in easily recognisable and distinctly marketable series, such as Nelson’s Sixpenny Classics, Everyman’s Library and World’s Classics.²⁴ This ‘pattern of publishing ... reached its climax in the work of Allen Lane in the 1930s when he founded Penguin Books’.²⁵ At the same time, book sales in the 1930s were becoming ‘seriously affected’ as the economic recession took hold.²⁶ Exports fell and unemployment increased.²⁷ Piracy, once ‘an irritating but minor annoyance ... suddenly became rife’, especially in countries where publishers had neglected to develop agency relationships, such as Egypt, Japan, China and Argentina, or where they were difficult to manage, such as India.²⁸

During these challenging times, the UK Publishers Association in 1935 made recommendations to the Departmental Committee on International Copyright, asking it to consider that a copyright in typography be created, by amendment to the *Berne Convention for the Protection of Literary and Artistic Works*.²⁹ It was positioned as a necessary reform to deal with the piracy of books internationally, and prevent the negative impact of future technological changes.³⁰ The Publishers Association was led by Sir Stanley Unwin, founder of George Allen & Unwin publishing house, who had ‘established himself as a spokesman on the affairs of the British book trade not only within Britain but all over the world’.³¹ The Association expressed concern that more and more attention, time and money was

22 John Feather, *Publishing, Piracy and Politics: An Historical Study of Copyright in Britain* (Mansell Publishing, 1994) 181.

23 Ibid.

24 Ibid.

25 Ibid 182.

26 Iain Stevenson, *Book Makers: British Publishing in the Twentieth Century* (British Library, 2010) 85.

27 Ibid 84.

28 Ibid 85.

29 *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 828 UNTS 221 (entered into force 5 December 1887) (*‘Berne Convention’*). See Letter from Publishers’ Association of Great Britain & Ireland to Board of Trade (UK), 26 February 1935, 1–2; Board of Trade (UK), *Report of the Departmental Committee on International Copyright* (1935) 8 [21] (*‘International Copyright Report’*).

30 Letter from Publishers’ Association of Great Britain & Ireland to Board of Trade (UK) (n 29) 1–2.

31 Robin Denniston, ‘Unwin, Sir Stanley’, *Oxford Dictionary of National Biography* (Web Page, 4 October 2008) <www.oxforddnb.com/abstract/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-1012349>.

being spent on typographical design, and — due to the improvement of copying avenues — the risk of copying was greater than ever.³² Traditionally, many American publishers had paid fees for the right to reproduce typographical matter in the form in which it was set in England, but with ready access to books, some publishers in America and China were now starting to reproduce typographical matter without permission or payment.³³ Convinced by the arguments of the Publishers Association, the Committee recommended introducing a right to typographical arrangements of published editions that would last for 50 years.³⁴ Initially, nothing came of this proposal.³⁵

After the Second World War the Publishers Association renewed its efforts, this time by approaching the Gregory Copyright Committee. The Committee, chaired by HS Gregory, was appointed by the at-the-time President of the Board of Trade, the Rt Hon Harold Wilson, on 9 April 1951. It was asked to consider changes needed to copyright law in light of new technological and international developments emerging in the field.³⁶

During the intensive industry consultations that followed, the Publishers Association, represented by its President, Sir Stanley Unwin, and Secretary, FD Sanders, submitted its memorandum³⁷ and provided oral evidence³⁸ on a number of issues of interest to the industry. This included the appropriate duration of copyright to literary works, anonymous, pseudonymous and posthumous works, fair dealing for private study, and finally a request to introduce a new right to the typographical arrangements of published editions. In the meeting with the Committee, the Publishers Association clarified that by this proposal it did not mean that particular types of designs or fonts should be protected.³⁹ This was because new fonts (or typefaces) could already be registered as designs, and therefore publishers saw no need to change this system. Instead it was seeking protection for typographical arrangements.⁴⁰ This was so that ‘unscrupulous competitor[s]’ could not copy a particular edition of a literary or musical work printed by or for a publisher using photolithography or a similar new technology.⁴¹

32 Letter from Publishers’ Association of Great Britain & Ireland to Board of Trade (UK) (n 29).

33 Evidence to Committee on International Copyright, Board of Trade (UK), London, 15 July 1935, 1–2 (WG Taylor), 8 (S Unwin).

34 *International Copyright Report* (n 29) 8 [22].

35 The protection of typographical arrangements was not discussed in the Brussels Diplomatic Conference for the Revision of the *Berne Convention* (n 29). See the records of the conference in World Intellectual Property Organization, *The Berne Convention for the Protection of Literary and Artistic Works from 1886 to 1986* (1986) 178–84.

36 *Gregory Report* (n 17) 1.

37 Publishers Association, Submission No 85 to Copyright Committee, Board of Trade (UK) (1951).

38 Evidence to Copyright Committee, Board of Trade (UK), London, 17 July 1951 (Sir Stanley Unwin and FD Saunders). See discussion on typography: at 25–7 (Sir Stanley Unwin).

39 *Ibid* 26 (Sir Stanley Unwin).

40 *Ibid*.

41 *Gregory Report* (n 17) 110–11 [306].

In its oral submission, the Publishers Association did not provide any evidence that this kind of copying was occurring in the UK, but instead it referred to the theoretical possibility of unfair practices.⁴² To strengthen its position, the Publishers Association drew the analogy between the work that a publisher would do to bring out an edition of a literary or musical work, and compared it to a work done by the manufacturer of a gramophone record.⁴³ The argument was that both spend time and labour to make the original work available in convenient and attractive formats for the public, irrespective of whether it is under copyright or not.⁴⁴ Based on this, the Publishers Association requested that copyright protection be considered for a duration of 50 years.⁴⁵

The Gregory Committee members were receptive to the arguments proposed by the Publishers Association. They seemed to agree with the need to protect the investment in typography, and did not question whether an additional layer of protection over public domain works would benefit the public. After clarifying that the Publishers Association was asking for the protection of typographical arrangements and not of the type itself, and that the protection should in turn extend to all types of works (both in and out of copyright),⁴⁶ the Committee concluded that a new right in the typographical arrangement of published editions should be introduced, albeit with a shorter term of 25 years.⁴⁷

According to the *Report of the Copyright Committee* ('*Gregory Report*'), the right was meant to prevent unfair copying of published editions of out-of-copyright works:

If the literary or musical work printed is in copyright, such copying would of course, require the consent of the copyright owner, and this would also be the case if the edition includes original artistic works in copyright. But if the work printed is itself out of copyright, there is nothing to prevent the unscrupulous competitor from copying the work photographically and so benefiting unfairly from the work of the original publisher.⁴⁸

When a comprehensive Bill was introduced into the House of Lords on 26 October 1955, cl 15 of the Copyright Bill 1955 provided publishers with a right to typographic layout of published editions that lasted for 25 years.

Interestingly, the proposed right to published editions attracted very little attention both from the media and in Parliament. *The Bookseller*, the leading industry

42 Evidence to Copyright Committee, Board of Trade (UK), London, 17 July 1951, 25–6 (Sir Stanley Unwin).

43 Publishers Association (n 37) 4.

44 Ibid.

45 Ibid 5.

46 Evidence to Copyright Committee, Board of Trade (UK), London, 17 July 1951, 26 (Sir Stanley Unwin).

47 *Gregory Report* (n 17) 111 [308].

48 Ibid 110–11 [306].

journal at the time, mentioned it several times by merely restating its content, however it gave no further comment.⁴⁹ The proposed new right did not receive much discussion in parliamentary proceedings either.⁵⁰ Only Lord Douglas of Barloch expressed some concern. While his Lordship generally agreed with the rationale of the right, he doubted the need to apply it retrospectively for all editions published in the previous 25 years.⁵¹ One of his Lordship's comments raised a broader discussion on the anticompetitive effects that this and other rights may cause:

It does not appear to be reasonable that industrial progress should be handicapped in this fashion. If we go on in this way, the next step will be that should somebody invent a new method of setting type at half the cost of the existing methods of doing it, there will be a proposal that printers of books should have some kind of protection against that. This is something which is quite outside the sphere of copyright. It has nothing to do with protecting the skill and labour of an individual involved in creating some new work of literature and art. It is a purely industrial question and it ought to be left to be settled by the ordinary process of commerce and should not have been in this Bill at all.⁵²

His comments however, did not attract much attention by other parliamentarians, and ultimately cl 15 was agreed to.⁵³

There are many reasons that could be surmised for such an easy path to law reform.⁵⁴ The publishing industry had a longstanding history and wielded enough political power to effect genuine reform.⁵⁵ In fact it already enjoyed a certain protective status.⁵⁶ As the proposed right did not involve the interests of any other stakeholders, it therefore did not receive any opposition from the industry itself.

49 'The Copyright Bill', *The Bookseller* (London, 5 November 1955) 1419–20; 'Government's New Copyright Bill Is Subjected to Criticism', *The Bookseller* (London, 19 November 1955) 1714–16.

50 It was shortly mentioned in the introductory speech by Lord Mancroft: United Kingdom, *Parliamentary Debates*, House of Lords, 15 November 1955, vol 194, col 508.

51 United Kingdom, *Parliamentary Debates*, House of Lords, 6 December 1955, vol 194, col 1169.

52 *Ibid.*

53 There was also some general opposition to the introduction of neighbouring rights into the Copyright Bill 1955 but none of the comments specifically referred to the new proposed right to published edition. Lord Lucas of Chilworth, for the Opposition, and his colleagues opposed the Bill where it cut across the sound principle that copyright was the natural and inviolate property right in the creation of an author's own mind: United Kingdom, *Parliamentary Debates*, House of Lords, 15 November 1955, vol 194, cols 511–12. See also 'The Copyright Bill', *The Bookseller* (London, 19 November 1955) 1707. Similar disagreement is echoed in 'Mistakes in the Copyright Bill', *The Economist* (26 March 1955) 1074.

54 For an overview of copyright reform, see generally A Goodman, 'The Copyright Bill' (1956) 19(2) *Modern Law Review* 186.

55 See generally Catherine Seville, *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century* (Cambridge University Press, 2006); Catherine Seville, *Literary Copyright Reform in Early Victorian England: The Framing of the 1842 Copyright Act* (Cambridge University Press, 1999).

56 For example, throughout most of 20th century the British book industry relied heavily on the Net Book Agreement that allowed the book industry to fix prices. For more, see Feather, *A History of British Publishing* (n 14) 102.

At the time, civil groups and non-governmental organisations that would typically represent users' interests and advocate against the expansion of copyright did not exist,⁵⁷ and libraries that today represent institutional users, at the time, did not realise the threat that the right could cause to public domain material. For parliamentarians — many of whom may have had a limited comprehension of how copyright law could prevent unfair copying by unscrupulous competitors — it may have simply sounded fair. The right could have been perceived as putting publishers in an equal treatment with other competing industries, such as the recording industry. Record producers' investments in creating a recording were already protected under the *Copyright Act 1911*,⁵⁸ and the publishing industry managed to convince the government that its investments deserved similar protection. Furthermore, the government was dealing with a number of very controversial issues, such as the broadcasting of sporting events and the public performance of records.⁵⁹ It is possible that the government was relieved not to get involved in additional discussions concerning published editions.

As a result, the right to published editions was introduced in part to address concerns about how to best support the publishing industry in a time of technological change. At the same time, it was overshadowed by many other reform measures that required greater in-depth policy discussion at the time. Since there was nobody willing to represent an opposing view or to produce a compelling argument that challenged the need for such a right, it was passed into law without much meaningful debate.

III THE AUSTRALIAN PERSPECTIVE ON PUBLISHED EDITIONS COPYRIGHT

During the 1950s the British publishing industry had strong links to the Australian market.⁶⁰ As a result British books largely dominated the local market, with the vast majority of books in local bookstores originating from the UK.⁶¹ This was a concern for many local publishers such as Angus & Robertson.⁶² The post-war years had seen an unprecedented boom of Australian titles and growth in the local

57 Today, such interests are represented by organisations such as the Australian Digital Alliance and others.

58 *Copyright Act 1911*, 1 & 2 Geo 5, c 46.

59 For more, see Brad Sherman, 'Public Ownership of Private Spectacles: Copyright and Television' in Brad Sherman and Leanne Wiseman (eds), *Copyright and the Challenge of the New* (Kluwer Law, 2012) 221.

60 Letter from Angus & Robertson Ltd to Commonwealth Copyright Office, 17 July 1957.

61 See Jason D Ensor, *Angus & Robertson and the British Trade in Australian Books, 1930–1970: The Getting of Bookselling Wisdom* (Anthem Press, 2013) 24.

62 The situation was so concerning to local publishers and writers that in 1930 they initiated an inquiry on tariffs on imported books, which discussed the possibility of imposing a tariff on foreign books in order to stimulate the Australian publishing sector: see Craig Munro and John Curtain, 'After the War' in Craig Munro and Robyn Sheahan-Bright (eds), *Paper Empires: A History of the Book in Australia 1946–2005* (University of Queensland Press, 2006) 3, 4.

publishing industry,⁶³ but even in the 1950s and 1960s, 80% of books in stock in Australian bookstores still originated from the UK.⁶⁴

In fact British dominance of the Australian publishing market was further reinforced by several trade agreements in place. The so-called British cartel, the agreement between British publishers and Australian booksellers regarding resale price fixing,⁶⁵ guaranteed that UK books could be sold in Australia at discounted prices, with which local publishers struggled to compete.⁶⁶ The British Market Rights Agreement with the United States ('US') established that Australia remained an exclusive dominion of the UK publishers, therefore cheaper US books could generally not be sold in Australia.⁶⁷ This context is especially important to properly understand the history of the published editions copyright in Australia.

In contrast to the UK, the right to published editions in Australia did not come as a result of lobbying efforts by local publishers. Instead it was proposed by the Copyright Law Review Committee ('CLRC') as an attempt to comprehensively transpose the *UK Copyright Act* into Australian copyright law.

The CLRC was appointed on 15 September 1958 by the then Attorney-General, Senator the Hon Neil O'Sullivan. Its purpose was to advise the Australian government which amendments recently made into copyright law in the UK should be incorporated into Australian copyright law, and to recommend if any alterations or additions should be made.⁶⁸

When the Committee announced the consultation process, local publishing organisations such as the Australian Book Publishers Association ('ABPA') showed limited interest in the ongoing copyright review. The ABPA was established in 1947. In 1960, out of 37 member firms, only 25 'actually published any books in Australia, and only nine could be said to have had a national profile'.⁶⁹ Of those, only four — Angus & Robertson, FW Cheshire, Ure Smith and Horwitz — were 'primarily interested in books for the general public'.⁷⁰ In its

63 Ensor (n 61) 25; Frank Thompson, 'Sixties Larrikins' in Craig Munro and Robyn Sheahan-Bright (eds), *Paper Empires: A History of the Book in Australia 1946–2005* (University of Queensland Press, 2006) 31, 31; Feather, *A History of British Publishing* (n 14) 208–10.

64 In 1959 Australia was the largest export market (or 'run on' market) for British books, 'valued at its peak to be worth £4,387,810 sterling in export turnover for British publishers': Ensor (n 61) 11, citing RE Barker and GR Davies (eds), *Books Are Different: An Account of the Defence of the Net Book Agreement before the Restrictive Practices Court in 1962* (Macmillan, 1966) 907.

65 1964 Statement of Terms and Conditions of Supply of Books Published in Australia and in Great Britain and Ireland, reproduced in John Percy Holroyd, *The Australian Book Trade: A Bookseller's Contribution to Its History* (Braidwood Press, 2015) 92–3.

66 Munro and Curtain (n 62) 5.

67 Feather, *A History of British Publishing* (n 14) 189.

68 Copyright Law Review Committee, *Report of the Committee Appointed by the Attorney-General of the Commonwealth to Consider What Alterations Are Desirable in the Copyright Law of the Commonwealth* (1959) 7 [1] ('Copyright Law Review Committee Report').

69 Thompson, 'Sixties Larrikins' (n 63) 31.

70 *Ibid.*

short initial submission on 12 December 1958, the ABPA expressed the opinion that ‘the British Act of 1956 is wholly suitable for its purpose in Australia’.⁷¹ The Association highlighted that as publishing was steadily becoming more and more international, it was therefore important to ‘conform in all respects to the laws in other countries subscribing to the Universal Copyright Convention, and in particular to the law of copyright in Great Britain’.⁷² In a later submission the Association commented more extensively on fair dealing rights.⁷³ However, none of the submissions mentioned the right of published editions.⁷⁴

Limited involvement of the ABPA in the copyright review process at the time was understandable. ‘[O]nly a few Australian publishers (including Angus & Robertson, Melbourne University Press and FW Cheshire) produced more than a handful of titles each year’.⁷⁵ Its main concern at the time was how to compete with British books that had secured the majority of the local market and were being sold at a discount.⁷⁶ This was not a part of the terms of reference. The popularity of local titles was also limited, not least because of a lack of appetite for Australian titles at the time.⁷⁷ Given these circumstances, there was limited (if any) risk that unscrupulous competitors would copy the published editions of Australian works and, therefore, there was no apparent need for new publishers’ rights locally. At the same time, the close business ties between many Australian and UK publishers may have led to the presupposition that Australian publishers would be well served by having the same laws as their UK counterparts.

This latter approach appeared to be in line with the Committee’s general approach that Australia ‘must keep in step with Great Britain’.⁷⁸ The Committee was dominated by lawyers,⁷⁹ and the local legal profession had a long tradition of implementing and applying UK law in Australia.⁸⁰ Committee member George Ferguson (1910–98) had a similar approach. As the managing director of Angus

71 Australian Book Publishers’ Association, Submission to Copyright Law Review Committee (12 December 1958) (‘1958 ABPA Submission’).

72 Ibid.

73 Australian Book Publishers’ Association, Submission to Copyright Law Review Committee (5 May 1959) 1–2.

74 The Association’s limited interest in the copyright reform could also have been explained by the fact that it did not ask to appear in the hearing, nor did it participate in the meetings held by the Committee in early 1959: ‘1958 ABPA Submission’ (n 71).

75 Munro and Curtain (n 62) 4.

76 Ibid 5.

77 Holroyd (n 65) 25, citing John Wallace, ‘Plan to Help Australian Writers’ [1939] (6) *Bohemia: The All-Australian Literary Magazine* 7, 7.

78 Letter from Sir Arthur Dean to John, 24 November 1959.

79 Three out of five Committee members represented the legal profession: the Hon Justice Sir JA Spicer, Chief Judge of the Commonwealth Industrial Court; the Hon Justice Sir Arthur Dean, a Justice of the Supreme Court of Victoria; and Mr AJ Moir, solicitor of Melbourne.

80 See, eg, Law Council of Australia, Submission to Copyright Law Review Committee (19 August 1959). In its submission, the Law Council of Australia maintained that ‘[i]t is desirable to maintain uniformity with the United Kingdom, consistently with having provisions suitable to our own conditions’: at [3].

& Robertson and former President of the ABPA, Ferguson acted as spokesperson for the entire publishing industry in Australia. Aside from being well known for his significant interest in and contribution to the Australian publishing industry, he also had strong connections to the UK publishing industry.⁸¹ With a business model dependent on British trade and close relationships with the large, established British firms, he closely followed legal developments in the UK and often pushed the Australian government to follow suit.⁸² His overall support of the *UK Copyright Act* is therefore not surprising, and his views were no doubt influential amongst fellow Committee members.⁸³

The CLRC went on to recommend the introduction of the right to published editions into Australian copyright law, with the 1961 report summarising its rationale in one paragraph:

We understand that it is now possible to make reprints of published works by photographic means and that it can be done relatively cheaply owing to the absence of type-setting. We are also given to understand that even before the enactment of section 15 of the 1956 Act it was not uncommon for one publisher to pay another a sum for permission to use a typographical arrangement. In our view, therefore, a copyright in typographical arrangements should be created and provisions along the lines of section 15 should be enacted.⁸⁴

Similar to the situation in the UK, the proposed right to published editions was introduced into Australian law without much debate or attention.⁸⁵ Its content was almost identical to the right found in the *UK Copyright Act*, in that it stated that it prevented unauthorised reproduction, by photographic or similar means, of published editions of literary, musical, dramatic and artistic works.⁸⁶ In the second reading of the Copyright Bill 1967 (Cth), the Attorney-General the Hon

81 See Ensor (n 61) 7. Ferguson ran the Angus & Robertson London office from the 1950s to 1970, which he referred to as his own ‘baby’. ‘[H]e visited London over twelve times during the course of his career at Angus & Robertson’ and he figured as a ‘primary Sydney correspondent with British publishers’.

82 See, eg, Letter from George Ferguson to LR Zines, 12 September 1960.

83 See Letter from Angus & Robertson Ltd to Commonwealth Copyright Office (n 60).

84 *Copyright Law Review Committee Report* (n 68) 58 [302]. The previous licensing practices related to typographical arrangements are discussed in Sir Stanley Unwin, *The Truth About a Publisher: An Autobiographical Record* (George Allen & Unwin, 1960) 383–4.

85 The Copyright Bill 1967 (Cth) that was introduced to the Parliament in early 1967 among many other things included the new right to published editions. Due to pressure from different stakeholder groups the initial Bill was soon removed; the new Bill was introduced later the same year: see Adrian Sterling, ‘The Copyright Act 1968: Its Passing and Achievements’ in Brian Fitzgerald and Benedict Atkinson (eds), *Copyright Future: Copyright Freedom: Marking the 40th Anniversary of the Commencement of Australia’s Copyright Act 1968* (Sydney University Press, 2011) 51, 57–9. The right to published editions was transposed from the initial Bill without changes to the subsequent Copyright Bill 1967 (Cth).

86 The only more significant difference is, while the Australian Act referred to literary, musical, dramatic and artistic works, the *UK Copyright Act* (n 13) did not refer to artistic works. In the parliamentary debates preceding the *Copyright, Designs and Patents Act 1988* (UK), the debates on typographical arrangements concluded that there is no need to include artistic works: United Kingdom, *Parliamentary Debates*, House of Lords, 30 November 1987, vol 490, col 871 (Lord Beaverbrook). Also, instead of having the provision in one clause as in the *UK Copyright Act* (n 13), the Australian *Copyright Act* (n 1) defines its scope in five separate clauses: at ss 88, 92, 96, 100, 112.

NH Bowen, explained the rationale of the proposed right by reiterating arguments provided in the *Copyright Law Review Committee Report*:

Modern printing processes have made it very easy for a printer to copy, by photographic means, a published edition of a work. Thus, a publisher who has gone to great trouble and expense to produce an edition of a work, say, of Shakespeare's plays, by using special type and a well designed layout has no protection under existing law against a printer who photographically reproduces his edition. What is proposed in the Bill is to give a publisher the exclusive right to make, by means including a photographic or similar process, a reproduction of the published edition of a literary, dramatic, musical or artistic work.⁸⁷

With no comments on these provisions from any parliamentarians,⁸⁸ a right to published editions became a part of Australian copyright law when the *Copyright Act* received the royal assent on 27 June 1968. These clauses remained significantly unchanged for the majority of the 1970s and 1980s.⁸⁹

From a comparative perspective, the approach taken towards the right to published editions in different parts of the Commonwealth largely reflected the different domestic copyright cultures. For example, Canada, in keeping with its more independent approach to copyright and the book trade, took a different view.⁹⁰ The Canadian Royal Commission on Patents, Copyright, Trade Marks and Industrial Designs in its Report on Copyright did not recommend the implementation of this right — instead it argued that the need was not conclusively demonstrated.⁹¹ The New Zealand *Report of the Copyright Committee* on the other hand, did recommend the introduction of copyright in typographical arrangements (as stated in s 15 of the *UK Copyright Act*), but with less enthusiasm. Even though it generally agreed with the conclusions made by the Canadian committee, its position was motivated by the need to protect the interests of British publishers.⁹² Eventually, a right to published editions was implemented in the *Copyright Act 1962* (NZ). While some Commonwealth countries would go on to follow the same course as New Zealand,⁹³ other international efforts to introduce similar

87 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 May 1967, 2333 (Nigel Bowen, Attorney-General).

88 Instead, parliamentarians seemed to be more concerned with other issues pressing the local publishing industry that fell outside the scope of copyright legislation, such as the UK dominance of the Australian book market and high book prices.

89 The *Copyright Amendment Act 1980* (Cth), as a result of the newly introduced statutory licensing schemes, had slightly narrowed its scope: see S Ricketson, 'The Copyright Amendment Act 1980: An Analysis of the New Amendments' (1982) 10(1) *Australian Business Law Review* 31, 49–50.

90 For more on book policies in Canada, see generally Josée Vincent and Eli MacLaren, 'Book Policies and Copyright in Canada and Quebec: Defending National Cultures' (2010) 204 *Canadian Literature* 63.

91 *Royal Commission on Patents, Copyright, Trade Marks and Industrial Designs* (Report on Copyright, 1957) 27.

92 *Report of the Copyright Committee* (Report, 1959) 137 [363].

93 See, eg, *Copyright Act 1978* (South Africa) s 11A; *Copyright Act 1987* (Malaysia) s 9. See also Eugene Khoo, 'Legal Aspects of Investing in Malaysia' (1995) 69(1) *Australian Law Journal* 62, 72.

publishers' rights had limited success.⁹⁴

IV THE ROLE OF THE NEW RIGHT IN THE AUSTRALIAN BOOK PUBLISHING INDUSTRY

The next question looks at whether the new right to published editions was effective in achieving its original goals. The coming decades saw the further growth of the Australian publishing industry. As Hart put it:

If the 1960s was the infancy of modern Australian publishing, then the 1970s was surely its adolescence — a time of life that is characterised by rapid growth, increased maturity and an urge for independence, together with experimentation, recklessness, high ideals and overactive hormones.⁹⁵

The growth of the industry was reflected in the increased number of local publishers.⁹⁶ The market for reprints of classics was also significant, with high market demand and large players competing in editions of classics.⁹⁷ Some larger global publishers, such as Oxford, Penguin and Random House, began releasing their own editions of the literary classics. More recently, the Australian independent publisher Text Publishing released its 'Text Classics' series of Australian novels.⁹⁸ Even today, the classics market is huge.⁹⁹ As the right to published editions was introduced to protect the typographical layout of public domain works, it should have been most relevant for publishers who decided to issue new editions of out-of-copyright classic works. Has this been the case? Has the new right to published editions contributed to these positive developments in the publishing industry?

There is no doubt that the growth of the Australian publishing industry — especially in relation to the number of new publishers that emerged — was helped by changes in the book production process. The use of offset printing, which had already started to replace letterpress in the 1960s, 'helped lower the entry cost for young publishers'.¹⁰⁰ 'As typesetting and layout became almost kitchen-table operations, it wasn't too hard for ideas-rich but cash-poor entrepreneurs

94 See generally Charles Clark, 'Publishers' Rights: From Rhetoric to Reality 1984–1998' in Editorial Committee of Proceedings of the IPA Fourth International Copyright Symposium (ed), *The Publisher in Changing Markets: Proceedings of IPA Fourth International Copyright Symposium* (Japan Book Publishers Association, 1998) 36; Herman Cohen Jehoram, 'Hybrids on the Borderline between Copyright and Industrial Property Law' (1991) 2(4) *Intellectual Property Journal* 190, 194–5.

95 Hart (n 18) 53.

96 In 1960 the ABPA had 40 members; in 1975, there were over 90: Holroyd (n 65) 72, citing Frank W Thompson, 'Bookselling and Publishing' (Pt 2) (1976) 52(12) *Current Affairs Bulletin* 18, 18–19.

97 John Walsh, 'Old Book, New Look: Why the Classics Are Flying off the Shelves', *The Guardian* (online, 17 September 2016) <www.theguardian.com/books/2016/sep/17/classic-book-covers-sales-tv-adaptations>.

98 Email from Peter Donoghue to Rita Matulionyte, 26 February 2018.

99 Walsh (n 97).

100 Hart (n 18) 55.

to finance a short print run.¹⁰¹ At the same time, the general adoption of offset lithography opened other possibilities. In simple terms, anything that could be photographed could be printed without any intervention other than platemaking. ‘From the late 1960s, in Britain, Germany, the Netherlands and the United States, a new branch of [publishing] developed which focused on lithographic reprints of out-of-print material.’¹⁰² It was initially aimed at the growing market of ‘educational institutions, especially new universities which wanted to stock their libraries. Runs of [academic] journals, monograph series and individual academic texts were reprinted by offset lithography, often by small ... publishing houses’ set up solely for this purpose.¹⁰³

While such materials were often still protected by copyright and could therefore not be reprinted without permission from the publisher, in the case of classic works no licence was needed, except for the copyright to published editions. If the right to published editions had not existed in Australia, unscrupulous publishers could have made reprints of recently published classic works without the need to work on typography or layout of the edition. It could further be suggested that alternative legal mechanisms, such as passing off or trade mark protection, would not necessarily have helped in all situations. For example, if a competitor copied a layout of the edition, but instead of an initial publisher’s name used their own trade mark or other sign to avoid consumer confusion, no trade mark infringement or passing off was likely to be established.¹⁰⁴

Some publishers therefore argue that the right to published editions had been of ‘extraordinary importance’ to the publishing industry.¹⁰⁵ Charles Clark, General Counsel for the International Publishers Copyright Council, believed that the right had three benefits.¹⁰⁶ First, ‘[i]t encourage[d] new editions of out-of-copyright works of literature and music, notably of classical texts, from Shakespeare to Verdi’.¹⁰⁷ He argued that it provided certain reassurance for publishers that if they invested in the publishing of classical works, their investment could not be easily swindled by competitors looking to reprint their editions. Second, Clark claimed it was ‘a weapon against piracy in those countries which incorporate[d] the right in their national laws’.¹⁰⁸ In other words, it extended market control over published editions of public domain works that could otherwise be freely copied and distributed. Essentially, it was a second layer of rights that publishers pushed

101 Ibid.

102 Feather, *A History of British Publishing* (n 14) 214.

103 Ibid.

104 Similar arguments were put forward by UK publishers: see Publishers Association (n 37) 4.

105 Interview with Michael Webster, Former President of Small Press Network (Rita Matulionyte, Telephone, 2 February 2018).

106 Clark (n 94) 37.

107 Ibid.

108 Ibid.

to apply to books, which arguably provided them with a stronger legal basis in enforcement cases. Third, it gave publishers ‘a right ... in the management of collective societies for the licensing and administration of photocopying’.¹⁰⁹ For instance, under the *Copyright Act*, Australian publishers were entitled to receive remuneration for the use of copyright material by the Commonwealth or a state,¹¹⁰ which is administered by the Copyright Agency.¹¹¹

At the same time, the arguments that suggested the importance of the right to published editions could be challenged. First of all, Peter Donoughue, a former publisher and a former President of the Australian Publishers Association, suggests that the published edition copyright was certainly never a front-of-mind issue for Australian publishers. According to Donoughue, ‘I doubt any publisher would not have embarked on the investment if the right didn’t exist. After all the far greater cost in producing these volumes is the printing, marketing and distribution of them. Especially given that readers expect these books to be very cheap.’¹¹²

Similarly, for the competitor wishing to embark in classics publishing, ‘stealing’ a layout created by another publisher would not have saved any significant costs, since typesetting had become a lot more affordable with the introduction of offset technology. In other words, advances in technology have meant the original need for protection has decreased.

Second, as far as a threat of piracy was concerned, publishers in developed countries like Australia were already well protected by copyright in literary works that they routinely acquire from authors.¹¹³ In contrast to other neighbouring right holders, such as broadcasting organisations or record producers, book publishers do not normally have difficulty proving the chain of rights transfer, which is essential in right enforcement cases. In Canada for example, publishers did not feel the need for such a right, and there are no signs that the book publishing market there suffered from the lack of such a right.¹¹⁴

109 Ibid.

110 *Copyright Act* (n 1) pt VII div 2. Until 2017, the copying of published editions was also compensated under the statutory licence for copying by educational and other institutions. In particular, the *Copyright Act* (n 1) pt VB covered copying of published editions under certain circumstances (eg the copying of published editions of works by educational institutions in hardcopy form: at s 135ZH; and the copying of published editions by institutions assisting persons with print and intellectual disabilities: at ss 135ZN, 135ZR). The *Copyright Amendment (Disability Access and Other Measures) Act 2017* (Cth) replaced pts VA and VB licences with a simplified licence (New Statutory Licence): see *Copyright Act* (n 1) ss 113N, 113P. The new s 113P covers copying of works and broadcasts, but does not explicitly refer to published editions. It remains to be seen whether this change will affect licensing agreements between educational institutions and rights holders, and what impact it will have on payments that publishers receive for copying published editions.

111 The former Copyright Agency Ltd (‘CAL’): see KE Lindgren, ‘Market Power, Collecting Societies and the Role of the Copyright Tribunal’ (2005) 79(9) *Australian Law Journal* 561, 570.

112 Email from Peter Donoughue to Rita Matulionyte (n 98).

113 The situation might be different in developing countries, such as Taiwan, India and Singapore, where the offset technology led to extensive piracy: Feather, *A History of British Publishing* (n 14) 215.

114 Email from Peter Donoughue to Rita Matulionyte (n 98).

Third, laws allowing publishers to collect remuneration for copying of parts of published editions by either governmental institutions or libraries¹¹⁵ disregard the initial intention of the right. That is because the right was intended to merely prevent the unfair copying of entire editions by competitors, not extracts from public domain works for administrative or educational purposes. Allowing publishers to collect royalties under such collective licensing schemes goes beyond the scope that the original right was intended for, and collides with users' rights to the free use of public domain works.

It is interesting to note that within the book industry itself, there have been no legal disputes related to the right to published editions. On one hand this could mean that the right was so perfectly drafted, so straightforward and clear, that all disputes were prevented in advance. The more likely reason is that in practice, there were no interests that were supposedly protected by the right. Either printers were not interested in 'stealing' the typographical arrangements created by other publishers, or publishers were not concerned even if such unauthorised copying was happening on occasion. It could be argued that, if such interests or attempts existed and were considered serious, there would have been reported disputes that would have tested the scope of the new right.

Last but not least, in the last decades of the 20th century, the relevance of the right further decreased with the arrival of new technology in the publishing sector — notably, desktop publishing ('DTP') software. The release of the Aldus PageMaker on 15 July 1985 'marked the beginning of the "Desktop Publishing" era'.¹¹⁶ DTP is the process of editing and layout of printed materials intended for publication, such as books, magazines, brochures, and the like, using a personal computer. DTP was adopted in the book publishing industry gradually, and a variety of DTP software is currently available on the market (eg Microsoft Publisher, Adobe InDesign, Scribus).¹¹⁷ DTP has dramatically reduced the skill required to carry out these functions, as well as the cost. DTP software can be used by professional designers, but also by freelancers, small businesses, etc.¹¹⁸ With the introduction of this software in publishing, typesetting was increasingly performed in-house by most publishers, and 'many of the old, specialist typesetting firms went bust'.¹¹⁹

115 Although previous judgments found that the copying of separate articles from newspapers by educational institutions does not infringe on the right to published editions owned by newspaper proprietors (see, eg, *Nationwide News Pty Ltd v Copyright Agency Ltd* (1996) 65 FCR 399 ('*Nationwide News Appeal*') discussed below Part V), under the *Copyright Act* (n 1) pt VB, publishers were entitled to receive remuneration for the copying of published editions or their parts by educational and other institutions. For more see above n 110.

116 Michael B Spring, *Electronic Printing and Publishing: The Document Processing Revolution* (Marcel Dekker, 1991) 125.

117 'The *Oxford Children's Encyclopedia* (1991) and the *Oxford Illustrated Encyclopedia* (1993) demonstrate the adoption of desktop techniques into professional book production': Paul Luna, 'Books and Bits: Texts and Technology 1970–2000' in Simon Eliot and Jonathan Rose (eds), *A Companion to the History of the Book* (Blackwell, 2007) 381, 391.

118 *Careers in Focus: Entrepreneurs* (Ferguson, 2009) 57.

119 'What Is Typesetting?', *Getting Published: Comments and Advice for Academic Authors* (Blog Post, 22 January 2010) <gettingpublished.wordpress.com/2010/01/22/what-is-typesetting/>.

Gradually, ‘further cost-cutting by publishers [saw] this typesetting work move out to local freelancers and further afield to places like India’.¹²⁰

These developments meant that the rationale of a published edition copyright was essentially lost. For competitors, creating a different typographical layout now required just a few clicks of the mouse. Therefore, there were no incentives for unscrupulous competitors to use exact reproductions of the original layout; a different layout could be created with essentially no time or significant costs. From the publisher’s perspective, the difficulty and costs of typesetting that were previously significant in the letterpress age, had now been reduced to minimum. Such minimal level of investment arguably did not justify the grant of a separate right to the publisher.¹²¹

V PUBLISHED EDITION COPYRIGHT, NEWSPAPERS AND OTHER INDUSTRIES

As the published edition copyright began losing its importance in the book industry, other types of publishers began trying to exploit it, in particular newspaper and magazine publishers. The cases below demonstrate how the right to published editions over time began being used as an instrument by some industries to protect or extend their own financial interests, shifting away from its original purpose as a measure to protect the rights of book publishers.

During the second half of the 20th century, the newspaper publishing industry not only began benefiting from new technological opportunities (such as offset printing), it also had to deal with new challenges, such as the arrival of television and later the internet.¹²² Photocopying technology for example allowed competitors, press monitoring services and educational institutions to make copies of newspapers and their extracts for different purposes. This led to the creation of a secondary market for news, and newspaper proprietors were keen to monetise these uses. At the same time, the existing copyright legal framework made it difficult for newspaper publishers to enforce their rights in these situations. Newspaper proprietors were not necessarily the owners of the works produced by employed journalists,¹²³ nor did they own the rights to articles written by freelancers.¹²⁴ For instance, under the *Copyright Act*, newspaper publishers enjoyed most of the rights to a work written by the employed author; however, the author retained

120 Ibid.

121 Baloch (n 10) 81.

122 Victor Isaacs and Rod Kirkpatrick, *Two Hundred Years of Sydney Newspapers: A Short History* (Rural Press, 2003) 19–20.

123 See *Beloff v Pressdram Ltd* [1973] 1 All ER 241.

124 See, eg, Jose Bellido and Kathy Bowrey, ‘From the Author to the Proprietor: Newspaper Copyright and *The Times* (1842–1956)’ (2014) 6(2) *Journal of Media Law* 206.

the right to control the reproduction of the work for the purpose of inclusion in a book, and reproduction of the work in the form of a hard copy facsimile.¹²⁵ This made it difficult for newspaper publishers to prove their legal standing in some copyright infringement cases. Newspaper and magazine publishers, both in Australia and the UK, therefore tried to find protection in the right to published editions. While the courts initially allowed newspaper publishers to rely on this right, they became increasingly uncomfortable in doing so.

For example, in the Scottish case *Scotsman Publications Ltd v John Edwards (Advertising Services) Ltd*,¹²⁶ an advertising company distributed a daily service of photographic reproductions of articles that had appeared in the petitioners' newspapers. The claimants were granted an interim interdict to prevent further distribution of reproduced articles on the basis of published edition copyright.¹²⁷ Lord Wylie did not challenge the question of whether newspapers qualify as a published edition under s 15 of the *UK Copyright Act*. In addition, the fact that full articles from the newspaper were reproduced was sufficient enough evidence to find a prima facie infringement of a published edition copyright.

Similarly, in *Machinery Market Ltd v Sheen Publishing Ltd* ('*Machinery Market*'),¹²⁸ Walton J decided that the unauthorised photographic reproduction in the defendant's magazine of advertisements, previously published in the plaintiff's magazine, constituted an infringement of the typographical arrangement of the edition. Walton J defined the concept of an 'edition' in a broad way, and proposed 'that each new publication of that advertisement however contained, each new mode in which it comes printed before the world, is a new edition'.¹²⁹

During the 1990s courts in both the UK and Australia became increasingly more reluctant to grant such broad protection under the right to published editions. In the Australian case, *Nationwide News Pty Ltd v Copyright Agency Ltd* ('*Nationwide News Appeal*'), 15 applicants, most of whom were newspaper and magazine publishers, claimed that the Copyright Agency Ltd ('CAL') (a collecting society representing authors and publishers in Australia), infringed their copyright by authorising libraries to copy articles from newspapers that publishers owned. Since the newspaper publishers could not claim ownership of

125 *Copyright Act* (n 1) s 35(4). Cf *UK Copyright Act* (n 13), which provided that the newspaper publisher only has a right to publish the article written by the author in the newspaper, magazine or similar periodical; all other rights remain with the initial author (journalist): at s 4(2).

126 1980 SC 308.

127 *Ibid* 309.

128 [1983] FSR 431 ('*Machinery Market*').

129 *Ibid* 432–3. According to Lord Hoffman, this decision is not a very strong authority since it 'was an unreserved judgment given on a motion for judgment under RSC Ord 14', and the question of what constitutes a typographical arrangement was not thoroughly discussed: *Newspaper Licensing Agency Ltd v Marks & Spencer plc* [2003] 1 AC 551, 558 [12].

articles written either by their employees or freelance journalists,¹³⁰ they relied on the right to published editions.¹³¹ At trial, Wilcox J acknowledged that newspaper publishers had a right to typographical arrangements of the published edition of a newspaper, without substantial discussion.¹³² However, in contrast to the previous UK cases, his Honour did not agree that copying one article from the newspaper would constitute a substantial part of the edition. Wilcox J analysed the legislative history and rationale behind the right, and decided that there may in fact be no right of published editions for a single article; rather it may relate to the typographical arrangement of the entire edition.¹³³

On appeal, the Full Federal Court agreed with the trial judge. Sackville J pointed out that published edition copyright protects the presentation embodied in the edition, which includes things like typographical layout, juxtaposition of text and photographs and the use of headlines.¹³⁴ In determining whether a substantial part of the published edition was copied, Sackville J suggested that the proportion of the published edition copied is not decisive.¹³⁵ Instead, the extent of the interference with the interest protected by published edition copyright should be taken into account.¹³⁶ His Honour concluded that the objective of copying articles was not to take advantage of the layout or presentation, but for the purpose of distributing the content of the articles to students.¹³⁷

A few years later, another similarly narrow approach was approved by the UK courts in *Newspaper Licensing Agency Ltd v Marks & Spencer plc* ('NLA').¹³⁸ Here, the Newspaper Licensing Agency ('NLA'), representing newspaper publishers, claimed that Marks & Spencer was infringing its rights to published editions by making copies of the press cuttings it received from the press monitoring company. The NLA succeeded in the first instance but lost on appeal. After agreeing that copyright in published editions related to the entire newspaper (and not to an individual article in the newspaper),¹³⁹ Lord Hoffman discussed whether a substantial part of the published edition was copied by Marks & Spencer. His Lordship generally agreed with the judgment in the *Nationwide News Appeal* and

130 Under s 35(4) of the *Copyright Act* (n 1), the right to make facsimile print copies of an article remains with the author.

131 *Nationwide News Appeal* (n 115) 410. While s 35(4) of the *Copyright Act* (n 1) grants certain rights with respect to works created by their employees, this right only allows them to publish articles in the magazine or newspaper, and does not extend to facsimile copies in print format.

132 *Nationwide News Pty Ltd v Copyright Agency Ltd* (1995) 55 FCR 271, 283–4 ('*Nationwide News Trial*'). See also *Nationwide News Appeal* (n 115) 413 (Sackville J).

133 *Nationwide News Trial* (n 132) 286–7. See also *Nationwide News Appeal* (n 115) 416–17 (Sackville J).

134 *Nationwide News Appeal* (n 115) 418.

135 *Ibid* 418–19.

136 *Ibid* 419, citing SP Skone James et al, *Copinger and Skone James on Copyright* (Sweet & Maxwell, 13th ed, 1991) 175 [8–27].

137 *Nationwide News Appeal* (n 115) 419.

138 [2003] 1 AC 551 ('NLA').

139 *Ibid* 557–9 [8]–[18].

suggested that ‘a copy of the article on the page, which gives no indication of how the rest of the page is laid out, is not a copy of a substantial part of the published edition constituted by the newspaper’.¹⁴⁰ Similarly to Sackville J, his Lordship wanted to see the copying of a layout of at least one page, not the content of the newspaper.¹⁴¹

In addition, there have been attempts to extend the published edition right beyond books and newspapers. Other industries, such as software and database production, have also tried to exploit this right to protect their interests. In the case of *Cortis Exhaust Systems Pty Ltd v Kitten Software Pty Ltd* (*‘Cortis’*),¹⁴² the applicant argued that its software instruction manual was protected as a published edition. It suggested that although there was no copying of the text of the manual, the respondents infringed copyright to published editions by copying the headings and general structure of the manual. Tamberlin J rejected this argument. Although the Court did not dispute the fact that the software manual could qualify as a published edition, Tamberlin J found that the headings and layout taken were too basic and would be necessary in any manual dealing with the software system in question.¹⁴³ His Honour also noted that there was no facsimile copying involved, which was considered a prerequisite for an infringement.¹⁴⁴

The right was also unsuccessfully invoked by the defendants in the New Zealand case *YPG IP Ltd v Yellow Book.com.au Pty Ltd* involving database producers.¹⁴⁵ The defendants allegedly copied parts of the Yellow Pages initially published by the New Zealand Post in 1959, which at the time was owned by the plaintiff. One of the defendants argued that the Yellow Pages constituted published editions that were protected for 25 years, and therefore the terms of protection had expired. The Court rejected this argument, merely stating that ‘the work concerned is not a mere typographical arrangement of a published edition’, but rather a literary work.¹⁴⁶

Several conclusions can be drawn from these cases. Firstly, these decisions show the changing understanding of what constitutes an infringement of the right to published editions and, in particular, what constitutes a substantial part-requirement in these infringement cases. In the *Machinery Market* case, the Court was satisfied that a reproduction of separate advertisements appearing in a newspaper constitutes an infringement of published edition copyright in

140 Ibid 561 [26].

141 Ibid 560–1 [23].

142 [2001] ATPR ¶41-837 (*‘Cortis’*).

143 Ibid 43341 [37]. The CLRC also considered software instruction manuals as published editions: see Copyright Law Review Committee, *Computer Software Protection* (Report, 1994) 231 [11.102] (*‘Computer Software Protection Report’*).

144 *Cortis* (n 142) 43341 [38].

145 (2008) 8 NZBLC 102063.

146 Ibid 102074 [49].

that newspaper.¹⁴⁷ In other words, copying individual advertisements from a newspaper constituted infringement of published edition copyright, as long as the copied content amounted to a sufficiently substantial part of the edition. This construction of an infringement was later modified in the *Nationwide News Appeal*, where Sackville J explained that the proportion of the published edition copied is not decisive.¹⁴⁸ Instead, layout or presentation of the content should be the focus of copying, not the content itself.¹⁴⁹ In *NLA*, Lord Hoffman generally agreed with such a conclusion and added that at least one entire page containing the layout would need to be copied in order to constitute an infringement of a particular published edition.¹⁵⁰ According to some commentators, this suggests that, ‘unlike other works, the primary factors in deciding substantiality for typographical works are quantitative’, rather than qualitative.¹⁵¹ On the other hand, it is possible to argue that the judges in these decisions did not deny that the qualitative test of substantial part applies to published editions copyright. But instead, they added a quantitative test to it, and for a good reason. As the object of protection under published editions copyright is the layout of the content, and the layout of the content cannot generally be expressed in less than one page, the substantial part requirement cannot be met if only a part of a page is copied.

As a second general observation, these cases demonstrate the expansion of published edition copyright beyond its original intent. Although the right was initially advocated by book publishers and was meant to protect published editions of books, as a result of the open drafting and broad terms used, the courts soon came to acknowledge that the right could be applied to other industries too, such as newspaper publishing or even software. As Lord Hoffman stated, ‘[copyright] sometimes affords protection in unexpected situations’.¹⁵² However, narrowing down the initially broad test of infringement has made it more difficult for the newspaper industry to rely on this right. By requiring that the object of copying should be the *layout* of the text and not the content, the courts made the right less valuable to newspaper publishers. Why would a competitor try to ‘steal’ a layout when they could easily create their own using any DTP software? Such a narrow interpretation may have come from an increased understanding among courts that, with advances in technology, the published edition right was straying from its original purpose. As discussed above, when the right was introduced, letterpress printing was still dominant and the typographical arrangement of the text required a significant amount of skill and labour — much of which was still largely mechanical. At the end of the 20th century, with the introduction of

147 According to Walton J, ‘each new publication of that advertisement however contained, each new mode in which it comes printed before the world, is a new edition’: *Machinery Market* (n 128) 432–3.

148 *Nationwide News Appeal* (n 115) 419.

149 See above nn 130–7 and accompanying text.

150 *NLA* (n 138) 560–1 [23]–[24], citing *Nationwide News Appeal* (n 115) 418 (Sackville J).

151 Baloch (n 10) 83.

152 *NLA* (n 138) 560 [22].

DTP, the skill required and cost of labour decreased dramatically. A typographer could now spend more time on the aesthetic aspects of arrangement and layout. Although the layout and a readable type encouraged people to continue reading and even improved their level of reading activity,¹⁵³ it is questionable whether the effort needed to create an attractive layout deserves special protection. The courts may have felt that although the right probably made sense when it was initially proposed, it was becoming harder to justify in contemporary situations.

VI POLITICAL ATTEMPTS TO EXTEND THE SCOPE OF THE RIGHT

Recognising the declining importance of the right, book publishers have tried to find a new place for the copyright of published editions in the digital era. As a result, publishers have asked lawmakers to expand the scope of the right to adapt to the new digital realities.

To some extent, the CLRC's *Computer Software Protection* report addressed the concerns of contemporary publishers. Although the Committee concluded that scanned digital copies do not qualify as reproductions per se,¹⁵⁴ if the digital file is reproduced in a printed form without modification of the format, such printed copies would constitute a reproduction since they would be essentially identical to the initial print copy. In order to clarify this, the Committee suggested that s 88 of the *Copyright Act* be amended by replacing the words 'by a means that includes a photographic process, a reproduction' with the words 'a facsimile copy'.¹⁵⁵ At the same time, the Committee was inclined to follow the technological neutrality principle, and recommended that 'published edition copyright be extended to include publication in computer or machine readable format'.¹⁵⁶

The CLRC *Simplification of the Copyright Act 1968* report agreed with the first suggestion but rejected the second one.¹⁵⁷ The majority of the Committee generally recommended that 'published edition copyright remain confined to print editions in hard copy form'.¹⁵⁸ Also, stakeholders' request to expand published edition copyright by granting publishers a new public communication

153 Jennifer Amar, Olivier Droulers and Patrick Legohérel, 'Typography in Destination Advertising: An Exploratory Study and Research Perspectives' (2017) 63 *Tourism Management* 77, 78, citing Aries Arditi and Jianna Cho, 'Serifs and Font Legibility' (2005) 45(23) *Vision Research* 2926 and Timothy J Slattery and Keith Rayner, 'The Influence of Text Legibility on Eye Movements During Reading' (2010) 24(8) *Applied Cognitive Psychology* 1129.

154 *Computer Software Protection Report* (n 143) 287–8 [15.13].

155 *Ibid* 19 [2.65].

156 *Ibid*.

157 Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 2* (Report, February 1999) ('*Simplification Report*').

158 *Ibid* 10 [2.26], 141 [7.153].

right was rejected.¹⁵⁹ The Committee justified its recommendations by pointing out ‘the special nature of published editions’ copyright, the fact that it ‘is not required under the international conventions, and that published editions exhibit a relatively low level of innovation in comparison to most other forms of copyright material’.¹⁶⁰ For these reasons it hesitated to apply a technologically neutral approach and extend the right to the online environment.¹⁶¹ The Australian Publishers Association also did not see the benefit in extending the published editions copyright to digital editions; instead it suggested that digital published editions be considered separately from print editions.¹⁶²

The CLRC recommendations were followed in the *Copyright Amendment (Digital Agenda) Act 2000* (Cth) where ‘the scope of copyright protection for published editions [was] confined to the situations which gave rise to its inclusion in ... legislation in the first place’.¹⁶³ Namely, to situations involving a hardcopy in print form only.¹⁶⁴ The Act clarified that reproduction included ‘facsimile copies’ only,¹⁶⁵ and that the newly introduced public communication right did not apply to published editions.¹⁶⁶

The failure to extend the right of published editions to the digital environment could be related to the reasons discussed above. Firstly, the rationale underlying the right was somewhat lost with the introduction of DTP software, which made typesetting and layout easy and cheap. Unscrupulous competitors no longer felt the need to make facsimile copies of original layouts. As the CLRC noticed, in as early as 1994, technology enabled all publishers to scan published editions of a printed-out work, and reformat it in order to create an original layout.¹⁶⁷ Additionally, with the introduction of new digital technologies, publishers’

159 Ibid 30 [4.07].

160 Ibid 64–5 [5.67].

161 Ibid 141 [7.153].

162 ‘The Australian Publishers Association warned that the proposal is a “tangled web”. It noted that the digital published edition should be separately identified from the hard-copy published edition, as they are separate copies, and that ownership of the hard-copy published edition copyright will not automatically give ownership of the digital version’: ibid 140 [7.151] (citations omitted).

163 Andrew Christie, ‘Simplifying Australian Copyright Law: The Why and the How’ (2000) 11(1) *Australian Intellectual Property Journal* 40, 56.

164 Ibid.

165 See *Copyright Amendment (Digital Agenda) Act 2000* (Cth) sch 1 item 133, inserting *Copyright Act* (n 1) s 135ZGA.

166 The later amendments to the *Copyright Act* (n 1), however, seem to have introduced some limited exceptions. For example, according to s 47J(7)(b) of the *Copyright Act* (n 1), inserted by *Copyright Amendment Act 2006* (Cth) sch 6 item 7 (*Copyright Amendment Act*), if a digital copy is made of photographs included in the published edition for private purposes and then the original photographs are sold, the digital copies infringe copyright in a published edition; s 110AA(1)(b) of the *Copyright Act* (n 1), inserted by *Copyright Amendment Act* (n 166) sch 6 item 9, suggests that ‘the videotape itself is not an infringing copy of the film or of a broadcast, sound recording, work or published edition of a work’, implying that the videotape could be an infringing copy of a published edition in other situations; s 47J(7)(b) of the *Copyright Act* (n 1), inserted by *Copyright Amendment Act* (n 166) sch 6 item 7, refers to a ‘published edition of a work, included in the original photograph’ (how could a single photograph be considered a published edition?).

167 *Computer Software Protection Report* (n 143) 288–9 [15.15].

investments in typesetting and layout were reduced to a minimum. Arguably, such levels of investment do not deserve special protection.

Secondly, the right was causing some friction in the newspaper publishing sector. As demonstrated in the cases above, newspaper publishers in the UK were in part trying to assert the right to published editions in order to extract additional fees from the users of press monitoring services.¹⁶⁸ In addition, during the copyright review consultation in the 1990s, Australian stakeholders pointed to the cases where media monitoring services (which attained a licence from the CAL to use copies of clippings in their services), were threatened by certain newspaper publishers which claimed they would assert their published edition copyright against the service notwithstanding the licence.¹⁶⁹ Overlapping claims from CAL and newspaper publishers for the same use caused additional legal uncertainty in the press monitoring market. As a result of ‘the overlap of the published edition copyright with that subsisting in the underlying works’, some stakeholders asked the CLRC to consider the repeal of the right or narrowing of its scope.¹⁷⁰ In those circumstances, the extension of the right to online uses would have further increased tension, and the idea of an extension was in turn rejected.¹⁷¹

Additionally, it is worth noting that with the emergence of the internet, newspaper publishers have largely lost their interest in the right to published editions. Hyperlinking to a large extent has replaced press clippings, and does not rely on the copying of layouts. Therefore there has been little interest on behalf of press publishers to advocate for the extension of the right to published editions to the online environment.¹⁷²

VII HISTORICAL LESSONS TO BE LEARNED

The history of the right to published editions teaches us some general lessons that could be useful in current copyright policy debates.

First of all, the above analysis demonstrates the shortcomings of copyright lawmaking in Australia during the 1960s. In the UK for example, there was a belief to some extent within the publishing industry that the right to published editions was needed to protect the industry against technological change and the risks that it brought with it. In Australia however, the right was arguably a mere blind transposition of the UK right into Australian law.¹⁷³ The Spicer Committee at

168 See *NLA* (n 138).

169 *Computer Software Protection Report* (n 143) 289 [15.16].

170 *Ibid.*

171 *Simplification Report* (n 157) 141 [7.153].

172 Instead, newspaper publishers have tried to claim copyright protection over titles and headings: see, eg, *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* (2010) 189 FCR 109.

173 See above Part III.

the time did not request any evidence about the need for the right or the potential impacts of it on the Australian publishing industry and society in general. Although it made the effort to collect opinions from stakeholders, the lacking industry interest meant it ultimately followed the path of ‘what is best for the UK is best for Australia’. This should not be a surprise since the publishers’ representatives, the ABPA, held this same viewpoint at the time. Five decades later, Australian stakeholders and lawmakers have probably become more careful in assessing the needs of the local industry and gathering evidence needed for effective law reform.¹⁷⁴ However, there is still a tendency to closely follow copyright law developments in the UK and other common law jurisdictions (especially the US), and local solutions continue to be largely ‘inspired’ by foreign policy solutions.¹⁷⁵

When rights are introduced that do not properly consider the actual circumstances, market forces and needs of a particular market, there is a real risk that they will be ineffective in solving the problems they were intended for. In the case of the right to published editions, we can see that historically it has been largely underused by the book publishers whom it was intended to protect. Although advocates of the right argue for its potential advantages,¹⁷⁶ in Australia at least there is no evidence to show that publishers actually faced the situations that it was meant to prevent (ie the copying of entire layouts of books by competitors), or that publishers employed the right to protect their interests in such scenarios.¹⁷⁷ Arguably, the right was of minor relevance for publishers when deciding whether to undertake a particular publishing project or not, and the absence of the right is unlikely to have had much of an impact on the Australian publishing industry. Because of this, the right was left untouched in the copyright statute for decades as a black letter rule with very limited, if any, relevance in the book publishing industry.

In parallel, there have been attempts to make use of and manipulate the right by other industries for financial gain or business interests, such as newspaper publishing or even software. Newspapers tried to employ the right to prevent competitors from copying extracts from their newspapers, while the software industry tried to leverage the right to prevent competitors copying parts of software manuals.¹⁷⁸ This demonstrates the risk that any newly created right contains in itself the possibility that it will evolve into a mechanism to protect the interests of those for which it was not initially intended. This risk is especially notable in cases where the right was not carefully defined at the outset, as was the case of the right to published

174 See, eg, Australian Law Reform Commission, *Copyright and the Digital Economy: Final Report* (Report No 122, November 2013).

175 For example, the ongoing debate on ‘fair use’ is largely based on fair use provisions in the US: see *ibid* 89 [4.12]–[4.13].

176 See, eg, Clark (n 94) 37.

177 See above Part IV. Such risk apparently existed in the much larger US market: see Letter from Publishers’ Association of Great Britain & Ireland to Board of Trade (UK) (n 29) 2. Ironically, the right to published editions never existed in the US.

178 See above Part V.

editions.¹⁷⁹ In these scenarios, the burden is on the courts to clarify the scope of the right by considering the original intention of the lawmakers. Although the UK courts initially provided a broad interpretation of the scope of the right and opened it up to use by the newspaper publishing industry, courts in both Australia and the UK would later limit the scope to better reflect the original purpose of the right.¹⁸⁰

That said, such efforts by the courts are sometimes not sufficient to entirely eliminate the issues that a new right may cause in related industries. In the *NLA* case,¹⁸¹ the courts clarified that the copying of a press clipping does not constitute a copying of a substantial part of a published edition of a newspaper and, therefore, does not lead to the infringement of the right to published editions. Despite this, some Australian publishing companies have relied on the right to approach press monitoring companies in an attempt to extract fees for the use of excerpts from newspapers (press clippings) in their services.¹⁸² This overlap of rights and frictions in the newspaper licensing market is an unexpected consequence of the right to published editions. In adopting new exclusive rights, the risk of unintended consequences should be properly assessed and minimised by carefully defining the right and its scope.

Last but not least, the history of the right to published editions demonstrates how rapidly changing technology may make the (already ineffective) right entirely redundant. Offset printing that largely replaced letterpress technology in the 1970s dramatically reduced the cost of creating an independent layout for a printed edition. A couple of decades later, layout costs further decreased with the introduction of DTP software.¹⁸³ This led to the question of whether the investment required to create a layout still deserves or requires special protection under copyright law. The new DTP technology enabled competitors to create their own layouts with just a few clicks of the mouse, essentially eliminating the risk of unscrupulous copying of layouts. After the failed attempts of publishers to lobby for the extension of the right to the digital environment, the right to published editions essentially became redundant. The risk that a new exclusive right, such as a press publishers' right online, will also become outdated and redundant remains especially high today. This is because the evolution of technology and online business models is faster than ever. Meanwhile, removing a redundant right from the statute may be more difficult than introducing it in the first place.¹⁸⁴ This ultimately leaves copyright statute with dead letter provisions, which contributes

179 Although it was lobbied by book publishers only, it was drafted in a broad way to encompass any 'published editions'.

180 See *Nationwide News Appeal* (n 115); *NLA* (n 138).

181 See above Part V.

182 *Computer Software Protection Report* (n 143) 289 [15.16].

183 See above Part IV.

184 Although there have been some suggestions to abolish this right, they have not led to any results so far: see, eg, *Computer Software Protection Report* (n 143) 289 [15.16].

to the further unnecessary complexity of copyright law.

VIII CONCLUSION

The historical analysis of the right to published editions reveals a number of interesting facts and lessons that could be applied to the contemporary copyright policymaking process.

Australia has a tradition of closely following the copyright law developments of other countries, especially the UK, as evident with the right to published editions arguably being a blind transposition of the UK law into the Australian copyright statute. Such transposition of foreign copyright law provisions into local law without the careful assessment of the local market situation and its needs is likely to lead to ineffective laws in Australia. Furthermore, new rights have the potential to be manipulated by other industries and cause unexpected issues in other markets that are difficult to eliminate, even with the restrictive application of the right by courts. In addition, exclusive rights, especially those that are meant to address the challenges posed by new technologies, tend to become quickly outdated and risk becoming redundant, especially in today's environment of fast-evolving technology and business models. These and other potential risks should be kept in mind and properly addressed when discussing and designing new rights, such as the new right for online press publishers recently adopted in the European Union.