

**The Copyright Regulatory System in Ireland:
Its Development and Effects, 1700 - 1990**

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May 2001

I hereby certify that this material, which I now submit for assessment on the programme of study leading to the award of Ph.D. is entirely my own work and has not been taken from the work of others save and to the extent that such work has been cited and acknowledged within the text of my work.

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Abstract

This study investigates the formulation of copyright regulation in Ireland, within the administrative and political structure, in the context of wider cultural and political debates in the period between the eighteenth century and the late twentieth century. Political, cultural, industrial and economic inputs to the formation of policy are identified and analysed.

A critical examination of the development of the country's copyright regulatory system is provided, in order to give an assessment of its effects on specific Irish cultural industries in each of the major periods which were researched. The printing and publishing industries are a consistent focus, but this is extended in later chapters to include broadcasting and some developing new media. The influence of copyright legislation on the balance between the development of the cultural industries in Ireland and the importation of cultural goods from outside Ireland is demonstrated in parallel with this assessment. A lack of awareness of the possibilities of linking Irish cultural production to cultural reproduction within Ireland is demonstrated. The development of the Irish content industries is shown to have been almost wholly dissociated from the intentions of the framers of the copyright regulatory framework, in contrast to the situation in other states.

It is shown that debates on Irish copyright policy began in earnest only after independence. The contamination of copyright policy by extraneous issues (notably the use of copyright policy as an instrument for the assertion of sovereignty) is highlighted. The relative absence of analysis of the substantive matter of copyright and of its effects, together with the associated shadowing in Irish legislation of pre-existing British forms, draw attention to the normative approach within the Administration to British copyright choices. The longstanding dependency of the Irish administration on external debates and solutions to copyright problems is established.

The study concludes with a commentary on the implications of Irish copyright regulation on the industrial and cultural development of the country. The shift of the location of debate from domestic to international negotiating forums, notable the European Union and the World Trade Organization is shown. The necessity for realism in relation to the contemporary possibilities for Ireland to use copyright regulation to achieve differential beneficial effects for the country is argued.

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List of Abbreviations

AG	Attorney General's Office
Berne	The Berne Copyright Convention
CCE	Comhaltas Ceoltoiri Eireann
CLE	Cumann Leabharfhoilseoiri Eireann (Irish Book Publishers' Association)
CSO	Central Statistics Office
CTT	Coras Trachtala Teoranta
DD	Dail Debates
D/EA	Department of External Affairs (later Department of Foreign Affairs)
D/Ed	Department of Education
D/FA	Department of Foreign Affairs (previously Department of External Affairs)
D/T	Department of the Taoiseach
DETE	Department of Enterprise, Trade and Employment
DTPS	Dublin Typographical Provident Society
EBU	European Broadcasting Union
EU	European Union
GATT	General Agreement on Tariffs and Trade
Gov. Gen.	Governor General's Office
HC	House of Commons (British)
I&C	Department of Industry and Commerce
IBEC	Irish Business and Employers' Confederation
ICLA	Irish Copyright Licensing Agency
IDA	Industrial Development Authority
IFS	Irish Free State (Saorstat Eireann)
IMRO	Irish Music Rights Organisation
INFACT	Irish Federation Against Copyright Theft
IPR	Intellectual Property Rights
IRMA	Irish Recorded Music Association
LDCs	Less Developed Countries
NAI	National Archives of Ireland
NLI	National Library of Ireland
P&T	Department of Posts and Telegraphs
PAC	Public Accounts Committee of Dail Eireann
PC	Privy Council (in reference to the Judicial Committee of the Privy Council)
PO	Patents Office
PPNP	<i>Progressive Printer and Newspaper Publisher</i>
PRS	Performing Rights Society
RDS	Royal Dublin Society
RE	Radio Eireann (pre-1961)
RTE	Radio Telifis Eireann (after 1961)
SD	Senate Debates
TCD	Trinity College Dublin
UCC	Universal Copyright Convention (the Geneva Copyright Convention)
UDC	Urban District Council
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation

Periodicals publications and newspapers consulted

Administration
The Author
The Bell
Billboard
Christus Rex
Copyright Bulletin
Dublin Historical Record
Dublin Magazine
EBU Review
Envoy
Evening Herald
Ireland Today
Irish Book Lover
Irish Builder
Irish Ecclesiastical Record
Irish Economic and Social History
Irish Folk Music Studies
Irish Historical Studies
Irish Independent
Irish Intellectual Property Review
Irish Law Reports
Irish Law Times and Solicitors' Journal
Irish Press
Irish Statesman
Irish Times
Irish University Review
Journal of the Statistical and Social Enquiry Society of Ireland
An Leabhanlann
The Leader
Long Room
Progressive Printer and Newspaper Publisher
Publishing History
The Round Table
Studies
Sunday Tribune

Archival Sources

National Archives of Ireland

Attorney General's Office
Department of Education
Department of Foreign Affairs (previously Department of External Affairs)
Department of the Taoiseach
Department of Enterprise, Trade and Employment
Department of Justice
Department of Posts and Telegraphs (later Department of Communications)
Governor General's Office
Patents Office

Cabinet Minutes

National Library of Ireland

Pamphlet Collection
Daniel Corkery papers

Royal Dublin Society

Proceedings of the Royal Dublin Society

National Print Museum

Archives

Official Publications

Dail Debates
Senate Debates
Reports of the Dail Public Accounts Committee
Report of Dail Committee on Industrial & Commercial Property (Protection) Bill
1925

Irish Parliamentary Register (Eighteenth century)
Journal of the Irish House of Commons (Eighteenth century)
House of Commons (London) Debates (Nineteenth century)

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Chapter 1: Introduction, Research Questions and Methodology

1.1 Introduction to the key concerns of this thesis

This thesis examines the development and influence of copyright regulation in Ireland from when it began to impinge on the country from outside in the eighteenth century until the early 1990's, when the formulation of Ireland's copyright regulatory apparatus was about to be transformed by the changes in the country's institutional obligations as a Member State of the EU. The development of Irish copyright regulation in the intervening period has been distinctive for a number of historical, political and cultural reasons. I examine the development of this copyright regulation, I situate this in the context of domestic and international debates and I relate the regulatory framework to Irish cultural production.

The thesis proceeds from an axiomatic position that states, acting in their legitimate self-interest, make purposive choices in relation to copyright regulation in furtherance of policy objectives. These are typically in the industrial, cultural or social spheres. Industrial development policy goals tend to centre on the use of copyright as a tool for the development of publishing and other industries. Cultural and social objectives can be linked to these aims, and typically involve the mobilisation of distinctive copyright law provisions to encourage the development of a body of published work in a society, generally to raise the level of cultural attainment in a society, or, as a minimal goal to raise literacy levels in a society. The development of copyright policy in Ireland has not hitherto been a subject for study from this perspective, and this thesis sets out to examine how Ireland measured up to the demands placed on it, particularly by the possibilities offered for independent action after 1922, when legislative independence was achieved.

1.1.1 What is copyright?

Copyright, in the sense in which it is examined in this study, is the legal right of an author or other creator to derive recompense from the market for the labour involved in creating an original or novel work. A bargain is struck between society and the creative individual, in which the work is made available to the public for the benefit of society,

while the creator is granted a limited monopoly right to derive financial benefit from the sale of his work. The monopoly granted to the author is limited in time.

A body of law has been developed which modifies the application of this bargain, for the differential achievement of greater social benefits. The debates which are the substance of this thesis largely concern the nature of the modifications of the simple absolute right of the author. These debates have led to the enactment of regulations in different countries and territories in furtherance of different political, social, cultural, industrial and economic agendas. Few countries have been aloof from these debates, and indeed the debates have become more intensely argued over recent decades, under the impact of forces such as the emergence of new states, the development of new technologies, the development of ideas of national cultural rights and the creation of international organisations and agreements to administer copyright treaties and other pacts.

1.1.2 The importance of the topic

The legal regulation of the production, reproduction and circulation of cultural goods in societies is intrinsically interesting, because of the choices made by governments and societies, the reasons for the choices and the results from those choices. An understanding of the forces which gave rise to the existing regulatory situation in Ireland provides a useful backdrop to the ongoing debates on domestic and international copyright regulation. The historical perspective is particularly illuminating, as I will argue that the failure by Ireland to develop a cultural industry on a scale commensurate with its cultural achievements was in part due to the regulatory choices which were made after independence.

There is also an intrinsic interest in charting the development of an aspect of communications regulation in a particular territory over an extended period. Copyright regulation, as one of the earliest forms of communications regulation, provides an unusually long span over which to examine cultural and industrial effects. Despite radical structural political changes in Ireland over the period of the study, for most of the period Ireland adopted a regulatory framework which derived from outside itself, and which was not advantageous to its own interests. Certain paradoxes become apparent from an examination of the historical record in this regard, and these will be addressed.

Ireland has developed and propagated an image of itself as a cultural community, in which the products of its distinctive native culture have been accorded high social prestige. By the late twentieth century many aspects of its creative culture have been celebrated by its social and political elites, as well as by the consuming population. In this context, the formulation of the regulatory framework for the protection of its culture rightly draws attention to itself as an important subject for study. The apparent disjunction between the celebration of cultural production and the absence of a finely judged regulatory system to protect and differentially encourage cultural production form part of the motivation for undertaking this work.

The cultural background to the Irish independence movement in the nineteenth and twentieth centuries, in which many of the political leaders either were themselves writers, or were closely associated with cultural and literary movements, makes the later antipathy of the political world to cultural issues striking. Certain forms of 'high cultural' artistic and creative activity was not always politically acceptable in post-independence Ireland. In parallel, the cultural nationalist agenda became separated from the practical industrial exploitation of cultural production. When placed in the context of the spoken and unspoken myths of Ireland as a major source of cultural production and in the context, after independence, of an Ireland which restricted the circulation of cultural goods through the use of censorship, the actual place of cultural production in Irish society can be discerned more clearly.

The desires of the Irish "political class" after independence to establish the legitimacy of the Irish state led to a sacrificing of the potential of full sovereignty to the greater goal of being seen as capable of running a functioning State. Ireland was buffeted by international interests, and became preferentially attached to the formal attributes of legal sovereignty. Copyright policy was mobilised symbolically but in a futile manner in the furtherance of the government policy of restoring the Irish language. This decorative use of copyright regulation demonstrated that, while the lesson of the importance of copyright had been learned, it was used only in the most ineffectual manner.

The Debates

The Irish government saw copyright regulation only as a means of regulating the cultural economy according to legal structures developed primarily in Britain. The parliamentary and extra-parliamentary debates, such as they were in the early post-independence years, did lead to the ventilation of the idea of using copyright to assist the printing industries,

but avoided any serious consideration of the cultural potential of the publishing industries. Irish shadowing of British copyright policy throughout the post-independence period is a constant factor in this discussion.

In the following chapters, I seek to identify who was thinking strategically in the Irish debates. After independence, it is clear that the most strategic thinking was done by foreigners. Industrialists, including publishers, were generally little concerned with the issue. Some writers proposed positive policy options in the debates, but their efforts were generally sporadic and atomised.

1.1.3 Exclusion of Legal deposit

I have excluded any detailed discussion of the legal deposit of books in this study, as I believe that the issue is not relevant to discussions of copyright, and should, in my view, be separated from copyright in law. However, disputes about legal deposit frequently dominated discussion of copyright in Ireland, because of the legislative linkage of the two issues. Despite the very minor financial consequences of the provision of reciprocal legal deposit obligations between Ireland and Britain, the symbolism of requiring publishers by law to supply free copies of books to foreign institutions meant that the provision was always controversial. As a result, it tended to engage the interest of legislators and others, to the detriment of considerations of the central concerns of copyright law.

1.2 Brief Overview of the historical background and context of this study

1.2.1 The Eighteenth Century

The effects of copyright regulation on the cultural industries are traced from the eighteenth century, when the country did not legislate for copyright. Indeed, the Irish Parliament refused to legislate, despite strong pressure from British political and economic forces late in the eighteenth century. A successful publishing industry developed in Ireland, which assisted in the dissemination of British cultural products, within Ireland, in the world outside, and even in Britain itself. This publishing industry,

off-shore to Britain, and exporting illegally to Britain, was widely accused of being based on copyright piracy. Despite the energy evident in this publishing industry, the pattern of texts of Irish origin being first published in Britain became well-established in the eighteenth century. The Irish publishing industry was confined by economic realities to publishing material for purely local consumption, or reprinting without permission material issued by London publishers and exporting the bulk of the production. This has a dual effect: a large publishing industry developed in Ireland, but this was largely separated from local cultural production.

1.2.2 The Act of Union and the Nineteenth Century

The Irish publishing industry collapsed within a few years of the Act of Union of 1800. A cluster of factors were responsible, including the imposition of UK copyright law on Ireland. No efforts were made to provide Irish publishers with transitional measures, which might have cushioned the blow of the imposition of copyright. Since this was a period in which the norms of copyright law were being developed, the potential existed for some modification of the rigid territorial application of the law (which later became the universal rule). The lack of access for Irish publishers to copyrights, which were monopolised by prior ownership by British publishers, placed Irish publishers at a great disadvantage at this time.

Ireland in the nineteenth century underwent immense social, cultural and economic changes. In the course of these changes, technological developments in physical communications and in printing negatively affected the capacities of Irish publishing to serve the Irish market. The apparent Irish preference for newspapers over books, partly determined by the relative costs of the two products, militated against the emergence of a strong book-publishing industry. The linguistic changes in Ireland, as the Irish language gave way to English, with a corresponding increased consumption of English texts, reduced the potential of developing a publishing industry serving the Irish-speaking population, while further exposing Ireland to cultural imports from Britain. Paradoxically, a proportion of the imported cultural material derived originally from Irish writers. The publishing industry sector which best survived in nineteenth century Ireland was educational publishing, issuing texts in English, and developing an export trade in some territories or among particular religious groups abroad.

1.2.3 The Twentieth Century

Copyright legislation in Ireland was used in the 1920's for purposes entirely unconnected with its intrinsic purposes. The assertion of Irish legislative independence from Britain through the enactment of copyright laws was a primary aim of the new administration. This applied also to Ireland's adherence in its own right to international agreements, which included those on intellectual property. The government used copyright as a tool to demonstrate that the country was an independent member of the British Commonwealth, while simultaneously it re-enacted the broad principles of British legislation in Ireland. The Irish administration did not concern itself with any serious examination of the potential of copyright regulation as an engine for cultural or industrial development. Copyright legislation in independent Ireland became diverted into byways of industrial and cultural objectives. In particular, Ireland had recourse to the exemption provisions or 'derogations' of international agreements to assist the educational publishing industry, and to assist the translation of works into Irish, as part of a half-hearted, financially unsupported effort to revive the spoken Irish language. Throughout the 1930's, Ireland's attitude to copyright reform was one of indifference. International economic and political factors influenced this, but the more settled international acceptance of Irish independence may also have been a factor.

After the Second World War, as new international information and development policies were elaborated, Ireland too adopted a more sophisticated attitude to international copyright. Domestic awareness of the potential of copyright law to achieve policy objectives, and of the scale of the potential export market for Irish cultural goods both developed in the post-war period. This arose as a result of the gradual opening up of international markets, and as new Irish publishing houses with real cultural credentials were established. Irish publishers and writers in the late 1940's and early 1950's began to agitate for changes in copyright law. In particular, the need for a proper copyright agreement with the US became urgent for some publishers, who had begun to tap the potential of the market among Irish Americans for non-fiction works about Ireland. The government in the 1950's set aside a translations reservation¹ which had formed part of the copyright legislation since the 1920's, as part of a realisation of the futility of the use of such crude regulatory measures as agents in the attempted revival of the spoken Irish language.

¹ This allowed the publication of translations of books into Irish without payment to the authors, in specific limited circumstances; this was permitted under the Berne Convention in the revision which was internationally applicable in the 1920's.

In the late 1960's there was a renaissance of Irish public and official recognition of and support for cultural production. This did not take the form of using the copyright law, however, as had been the case in the United States and in developing countries. Instead, special legislative measures were introduced to give taxation privileges to cultural works of certain kinds. The Arts Council later became involved in the support of cultural production in this sector. National policies in support of the Arts, and of literature, were formulated. Recognition of the importance of culture was being made more explicit in the 1980's, with the appointment of the first Minister for Arts and Culture. Other culturally-based initiatives were taken, such as the establishment of Aosdana, a writers' and artists' academy. The Arts Council in the 1980's recognised the anomaly of Irish writers publishing abroad, and a sense of the rightness of publishing Irish authors in Ireland developed in official circles, and this was articulated in policy documents at the time.

The EC Commission, which had historically taken little interest in copyright, began to intervene in the field in the late 1980's, as it recognised that intellectual property rights had to be regulated in the proposed European Single Market.

Ireland's copyright law had become more out of phase with technological and international political demands in the 1980's, as new media emerged, and as new international minimal desirable levels of protection became prevalent. Once Britain amended its Copyright Act in 1988, Ireland's law was clearly dated and technologically inappropriate. Government intentions of introducing amending legislation were flagged throughout the 1990's, but the Copyright Bill was repeatedly delayed, partly as a result of the onward rush of technological development, and also because the international intellectual property landscape was transformed as new policy-making and policy-enforcing actors emerged.

Disinterest in Irish official circles in the mobilisation of copyright regulation for cultural purposes continued into the early 1990's. The impetus for change, leading to the introduction in 1999 of a major new Copyright and Related Rights Bill, derived from external pressures. The European Commission and the WTO are now the major agents in driving Irish copyright policy. The US became the most active direct force on Ireland, through the mechanisms of the WTO, following the transformation of that country's copyright policy in the 1980's.

In the late 1990's, the Irish government introduced a Copyright and Related Rights Bill which was intended to adapt Irish regulation to new technologies and to give domestic legal effect to new international agreements. The government's intention was that what it assumed would be a non-controversial Bill would be enacted quickly, with limited parliamentary debate. In fact, due to the unexpected mobilisation of a wide range of economic actors in Irish society, the parliamentary progress of the Bill was greatly retarded, and the Bill had not been enacted by the end of 1999.

By the end of the century, the economic, social and cultural importance of copyright regulation was finally recognised by a wide spectrum of political actors in Irish society. If this had been the case at an earlier period, it is likely that a regulatory system could have been devised which would have given considerable legislative support to the productive Irish cultural sector, including a strong indigenous publishing industry. This thesis examines a situation in which copyright regulation was relegated to being the concern of only a few actors, and in which the government generally did not give a lead in recognising the potential of regulation to transform the extent and importance of cultural production and exchange.

1.3 The Research Questions addressed

I examine the historical record to seek to answer the following four primary clusters of questions.

1.3.1. What was the relationship of copyright regulation to the political project of nation-building and state-building, and how did this relate to conceptions of Irish cultural identity and distinctiveness? Why and how was copyright law mobilised for diplomatic and political purposes which were analytically distinct from the ostensible purposes of copyright?

In certain states, copyright regulation was mobilised by governments as a tool in projects of nation-building or state-building. This was notably so in the cases of the United States and Canada in the nineteenth century which created copyright regulatory regimes for policy purposes which extended beyond merely regulating the market for published works. These countries devised copyright regimes finely tuned to the needs and

prospects of their own cultural and economic conditions, to a considerable extent heedless of the protests of other states. In the twentieth century, some other states have identified copyright regulation as a tool in their attempting to repeat the developmental trajectories of these earlier states.

Cultural distinctiveness

Copyright regulation can be mobilised in the cause of nation building or state building, by selectively protecting domestic cultural production, for example, or by imposing disabilities or differential barriers to imported cultural goods. This might be done in furtherance of the development of an indigenous corpus of published work, in which nationalistically-acceptable political or cultural values might be propagated. In the cases of states which are grounded in ideologies of cultural distinctiveness, such policies would offer useful and appropriate support for such political objectives.

When Ireland emerged after 1922 as an independent state, the foundations of nationalistic thought among the new political elites included the belief in the country's cultural distinctiveness. This distinctiveness was expressed linguistically through the Irish language. The folk cultural traditions of Ireland, in music, dance and other art forms similarly expressed this distinctiveness. Because there was a political desire to distinguish Ireland culturally from the English-language culture of the United Kingdom, the new Irish administration might have been expected to examine its cultural legislation and regulatory framework, in search of mechanisms which might be used to mobilise cultural distinctiveness for this political purpose.

Translations and education

The issues of Irish translation and educational reservations in copyright law will be examined in later chapters. In particular, the genuine belief in some political and administrative circles of a likely linguistic transformation in Ireland is relevant to a discussion of copyright, since it informed positive actions by the government. It also diminished the political impetus for taking other action in favour of English-language based cultural industry development. On this issue, one of genuine political interest to legislators, Ireland made a formal, if ultimately insignificant, departure in its legislation from British practice, in the face of considerable international opposition.

Diplomatic use of copyright law

I will examine how copyright legislation was used to assert the Ireland's independence from Britain in the 1920's. The government harnessed copyright for policy purposes which were not intrinsically concerned with copyright, but rather for purposes of establishing internationally the independent status of the Irish state. This gave copyright regulation a higher profile than its intrinsic interest had for politicians. An assessment will be given of the consequences which flowed from the assertion of independence in this manner. The effectiveness of Irish copyright diplomacy, and, in particular, the striking disproportion between the diplomatic energy expended and the minor gains made will be revealed.

1.3.2. What were the industrial effects of copyright regulation on the publishing industry, and secondarily on the printing industry in Ireland over the period of the study? What were the cultural consequences of these effects? What debates took place on the influence of copyright regulation on cultural production? These questions concern the application of copyright regulation as a potential tool for cultural and industrial development purposes.

National studies of the effects of copyright regulation on industries concentrate largely on 'manufacturing requirements', such as those enacted in the United States, or on copyright regimes which do not accord protection to the works of foreign nationals. However, copyright regulation, given the myriad regulatory differences which it can encompass, can affect cultural industries in many different ways. The Irish copyright regime demonstrably had effects on the publishing and cultural industries, from the earliest periods.

Among the issues which arise under this heading are: What effects did copyright legislation have on the development of an Irish publishing industry? How were the Irish publishing and cultural industries affected by legislative and regulatory developments which were formulated before 1922 to accommodate the UK general interest, and after 1922 to meet the needs of international industry? To what extent, over time, was there a feedback into the legislative drafting system, in the sense of previously observed deficiencies being rectified?

The proposed Irish manufacturing clause, debated in the 1920's, was intended by its proponents solely to sustain the Irish printing industry. The reasons for its failure to gain

acceptance, and the reasons why its proponents confined themselves to an industrial rather than a cultural agenda will be examined.

The extent of the debates in Ireland on copyright law, and on its relevance to the development of an Irish “cultural capital”, of a collective national cultural patrimony, will be examined. This linkage, which has become almost a truism of debates in the twentieth century, is prefigured in some contributions to the debates in the nineteenth century. The limited extent of these debates in Ireland contrasts sharply with the energetic debates in the US, but even more, with the debates in Canada, which was in a broadly similar, if, perhaps, even more difficult situation, than Ireland.

1.3.3 How can Irish copyright regulation be situated historically in the wider regulatory environment for the control, regulation and encouragement of cultural production?

Copyright law was a minor concern for Irish legislators and regulators, in comparison with other IPR issues, notably patents and trademarks. In formulating Irish copyright law, the protection of authors was emphatically a minor concern. The reasons for the apparent national pride in writers which existed in parallel with a reluctance to support a cultural industry will be highlighted. The attempted mobilisation of copyright regulation in Ireland as a minor support for censorship will also be examined.

Technological developments in electronic media in the 20th century led to provisions in copyright legislation which were primarily directed at securing preferential rights for broadcasting (in effect for the State). The reasons for the diminution of the rights of Irish creative artists, and in particular musicians, will be examined. Latterly a new balance was struck, in favour of the mass media audience, in response to wider European pressure. I will also argue that Ireland adopted international ‘good practice’ in copyright law at all times, merely to be seen to be at the forefront of international developments.

1.3.4 What were the effects of the internationalisation and ultimate globalisation of copyright regulation on Irish regulatory policy-making, and on Irish cultural production?

The pattern established before Irish independence was that copyright law was internationalised. Ultimately it became globalised in its application. The pattern is reflected in Ireland, as legislation was enacted in response to international obligations, and later in response to direct, strong international pressure, particularly from the US, and, perhaps more legitimately, from the EU.

The situation today is that, as a policy-furthering tool, differential regulation of copyright in Ireland is no longer available to the government to be applied differentially in favour of Irish industry or cultural development. However Ireland still has a voice within the European Union, within the Berne Union and, to a diminished extent, within the World Trade Organisation. Nevertheless, the days of applying copyright law for domestic advantage, or to advantage particular sectors of the cultural industries have passed.

When the opportunities were available, Ireland prioritised international good practice over national interest. The geographically-enforced and economically-enforced iron logic of the regulatory marketplace probably mean that, with the exception of the possibilities in the 1920's, Ireland has been a regulatory prisoner in copyright terms since 1801.

1.4 The structure of the thesis

The research questions will be addressed through a longitudinal historical approach. This chapter sets out the questions to be addressed, indicates the methodology which is used and places the questions in the context of the contemporary debates in Ireland.

Chapter 2 is a literature review, arranged thematically, in which relevant authorities are discussed in the context of the Irish situation. The relative absence of a literature on the regulation of Irish policy is drawn out in this chapter, and the reasons for a reliance on international authorities is made clear. National case-studies are employed, but no directly analogous example is known. The international literature provides useful conceptual steers and guides which are applied to the Irish case throughout the later chapters.

Chapters 3 to 7 cover historical periods, from the eighteenth century to the end of the twentieth century. The divisions between the chosen periods is determined either by political changes or, in the twentieth century, by regulatory transformations in Ireland.

In Chapter 3 I deal with Ireland before the Act of Union of 1801. This was a period in which copyright law was being developed in Britain and, later, in the United States. From 1710 to 1801, Ireland did not introduce a copyright law. By standing apart at this time, Ireland took advantage of its absence of copyright law, but it also sacrificed any opportunity to develop copyright law in a manner appropriate to its own local conditions, or to participate in the early debates on the formulation of copyright law.

In Chapter 4 I cover the period of the United Kingdom, from 1801 to 1922. Following the Union, copyright law was extended to Ireland almost immediately, and the country was subsumed into a single copyright territory with Britain, without public debate and without any transitional period to allow the industry to accommodate to the changed circumstances. The publishing industry of the country was subjected to a radically changed legal and commercial environment at the time, and implications of this for the publishing industry are discussed. Throughout this period, modern international copyright law began to be developed and the international treaty system of copyright reciprocity was established. Ireland had no separate voice in the debates of the time. Technological changes in this period also extended the possibilities of communications and of cultural reproduction. Regulatory systems responded piecemeal to these developments. In this chapter, the copyright situations in the United States and in Canada are discussed, since these case-studies offer two other options which might have been available to Ireland if it had remained a distinct copyright territory.

Chapter 5 is a discussion of the debates on Copyright in Ireland from independence in 1922 until 1949. The end date for this period is chosen because the 1950's marked a major change in official Irish attitudes to copyright, in response both to international activism on copyright regulation and to domestic requirements.

Chapter 6 deals with copyright in Ireland between 1950 and 1963. In this period, the impact on Ireland of new technologies gave substance to the Irish debates. At this time the country became further enmeshed in the international treaty system governing copyright. The most searching debates on copyright in Ireland for which there is archival evidence took place in this period. For the first time, a consideration of copyright regulation in relation to cultural and larger political objectives is evident. The period

ends with the enactment of the 1963 Copyright Act, which remained the main copyright legislation in Ireland for the remainder of the century.

Chapter 7 discusses the debates on copyright in Ireland from 1964 to the 1990s. By the end of the period, various international forces were again acting on Ireland to make a new Copyright Act desirable. By the end of this research period, the new Copyright and Related Rights Bill had not been finalised or passed by the Oireachtas, and, indeed, was being amended repeatedly by the government during its parliamentary progress. By the end of the century, there was much wider awareness of the importance of IPR issues in the country. Government policy, which prioritised the development of electronic commerce, necessitated the enactment of high level IPR protection. However, new interest groups emerged at the end of the century, and forced a radical consideration of the proposed legislation. Civil Service aspirations for administrative convenience had to come to terms with the demands of newly-informed actors, including consumers' groups. For perhaps the first time in the history of the Irish debates, the parliamentary process has given voice to a variety of opinions, and Ireland, despite government intentions, will not in this case merely re-enact the maximalist provisions of the international treaties, as defined by the major international actors. At the moment when Ireland's independence of action in relation to copyright was becoming most restricted, civil society in various forms emerged to influence the debates. This is more than an empty irony, however, since it demonstrates that the trade in cultural and information goods has now become a practical concern for a wide range of opinion in Irish society. Much of the artificiality and legal fiction of the debates in earlier periods have been replaced by hard-headed economic, social, cultural and political concerns.

The final chapter presents the conclusions drawn from the research in relation to the research questions, proposes issues which would merit further research and suggests policy implications for Ireland in the future as the country formulates its copyright law in changing conditions.

1.5 Methodology and Bibliography

A mass communications approach, with a reliance on the literatures of political economy, industrial development policy studies, developmental theory and cultural studies have informed the approach used in this study. The relevant contemporary literature in legal history and historical bibliography expanded the field in which the research was conducted. The work is organized as a longitudinal study of the Irish experience of copyright regulation, from the pre-history of an Irish copyright regime in the eighteenth century, through the unusual experience of a non-copyright territory being incorporated into a pre-existing copyright territory without any transitional or ameliorative measures and, finally, into a stage where there is a distinct Irish political territory coinciding with a copyright territory.

The study is based on a critical examination and interpretation of the published and archival record. Using a comparative approach which draws on the literature relevant to the experiences of other states, particularly Canada and the United States, the study proceeds on the basis of an archival and literature analysis, where Irish regulatory policy is situated in the context of the industrial and cultural development of the country. The intention of the study is to examine the data and to seek to answer the research questions.

This is done in the following context:

- (a) to examine the debates which surrounded the development of the Irish copyright regime;
- (b) to situate the debates in both
 - (i) the wider Irish legislative and regulatory framework, understood in both its industrial and cultural senses and
 - (ii) the inter-state and multi-lateral international context; and
- (c) to analyze the actual effects of the regulatory regime on industrial and cultural activity.

The comparative perspective which is used draws particularly on the experiences of states in similar conditions to Ireland, in terms of scale, history or national developmental patterns.

The research on the pre-1922 period concentrates on the published record, both of pre-existing academic work in this field, and on texts from other fields which offer insights and understanding of aspects of the development of the regulatory system in Ireland. For the work on the eighteenth century, the published work used is primarily historical, although the contemporary published documents of the Irish Parliament, including the Journals of the Irish House of Commons were consulted. The indexing literature, including online literature searches, was used to identify sources in the periodical literature.

The work on the nineteenth century depends mainly on published sources. The contemporary periodical literature was selectively examined, guided by more recent historical writing. The holdings of the Department of Early Printed Books in TCD and of the National Library of Ireland were the most useful sources. The records of the deliberations of the Royal Dublin Society were also used. An important source has proved to be the publication *Irish Builder*, which in the late 1870's published a series of articles on the Irish book trade. The printed material used includes the official publications, including parliamentary debates, reports and other official papers. The legal report literature was used, using the published digests of cases and the academic legal literature as indicators of relevant material. The literature of the cultural movements of the nineteenth century, particularly for the Young Ireland period, and for the period of the Irish Literary Revival have been used. The academic economic surveys published in the nineteenth century, and early twentieth century have been relied upon for economic information relevant to the publishing trade. The works of influential creative writers in Ireland who adopted a stance on cultural development have been consulted selectively, in search of a fuller perspective on the cultural debates of the time in relation to publishing.

The work on twentieth century material relies more heavily on archival sources. However, printed works are also used, including contemporary literary journals and magazines, political journals, newspapers at critical junctures, official reports and law reports. The parliamentary debates were a major source, since much of the content of the debates on copyright in the early years after independence is not adequately recorded in the archival material. The National Print Museum also held useful documents.

The archival material is dominated by government files in the National Archives, and also submissions to government from outside organizations which have not been

preserved in the National Archives but which exist elsewhere. The files of the Department of Posts and Telegraphs, of the Department of Industry and Commerce, of the Department of Taoiseach, of the Department of External Affairs, of the Governor General's Office, of the Attorney General, of the President's Establishment, and the files of Cabinet Minutes were the main archival sources used.

Certain archival sources proved to be unavailable or destroyed. The policy files of the Patent Office, which were likely to have been informative, are missing for all years before 1958, and have been unavailable for administrative reasons for the remaining period. This is a considerable loss, since the Patent Office had a strong influence in the development of Irish copyright policy until the 1960's. For the period 1958 to 1963 the Director of the Office was a dominant figure in the debates which led up to the enactment of the 1963 Copyright Act, and in other debates at the time. However, due to the copious archival material preserved by the Department of Posts and Telegraphs for the period, much of the Patent Office's contributions to the debates can be reconstructed, though from an oppositional source.

The last year for which archival sources were available was 1969. The release of files by Government Departments has depended on departmental administrative decisions, and so certain files are not available. Similarly, divergent retention policies have had a considerable impact on the nature and scale of material which has survived. In the case of the Department of Education, and of its publication branch An Gum, no relevant policy files were available, and it appears that none may exist. This has been a matter of regret, since Irish copyright policy until the late 1950's had an educational purpose, and the Department of Education adopted a position on broadcasting copyright in the 1950's which can only be recouped from the antagonistic record preserved by the Department of Posts and Telegraphs.

After 1969, archival material was not available, and the mechanisms of the Freedom of Information Act 1997 were used to obtain an insight into official thinking on the contemporary copyright debates. However, this procedure was unsatisfactory, since a gap of almost thirty years exists, between the latest date for which material is released under the terms of the National Archives Act 1986, and the first date for which material must be released under the Freedom of Information Act, 1997. Some government departments refused to release any material, for various reasons. The Department of Enterprise, Trade and Employment, which was drafting the Copyright and Related Rights Bill, 1999, refused to release any material which pre-dated the coming into force in 1998 of the Freedom of Information Act 1997. Later material was released

selectively. However, because the Copyright and Related Rights Bill 1999 was being drafted, the obligations on the Department to release documents under Freedom of Information legislation were lessened. Because aspects of copyright policy involve relations with foreign states and governments, many records still remain confidential. This, combined with the built-in delays in the Freedom of Information procedure, mean that such information as was released was repetitious and of relatively minor interest or importance, though it was released in considerable quantity.

Personal interviews with a number of the actors in the Irish copyright debate were conducted. Experts in aspects of Irish publishing history and cultural history were consulted. These were not used as primary research methods or data gathering exercises, but were invaluable as disclosures of the existence of material sources, or as suggestions on new directions to take.

1.6 Conclusion: Agenda setting

The historical perspective which is offered in this work allows for some agenda-setting for Ireland in the new century. Many of the issues which were debated in relation to the relatively underdeveloped technologies of the time become more germane to the concerns of today, as further new technologies become available and begin to penetrate society. The debates, which in the past were frequently relegated to a small minority of legal experts, are now being repossessed by a wider constituency of interests, as citizens and groups identify direct personal and collective interests in copyright regulation.

While the technologies change, and the regulatory solutions to the dilemmas posed are couched in contemporary terms, certain truths about copyright remain apparently immutable. The fact that copyright law exists to regulate the exchange of works of intellectual property in the market remains true. The necessity to balance the sides of the bargain between the creator and society remains. The asymmetric power relations between states continue to have effects on the debates. The globalising forces of the international organisations, large communications companies and of the major producer states have had a powerful impact on the effectual exercise of sovereignty by smaller states. Ireland's residual sovereignty in the copyright arena, which is hemmed in by international agreements, by membership of the EU and by direct pressure from foreign actors, should be recognised. The recent Irish legislation, originally presented by the government in 1999 as a *fait accompli*, to enact international obligations, has been

chipped away at its edges by legislators, to produce a better fit for Irish conditions. Regrettably, there remains in the official mind a belief that Ireland must accept international buffeting and simply behave passively in its legislative function. This has been the pattern throughout the past eighty years, and, although the opportunities for independent action are narrowing, there is value in being aware of the possibilities of ameliorating action by the legislature.

As a result of EU membership, Ireland is part of a major actor in the international copyright debates. If culture is considered important, Ireland can now seek to influence policy from within the EU in furtherance of its objectives, because the EU is one of the prime initiators of proposals for changes in international copyright law. In the course of this research, no record of any initiative by Ireland in the international copyright arena has come to light. While in the confidential arena of the EU there may have been such an initiative, this is unlikely. Documents released under the Freedom of Information Act 1998 give no grounds for expectation that Ireland might have taken a campaigning role in the debates. An impression is created that copyright regulation may well have been traded off against gains in other (supposedly more important) areas of European policy.

The lack of a distinctive Irish voice at any level in the international debates is one of the striking insights which emerges from this research. While it is understandable that a commonality of view within sectors² internationally might have led to the absence of a distinctive Irish voice in publishing, recording and writing, even in some areas such as the protection of Irish folk music and folk culture works, there has been a lamentable absence of initiative. African countries have taken the lead in this area, despite Ireland's membership of some of the more important international clubs, and Ireland's longer history of independence. Copyright came to be seen in many developing countries to be part of the armoury of states which wished actively to develop their cultural industries, or to raise the level of literacy or of cultural attainment of their populations

Over the course of the entire range of Irish copyright history, the interests of industry have been primary. In the eighteenth century, the printers were dominant; after independence, the printers again came to prominence in the debates. In the contemporary debates, actors such as owners of performance venues and recording companies are dominant. The creative artists and the consuming public remained

² The most vocal of the actors in the Irish debates have been the performance rights organisations. Even when they became ostentatiously detached from the British organisations in the last ten years, their interventions in the policy debates have been, as would be expected on economic grounds, aligned with those of their international allies.

relatively mute in the debates until recently. There would be value in raising public awareness of the importance of copyright regulation. Some signs exist that this may be happening, and it would be to the benefit of both the public and of the artists if this heightened awareness were to continue.

The picture which emerges is of a country which is generally passive in the face of external economic and cultural forces, and where the administrative structures internalise the demands placed on them by external actors. Viewed from the perspective of the direct effects of choices made in relation to copyright regulation, the results have been largely negative. Despite the failure by the government to use copyright for developmental purposes, however, it will become clear that the resilience of Irish cultural production, coupled with some fortuitous events particularly in recent decades, have seen the emergence of a relatively strong cultural sector.

Chapter 2: Literature Review

Introduction

In this chapter, I review a body of work which is relevant to this study. A considerably larger body of work was surveyed in the course on the work, but much of the material surveyed was of only minor relevance to the central issues being addressed. Reference is made in later chapters to some of these works. A full list of the works consulted is provided in the bibliography. The thesis examines copyright in Ireland in the light of questions which have not all been addressed in a similar manner in earlier work. This has meant that some aspects of the research have been conducted without the benefit of scholarly insights drawn from the existing literature.

Because this thesis draws on secondary material, particularly in Chapters 3 and 4, some of the pre-existing literature is discussed there, instead of in this chapter. This is particularly so in the case of literature dealing exclusively or primarily with the Irish case.

1. The Extent of the literature

There is a considerable literature on copyright, spread across many disciplines, most notably legal studies and political economy. More recently, a cultural studies approach to the study of the effects of copyright regulation has developed. The existing literature which is most relevant to this study is concerned with the use of copyright law for developmental purposes. Part of the story told in the succeeding chapters is of the reasons for the failure by Ireland to mobilise the law for the purposes of industrial or cultural development. In part this failure was due to the absence of extensive or influential articulation within Ireland of the possibilities of using copyright law for such purposes.

There has been an anomalous situation in Ireland that debate on copyright has been largely absent in Irish academic writing, other than technical legal work. This is despite the extensive research effort directed at improving the understanding of the forces shaping Irish culture and cultural production. The failure until relatively recently to address copyright issues has undoubtedly had consequences for the quality of the debate in which public figures have been enabled to take part. The scarcity of research on the Irish aspects of this cultural-legal issue has muted the domestic debate in Ireland, and

has functioned as an additional stimulus to relocating the debates to external forums. This absence of a domestic literature is probably partly responsible for the widespread indifference to copyright policy among Irish legislators, policy-makers and opinion-formers. It contrasts with a more voluminous literature on the area in other countries and it has led Irish policy actors to rely on foreign authorities when engaged in debates on copyright policy issues.

Academic discourse about copyright in Ireland has been largely confined to the legal literature, and has concentrated on technical legal issues, though this has included some scene-setting introductory historical work. The Irish literature on the formulation of copyright policy and on the effects of copyright on culture and on industry is sparse and the field has not been studied in Ireland from a mass communications or cultural studies perspective.

The research questions addressed in this work are not all easily related to existing scholarly literature. The research methodology applied involved the use and analysis of texts in several fields. Because this material is used to sustain the arguments of the succeeding chapters, this chapter is limited to a discussion and review of a restricted subset of this literature which was used to define the field and to provide a conceptual framework under which some of the questions could most fruitfully be addressed. Necessarily, the literature consulted has been primarily concerned with other countries or with international agreements.

Copyright regulation is most obviously the subject of legal research. The focus of the present research is on policy development and its implications for the cultural industries. Consequently, the literature on policy formulation is central. This study draws on research in a number of cognate fields, including mass communications studies, the developing discipline of library and information science, historical bibliography, historical research, political studies and political economy literature. A body of more descriptive work on the history of the Irish book trade has grown in the twentieth century, supplemented by more general international studies which offer either analytical insights or factual information relevant to the Irish case.

Official studies have concentrated on the industrial potential of publishing, rather than on the cultural advantages to Ireland of the development of a strong publishing sector. Studies commissioned by the EU have addressed industrial aspects of the Irish publishing sector. The Council of Europe has conducted some quantitative work,

although this has not addressed policy issues as a central theme. Factual accounts and descriptive works have dominated the literature in relation to Ireland.

Some of the research undertaken in this study has not been supported by a pre-existing literature concerned with copyright. This applies most obviously to the strand concerned with the use by the Irish government of copyright for unrelated political and diplomatic purposes. The research on this topic involved the use of the literature on state sovereignty and state succession. The policies pursued by the Irish government in this area were peculiar to Ireland, and arose in particular historical circumstances.

Consequently, they found few resonances in the policies of other states. While other countries have legislated for copyright and thereby expressed their sovereignty, the purpose was, in the cases of which I am aware, genuinely concerned with copyright, and not primarily with the establishment of sovereignty. However, sovereignty did come to prominence internationally from the 1980's onwards, particularly as a result of the new US activism in international copyright.

Until recently, there has been little published work on the internal debates within administrations on copyright regulation. Recent work by Sherman and Bentley (1999) has made a contribution to this field, in their treatment of the formulation of British copyright regulation in the nineteenth century. However, this work is so removed in time, and is so concerned with the manner in which the debates of the time contributed to the actual structure of the regulation and to the forms of jurisprudence, that it is not directly relevant to the theme of this work.

The literature which engages most clearly with the question of the active choices which states have made in their copyright regulation is the historical literature from the United States and Canada, where nineteenth century debates on colonial copyright and on the use of copyright for larger policy purposes is directly relevant to the Irish case. This relevance is particularly evident when applied to the debates on copyright in Ireland in the 1920's.

The conception of the author, and its derivation from literary theory and from the work of Foucault and others, impinges on many of the recent theoretical debates on copyright. However, for the purposes of this work, such discussions are of marginal interest, since I wish to address questions of how the regulatory and economic influences of copyright can be seen in the cultural and economic spheres in particular. The identity and integrity of the author, while of immense importance for situating the point of origin of the

created work and for establishing the nature of the ownership right which the author has, are almost entirely extraneous to the Irish debates, where an economically-informed legal conception of copyright was universal.

The exclusion from the Irish debates of this issue reflects the pragmatic approach of most actors in the Irish debates. Conceptions of the author which deviate from the common-sense understanding have influenced the Irish debates only tangentially and indirectly. The influence of the European civil law tradition of the *droit d'auteur*, through the international conventions, through EU law and, though only belatedly realised, through the Berne Convention itself, have not to date diminished the common-law understanding of copyright in Ireland as almost entirely an economic right.

2. Brief Review of work on the history of copyright

Historical narratives on copyright in particular territories are relatively abundant. In addition, specific aspects of copyright law, such as legal deposit and performance rights have been the subjects of descriptive and analytical histories. The literature is most extensive in the case of the United States and Britain.

General treatments of copyright, largely from an uncontroversial historical perspective, which establish the framework in which British and US copyright regulation were framed, such as Ransom (1956), Kaplan's (1967) and Patterson and Lindberg (1991). These treatments cover broadly similar ground and are mutually sustaining in their analyses. There is a concentration on the eighteenth century formulation of copyright in the particular situations of Britain and the US, and these works set out the establishment of the normative understanding of copyright in the Anglo-American model. Ploman and Hamilton (1980), in the same tradition, provide an overview of copyright law in its various international formulations, and summarise the international agreements and representative systems of national legislation.

Feather (1994) is a major source for historical information on the British copyright system, and his work is of particular relevance to this study in relation to the debates in the nineteenth century. Feather performed a close analysis of the historical record, in order to formulate a narrative of legislative initiatives in the context of the development of the large British publishing industry. The work is supported by a consideration of the social and cultural forces which impacted on the development of legislative proposals. Feather draws attention (1994, 2) to the particular importance in the debate on this issue to status of the printed word itself. British legislators operated in a society whose

enfranchised class were literate, and likely also to have concerns about business development. In addition to outlining the nineteenth century legislative history of copyright, Feather draws attention to the early intertwining of copyright regulation with the social structure of the state, with corporate interests and with personal property interests. It emerges in later chapters of this work that this pattern was replicated in Ireland's case in the twentieth century. Feather conducted his analysis along a chronological framework, which is clearly appropriate to the analysis of the historical development of a regulatory structure.

While the concentration of the available literature is on the American and British cases, some other national studies were reviewed, notably Thairani's work on copyright in India (1987). It became clear that the substance of most of such national studies was a description or analysis of the regulation itself, rather than on a consideration of either the formulation or the consequences of that regulation. Abrams (1983) is a rare exception to this pattern, in that his work concerns the deeper background behind the formulation of US copyright law. However, as a case study, it does not offer analytical insights which could be applied more broadly.

3 Copyright law within the mass communications studies tradition.

Bettig (1996) case study of the US copyright system is a landmark work in the mass communications studies approach to copyright, where he adopted a Marxist-informed political economy approach. He identified copyright law as a hitherto little regarded mechanism through which corporate owners of the means of communication could extend their ownership into the content carried by their media, to increase the financial return on their investments and expand their markets (1996, 2). Bettig's approach to copyright centres clearly on the "appropriation and commodification of information and culture" (1996, 35). While his work is dominated by a concern with US-based communications companies, this does not extend to a consideration of the use of copyright law for purposes of national development. On the contrary, he emphasises that corporate entities are the primary beneficiaries of enhanced copyright protection, and this is without regard for broader issues of national development.

For the present work, this is an important issue, because of the international activism of the US government in the copyright debates in the late twentieth century. The concentration of the US corporations has been on securing their corporate interests. The

US government has acted internationally in the interests of these corporations, but has done so for ostensibly national purposes. A coincidence of national and corporate interests, together with the capacity to ensure international compliance with its demands, has enabled the US to derive considerable economic advantage from its ability to influence the international copyright system.

Macmillan (1998, 311) cites authorities who point out that domination of national cultural markets (where, for example, the Australian music market is effectively controlled by six international corporations) leads to a diminution of the range of cultural material available. One cited source noted that only 20% of the cultural property of these copyright owners, who own 70% of world copyrights in music, is available for sale in Australia, which obviously represents a likely diminution of the quality of the cultural life of the country. Similar diminutions are evident in relation to published material, particularly where books can be in effect suppressed in particular markets, or throughout the world, through being the property of international corporations.

An earlier mass communications approach to an aspect of the study of copyright regulation is the specialised work of Subramanian (1967), who examined the Universal Copyright Convention (UCC) of 1952, with an international rather than a national focus. This work to some extent foreshadowed Bettig's conclusions, in this case, highlighting how in the early 1950's, the US national interest determined the international agenda in the international copyright debate. The internationalist impetus from which the UCC arose, primarily to incorporate the US within the international copyright system, was "the underlying hallmark throughout" the negotiation of the UCC (Subramanian, 1967, 186). This effort has underlain the international copyright debates in recent decades, and again, it was this incorporation of the US which ultimately led to the more complete internationalisation of copyright which is seen today. Subramanian argued that the US was a "prolific producer of works in all branches of human knowledge" (1967, 186) and that this was its primary rationale for joining the international system. One of the most telling features of the UCC, which emerges from Subramanian's work, is that its unspoken purpose was to bring the US within the system, and consequently, an international bargain was struck in which the interests of the US were the primary concern. In this respect, the national imperatives inherent in international copyright are clearly disclosed. The UCC was also the spur to "vigorous activity in the domestic copyright legislation of Member States" (Subramanian, 1967, 190). This will be shown to have been the case in Ireland also, as its amendment of its copyright legislation in the 1950's was required to obtain full reciprocal protection in the US for Irish works.

4 Cultural studies and State awareness of the importance of cultural inputs to policy-making

Certain countries, such as Canada and Australia, which have a highly developed, structured system of reflection and comment on cultural policy provide valuable sounding boards for an examination of Ireland's relative lack of reflection on these issues. These debates in these countries have been articulated particularly in official publications, but to a lesser extent also in the scholarly literature.

Because of its potential to offer a comparative perspective on the Irish situation, the Canadian literature is clearly relevant to this study, either offering methodological, factual or interpretative insights. Audley (1983) provides an overview of the Canadian cultural industries, and addresses copyright policy as an element of the general encouragement of and the specific orientation of the output of those industries. Canadian government policy, geared for many decades to sustain a Canadian cultural sector, including a publishing industry supplying the Canadian market, continues to approach the problems of the publishing industry with an eye on the utility of formulating its copyright regime in a manner favourable to domestic policy aims.

Canadian writers have also addressed the question of moving away from the standard model of copyright, in furtherance of cultural objectives. This openness to systematic and comprehensive official examination of the purposes and structuring of the copyright regime is the most relevant analytical insight to be drawn from this literature. Blomqvist and Lim (1982) present one example of the continuing Canadian official examination of policy alternatives in the sphere of copyright. Their work considered the value of enhancing national cultural activity, through the limitation of the importation of copyright goods. The work considered whether the 'territoriality' of Canadian copyright should be prioritised in policy, for the general cultural benefit of the population. While ultimately arguing against and in favour of subsidising Canadian cultural production in other ways, this work is of value to this study, since it validates the consideration of radical copyright solutions to cultural policy aims. Such examinations, the norm across the spectrum of Canadian regulation development, will be shown to have been largely absent in Irish debates.

The pure cultural studies literature has not yielded directly relevant material for the foundation of this study. Nonetheless, it was necessary to survey the most influential

work, to enhance my understanding of the context in which the broader international copyright debates have been situated.

Lury (1993) examined what she argued was a change in the nature of copyright debates and concerns in the twentieth century. Rather than being concerned with questions of authorship and the economic issues which have been associated with authorship, Lury advanced the argument that the cultural industries now concentrate on the distribution of non-innovative, popular cultural goods and not on the distribution of innovative high-culture goods, as was the case in the earlier periods of copyright regulation. The impetus, she argued, was technological advances, and the possibilities for commercial gains which were thereby made possible. In Lury's analysis, technological development, with its increased capacity for reproduction of cultural goods, diminished the demand for originality and creative invention: "the cultural producer was required to produce plagiarisms of character and style as well as variations of routine plots and formulaic narratives, rather than so-called original work" (1992, 33). I would contend that, to the considerable extent that this is true, it applies in the Irish case broadly to the same degree as it does in other comparable countries. It is well to understand such a cultural debasement to be a consequence of technological developments. Its relevance to the contemporary Irish case is necessarily limited to being an argument for an increase in the quantity of domestic cultural production, and a diminution of the importation of 'industrial' cultural products from the 'technological cultural industry.'

MacMillan argues "copyright's role in relation to culture is best characterised as instrumental rather than fundamental" (1998, 306). She suggests that there is a dichotomy, or at least a polar coalescence, in the understanding of copyright. On the one side is the understanding of copyright as being about 'culture', and on the other, an understanding that it is about economics and trade. This leaves law and regulation as above or below this plane, and this is perhaps the best way in which to understand the issues. She argues, however, that the two understandings of the centring of copyright are not incompatible.

She describes the "utilitarian / development justification for copyright" as "overwhelmingly familiar." The suggestion is that the legal recognition and support for copyright leads to an encouragement of further works, and this "is essential to the development process." She suggests that this is a received idea, which is more reiterated than analysed or challenged. One issue is the suggestion that the promotion of culture is necessarily linked to the process of development (1998: 306). She suggests agreeing

with the idea that cultural production is a good in itself, and that it contributes to development. Additionally, she argues (1998, 307) that excessive cultural dominance held by external states or actors, by implicitly limiting the scope for indigenous, national or local cultural production, necessarily involves a constriction of the scope for development. It would therefore seem that such an effect would be a negative in cultural and in developmental terms. Macmillan's analysis is broadly consonant with the approach taken in this study, where the developmental possibilities of copyright are examined. Her view that copyright has in a sense two faces, cultural and economic, and that these are not incompatible, supports arguments made in later chapters of this work.

4.1 The economic face of authorship

The conception of copyright as an economic right and of the author as a figure playing a role on the economic stage emerged clearly in the eighteenth century, and, to a great extent, at the expense of a conception of the author as a cultural creator. Rose (1993), in addressing the formulation of British copyright law in the Eighteenth century, gives prominence to the emergence of two new features or entities in the marketplace, the economic author and the commodified work. He argues that these two entities developed in tandem, in an uncertain climate, where the ultimate legal formulations were the result of negotiation and, crucially, judicial decision making. The conception of the author, if more than as a necessary evil, is generally that of an economic actor seeking to maximise economic and financial benefit from the products of his imagination or intellectual work.

This conception of the author has been dominant in Irish discourse in almost all the debates examined, and is a feature of debates on copyright in the Anglo-Saxon world. Conceptions of the author as a cultural creator are generally found outside the Anglo-Saxon legal world, or, at least, have been influential only in the most recent decades. Indeed, it would be true to say that, given the dominance in the debates of the legal authorities, the cultural conception of copyright remains very much the minor influence on the debates.

5. The Legal Literature

Necessarily, the published literature on copyright is dominated by legal works. This applies in the Irish case to an even greater extent than in others. Clark and Smyth's

comprehensive legal text (1997), summarises the major historical landmarks in copyright law development in Ireland, and adumbrates some of the policy formulation debates which preceded the enactment of particular copyright measures. However, this is very much a tangential aspect of their work, which focused rigorously on the actual law, from the point of view of legal practitioners. Other texts by Irish legal practitioners have been consulted in the course of this work (Hanna, 1929; Lysaght, 1931), and certain texts are relied upon in later chapters when discussing particular points, but, with the exception of Murdoch (1971), these texts have not contributed significantly to the foundations of the arguments advanced.

It has been necessary to address certain issues which are integral to the concept of copyright, and of these, the different conceptions of copyright in the Common Law tradition and in the continental Civil Law tradition, is one of the most important. It is in fact likely in the future to prove to be of great importance to the content and direction of Irish debates, as continental legal influences on Irish law and regulation become more pronounced. Over the period which this study examines, the distinctions are of lesser importance, but even so, the different philosophical views which underpin national copyright systems have had some influence on the negotiation of international agreements to which Ireland has been party.

5.1 The Moral rights conception of copyright

It is useful to give a short outline of how the continental understanding of copyright has impacted on the common law world, before proceeding to a discussion of the literature of the economic conception of copyright.

The French (and continental) view of authors' rights considers the author's work to be an emanation (or even, in the strong view, an aspect) of the personality of that artistic or other creator. While the French system is also predicated on rendering an appropriate economic return to the creator for his efforts in creating the work, it is achieved through a different legal route. Authors have additional rights in this system than they have had classically in the Anglo-American systems, in that in the French system the author is entitled to protect his work from derogatory treatment, and also to be identified as the author of the work. This tradition has extended in to the law of other systems, notable in the British 1988 Act, but also in the Rome Convention in 1960, where the civil law tradition appears in fact to have been included without the realisation of the British delegates. Ireland, as long ago as 1963, countenanced the inclusion of some aspects of

moral rights, in that it was made illegal to misrepresent the relationship of authors and works. In the US, the influx of continental ideas about copyright into international agreements threatened to have a destabilising effect on the existing system of copyright, and this led to the emergence of a body of comparative work on the two systems, notably Monta (1959). No comparable Irish literature was produced at such an early stage, despite Ireland's legal system being in a similar position to that of the US.

Some distinctions must be drawn between the Anglo-American and civil law traditions on the basis of the availability of full moral rights in the civil law tradition. The result is that, while all the rights traditionally granted under the Anglo-American system could be sold or alienated to another copyright owner, in the French system, the moral right was, as a matter of principle, inalienable. The distinction between the economic and the cultural conceptions underlying the two systems are somewhat clarified by the drawing of this distinction.

Hirst¹ (1979, 17) points out that the absence of moral rights in Anglo-American copyright law was not an oversight, but was simply the reflection of the fact that the intention of the British 1710 Copyright Act was to structure and protect the British book trade. The difficulties which would become particularly clear in the 1960's, when French and British (and Irish) conceptions of film copyright clashed, were laid down in the eighteenth and nineteenth centuries. Irish law could conceive of one person being the owner of the rights in a collective work such as a film, or indeed of a legal person, such as a company owning such intellectual property; French legislators could not easily conceive of such a position. This would come to attention in, for example, certain contributions to the Irish debates in the 1960's, where in effect shock was expressed at the idea of introducing into Irish law concepts from the French, considered unnecessary or unsuitable to the Irish.

6. Economic justifications of copyright

Copyright is held out by most authorities to be a form of encouragement for authors, with the claim that its existence encourages the creation of new books, and this view has been validated by its explicit inclusion in the texts of many of the earliest copyright statutes, notably the US.

¹ Introduction to Edelman (1979).

However, the argument must be challenged on a number of fronts. Originally, because writers sold their copyrights to publishers, copyright was in effect a publishers' and not an authors' right. If encouragement were its purpose, this could be achieved otherwise, for example through the payment of royalties, bounties or pensions to authors. Because most books are commercial failures, it is in fact difficult to see how it is an encouragement for the creation of new works. Whalley (1983, 279) argued that

"one of the most important characteristics of works of authorship is the revenue uncertainty involved at the point of production. This applies equally to authorship and recording activity. When an author writes a book, he or she has only an expectation as to what the eventual royalties and sales may be, and it is only after marketing that it is known what the sales of the work actually are."

Therefore, the encouragement argument, though made almost universally, applies at best when considered over an entire population, and not as it applies to the individual author. The individual author, economically considered, takes a risk (large or small), with only the potential of a financial return as an encouragement. This is likely to be as much a discouragement as an encouragement to a doubtful author, or to one intent on producing a useful but financially unrewarding work. In this latter case, the population at large might well benefit, but not the individual author.

The intended collective benefit from the economic justification of copyright was present even in the eighteenth century United States. Donner (1992) examined the reason for the unanimous inclusion of a copyright clause in the US constitution of 1789. He ascribes this early and politically-elevated interest in copyright to a very early US concern with the possibilities of using cultural production as a means of being "culturally competitive with the other countries of the world" (Donner, 1992, 362). A belief existed in political circles in America that by encouraging writers to produce works, this international cultural competitiveness could be achieved. The balance was struck, I would argue, in favour of society as a whole, and not in favour of the author. While, in ideal circumstances, the individual might achieve great rewards, it was encouragement in the nature of a lottery, rather than encouragement closely aligned to effort, novelty or inventiveness.

The economic understanding of copyright regulation as a necessary encouragement for the production of new books and similar cultural and intellectual products has been

called into question by numerous writers (Plant, 1934; Gordon, 1989; Landes and Posner, 1989). Plant (1934) cast doubt on whether copyright actually achieved its ostensible purpose of promoting the creation of new works, within the context of charging the inflated price which the monopoly copyright brought in its wake. Plant also argued that similar doubts were appropriate in the case of patents.² The length of the copyright term of protection, which increased incrementally between 1710 and 1995 in Britain, from 14 years to upwards of one hundred years, called into question what encouragement value it had, as it is difficult to conceive of the encouragement value of an economic right which persists for many decades after an author's death. This issue is particularly important, for the already discussed reason that most books either make their money almost immediately, or sink without trace; the writer is in reality taking a gamble, with only long chances of financial encouragement actually being realised.

There is a strongly made argument contrary to the strand which I emphasise, in which it is asserted that the intentions of legislators in relation to copyright was to achieve benefits for the individual author, and not primarily for society. Such a view is advanced authoritatively by Cornish (1992), for example. He argues that copyright's social or cultural purposes have been secondary to its purpose of granting a legally enforceable financial privilege for authors: "the cultural well-being of a society, the enlargement of choice for the edification and entertainment of its consumers - these are only secondary objectives of copyright as a form of legal protection" (1993, 51). I would demur from this view, in the light of the evidence available to me, but I can accept that the position is always complex, with different motivations and intentions feeding into the debates and the formulation of regulation. This, indeed, will be shown to have been the case in Ireland at crucial points in its copyright history.

Hesse (1991: 123-4) reviewing French publishing history in the late eighteenth century, noted that the expansion in the period of trading in printed works led there too to pressure on the political system to recognise the property rights of authors. The introduction of an authors' right was not determined solely by economic changes, however, but by a complex of interrelating political and public policy objectives and pressures. The result in France was not the creation of an absolute property right, but one in which the rights of the public to access to the intellectual property was balanced. The result was a parallel development of a modern conception of authors' rights in the

² There are important differences between copyright and patent protection, of course, including the shorter term of the patent, the failure of copyright to cover 'ideas' and the possibility of much greater reward from a particularly successful patent, than from a book.

context of a public culture and economic life. In the context of the present study, this evidence of the integration of copyright regulation within the broader regulatory and political framework merits recognition, as it will be argued in later chapters that Irish copyright policy was formed and modified through a similar process.

7. National debates on copyright policy

The literature on the debates in individual countries, while a source of comparative information, does not always reveal generic, theoretical or analytical insights into the questions to be raised in this thesis. However, since such studies are so strongly represented in the literature, and since the present work is such a study, it is important to review the more salient material. Because Chapter 4 in particular deals with certain aspects of Canadian and US policy development in the nineteenth century and early twentieth century, this ground will not be covered in this section. The scholarly and official literature of recent years in any case is more appropriate to the discussion in this chapter.

7.1 The Canadian debates

At a time of extended official and non-official reflection on and consideration of Canadian media and cultural policies, Whalley (1986) examined Canadian copyright policy options from an economic perspective. A Canadian government report in 1977 had suggested that Canada even then had three principal options in its international copyright relations: it could withdraw from the Berne Convention and from the UCC, it could maintain its membership as it was, or it could in effect deepen its membership, by acceding to later revisions of the texts of the Conventions. Whalley pointed out that, while a simple calculation of the balance of royalty payments inward and outward could decide Canadian policy in relation to international copyright, in fact the position is far more complex. He argued that copyright should be viewed as part of a continuum of other international agreements and regulatory instruments, and the advantages and disadvantages should be weighted over a much wider range of options. At that time a perception had developed in the US that Canada was “determined to flex its muscles with regard to economic nationalism” (Whalley, 1986, 278).

In the 1980’s Canada’s international copyright obligations derived from the 1928 Revision of the Berne Convention and from the 1952 Geneva text of the UCC. The

Canadian case differed from the Irish, since for Canada the UCC was considerably more important than Berne, as Canadian cultural trading relations were primarily with the US, a non-Berne state. The fear of retaliation by the US was one of the great concentrators of the minds of Canadian policy makers, since the US pattern was of course to exert pressure even in unconnected sectors of the economy from where the US directly suffered, in a form of economic warfare.

Torno (1981) compiled a report for the Canadian government on the ownership of copyright in Canada, again indicative of the concern with the Canadian government had for the territorial and nationality aspects of the ownership of copyright. As will be shown in a later chapter, Canadian self-awareness in the 1920's in relation to copyright is clearly shown in Vipond (1980), and, in relation to music publication in 1924, in O'Neill (1993). Tensions between the United States and Canada over copyright continue to form the substance of much of the work on Canadian copyright policy, and this will be drawn on in later chapters. Vaver's work is of direct relevance to this study, notably his comparative work on the different philosophies of copyright regulation in Canada and the US (1996).

7.2 The US debates

Canadian awareness, at institutional and governmental level, of the importance of copyright as a support to culture or to industry, is equalled or surpassed by American awareness. The American debates are distinguished by the extent and intensity of contributions from economically engaged actors. Polemical works, such as Benko (1987), who wrote as a member of the free-market American Enterprise Institute, called for stronger international protection of American intellectual property. Writers such as Benko proved to be influential in their national debates, and have as a consequence had a strong, indirect influence on the contemporary international copyright regime.

The American national debate has also thrown up some contrarian thinking, attacking the transformation of the US from being a significant offender against the ideals of international copyright, to being a supporter and enforcer of strong IPR regulation internationally. Brener-Beck (1992) has argued persuasively against the then crystallising US position of strong enforcement. Her argument that there was a historical contradiction in the US arguing that other states should now not act as it had itself in the past. The only reason for the change in the US policy was that it had, through what it now called inadmissible behaviour, achieved a dominant position as a producer and

exporter of cultural goods, and it did not wish to have this position challenged. Brener-Beck's work, though logically and morally unanswerable, has not had the influence its quality might have entitled it to. However, it is an example of a rhetorical position which, while voiced in the domestic US debates, has found resonance and acceptance in other quarters, notably among the developmentalist lobby internationally, and among states with less developed cultural industries.

US activism in advancing its policies on international copyright has generated a considerable literature, both domestically and internationally. Much of this literature has been oppositional in content, and frequently polemical in tone. Among the more thoughtful is the calmly analytical work of MacMillan (1998), who discerned a remarkable sleight of hand by the US, where it succeeded in convincing the GATT Council that "intellectual property rights were relevant to the GATT" (1998, 309). In addition to achieving this objective, the US, under the 'Special 301' 'watch lists' allowed under its Omnibus Trade Act 1988, was enabled to place foreign countries under pressure to comply with US demands in relation to IPR issues.

MacMillan argued that, with the commodification of culture which is central to modern copyright law, the potential power of copyright owners is increased: "Commodifiers are able to use distribution rights in order to isolate and control national markets for certain types of cultural products" (1998, 310). The extent of multinational ownership of rights and of distribution and production channels, the integration vertically of many of these activities, the multinational nature of the exercise of these rights, the ease of operation which harmonisation of legislation has given rise to, and the operation of particular multinationals in several different cultural areas, makes for a hugely increased international cultural power. International copyright law, though recognising the commodificatory moment and providing the protection, is only one element in the network of co-operating technologies and regulations which permit and encourage the operation of this system. Macmillan points out that such power is also self-reinforcing, and permissive and supportive of further, increasing and deepening cultural ownership and domination.

US activism, which is analysed by writers such as Macmillan and Brener-Beck, was to have a strong, direct impact on Ireland's copyright policies, and, I would argue, demonstrates the power of the earlier polemical US literature both on US policy formation, and on the foreign countries.

Development

8. Developmental theories of copyright

The literature which is most directly relevant to the concerns of this thesis concerns the application of copyright to developmental purposes. Because of the inherent difficulty in disentangling this issue from other aspects of copyright regulation, the developmental aspects and potentials of copyright law have been addressed earlier, notably in the discussion of the economic basis of copyright.

The developmental possibilities of copyright regulation, and the necessity or desirability of special derogations from the full rigours of copyright regulation, or of international practice, are addressed in works by numerous authorities. A number of international organisations have also contributed to the literature on copyright, and their interventions in the debates can be predicted from the general positions adopted by those organisations. Notable among such studies are the works issued by the World Bank and by various United Nations agencies. A related issue is the argument that the enforced enactment of copyright laws by developing countries is a form of cultural imperialism. This view has found favour by writers on China, Africa and other Third World states, and is discussed in a following section.

While the use of copyright law for cultural developmental purposes might be considered a relatively recent phenomenon, in fact some countries have practised it since at least the eighteenth century. Early legislation, including the British Statute of Anne of 1710 and the US Constitution of 1789, are among the earliest official documents which draw attention to this purpose of the law. The scholarly literature on this aspect of copyright law, however, is more recent. Barnes (1974) has shown how copyright law was mobilised by the US and by Canada as a developmental tool, the former in its own period of nation-building in the nineteenth century, and the latter, as it sought to define its identity in cultural terms as separate from both the US and Britain.

The work of scholars like McVey, Altbach and Macmillan have been most directly useful in the course of this research. These writers have addressed the utility of the copyright law for the development of national literatures, national cultures and society in general. This developmental strand of thought is a credible basis for the arguments in

this study that copyright regulation should be applied by states for developmental purposes.

McVey, writing of the development of the US publishing industry, pointed out the importance to a developing country of a sound, properly drawn copyright law. She argued (1975, 80) that

"... like nineteenth century America, developing countries recognise that cultural autonomy is part of the cloth from which political and economic independence is cut. As more and more countries break colonial and neo-colonial bonds, and as the domestic demand for cultural autonomy grows stronger, the possibility of innovative, protective legislation for indigenous authors arises."

Once countries develop publishing industries which can benefit from strong copyright protection, the incentive to dilute the protection of foreign works diminishes: "nations, such as India, which at one time were critical of traditional copyright and engaged in some book piracy, now support copyright, in part because a local publishing industry has developed which benefits from copyright protection" (Altbach, 1998, 324). Despite Altbach's recollection of Indian rhetorical opposition to the requirements of copyright protection, the country in fact historically has had, at least formally, copyright protection to a high standard. The British 1911 Copyright Act formed the basis of Indian legislation, until the enactment in 1957 of new but broadly similar legislation. An UNCTAD report (1996, 34) records that "India has long had strong copyright protection for traditional forms of literary and artistic endeavour," and this view is sustained by Thairani (1997).

The transformation in recent decades (at the instigation of the US and other developed states) in the ostensible purpose of copyright from being formally a property right of authors for the purpose of encouraging creative endeavour to being a trade-based right with diminished cultural purposes, has implications for the consideration of the developmental application of copyright law. Those states which in the past sought to use copyright law for developmental purposes did so in pursuit of two aims, the economic advantage which might accrue to them from the development of their publishing industries, and the cultural and social benefits which might accrue through the increase in consumption of domestically-produced cultural goods. In addition, the export from states of reproduced cultural goods which were protected abroad by law was to those states' advantage.

Macmillan, drawing on work published by the United Nations, described a dichotomy between what she termed an instrumental and a fundamental approach to the use of copyright for developmental purposes. The instrumental understanding of development is concerned with economic growth, while the fundamental understanding of development is concerned the expansion of the possibilities of choice of the individual in respect of desires and ends which individuals have reason to value. Fundamental development, therefore, is concerned with diminishing the power of cultural domination, since such domination effectively reduces the scope for choice available to individuals (1998, 306).

Macmillan drew attention to the rhetorical use in copyright law of a linkage between culture and legal protection. However, she also noted that copyright law, as developed in the Anglo-Saxon legal tradition, had in fact been used to protect works which have little concern with culture, and which manifest little originality (1998, 208). She also argued out that copyright had failed to support cultural development and protection, by failing to adjust to the requirements of certain folk cultures, such as Australian Aboriginal cultures, whose cultural production is difficult to contain with the structures of existing copyright law (1998, 309). Where works are created within social structures dissociated from law, forms of ownership and norms of use can exist which cut across the rigid forms of existing copyright law. This will be shown to be the case in relation to Ireland also. Issues such as the enclosure of forms of 'intellectual commons' arise in relation to these debates, as works in common ownership can be appropriated by dominant economic actors, to the detriment of society, and in a manner which operates against developmentalist goals.

Macmillan argued that, while copyright has not supported the second form of development, namely fundamental development, it has been more successful in relation to what she terms instrumental development. This is because instrumental development adheres more closely to the economic demands of world trade. Copyright, by being subsumed within the TRIPS structure, has acquired a clear economic colour. This inevitably means that the rhetoric of the encouragement of works of cultural production, employed in the Berne Convention copyright system, is in reality dominated by the more powerful economic motives of the dominant actors. Macmillan, however, has suggested that there is some scope for hope in the new dispensation, given that it is at least implicit in the TRIPS Agreement that there remain some non-trade related aspects of intellectual property. These might still be amenable to being mobilised in the interests of

'fundamental development' (1998, 310). The commodification of cultural production, which the integration of copyright law within the economic framework of the TRIPS Agreement has bolstered, has led to an increase in the power of international media organisations to dominate cultural reproduction and exchange throughout the world. In this context, the primary developmental beneficiaries of copyright law in the future are likely to be corporate entities, rather than populations. Indeed, as Macmillan argues, the effect of recent changes in the international copyright environment has been to privilege the interests of private organisations at the expense of the common good.

Development is understood in the present work to be two-fold. It is the process by which the cultural industries of a country grow in terms of output and numbers of commercial entities. It is simultaneously a process of enhancing the cultural possibilities of the population of the country, through an increase in the quantity and availability of cultural goods. In particular, in the context of this work, a particular premium is placed on the consumption at home of domestic cultural production, and the export of reproduced cultural goods. This also carries implicitly a belief in the value of substituting cultural imports by domestic cultural production, in the interests of further developing the culture of the country. As a consequence, it is bound up with efforts to dilute the impact of cultural imperialism.

Developmental thinking in relation to copyright is heavily influenced by the economic realities of international trade. This is clearly evident from a consideration of the historical record. In countries which imported the majority of the cultural goods consumed, there was little incentive to enact copyright laws. The pattern which can be discerned in the actions of the Asian states previously accused of international piracy, has been that, once their cultural industries reach a stage of maturity, they are more open to legislating for copyright. Altbach examined the cases of certain Asian countries, which adopted copyright laws to international standards between the 1960's and the 1980's. India became a major supporter of copyright enforcement internationally from the 1960's, largely because of the importance of its textbook publishing industry. Throughout the ensuing decades, the pattern has been for countries in Asia to develop their industries with the aid of piracy, and then to adopt copyright laws. US pressure, of course, was an additional incentive (Altbach, 1993). The Asian countries, of course, were also forced to realise that their full participation in international trade was dependent on adopting full protection.

Chakava (1995, 18-9) pointed out the particular difficulties which Africa endured in terms of copyright in books; while it needs to import books and intellectual property, "it has little or nothing to sell to the outside world." Africa is in the cultural position which Ireland has been in historically, since, as Chakava notes, the leading African fiction writers are published, not by African, but by European or American publishers. African publishers who acquire licenses to publish editions of works are in practice restricted to their own country of domicile, rather than being allowed to produce editions for a language area, or for a group of countries.³

9. The problem of upward harmonisation

Hall (1998) argues that the international agenda is set by those states and actors who argued for what is politely called 'harmonisation', by which is meant harmonisation at a high level, perhaps too high for developing states. Mason (1998, 253) claimed that global harmonisation is in the interests of the consumers of information goods, just as it is in that of the creators and owners. The difficulty is in creating mechanisms in which the interests are ranked in an appropriate order, and in particular that those of the copyright owners do not unduly dominate those of the consumers. He also suggests that harmonisation is not uniformity, and that there should remain scope of national treatment.

Reichman suggested that the complexities of copyright terms of protection are frequently overlooked in considerations of the desirability of harmonisation of terms. In addition,

"developing countries already struggling to defray the costs of imported cultural and technological goods will hardly welcome lengthened terms of copyright protection, any more than the United States did at earlier stages of its own economic development. On the contrary, these countries would normally stand on their rights under the Berne Convention, except when expressly overridden by the TRIPS Agreement, or, perhaps when longer terms happened to benefit economically significant local interests.

"For the foreseeable future, the developing countries have no reason to diminish their own competitive prospects or otherwise to burden their trade balances by exceeding the minimum international standards under the relevant treaties" (1996, 641).

³ Altbach (1995) has argued that copyright is being applied inflexibly internationally, to the detriment of the interests of developing countries. He argued for what he termed 'permissiveness' in relation to licensing of the re-publication of books in developing countries.

Reichman argued that “despite the persistent claims of lawmakers, administrators, courts, and commentators that the United States copyright law rests on the utilitarian theory of protection, that theory will no more account for all the peculiarities of developed copyright systems (our own included) than natural rights thinking and the protection-of-personality principle still prevalent in Europe.” He continued, citing an article of his own,

“ ... The incentive theory of copyright protection thus tends to underestimate the extent to which all states, to varying degrees, have deliberately subordinated efficiency to other cultural policy goals in the market for traditional literary and artistic works.” (1996, 643)

10. The New International Economic Order

Olsson (1988) argued that copyright in relation to developing countries should be considered in the light of the New International Economic Order. He argued that developing countries did not preferentially resort to copyright piracy, and would prefer to rely on the “development of an indigenous production of material in the cultural, educational and research fields, i.e. they should, in accordance with the approach of the New Economic Order, be able to produce high-level material themselves” (1988, 53). He suggested that countries which wished to encourage indigenous development, towards the goal of building up a “national cultural heritage” would naturally tend towards the introduction of copyright legislation. However, he argued that such legislation should “be promulgated and be in step with the character of the people, as well as their national, social, economic and political structure” (1988, 55). Such particularism does not accord with the international tendency towards globalisation of copyright regulation, both in effect and in substantive form. Olsson argued that the “encouragement of national creativity was *sine qua non* for progress” (1988, 56) and that many of the developing countries had histories, including cultural production, dating back 3 000 years.

The copyright policies of developing countries, as Olsson shows (1974, 88) have as one of their purposes the “educational, cultural and technical development of their people.” There has frequently been a utilitarian concentration on the educational and technical aspects of this issue, which has been demonstrated, for example, in the lengthy

international debates and disputes concerning educational publishing in India in the 1960's and 1970's.

11. Cultural Imperialism

Olian (1974, 92) argued that developing countries were anxious in the 1960's and later to "free themselves from the remnants of colonialism and to achieve full cultural independence." In order to achieve these goals, it was apparent that these countries had to overcome their cultural dependency on the former colonising powers, and that this could be achieved by the encouragement of the artistic and cultural activities of their writers. He notes that in this way, developing countries were recapitulating the practices and rehearsing the arguments of the nineteenth century United States. He adduces evidence that the cultural domination of imported copyright material in nineteenth century America was such that no American author was in a position to rely economically on writing until the time of Washington Irving and James Fenimore Cooper (1974, 93).

Olian (1974, 96) showed that the discontent of the developing world with the international copyright arrangements were apparent even when the Geneva UCC was being negotiated in 1952. However, at that time, the developing nations were numerically dominated by the developed world. It was the change in this numerical balance which unsettled the developed world in the 1960's, when the prospect of their being outvoted in the international democracy of sovereign states was being practised in international forums. The regress to trade-regulatory schemes of control in the 1980's is further evidence of the anxiety of the developed states to protect by economic power what they could not defend by negotiation. The defensiveness of the developed world in the face of copyright protectionism in the developing world is shown, for example, in Kunz-Hallstein's (1982) survey of the actions of such states in relation to copyright

The view that the international enforcement of copyright amounts to a form of imperialism, while a 'given' in many contributions to the debates on copyright, is less frequently stated openly, though this is perhaps from a perception that the point is obvious. In addition to Altbach, as previously discussed, the argument is advanced by Kumar (1983).

Arguments about the necessity for developing countries to formulate appropriate PR policies are advanced by Rapp and Rozek (1991), although they focus their attention on

the industrial manifestations of IPR. They argue that there are clear benefits for developing countries in terms of investment, technology transfer, access for local firms to international intellectual property and ultimately economic growth. They argue that there is a causal link between modernisation and the enforcement of property rights, including IPR. They admit that such benefits “may be more difficult to realise in economies that are underdeveloped and static,” but that “protecting intellectual property should be a public policy goal of developing countries seeking sustained economic growth” conclude (1991, 102). These views, which are born from a strong protection paradigm, are at least arguable, and, indeed, may in reality be the only practical option available to states which are subject to intense pressure from developed states. They are not, however, self-evidently the ideal option from a developmental perspective, and cannot even be tested realistically, because of the existing constraints on the autonomy of developing countries. In Ireland’s case, though a willing participant in the high level protection system of the Berne convention, frequently contrary to its internal interests, the developmental questions have at crucial moments been answered for the country, as a result of external political and economic pressure. It is clear, therefore, that the developmentalist argument is difficult to test in actually existing conditions.

Von Lewinski addresses the conundrum inherent in suggestions of using copyright law for reasons of national cultural development, where the population at large can be advantaged at the expense of domestic writers (1999, 188-9). Drawing on the nineteenth century Anglo-American disputes, she notes that the concern of the Americans before a bilateral agreement was reached was that such an agreement would have meant that “American readers would have to pay more than double the price for the reprinted English books.” The result would be that consumers would be denied cheap books, as is argued in developing countries more recently. The counter-argument, which supported the protection of English books in the US, made by American writers, was that the availability of English copy free of charge operated to the disadvantage of American writers, limited their market, limited their opportunities for publication, and consequently diminished American cultural production. The ultimate resolution in the Anglo-American case involved a compromise between the English interests, the American authors and the American printers, so that reciprocal copyright was agreed, but subject to the manufacturing requirement. The substance of this issue will be discussed in Chapter 4.

Hedley (1995) considered the problems facing the US cultural industries in the light of Canadian agreement on joining North American Free Trade Agreement (NAFTA). As

was discussed above, the Canadian government was an early adopter of a culturally activist policy, granting special treatment to the cultural industries from early in the twentieth century.⁴ Cultural imperialism as expressed in copyright terms is clearly discernible in the series of events and the pressures exerted on Canada, as discussed by Shields (1981). Canadian protective measures against American imports included tariffs on foreign periodicals, restrictions on the foreign ownership of broadcasting stations, and regulations on minimum Canadian content in broadcasts (Hedley, 1995, 657-8). Latterly, tax policy and restrictions on foreign investment of dissemination technologies were used for protective purposes. Hedley (1995, 666-7) criticised Canada for persisting in discriminating against “nearly every category of U.S. copyright-based industries,” through the cultural industries exemption⁵ which is in apparent conflict with the requirements of the NAFTA agreement. Hedley (1995, 676) pointed out that the American experience with the Canadian sensitivity to, and insistence on protection of, its cultural distinctiveness, led to the question of possible cultural exemption grounds in the GATT being a “point of contention between the United States and the European Union.”

US concern with their neighbouring states, in terms of cultural production and copyright relations is also discussed by Secor (1993), who examines the Canadian book publishing industry in the context of a free-trade area, and Sandoval and Chung-Pok (1993), who examine the intellectual property law systems of Mexico and the US in the light of the free-trade agreement.

12. International divisions strengthened by copyright laws

Altbach (1993) argued that the developing international copyright structure of the 1990's brought with it a danger of a world sharply divided along an information-access faultline. Countries were changing sides in the decades before the 1990's, on grounds of self-interest. Altbach (1993, 20) noted that Indian book publishers, historically supporters of lower levels of copyright protection, began to argue for stronger protection as their strong publishing industry began to suffer from piratical activities of African and South East Asian piracy.⁶ Despite the superficial appearance of multilateral

⁴ The Canadian debate in the 1890's is summarised in Parker (1976). Parker later wrote a more comprehensive account of the development of book publishing in Canada (1985).

⁵ This was agreed with the US at the time of the Canadian - US Free Trade Agreement, but has been suspected since by US figures of being a mechanism to extend unwarranted advantages to Canadian industries.

⁶ Primo Braga (1990, 55) noted also that the Indian film industry had become a strong supporter of international copyright protection, and that the Brazilian Globo TV network became vocal against video piracy once it entered the video

egalitarianism which seemed to be implicit in the terms of the Berne Convention, the international imposition and enforcement of copyright was leading to what Altbach termed an "OPEC of knowledge", in which a cartel of a few countries were the dominant producers of knowledge, and where other countries are relegated to a peripheral status.

13. Accusations of Piracy against developing countries

This issue is directly relevant to contemporary Ireland, due to its being named by the US in the 1990's as a low-level protector of intellectual property. There is, however, a notable absence of a scholarly literature on the scale of piracy in Ireland, and there has been reluctance on the part of the Irish anti-piracy agencies to respond to requests for data.

Brener-Beck (1992, 85) pointed out that international accusations of piracy could draw the rejoinder of accusations of "exploitation and attempted economic domination." She showed that the US change of heart in relation to international protection of IP came about as a result of economic changes in the 1980's, and in particular changes in international trade. The US used arguments that it was to the economic advantage of the infringing nations that they should strengthen their IP laws. In parallel, the US put direct pressure on these states, including threats of restricted access to US markets. The US and developed nations have argued that protection encourages innovations internationally, but that it also encourages development within the LDC. Indeed, they argue not simply on economic grounds, but also argue that the cultures of developing nations suffer through piracy. "'Pirating' of foreign literary, cultural and academic works, sold at low prices, can destroy the market for domestically produced works that embody the local culture. In effect the local culture is overwhelmed by imports of cheap copies of foreign movies, books, ideas and music" (1992, 95). However, the main thrust of US arguments appear to have been made in the patent and industrial property fields, rather than in the cultural, presumably due to the primacy of utilitarian arguments in the minds of the legislators in developing countries.

Brener-Beck showed however, that some states, once they have passed a developmental threshold at which absence of protection or diminished protection are no longer necessary, can tend to continue to fail to adopt higher international protection levels,

production market.

despite its being by then in their overall domestic interest. For example, Singapore in the 1980's, identified as the "world capital of piracy" of cassettes, was forced by US pressure from 1984 to adopt a new copyright law in 1987 (1992, 107). Brenner-Beck showed that as a result of the new law, there was a surge in indigenous economic-cultural activity, in music, in the film industry and even in the printing, as the reputation of the country improved. However, other factors are noticeable, such as an underground rather than a blatant piracy industry, and the displacement of much of the piratical activity offshore to Malaysia, though still supplying the Singaporean market. Overall, however, Singapore is considered to have wiped out most of its piracy industry, and is "considered one to the success stories in the international effort to eradicate piracy." (1992, 109).

Alikhan (1996) centred the debate on international copyright protection on the socio-economic and the cultural issues, and identified the 'cultural industries' as crucial agents in the development of countries. He identified the 'cultural industry' with the 'copyright industry', and summarised international quantitative data on the economic⁷ and employment⁸ value to countries of their copyright industries (1996, 8-9). Alikhan examined the case of the large Indian cultural industries, in books, film, music and other sectors, and the case of Singapore, both of which had become internationally significant producers. In these cases, enhanced copyright protection had paralleled the development of the industries. Alikhan noted (1996, 20) that "many ... developing countries are currently using the intellectual property system as an engine of growth." I would argue, in the light of the evidence from other states, and from the Irish case, that it is unquestionable that, in appropriate circumstances, copyright and other IPR laws have at least the potential to act as energisers of the cultural industries of developing states, and that this can bring cultural as well as economic benefits to societies.

14. A Corpus of National Cultural Production

In this work, the term 'intellectual property' suggests the possibility of there being also a collective or national intellectual property. I understand this to be a heritable body of works in some intimate relationship with the producing nation. Its basis is, of course, those anonymous works, and folk works, which are held in common, but it is also, in a sense, the growing body of writings produced by writers and other creators in a country. This work suggests that, for cultural and also for economic and industrial reasons, it is

⁷ Britain, Australia, Germany, Netherlands, New Zealand, USA, Sweden.

⁸ Australia, New Zealand, Germany, USA, Britain.

valid to propose that the production and dissemination of the anonymous or folk works should ideally be done or at least controlled from within the producing nation. Similarly, it behoves a state to have a duty of care for the cultural works which are produced by its citizens.

Callison (1995) opposes the appropriation by institutions and corporations of the intellectual property of native peoples, in the form of 'aboriginal oral traditions'. Similar concerns were raised by Collins (1993), and, on ethical grounds, by Ward (1996).

15. State and Sovereignty literature

The invocation of copyright law as an attribute of national sovereignty, through implicit in the law as a consequence of its territorial application, will be shown to have been a concern for the Irish government in the years immediately after independence. This linkage holds true for other states also, at least to a limited extent. For example, McGill (1997) argued that trading in printed goods is deeply integrated into the identity and status of the state through the copyright law of the US. The territoriality of copyright law, as understood internationally is laid out in Drahos (1999), but is also covered in the historical treatment given by Barnes (1974) and by Feather (1994). This concept, so important to a discussion of copyright in relation to Ireland, is in fact little discussed in the domestic Irish literature. The use of copyright for diplomatic purposes, as was done by Ireland in the 1920's, is absent from the literature, and appears to have been a peculiarity of Irish practice at the time.

16. Internationalisation and Globalisation

Internationalisation of copyright can be traced back to the bilateral agreements which states concluded in the mid-nineteenth century. Following these reciprocal agreements, fuller internationalisation began with the conclusion of the Berne Convention in 1886. Internationalisation of copyright emerged as an issue for legislative action as a result of the growth in the trade in information goods, and in the development of substantial international markets for those goods. However, globalisation can be considered to have required the existence of transnational copyright owners, in the form of commercial entities, concerned with the transfrontier delivery of their cultural goods for financial advantage. Thus, its emergence on the world stage came later than simple internationalisation.

In the nineteenth century, states began to consider international agreements and bilateralism. France led the way in some respects in its law of 1852, by not requiring reciprocity when granting copyright protection to works by foreign authors (Drahos, 1999, 16). Drahos, writing on Britain's problems with international reprinting of its authors' works, noted that such reprinting was being done also in France and Germany, in the late 1830's. The primary source on the international aspects of copyright regulation, is Barnes (1975).

Drahos (1999, 17) argues that it was only after the Second World War that the US "began to exercise real leadership in international copyright. It did so with a boldness that few would have foreseen." This coincided with the negotiation of the UCC in 1952. Drahos (1999, 19) argues that WIPO was functionally superseded in 1992, as the GATT negotiators took control of intellectual property for trading reasons. WIPO in a sense became thereafter an administrative union, while the real content of the international discussion of IPR issues shifted effectively into the trade arena.

The integration of the developing world into the world system, through the agency of copyright regulation internationally is described by Lehmann (1995). After the Second World War, the developed countries were joined by developing countries in the IP treaties, and were being outvoted. As the developing countries sought to establish a system responsive to their needs, they succeeded in having the Stockholm Protocol adopted in 1967, which gave additional rights of access for developing countries to copyrights. Drahos (1999, 19) argues that the adoption of the Stockholm Protocol "provoked something of a crisis in international copyright." Subramanian (1967, 164 - 5) noted the danger for newly independent states where "they either borrowed blindly the law of a western nation that was not at all suitable to their needs, or, did not formulate any law at all, or, clung to legislative practices long obsolete." Drahos (1999, 16) writes of the nineteenth century as seeing "the proliferation in Europe of national intellectual property regimes." The development was "somewhat chaotic." One obvious feature was the manner in which colonial legislatures mirrored the concepts of authors' rights which had developed in their metropolitan countries.

Modern works on the international regulation of copyright include Beir and Schriker (1989), in which the alternative options of the GATT or WIPO are canvassed and critically assessed. Gadbow and Richards (1988), writing at a time when the international structure of the GATT / WTO agreements had not been completed,

articulate a view of the potential for intellectual property issues to lead to international tension. The US at this period was actively identifying rogue states in copyright terms, and indeed, was re-dividing the world on moral grounds, in ways which cut across existing political allegiances; this multivalent approach to the understanding of the world is indicative of the importance which American was placing at that time on the cultural property.

Draho (1998, 245) lays great emphasis on the TRIPS Agreement as an engine in the globalisation of property rights. He wrote that “the principles of common heritage, free flow and national sovereignty along with the NIEO agenda met their Waterloo in TRIPS” (1998, 245). In this conception, free flow is understood to mean both the liberal position adopted by the US which would make for unrestricted flows of data across national boundaries, as well as the developing countries understanding of the term, in which all information was part of the common heritage of all. As Draho argues, the WTO has no place in its conception of trade for any aspects of intellectual property for principles such as a ‘common heritage’.

Mason (1998, 249-50) drew attention to the effect of globalisation of intellectual property law on the sovereignty of states. In addition to the circumscribing of the rights of national legislatures thereafter to vary the terms of the law, the democratic deficit inherent in international negotiation also impacts on the domestic acceptability of copyright regimes. Concerns of this nature have been a feature of the Irish debates, particularly since 1922. There has been a striking paradox between the efforts of the Irish government to use copyright law for purposes of advertisement of sovereignty, and the actual diminution of sovereignty which flows from adherence to the treaties. Indeed, the scope for Ireland to use copyright law for developmental purposes was limited by its membership of the Copyright Unions and latterly of the European Union. The social acceptability of copyright law is also adversely affected by the democratic deficit in the negotiation of international agreements.⁹

Aoki (1996, 1343-4) also draws attention to the globalisation of copyright, particularly as a result of its inclusion in the WTO Agreement; indeed, he suggests that this is a “capitulation” by sovereign states to the onward march of globalism, despite signs that globalisation is not a single, unitary force, but is instead a “lumpy” phenomenon, which by-passes large areas of the world. In such a circumstance, it might appear that there is

⁹ It must be admitted however, that in the Irish case, the bilateral legal deposit arrangements between Britain and Ireland have given rise to the most vocal objections.

at least a justification for continued national policies in the copyright area. As Aoki points out (1996, 1353), the present situation is a structure contrary to the previous logic of Berne, where the traditional 'national treatment' system is being obliterated by a US-led striving for single, uniform universal rights and laws. Aoki suggests that globalisation might include a "dimension of meaningful dialogue with others" (1996, 1354), and that otherwise, as hinted at by Altbach (1993), if "hybridities, pluralisms and localisms" (1993, 1355) in IP regulation are not considered, there is a possibility that the entire system might unravel, or the structure collapse.

Historical Bibliography

17. History of publishing and of the book trade

Febvre and Martin (1990, orig. 1958) is an account of the emergence of the book trade, but its concern with copyright is minimal. Chartier (1994) contrasts the English and French copyright systems in the eighteenth centuries, as part of a contemplation of the means of regulation of texts and books from the invention of printing to the end of the nineteenth century.

The British book trade has developed an immense literature, dating back into the nineteenth century. Among useful studies are Barber (1976), discussing the eighteenth century trade in books, and the same author's later work (1982). Detailed studies of aspects of the trade are to be found in, for example, Barnes (1983). Jordan and Patten (1995) have edited a volume on the nineteenth century British publishing industry and readership. Plant's dated history of the English book trade (1939) is an economic analysis of the trade.

The printing trade is dealt with in works such as Berry (1958), who examines the late nineteenth century trade. Feather (1988) also takes account of the effects of development in printing technology on the book trade, and (1994) on the debates on copyright regulation.

18. The Irish publishing and book trades

From a historical bibliography perspective, Pollard (1989), Phillips (1952 and 1998) and Cole (1986) provide historical data on the impact of copyright regulation in Ireland. Feather (1988) is a useful survey of British publishing over the period under review, and its passing reference to Ireland indicates that Irish publishing was a minor concern to the British trade or public. Barnes (1964) is another example of a treatment of the book trade, in this case the London book trade, though one with immense impacts internationally. Dix, though concerned with historical bibliography, does not appear to have given much attention to copyright legislation, other than some work on eighteenth century piracies, considered from the perspective of the internal organisation of the Irish book trade.

Cole (1986), though primarily concerned with the book trade, and on its relations with America, analyses the impact of the absence and subsequent imposition of copyright law on Ireland. His work also identified the debates on copyright which were conducted at intervals in the late eighteenth century.¹⁰ However, this work is not directly focused on the cultural or collective consequences of the imposition of the legislation. The focus of Cole's work lies in the transfer of a proportion of the Irish industry to America, and on its subsequent cultural and economic consequences there. His examination of the terms of copyright is largely confined to its existence, its threatened imposition and its eventual imposition, and the ensuing collapse of the Irish publishing trade.

Cole (1986) argued that in the absence of copyright regulation, Ireland acted as an agent for the extension of British culture, both domestically, and abroad, in the United States and in Britain itself. It did this in the face of British opposition, but, while the British government opposed the actions of these Irish publishers (particularly in the 1780's), Britain achieved some gains, since her culture and in a sense her ideology were disseminated more cheaply and more widely, than if the international market had had to be supplied at high British prices. (American independence would, admittedly, seem superficially to negate such a suggestion.) Cole (1986, xi) also showed that the imposition of copyright on Ireland in 1801 led to the "massive transfer from one national book trade to another", as large number of Irish publishers emigrated to the United States, where they continued their trade.

¹⁰ For example, Cole describes debates in the Irish parliament, and interventions by Flood and Grattan, which were motivated by a desire to ensure that Irish legislative independence was not encroached on by other means by Britain.

Phillips (1998) is a detailed examination of the book trade in Dublin up to 1800. Phillips takes 1800 as the end date, because "the Act of Union at the end of the 18th century destroyed the position of, and removed the basis from the Dublin trade" (1998, ix). This writer identifies copyright as a critical issue for the development and persistence of the Dublin book trade, and (1998: 103 - 150) examines the effects of the negative copyright regime which applied in Ireland, and its propitious influence on the books trade, if not on the development of Irish cultural production. This study relies on Phillips as a major source, since the quality of his information and analysis, and its clarity of presentation, are of such a high order.

Pollard (1989) examines the Dublin book trade over the two hundred and fifty years preceding 1800, again in great detail, and, while copyright relations are not the primary focus of her work, it is an important source of material, and an identifier of contemporary texts of relevance. The third of her Lyell lectures (1989, 66 - 109) is an examination of copyright relations between London and Dublin. In this Pollard draws out much of the complexity of the relationship between Dublin and London publishing, and undermines, in a way similar to the outcome of Phillip's work, some of the simplistic myths which arose surrounding the relationship of the two countries' publishing trades.

Maxwell (1997, orig. 1937) is a useful source for the cultural milieu of Dublin in the decades around 1800, and in particular for gaining an understanding of the intellectual and cultural life of the time, though with an emphasis on the English-speaking community. Inglis (1954) provides a useful account of aspects of communications in the post-1800 period, and in particular, on the impact and content of the newspapers of the period. An anonymous work of 1877 - 8¹¹ is an interesting source, again broadly from a historical bibliography or industrial history perspective on the publishing industry in Ireland. This work is a useful corroboration of what might have been thought mythic prejudices which might have been supposed to arise in the post Union period. Maxwell's works is usefully updated by the interpretation of Beckett (1979), in which the literary relationship of Ireland to Britain is discussed. Craig (1980) also provides some insight to aspects of the cultural life of Dublin in the period up to the mid-nineteenth century.

Finally, the sparseness of literature on individual Irish publishing houses is worthy of note. Of the work which has been examined, Dunne (1971), Cullen (1989) and Hutton

¹¹ A series of anonymous articles in the *Irish Builder*, signed C.

(1997) are the most detailed and objective. Cullen's (1989) comprehensive history of Easons publishing house and Dunne's (1971) more personal account of the Talbot Press did not provide any substantial source material for this study, although it would be incorrect to censure these works on that account, since copyright was not a concern for these writers. It is indicative, however, of the perceived irrelevance of copyright regulation to the functioning of two of the most important firms in the Irish book trade that the question was not one of major consequence for these firms. Hutton's (1997) more recent work, which examined the archives of the Talbot Press and of the Educational Company of Ireland, gives a valuable insight into the output of these two associated publishing houses in the early part of the twentieth century, but again, copyright does not emerge from her account as a significant issue for them.

Conclusion

This chapter, in which I have drawn on the most relevant literature used in the preparation of this study, relies to a considerable extent on the developmentalist aspects of the general copyright literature, and, on the subset of that literature which prioritises the impact of copyright policy and sovereignty on each other. This sovereignty, understood primarily in political terms, also flows across categories, to raise the issue of the cultural sovereignty or autonomy of states and cultures. The later chapters of this work will draw particularly on this strand of thought, as I argue that there is a close linkage between a cultural industry and the regulatory framework which organises and shapes it. Copyright regulation, which is thought of primarily as an economic right in societies such as the United States, has, in my view, a clearly cultural component. This cultural component is not confined to the actual content of the protected copyright work, but extends to encompass the cultural consequences of regulatory choices made on legal, economic or diplomatic grounds. In supporting my arguments in the following chapters, I draw extensively on the existing literature.

Chapter 3: Copyright in relation to Ireland before 1800

1. Introduction

Copyright in books was first regulated by law in Ireland in 1801, when Ireland and Britain formed the new United Kingdom of Great Britain and Ireland, under the terms of the Act of Union. Before that date, Ireland had not legislated for copyright, whereas Britain had enacted the first modern copyright law in 1709.

A large printing and publishing industry developed in Ireland, supplying the local market, while Ireland also developed into one of the most important markets for British publishers. Over the course of the century, Ireland began to export books in considerable quantities to Britain and to other countries.¹ In this way its industry competed with British printers and publishers, and it was frequently argued that Irish printers were trading at an unfair advantage, or indeed were trading illegally.

The reasons for the disputes between Ireland and Britain in relation to publishing stemmed from the fact that since 1710 the British publishing industry was operating under the terms of a copyright act, while Ireland remained a non-copyright territory. One of the universal characteristics of copyright is that it is applied uniformly throughout a territory, and that separate copyrights exist for separate territories. This logic became evident in the relationship between Ireland and Britain before 1800. Phillips summed up the Irish situation in the eighteenth century as a “trade in an area without a copyright law but operating within the orbit of one where such existed” (1998, 147).

Over the course of the century, campaigns were conducted by London publishers and by the British government to have copyright regulation imposed on Ireland. This culminated in the inclusion of intellectual property issues in the inter-parliamentary negotiations conducted in the 1780's on what were called the Commercial Propositions, through which the British government endeavoured to reassert control over the Irish economy. The Irish Parliament, which achieved a measure of legislative independence as a result of the political settlement of 1782, did not concur with the legislative initiatives proposed by the Pitt government and the century ended with no copyright legislation in respect of books being applied in Ireland. Even the Dublin government

¹ The export trade to America was considerable, particularly in the last two decades of the eighteenth century.

opposed the proposal to introduce copyright. The Chief Secretary told Parliament "I do not mean to propose anything relative to [the British proposals on copyright] unless the country should think the same regulations necessary here with respect to them that have been adopted in Great Britain."²

2. The Economic Rationale for Copyright

One of the intended purposes of copyright is to encourage the production of new works, while providing for recompense to the author for the reproduction of existing works. Common law copyright therefore stimulated the production of works by means of economically-based encouragement and protection. This is explicitly the case in the American Constitution, for example, where the rights of authors were granted the enhanced degree of protection of a constitutional provision, rather than merely the protection of ordinary law applied for a particular (possibly transient) policy purpose.

Where copyright is not legislated for, the only effective way to prevent unauthorised publication of a work is for the originator to offer copies at or near the marginal cost of making copies (Landes and Posner (1989, 326). In such a situation the original cost of creation may not be covered, unless the sale of copies is at a very high level. Copyright, which limits public access to the information good, creates an artificial incentive for creators to make the initial effort in the hope of subsequent reward. The creator takes an initial risk, but, if he or she reads the market correctly and offers something for which there is a demand, the work is given protection and the author receives a measure of reward. The central problem for copyright law, in the economic sphere, is striking an appropriate balance between access and incentive. In the eighteenth century in Ireland, access was open, prices were low and Irish creators of information goods fled to England where the economic balance was struck more in their favour. This resulted in a disintegration of any common interest between the individual creator and the national public. Furthermore, it dissociated Irish writers from Irish publishers, and added to the existing impetus on Irish publishers to pirate works without payment, since little unexploited intellectual property remained in Ireland. An American publisher of Irish extraction called copyright a monopoly and stated that the Irish Parliament would never legislate for copyright as long as it protected the rights of the people.³

² Speech of Thomas Orde, Chief Secretary, in Irish House of Commons debate on a Bill on the regulation of trade between Britain and Ireland of 12 August 1785. Pollard (1989, 73).

³ Phillips (1998, 128), summarising the argument against copyright of Robert Bell's Address to the Subscribers, published in Philadelphia, 1771. Bell held that the English publishers were not being deprived of anything, since a publisher's

One of the economic reasons for the development of pressure seeking the enactment of the Statute of Anne⁴ was that in the late seventeenth century and early eighteenth century, the economics of making copies of books were shifting. The marginal cost of production of a copy, which had been quite high in the less developed print technologies of earlier times, was falling and in the absence of any regulation, another economic factor was coming into play. This was the invisible pressure on those who saw the opportunity to make copies for sale of books whose copyright was owned by others. This was the gap in the market in which Irish publishers chose to operate. Because publishers in Ireland did not legally have to pay copyright fees, entry into the publishing market required a correspondingly lower level of investment (Phillips, 1998, 309-310). Because of the level of technological development which had been reached by the later eighteenth century, an economic imperative for legal intervention in the Irish market to prevent market distortion was becoming apparent. Consequently, pressure for copyright regulation developed, primarily from the commercial owners of copyrights, the London publishers.

3. Copyright in Britain

There is a large body of work on the history of copyright in eighteenth century Britain, and on the pressures in favour of copyright regulation which built up in the later decades of the preceding century (Birrell, 1899; Kaplan, 1967; Saunders, 1992; Rose, 1993; Feather, 1994). This contrasts with a marked paucity of published sources for the debates in Ireland.⁵

The Licensing Act, originally passed by the English Parliament in 1662, regulated printing and gave effective control of the printing industry to the Stationers' Company, a London guild of printers. The government's purpose was to control sedition by ensuring a measure of self-regulation by the printers.⁶ The advantage to the Stationers' Company was that they had a legally-guaranteed and enforceable monopoly on printing and

copyright was an economic right derived from the act of paying the original author, in the knowledge that it extended only to protection of the edition within Britain.

⁴ The British 1710 Copyright Act.

⁵ However, Cole (1986), Phillips (1998) and Pollard (1989) do treat the topic.

⁶ Copyright emerged out of a unremitting desire on the part of governments to control the press and not primarily out of a desire to secure to authors a just reward for their labours, nor as an aid to the capitalists of the printing industry, nor even to honour a putatively emergent authorial personality. The original purpose of granting monopolies was to secure political loyalty (Bettig, 1991, 138).

publishing in England and Wales. This legislation came up for renewal in 1694 and concerns were expressed about the propriety of allocating monopoly rights in printing to the Stationers' Company, on grounds of civil freedom. The Act lapsed in 1694 and the London publishers were left in a commercial and legislative limbo.

In the absence of a legislative basis for copyright, publishers resorted to claiming that there was at common law a perpetual copyright in written texts and that this was the "copyright" which was assigned by the author to the publisher.⁷ This idea of perpetual copyright, the so-called common law copyright, was to remain an active idea for much of the eighteenth century, and indeed it was not finally disposed of until the nineteenth century⁸. The issue which would arise was whether the statutory copyright granted by Parliament for a specified period replaced the common law perpetual copyright, or if it merely coexisted with it, with the common law copyright persisting on the expiry of the statutory term⁹.

In the first decade of the eighteenth century two major forces operated in London to encourage publishers to seek a statutory copyright. One was simply the desire of publishers to have statutory protection of their copyrights against "the alleged depredations of pirates" (Feather, 1994, 64). A second was the Union of Scotland and England in 1707, which brought the substantial Edinburgh publishing industry into one unified market.¹⁰ The London publishers found themselves in a position where there was no means of determining who rightly held copyrights in published works throughout Britain. The presumption of the London publishers appears to have been that their rights would take priority.

In April 1710 the first modern copyright act was passed in London, the so-called Statute of Anne. Feather has characterised this Act as "in effect, a law designed by its promoters to defend a group of property rights vested in a small number of owners and

⁷ Even after the introduction of statutory copyright in 1710, the publishers took the view that this was a temporary economic right attaching to authors (though capable of being assigned to publishers for payment), with the publishers' traditional copyright at common law subsisting in parallel and in perpetuity. Nichol expresses it thus "for much of the eighteenth century, copyright existed in twin universes - that the Act decreed and what the Stationers' Company maintained" (1996, 15). Saunders described the effect of the 1710 Act as "transposing a device purpose-built by and for stationers into the device that has subsequently been used to protect not only the publisher's but also the author's interests" (1992, 49).

⁸ Even in the mid-nineteenth century, the matter was again placed in doubt in an Irish case, *Rooney v Kelly* (1861) 14 Ir CL Rep 138. The judgement in this case emphasised that common law remedies to copyright infringement survived the passage of the Statute of Anne, but this was an idiosyncratic view which was not followed in later decisions.

⁹ As late as 1813, publishers were trading in ancient copyrights in Shakespeare's works (Saunders, 1992, 69). The traffic in copyrights in existing books may have continued into the middle of the nineteenth century (Plant, 1934, 191).

¹⁰ Saunders cites Prescott, who argued that "the real motive behind the first Copyright Act there, seems to have been an attempt to export copyright control to a region of Great Britain where the Stationers' Company's writ did not run" (1992, 55).

shareholders.” It amounted to a restoration of some of the monopoly rights previously held by the Stationers’ Company (1994, 64).

Among the novel provisions of the Act, however, was the concept of the limitation of rights in copies to a specified period. This was the seed from which the argument for the extinguishing of perpetual copyrights would grow. The Act provided that all new books¹¹ were protected for fourteen years, with protection for a second term of fourteen years available if the book were re-registered. However, since most works were published for immediate commercial exploitation, only a minority of rights holders benefited financially from an extension of the term of copyright protection. The existing claims of the Stationers’ Company were addressed by the meagre compromise of granting them statutory protection of twenty-one years in all existing copies. One effect of the Act was to eliminate the disputes about copyright duration from contention for some years, by postponing further dispute until the expiry of the statutory copyrights, twenty-one years after 1710.

Feather has suggested that the Stationers’ Company did not appreciate that the nature of copyright had changed as a result of the passing of the Statute of Anne, and that they considered that the statutory gap between the expiry of the Licensing Act in 1694 and the coming into force of the 1710 Act had been closed by the effective reintroduction of the *status quo ante* (1994, 63). Their assumption was that their common law rights in copies persisted¹² and that the 1710 Act gave them additional, rather than replacement, rights. The main difference they saw in the 1710 Act was that they could now prosecute pirates more easily in the common law courts.

4. Litigation in England and Scotland

Over the course of the eighteenth century, copyright disputes came before the courts on many occasions in England and Scotland. The two principal cases were *Millar v Taylor* (1769) and *Donaldson v Beckett* (1774). In the course of the trial and appeal of these cases, the confusions inherent in the drafting of the Statute of Anne and in relation to the

¹¹ In this discussion the reference is to books; the 1710 Act actually refers to “rights in copies”. This is a somewhat unclear formulation: the terminology of the eighteenth century booktrade used the word “copy” not in the sense of a reproduction, but in the sense of absolute rights in the text of a work. This terminology has survived in the sense of “journalists’ copy”.

¹² Bettig asserts that the 1710 Act, by “its very existence had the effect of bringing the period of common law copyright in England to an end” (1996, 23). This is a retrospective view and such a view was not at all clear at the time or for some

concept of perpetual copyright became evident. It became clear that the 1710 Act ought to have included an explicit reference to the extinguishing of the purported perpetual copyright.

In *Millar v Taylor*, the British House of Lords held that the common law right of authors¹³ had survived the enactment of the Statute of Anne. The case was heard in the common law Court of King's Bench. Millar was a London bookseller who had published a book, *The Seasons* by James Thompson, and had had the copyright assigned to him by the author, as was the trade practice at the time. In 1758, the copyright expired, under the terms of the Statute of Anne. A Scottish publisher, Taylor, considering the book to have reverted to the public domain, published an edition. The English court found for Millar, agreeing that the old perpetual copyright had survived the passing of the Statute of Anne, and had been assigned by the author's action to the publisher. The court held that statutory copyright was an extra protection which came into effect on publication. The case is interesting not just for its decision on perpetual copyright, but also since it was an instance of the London booksellers attempting to exert their dominance throughout the new multinational state of Great Britain, much as they wanted to do in relation to Ireland.

In the second leading case, *Donaldson v Beckett* (1774), the issue of persisting perpetual copyright was again in contention. The Scottish courts took an opposing view to the English courts when the case came before them in 1773. Donaldson, an Edinburgh publisher, was permitted by the Scottish court to reprint a book whose statutory copyright, held by a London bookseller, had expired in 1760. The Scottish Court of Session held that perpetual copyright had been abolished on the passing of the Statute of Anne, and that, as a consequence, the work was in the "public domain".

The English and Scottish cases represented commercial conflict which involved antagonists operating within two different legal systems and in what remained to a considerable extent two separate markets, a local Scottish market serviced by Scottish producers and an expanding metropolitan market centred on London and supplied by the

decades afterwards.

¹³ The formal position regarding copyright in Britain, and indeed later in Ireland, treats it as a right of authors. In practice, this amounted to a legal formulation for what was an economic right of publishers; the reference to the authors' creation in common law countries, at least until the late twentieth century, implied no sense of authors' moral rights. The continental doctrine of *droit d'auteur*, with the connotation of the personality of the author being in some way bound up in the written work, was not adopted in Anglo-American law in the eighteenth or nineteenth centuries. Nonetheless, some work on the so-called "romantic genius" theory of copyright has been applied to the circumstances of the eighteenth century in Britain. These theories are more readily applicable to the emergence of the law in Germany (Woodmansee, 1984).

London trade.¹⁴ Since 1707, all tariff barriers had been dropped and the London booksellers' interest was in ensuring that there was a uniform implementation (in their favour) of the regulations of the trade in books. Saunders suggested that the judicial conduct of the Court of Session in *Donaldson v Beckett* "might not have been entirely unrelated to the fact that a thriving local reprint industry had grown up based on English editions yet, to an extent, beyond the London booksellers' control" (1992, 61).

This case resolved the dispute, deciding that before publication there existed a common law copyright held by the author, but that this was replaced by the statutory copyright granted by the Statute of Anne once the work was published. In effect, an unpublished work remained protected by common law copyright, but once the work was issued on the market, the statutory term of copyright came into effect. The logic of this situation was that copyright protection had more than a function simply as a protection of the rights of the author. Its purpose was to secure just recompense to the author over a particular time, but also to serve social interests by making published works widely available to an increasingly literate public. A perpetual copyright in a work which was earning revenue for a publisher would not have been in the public interest, and a balance had been struck by parliament between providing a just recompense to the capitalist and ensuring access at reasonable cost to the consumer.¹⁵

The apparent resolution of the issue of a persisting common law copyright revealed the existence of three separate forces in the legal field. In England, as might have been the case in Ireland, copyright litigation took place in the common law courts, where there was even at that late stage some antipathy to statute law. In Scotland statute law tended to be accorded priority in a case of conflict.¹⁶ The House of Lords, where the case was finally determined in 1774, followed its own purposes by insisting on the primacy of parliament itself as the originator of law, and therefore asserting the primacy of statute law.

The replacement of perpetual copyright was a modernising action, appropriate to an industrialising country, since the perpetual monopoly system had a pre-modern

¹⁴ The earliest recorded pursuit of the Scottish printers by the London booksellers was in 1746, (Tompson, 1992, 18). It can be assumed that had the opportunity been made available by common British and Irish legislation, the Irish publishers would also have been pursued through the courts by the London trade.

¹⁵ In the course of the final decision in *Donaldson v Beckett* in the House of Lords, Lord Camden's speech revealed that the judges were concerned about a relapse to the system of perpetual copyright on the grounds that the "avarice" of the publishers would lead to the public becoming as much "the slaves (of the booksellers) as their own hackney compilers" (i.e. the writers) were. Cited in Abrams (1983, 1163).

¹⁶ Nichol pointed out that the Scottish judges in their Court of Session judgement in the *Donaldson v Beckett* case took the view, with one exception, that the common law right of literary property did not exist, and stated the "Scots law took a different view on the nature of literary property," seeing it as purely a statutory right (1996, 15).

character. In parallel, the trend throughout the century was of the economic centre asserting its dominance through legislation and through litigation over the periphery. This was seen initially in the dominance of London over the rest of England, then over Scotland from 1710 and, after the turn of the century, over Ireland. The mechanism used was not some instrument of the market working blindly according to impersonal logic, but one which operated through purposeful actions including propaganda, direct approaches to competitors by letter, litigation and political lobbying for legislation.

5. Copyright in Ireland

The formal position in Ireland in the eighteenth century was that the Irish parliament did not legislate for copyright protection and refused to do so even under pressure from British commercial and political sources. Ireland and Scotland in the eighteenth century were seen as havens of book piracy (Clark and Smyth, 1997, 175). Complaints about Irish reprinting and export to Britain of the literary property of London publishers were made to the British House of Commons in 1734, and the booksellers sought to have the British 1709 Act amended in some way to favour them in the face of this competition.¹⁷ No legislative measures were taken in Britain, however, and there is no evidence that any parliamentary effort was made at the time to have the British provisions extended to Ireland. Nevertheless, the possibility of introducing a copyright law to Ireland was discussed sporadically throughout the eighteenth century (Pollard 1988, 179-81). Until 1782, British legislation could be extended to Ireland with relative legislative ease.

Phillips, discussing the lack of energy of the London publishers, noted that “it is surprising that a trade group, which was strong enough to promote such legislation in Great Britain, yet made no attempt to have the provisions of this legislation extended to the Kingdom of Ireland” (1998, 107). This inactivity, in the light of complaints about Ireland and the Netherlands being centres of piracy,¹⁸ appears to indicate that the 1709 Act was generally considered by the London publishers in effect to be a trade regulation statute, whose primary intention was to prevent anarchy and divisive competition among themselves.

In the absence of copyright in Ireland, eighteenth century Dublin publishers were in danger of being in unwelcome and ruinous competition between themselves also. To

¹⁷ Great Britain. *House of Commons Journals*, XXII, p 412. Cited in Phillips (1998, 104).

¹⁸ Phillips cites a 1774 document, *The Case of the Appellants and Respondents in the Cause of Literary Property*, in which

overcome this problem, a form of recognition of priority was arrived at, where publishers indicated their publishing intentions, and generally accepted this form of customary right (Phillips, 1998, 128). In this way, one of the trade benefits of copyright regulation was adopted by publishers, by voluntary self-regulation. However, such a system was inherently unstable and liable to disruption, particularly from new entrants to the publishing market. Phillips notes that only one legal case resulted from the operation of the informal system, and that related to a failed claim to a royal monopoly to print bibles in Ireland (1998, 129), although other disputes, rarely pursued to litigation, did occur.¹⁹ Unsuccessful legal attempts were also made to enforce copyright in Ireland.²⁰ George Faulkner expressed dissatisfaction in 1734 with the fact that Irish publishers did not have any legal or enforceable customary property in what they published (Phillips, 1998, 128). This was a very early recognition of a national interest in intellectual property, because a publisher and a nation could be easily denuded of a cultural asset which was not defined as property in law, or which did not in some way achieve recognition as property.

The question of whether there was a common law perpetual copyright in Ireland in the eighteenth century, analogous to that in England has not been addressed in any literature which has been used in this study.²¹ If such a perpetual copyright were to have existed, it would have existed until the Act of Union in 1801 and would have applied to all works published in Ireland in respect of the rights of the author for sales in Ireland. Such a common law copyright would not have been in conflict with any English copyright, statutory or common law, because of the fundamental principle of copyright legislation that the law is territorial in application.

Regarding common law copyright in printed material in Ireland, Saunders' work on the real nature of common law copyright in England is illuminating. Saunders disputes the general belief that there was a copyright at common law in the ordinary understanding of

these two centres of piracy were identified (1998, 106).

¹⁹ See *Irish Builder* 1 July 1877 and 15 October 1877, concerning the United Company of Booksellers, an organisation analogous in some ways to the London Stationers' Company.

²⁰ *Pope v Curl* (1741). This case was heard in England and concerned an edition of Jonathan Swift's *Literary Correspondence*, issued by Edmund Curl. Alexander Pope, whose letters were included in the work, claimed that his copyright had been infringed. The principal matter at issue related to copyright in letters, but a tangential matter which arose related to first publication in Ireland. One of Curl's grounds for defence was that he had reprinted the letters based on a Dublin edition published by George Faulkner, under the direction, he believed, of Swift himself, and that he understood that any book published in Ireland might be lawfully reprinted in England. The decision of the British Lord Chancellor, Hardwicke, was that first publication in Ireland had no effect on the securing of copyright at a later stage in Britain. Cited in Rose, (1992, 485-6). Based on this premise, it might be argued that, at the time, from the point of view of British copyright law, publication of a work in another country did not count as publication. This appears to be in contradiction with the expressed view of the London publishers that Dublin reprints were piracy. The formal position in legal terms was surely that Irish publication was a nullity insofar as Britain was concerned, and that the only concern proper to British publishers was the importation of books from Ireland.

²¹ Although Phillips cites Lord Dreghorn, who in 1798 questioned the failure of London publishers taking actions in the

the term for published material: "as to its legal status, this 'copy right' was not a common-law right, but a 'right' grounded solely on the by-laws which the (Stationers') Company was empowered to make under the Charter of Incorporation granted by Queen Mary in 1557 allowing printers, bookbinders and booksellers to form themselves into a recognised guild of traders" (1992, 47-8.) A self-regulating monopoly controlled the market. On the basis of Saunders' argument, it appears that there was no common-law copyright in Ireland, not even a guild copyright of the form he asserts existed in England, other than the 'custom of the trade' which operated unofficially and unreliably, and in the interests exclusively of the Dublin publishers, rather than of the authors or of the public.²²

The question of common law copyright persisting after the passing of the Statute of Anne was disputed in relation to the Irish trade by John McLaurin, a Scottish advocate, in a book published in 1767, at a time when *Donaldson v Beckett* was already before the Scottish lower courts (Tompson, 1992, 28). McLaurin, in his discussion of perpetual copyright, noted that, in spite of the London trade's claims to have suffered more at the hands of the Irish trade than of the Scottish, they did not take action in the Irish courts. If they had a belief in the existence of a perpetual copyright at common law, he asserted, then Ireland would have been the place to try the case, since there was there no clouding of the issue by the passage of statute law. McLaurin's observations were based on the fact that Scotland, where *Donaldson v Beckett* was being tried, did not apply the common law system as England had, while no legal action was taken in Ireland, which had precisely the same common law as England.

The reasons for the Irish Parliament's failure and eventual refusal to enact a Copyright Act are complex and in some respects unknowable. However, a number of factors can be taken into account. The Irish Parliament was until 1782 entirely the creature of the government, being bound by Poyning's Act only to enact Bills which had the approval of the British government. Consequently, it can be deduced that the failure to enact a Copyright Act before 1782 was because the government did not require such an Act. The government was able to control the press in Ireland by methods which might not have been successful in Britain. These included prosecution of printers for sedition, but the government held an economic lever of control which was even more effective than the legal means of control.

Irish courts on the basis of a claim of perpetual copyright at common law (1998, 106).

²² See *Irish Builder*, 1 September 1877, on the assertion of a customary copyright in Thom's Street Directories in 1791. These were non-literary compilations of directory information, and were exemplars of the forms of publications which would come to be of great financial importance in the ensuing two centuries. In a sense, they were databases of

The Irish government and the Parliament were sources of a considerable amount of patronage for printers. As a formally independent polity, Ireland's administration by the eighteenth century generated a considerable quantity of official publications, including proclamations, parliamentary bills and Acts of Parliament. By allocating this printing work among printers, and by retaining the right to withdraw the work, printers were to a significant extent dependent on government patronage (Maxwell, 1997). This mechanism could not have been relied on for control in Britain, where the number of printers was too large to allow it to function effectively.

6. The Irish Book Trade and Irish Writers

Ireland was in the distinctive circumstance of being in close physical proximity to a larger market which effectively alone in the world had legislated for copyright protection. Among the advantages which Irish printers and publishers enjoyed were: a common language with Britain, a strong local market for books, an export trade to Britain, to the British colonies and to other foreign countries, the availability from Britain of a large range of material for publication, and, finally, an Irish Parliament which was not disposed to enact a copyright act.

Throughout the eighteenth century, Irish booksellers traded "without the sphere of legal recognition of (literary) property, but operated within the orbit of legal recognition and depended upon its position in that orbit for its continued existence" (Phillips, 1952, iv). No positive legal provision was made in Ireland in the eighteenth century in relation to copyright in books. Phillips, Pollard and others have argued that this situation was critical to such success as the Irish book trade had at the time. The trade derived a benefit (which was arguably unfair²³) from legal non-regulation in close proximity to a country which had a legally regulated market. Britain tried, in the absence of action by the Irish authorities, to limit the effect of Irish exports by placing a ban on the importation into Britain of books published in Ireland, and also by prohibiting the export of books from Ireland to the British colonies in North America. Smuggling ensured that these customs initiatives did not substantially reduce the volume of Irish exports (Cole, 1986; Pollard, 1988).

information. The issue was not pursued and remained a historical dead end.

²³ In the context of this work, the benefit is not judged unfair, since it was merely the rigorous application by printers of a

While the position in regard to copyright was to the advantage of printers and publishers in Ireland, it did have some negative consequences. Irish writers did not choose to have their works published in Ireland, where their work, once published, would not enjoy copyright protection and would be available as material to competing publishers in Ireland and Britain, with no financial return. From the point of view of national cultural development, therefore, the absence of copyright legislation in Ireland led to a denuding of the cultural capital of the country.²⁴ A further negative consequence of the relative positions regarding copyright in Britain and Ireland was that Irish writers who did publish in Britain suffered a financial loss as a result of the publication of editions of their works in Dublin. Oliver Goldsmith, for example, though an Irish writer, was aware of the danger of his works being pirated in Dublin, following their publication in London. In 1758, he sought to mitigate his loss, by inviting subscriptions in Ireland to one of his books before London publication.²⁵ Once he had become more successful as an author, he appears to have accepted that there would be unauthorised Dublin editions. Another Irish writer, Thomas Sheridan, resented the Dublin piracy of his famous 'pronouncing Dictionary'.²⁶ However, some Irish authors, particularly those living in Dublin, appear to have accepted that they could be certain of recompense for the London edition of their work, and may have come to private arrangements with Dublin publishers²⁷ (Pollard, 1989, 102-8).

One effect of a century of the one-sided copyright relationship between Britain and Ireland was that, while a vigorous Dublin book trade and publishing industry developed, there is little evidence that an Irish industry based on Irish literary property developed. It must be stressed, however, that the Irish publishers were not acting illegally. They were trading in an unregulated economy and they used their competitive advantage to produce their product at a lower price than their English competitors.

legal provision fortuitously available to them.

²⁴ The *Irish Builder* claimed that Irish writers emigrated to London, not just for reasons of prestige, but also because of financial necessity: "These young writers, then, who took to literature were obliged in a short time to pass over to London. Want drove some of them over the channel, and misfortune and offences others. Poets, artists, engravers, musicians, and other professionals at intervals followed suit." 1 November 1877.

²⁵ Cole records Goldsmith's attitude to Irish printers and his intent on maximising his revenue through subscription sales in a letter dated August 1758: "Every work published here [in London] the Printers in Ireland republish there, without giving the Author the least consideration for his Copy. ... I would in this respect disappoint their avarice, and have all the additional advantages that may result from the sale of my performance there to my self" (1986, 115).

²⁶ Sheridan's *General Dictionary of the English Language* was published in an edition of 2000 in London, following an investment of £700 by the author for printing. A Dublin edition of 3000 copies issued by Wogan and Byrne, was also sold in Paris, but brought no revenue to Sheridan. (Pollard, 1989, 102).

²⁷ Pollard suggests that Dean Swift, Bishop Berkeley and Archbishop King were among those who acquiesced in the publication of Dublin editions. However, Cole points out that writers such as Swift, Lord Chesterfield and Benjamin Franklin were probably atypical in their views, since they (and Berkeley and King) were not financially dependent on writing (1986, 8-9).

The Irish writers of the eighteenth century who are still read today were in the main people of considerable ambition who would not have been satisfied with the quantum of success which local commercial success and *success d'estime* in Ireland alone would have meant. It is likely that even if Ireland had had an iron law of copyright, they would have published in Britain. This is merely a reflection of the relative importance of Dublin and London as political and social centres. Beckett wrote that "an eighteenth-century Irish author who hoped to make his way in the world had little choice but to take his wares to the English market. The Irish public was simply not large enough to support a body of writers - the numerous pamphleteers, it should be noted, did not write to make a living but to promote a cause or, sometimes, to oblige a patron" (1979, 161). Books in the Irish language were of no consequence to the booksellers of London, and of little interest to politicians in the Irish parliament or to Dublin publishers.

7. Discussion of copyright in Ireland before 1782.

There was some sporadic public discussion of copyright in Ireland in the pre-1782 period.²⁸ Pollard records that Irish booksellers did discuss the idea of petitioning parliament for an Irish copyright law. She quotes George Faulkner²⁹ as writing in 1767 that the booksellers of Ireland were considering applying to Parliament for "a Law to secure the Property of Publishers."³⁰ Nothing came of this, however.

The debate in Britain on common law copyright was briefly discussed above. The issue was raised in Ireland in the eighteenth century also. In 1787, a case was heard in the Court of King's Bench in Ireland which "in a great degree seems to determine the question of literary property in this kingdom, respecting which many doubts were entertained"³¹ The case involved a dispute between an author, William Wilson, and a "corrector to the press and general hack", Richard Lewis, in which the latter used the former's material to prepare a work of his own when it had been given to him for fair copying. The case was won by Wilson, the original author, and, according to the *Dublin Chronicle* newspaper,

²⁸ For example, Edmund Burke is recorded as approving of the principle of extending copyright to Ireland in a university debate in 1747 (Cole, 1986, 8-9). During the debate Burke argued that "it is of much more moment, to encourage the writers and authors of books, than to consult the sole interest of the printers" Pollard (1989, 179).

²⁹ Faulkner was the leading Dublin publisher, who published Swift and many leading writers. His interests can be assumed to have been close to the commercial interests of the London publishers, since the scale of his publishing was so large.

³⁰ Pollard, (1989, 179). It is noteworthy that this vague idea of seeking copyright regulation was to secure the property of *publishers* and not authors. There is an unfamiliar honesty in the formulation.

“this important decision has in a great measure established the right of literary property here, for the security and encouragement of Irish Authors; and furnishes a useful lesson to all Printers, as well as the company of Booksellers, to be careful how they invade the copyright of any original work, the production of our own kingdom”.³²

The result of this case, though there is no evidence that it was later used by writers, appears to have established that authors had rights in their literary property, recognised as outweighing any rights the publishers might have claimed.

A sense of aggrieved and vindicated national honour is evident in this reflection on the case, since the “company of Booksellers” referred to must be the Stationers’ Company in London, given the reference to “our own kingdom”. The rhetoric is of its time, appearing two years after the defeat of the Commercial Propositions of 1785, which are discussed in a later section of this chapter. The language used is reminiscent of the United States Constitution of the same period, which provided for copyright protection on the grounds of national development. Pollard, however, sees little permanent significance in the court decision, since she was unable to find any consequence traceable to it.³³

In 1793, an unidentified writer in an Irish periodical, *Anthologia Hibernica*, appealed for a copyright statute for Ireland on the grounds of the need for the protection and development of a national literary industry.³⁴ It is impossible to judge the weight to be given to this opinion, printed in a short article in a periodical. The argument and language are those of the Protestant “nationalists” of the period. Pollard writes that the writer “evolved an elaborate plan to protect both the author’s and the trade’s freedom to reprint English books through a copyright register available only to natives or residents of Ireland” (1988, 180).

However, there does not appear to have been in Ireland any serious initiative to copy British legislation and exclude British books from Ireland, under customs legislation. The reason from this remains a mystery, although it is possible that the Irish authorities

³¹ Pollard quoting the Dublin *Evening Post* newspaper (1989, 180).

³² Cited in Pollard (1989, 180). In this case native Irish property was being protected, while the property in foreign works was ignored.

³³ It is in any case clear that the issue in this case is the straightforward matter of copyright in manuscripts, since the reference is to the production of a “fair Copy”, presumably a printer’s copy. Until the material was printed, a perpetual copyright might be assumed to have existed at common law, even in Ireland.

³⁴ “Were the abilities of the Irish to be estimated by their literary productions, they would scarcely run higher than those nations who had just emerged from barbarism and incivility. Notwithstanding this unfavourable appearance, letters are almost universally cultivated in this isle, and the presses groan beneath the weight of voluminous and expensive publications. But these are not the works of native writers. Various causes stop the growth of authorism in Ireland.... The law has not given security to the possession of transfer of literary property.” *Anthologia Hibernica*, 1793, cited in *Irish*

did not wish to provoke a strident British response, or alternatively that the competition in the Irish market from books imported from London did not limit excessively the market for native production.³⁵ Imports from Britain, in order to be financially viable, would have had to be cheaper than the competing Irish product, or not have any competing Irish edition.³⁶ The position in Ireland was that, in the absence of a Copyright Act, a writer whose work was published in Ireland had no statutory protection (in Ireland or Britain) and that no common law copyright in the printed work was known to exist. The consequence was that the legal situation in Ireland was to the benefit of printers and publishers and not to the benefit of authors.

Pollard argued that “given normal political development in Ireland, some form of copyright would eventually have been established by law” (1989, 200-1). She saw the Union of 1801 as an interruption in a process of development where the legislation of a more developed economy was extended to Ireland, with the imposition on a less developed economy of the regulatory framework appropriate to a more developed one. There are grounds for suggesting that the subsequent failure of the Irish publishing industry can in part be blamed on the commercially inappropriate imposition of a regulatory framework. This assertion will be examined in the following chapter.

8. The British-Irish relations in the trade in books

Throughout the eighteenth century, pressures of various kinds were brought to bear on the British government by the London booksellers to overcome the British publishers’ problem of Irish book “piracy”. The remedies which were used, principally the prohibition of the importation of Irish books into Britain,³⁷ were ineffective, largely because of smuggling (Phillips, 1998). Books, because of their high value to weight ratio,³⁸ were relatively easily smuggled into Britain. Barber indirectly gives an indication

Builder, 15 October 1877, p 208.

³⁵ There is in fact evidence that Ireland was an important export market for the publications of the London booksellers. Pollard (1988) and Phillips (1998) provide statistics of book imports and exports in the years before 1800.

³⁶ One interesting characteristic of the market in information goods, which everywhere impinges on commercial and purchasing decisions, is that each product or title is in effect a new commodity. Unlike consumable goods or other commodities, each published title is a separate good which cannot exactly replace another title. Consequently, if the British publishers issued a considerably larger number of fashionable or popular individual titles than the Irish, Dublin publishers could not compete across the entire range. One evident effect of this was that Dublin publishers concentrated much of their effort at the most popular end of the market, thereby leaving a market in other categories open to be supplied by British publishers.

³⁷ The prohibition applied to books which had been previously published in Britain. Irish publishers publishing new works by Irish writers would have had access to the British market, though their publications would have been in danger of being reprinted by English publishers.

³⁸ This is in comparison to the agricultural commodities which formed the bulk of Irish exports, and which were also

of the scale of Irish exports to Britain, showing that imports to Britain from all other countries through ports other than London were in very small quantities, but that Ireland was the only exception, with considerable quantities being smuggled in through the Lancashire ports (1976, 190).

Phillips argued for a lessening of the concentration on piracy by Dublin printers, claiming that the general impression that all Dublin editions were piracies was a “partial fallacy” (1998, 122). Indeed, basing his argument on the pattern of relatively good relations which prevailed between London and Dublin publishers (manifested, for example, in joint editions) he traces the animus between London and Dublin publishers instead to the smuggling activity which Dublin publishers engaged in with provincial English booksellers. It was one thing for a Dublin publisher to supply the local market (and possibly the American market also), but quite another for him to reduce the potential for sales by exporting his product to the English and Scottish markets, in contravention of both the Copyright and Importation Acts.³⁹

The relationship of the Irish and British markets and the book trade was a good deal more complex than might be judged from the evidence of the public statements made by the London book trade, whether in general commercial propaganda or in evidence to parliamentary committees. Pollard has shown that Dublin was one of London’s best markets (1988, 66).⁴⁰ Cole supports this view. “Not all Irish reprints were unauthorised, however. Some Irish booksellers worked out arrangements with the copyright holder, normally the London publisher” (Cole, 1986, 13). In support of this contention, he details the cases of Faulkner’s two⁴¹ forays into the publication of Richardson’s novels.⁴² Phillips also shows that rights were sold between London and Dublin publishers and that joint editions by London and Dublin publishers were issued (1998, 107 - 122).

allowed only restricted access to the British market.

³⁹ Phillips, commenting on the illegal Scottish importation of books from Ireland, notes that “The Dublin edition was too cheap and the Scottish bookseller was too good a business man to miss the opportunity whatever his conscience might have dictated.” Nevertheless, the export trade with Scotland was small, compared to that with England, (1998, 123).

⁴⁰ In contrast, Andrews records one example where a London printer in 1729 pirated a map of Dublin originally published by a Dublin printer, and sold it below price of the original edition. The *Dublin Gazette, or Weekly Courant* of 15 March 1729 carried a report in which the Dublin printer’s property in the original map was asserted, and expressed the forlorn hope that “It is not to be doubted but that the Publick will shew their Abhorrence of these mean pyratrical Practices, by discouraging the spurious Copy.” The Dublin publisher was forced to halve the price of the original map, in order to compete with the imported London edition. (Andrews, 1980, 35-6).

⁴¹ Pollard (1989, 97) notes that George Faulkner (the major Dublin publisher of the time) had rights in Richardson’s *Clarissa* as well as *Henry Grandison* and that in 1758 he was announcing in his *Dublin Journal* that he was seeking the rights to Tobias Smollett’s *History*.

⁴² Richardson himself, however, had later difficulties with a Dublin printer. In spite of taking the most elaborate security measures, the proofs of one of his novels (*The History of Charles Grandison*) appear to have been “spirited to Dublin” and been issued there in an edition before the publication of the London edition. Dix (1906, 70).

Much of the profit of the London publishers in their home market was made through the sale of works by Irish writers, such as Goldsmith, Arthur Murphy and Sheridan (Cole, 1986, 195). There is some evidence of the “amicable” trade and co-operation between the English and Irish publishers (Phillips, 1998, 171). Tompson detailed the practice of English publishers bringing out simultaneous editions in Ireland and England (1992, 28). This is a form of trans-frontier simultaneous production, a process which is particularly applicable to information goods. The English publishers, with their larger financial capital, were potentially in a position to engage in trade in the Irish market as producers as well as vendors, and to take advantage of the inherent economics of scale as well as the absence of copyright in Ireland.⁴³

In the last decades of the eighteenth century, many newspapers and magazines were published in Ireland. “During 1784, ten newspapers, most of them thrice weekly, were being published in Dublin alone” (Inglis, 1952, 21). Magazines in particular tended to be published by the same publishers as books and the function of the magazines was not simply to be profitable in themselves. Magazines advertised and reviewed works which were coming off the presses of their proprietors, and the result was that a public discourse was established and nurtured along lines beneficial to commerce (Cole, 1986, 197). Similarly, over the course of the century, London newspapers began to penetrate the rest of England more effectively than before “and they were full of book advertisements, epitomes and reviews” (Feather, 1991, 78). Feather characterises this as the London publishers protecting their investments by providing information about new books.

I would assert that it amounted to more than this. It was the extension of the forms of cultural communication from the capital throughout the country, where the legal dominance awarded by the copyright regime was bolstered by the cultural domination even of provincial discourse. Not alone was there an effort to see off Irish and Scottish competition,⁴⁴ but also there was a successful effort to dominate all aspects of written culture throughout England. As already noted, something similar was resorted to by some Irish publishers late in the century, when they moved away from the business of publishing only books, in response to demand created by information on the books published in London. Instead they actively generated indigenous demand through the use of newspapers and magazines in Dublin, reinforcing Dublin’s partial domination of Irish literary culture.

⁴³ No copyright fees were by law payable for Dublin editions, so there was a built-in saving to publishers or discount available in Irish editions, even when “authorised”.

9 Political Developments in the 1780's and 1790's

In 1785, a radical revision in the Revenue regimes in operation in Britain and Ireland was under discussion. Since 1782, the Irish Parliament was independent of the British government in formal legislative terms, and this gave a dimension of reality to the inter-parliamentary discussions. The political negotiations on revenue and financial issues were called variously the Commercial Propositions, Resolutions or Agreements of 1785.⁴⁵ The Commercial Propositions, which dealt with the equalisation of duties between Britain and Ireland, covered a very broad range of issues in the revenue field.

In March 1785, a number of London booksellers gave evidence to a British parliamentary enquiry that Ireland was illegally exporting large quantities of books to Britain. The enquiry reported that "the Protection of our Copy Right is the great Point to be attended to."⁴⁶ The Commercial Resolution⁴⁷ on copyright provoked an extremely negative reaction in the Irish parliament. According to Cole the seventeenth resolution "essentially tried to extend the 1709 Copyright Act to Ireland" (1986, 5). The Speaker of the Irish House of Commons, Edmund Pery, spoke against the seventeenth resolution on the grounds that it would damage the Irish trade without helping the British: "[t]he seventeenth resolution, relative to books, would put an end to the printing business in this country, without serving Great Britain. It would transfer that business from Ireland to Holland or some other foreign country" (Cole, 1987, 5).⁴⁸ This point was also made in the Dublin newspapers in April, May and June 1785 in the *Dublin Evening Post*, the *Dublin Journal* and the *Hibernian Journal* (Cole, 1987, 6). The *Hibernian Journal* of 13 April 1785 also claimed that Ireland, with over "2 300 000 illiterates ... needed every available opportunity for education and cheap books".⁴⁹ However, despite Irish reprint

⁴⁴ Or to accommodate to it, if it could not yet be defeated.

⁴⁵ The Commercial Propositions flowed from a British concern about the effects of Irish legislative independence on trade. The British government was determined to regain control of the entire British-Irish market, a control which had been lost only three years before, following the political upheaval of the 1770's and 1780's. In the final version, the twenty Propositions included one for the regulation of copyright, although one authority dismissed this, together with proposals on patents and fisheries, as insignificant (Murray, 1903, 253). The entire political effort failed, in the face of opposition not just from the Irish legislature, but even from the appointed government in Dublin.

⁴⁶ Representation to the Lords of the Committee for Trade and Plantations 1785, cited in Phillips (1998, 106).

⁴⁷ This was Resolution Seventeen, as they were numbered in the British Parliament.

⁴⁸ Gaines traced the impetus to enact the Statute of Anne in part to an effort to deal with the problem of foreign imports (1992, 254). Dutch book piracy was the major problem. When compared to the scale of Irish production, book production in the Netherlands was immense, and was the product of one of the most highly developed economies in the world. The particularly strong nature of the Dutch export trade can be judged in part from the fact that the books they were exporting were written in languages other than Dutch.

⁴⁹ Cited in Cole, (1986, 14-5). The inference can be drawn that the press was in favour of cheap books obtained by way of piracy or any other means.

publishers' claims, they were supplying the upper classes, not the masses, with cheap books (Cole, 1986, 21).

The Commercial Propositions were evidently foundering in the Irish Parliament, and yet the Executive in Dublin Castle did not press the matter. A bill for the implementation of an agreement on the Commercial Propositions was presented (though not earnestly) in parliament but was not passed, and the matter of introducing copyright in Ireland through domestic legislation rested until 1801, with the exception of one belated initiative.

In January 1798, the Irish House of Commons appointed a committee "to take into consideration the state of literary property, and whether any and what regulations are necessary for securing the same".⁵⁰ The Committee, which consisted of Doctor Browne⁵¹, Mr Corry and other unnamed members, was to conduct an enquiry, with the power to summon witnesses and to send for papers and records, and to report to the House. There is no record of the committee having conducted any business or having issued any report. Similarly, there is no full record of the parliamentary debate which gave rise to the appointment of the Committee. (The printed series of debates was discontinued in 1797.) It is likely that the Committee did not in fact conduct any business.

Political initiatives, therefore, did not lead to the enactment of a copyright law. Copyright could have been introduced into Ireland in the eighteenth century on a non-reciprocal basis, so that Irish publishers could have published as they did, while the smugglers could also have continued their activities.⁵² In the absence of any international structure governing copyright at the time, such an enactment would have been unexceptional, and in keeping with the tendency of the Irish Parliament to seek to develop Irish industries, particularly after 1782.⁵³

⁵⁰ *Journals of the Irish House of Commons*, 19 January 1798, pp 201-2.

⁵¹ MP for Trinity College.

⁵² Pollard (1989, 109) noted that Ireland was a foreign country when she tried to sell goods to Britain (though many of her exports to Britain were either excluded or attracted tariffs). As a consequence, no piracy could be claimed at law, since there was in the eighteenth century no concept of international copyright.

⁵³ In the later nineteenth century *The Irish Builder* [15 October 1877] suggested that copyright could have been introduced to Ireland before 1800 for the benefit of Irish natives only, as a selective support for the local industry. This had in fact been suggested in 1791 in *Anthologica Hibernica*

10. Printing Technology

The eighteenth century publishing trade was characterised by the application of an old technology in which there were only incremental technological improvements over the course of the century. Although the level of economic activity in the publishing sector increased over the course of the century, neither an economic nor a technological threshold was crossed which absolutely necessitated Irish government intervention in legislative terms. Nonetheless, Dix provides evidence of the impact of the refinement in technology on the Irish trade which allowed type to be set up quickly and books to be printed and bound quickly Dix (1906, 69-70). Dublin editions of new books due for publication in England sometimes appeared before their first publication in London, because proofs or even printed sheets were sent to Dublin by agents of the Dublin publishers. The lead time in production in the middle of the century had fallen to such an extent that this was possible, and it added to the irresistibility of introducing an Irish Copyright statute, at least in the eyes of the London publishers. Indeed, Dix refers to Swift complaining in a letter about the energy and enterprise of this practice of the Irish printers, when his book *Gulliver's Travels* was dealt with in this way (1906, 70).

Arguments have been advanced that there had been technological pressure to introduce copyright legislation in Britain before 1710. However, no wholly new technology was then developed for the reproduction of information goods. Saunders, writing on the specific case of the enactment of the Statute of Anne, maintained that the legislation was "occasioned by a new communications technology and an expanding demand for certain types of reading" (1992, 55). It is doubtful if this is actually the case, and it is more probable that technology was critical to the formulation of legislative provisions only from the nineteenth century onwards. From then on, new techniques of photo-reprography and electronic reproduction of print and later of sound were developed. It is from that time that the real technological pressure for legislation became apparent, together with the emergence of an increasingly prosperous urban and literate population.

11. The consequences for Ireland

In eighteenth century Ireland, an important consequence of the failure to legislate for copyright protection was that the intellectual property resulting from the labour of Irish

writers was held not by Irish, but by English publishers.⁵⁴ As a result, Ireland as an economy did not make any particular gains from the labours of its own nationals. The publishing industry was largely dissociated from the creative labour of Irish writers, and the commercial gain from Irish writing was made in Britain. The Irish publishing industry was in the main a low-order reprint industry, taking advantage of a legal situation which was always liable to prove evanescent. As it was, Ireland had a reputation for corrupt editions, produced quickly and cheaply. If circumstances had been different, a higher quality publishing industry might have developed.

The result ultimately was that the Irish industry developed along commercial lines in the eighteenth century which were ultimately undesirable, by taking advantage of the legal situation,⁵⁵ effectively to the exclusion of any part of the publishing industry being dependent on indigenous intellectual effort. When the Irish law changed in 1801, and when a unified market was created, the publishing industry withered; the Scottish industry in a similar circumstance did not.⁵⁶ The Irish effort had been concentrated in one direction and it did not have the flexibility to adapt once its single greatest competitive advantage had been lost. Its only advantage had been low price behind a legal barrier. In the new situation, there was no tradition of quality production. In addition, Irish publishers did not, of course, hold many copyrights which could be exploited in the new single market for books which resulted.

Within a short period, the Irish trade had lost even the native market. Legal uniformity across Britain and Ireland led to uniform commercial conditions. Without the tradition of holding copyrights even in books by Irish writers, the Irish publishing industry had no material to draw on. In the new cost structure, the economies of scale which applied led inexorably to further concentration of power in the hands of the London publishers. By comparison, the Scottish Enlightenment, which produced writers and readers, obviously placed Scottish publishing at a comparative advantage over Ireland's, which persisted even in a joint market with the London publishing industry. Irish Enlightenment figures were not in position to gain financially from publication of their works in Ireland. Similarly, Scotland's strong academic traditions, its considerable medical research, its

⁵⁴ This is not to ignore that there were other factors involved in the drift of Irish intellectual property to London. These included greater financial rewards, greater social prestige, greater possibilities for personal advancement, a reputedly better cultural environment and even simply better quality book production.

⁵⁵ The position was partly analogous to an indigenous industry developing and flourishing behind tariff barriers, or on the basis of state subsidy. Once these artificial conditions changed and particularly if that change is swift, the consequences for the industry can be catastrophic.

⁵⁶ This suggests that the extension of copyright regulation to Scotland at an earlier time may have ultimately been advantageous to the industry, since a publishing industry could then develop in a regulated environment, before the London industry had become as highly developed as it had by 1801. Ireland was protected behind a barrier, and, on the basis of the evidence, the industry collapsed on the removal of that barrier.

engineering traditions, its settled state religion and its different legal system all made demands on its local publishing industry, which developed to meet the requirements. By contrast, the bulk of the Irish population was alienated from the establishment, on religious, linguistic and social grounds, and consequently did not provide as significant a market demand for the output of publishers. The Union itself diminished the distinctive characteristics of the Irish legal system.

The most important characteristic of the Irish book trade in the eighteenth century was that it was a reprint industry which could not easily claim to advance the cause of a cultural industry in Ireland, since what was sold merely displaced what would have been imported. The book industry did not actively promote writing in Ireland, although printing and binding were promoted by the actions of the publishers.⁵⁷ Even the newspaper industry of the time was largely a reprint industry, giving scant coverage to Irish affairs.⁵⁸ In the case of Irish writers who were published in London, except for dramas, their material was generally not concerned with Ireland (Beckett, 1979) and so could not be held to have contributed to a developing national corpus of intellectual property, nor indeed to fostering a sense of distinctive national identity.

Phillips records that those books by Irish writers which were published in Ireland tended to be collections of sermons⁵⁹ and the like. In other words, they were neither imaginative works of the highest order, nor works of the intellect which would typify the cultural products of the age of reason. This contrasts starkly with the case of Scotland, where an Enlightenment culture comparable to any in continental Europe flourished in urban centres and which was based as much on the publishing industry as on the formal and informal academies and the Universities. Feather wrote that the few original works published in Ireland were almost entirely of regional interest (1991, 77). A problem, according to Pollard (1989, 67), was that

“[e]ven before the passing of the Copyright Act, most writers preferred to publish in London – for the sake of reputation and the better circulation of their work amongst the discerning. After 1709 there was the compelling argument of payment for copy. The Dublin printer had thus little matter to print apart from sermons, and fell to reprinting any London publication he thought would satisfy his customers.”

⁵⁷ The Irish Parliament also strongly supported the Irish papermaking industry, yet its production was largely disdained by Irish publishers as poor quality, in comparison with imported paper.

⁵⁸ In the 1780s the newspapers copied the bulk of their news directly from the English newspapers. Home news was neglected, with only “sketchy reports of debates in parliament or in the Dublin city commons (council) ... and ...each Dublin paper copying from the columns of its rivals any occurrences it had not itself received.” (Inglis, 1952, 19).

Broadly, the work disseminated by the Irish book trade originated in the metropolitan core. One of the immediate results was that, for reasons of commercial gain, the Irish industry perhaps more effectively and cheaply diffused British cultural products in Ireland and elsewhere than might have been the case had London been the exclusive source. A consequence of the situation was that, by drawing Ireland more closely into the Anglo-centric world, the publishing industry may have contributed significantly to the Anglicisation of Ireland.

Phillips suggested that the refusal or failure of the Irish parliament to introduce copyright regulation in the eighteenth century avoided industrial “suicide,” but continued that such regulation “would have marked the end of an artificial situation and provided grounds for a new development on a firmer basis - a printing and publishing trade flourishing or failing upon the lack of success of the literary produce of the country - an evolution from a parasite into a plant” (1998, 128). This proposition, grounded in economic and cultural rationales, raises the question of why Irish publishing appeared to fail in the nineteenth century, at just the point when copyright regulation was introduced into Ireland. This will be examined in the following chapter.

⁵⁹ Sermons were, of course, genuinely part of the diet of reading material which the market demanded.

Chapter 4: Copyright in Ireland 1801-1922

Introduction

The primary purpose of the chapter is to discuss how the application of an inappropriate form of regulation of copyright contributed to a decline in Irish publishing and was inimical to local Irish interests. This will provide a context for an argument in succeeding chapters about the decisions taken in the post-1922 period, when Ireland had an opportunity to formulate regulations appropriate to its particular economic, social and cultural conditions.

Following the extension of the British copyright regime to Ireland in July 1801, the output of the Irish publishing industry slumped dramatically. In addition to the quantitative change which occurred, the character of the industry's output also changed. Whereas previously Irish publishers issued books in a wide range of forms and genres, within a few years of the introduction of copyright, publishers in Ireland were limited to producing books of local interest, school texts and religious works. Later in the century, a larger publishing industry again developed, issuing books, periodicals and newspapers. The cultural nationalists of the Young Ireland movement in the 1840's recognised the cultural and political value of publishing. However, with the defeat of the 1848 Young Ireland rebellion, and following the devastating famine of the 1840's, publishing in Ireland slumped again at mid-century. Sporadic, small scale efforts at publishing continued, but Ireland was by then undergoing complex political, linguistic, cultural and social transformations which militated against the development of the industry.

Technological changes, both in publishing and in other aspects of communications, meant that imported books from London could more easily dominate the Irish market. Allied to this was the phenomenon that many Irish writers continued to be drawn to London under the influence of economic and social forces, thus severing the link between cultural production and the cultural industry in Ireland. Britain's international dominance in publishing in the English language, though threatened by America in the nineteenth century, rendered ineffectual Irish efforts to compete. Irish publishers continued to issue educational texts and religious texts, in a pattern which continued even after independence.

The period under review in this chapter is one in which copyright regulation increased in importance, as the publishing industry itself became more important economically and culturally. The large increase in the quantity of traded intellectual property goods internationally led to the gradual recognition that states had to regulate intellectual property as

part of their international relations¹. Copyright in the nineteenth century entered what Drahos (1999) has called its international phase.² Britain became an ardent supporter of international copyright, through bilateral and multilateral schemes. This interest arose because she was a major producer of books, and was vulnerable to international competition because her book prices were comparatively high. Because of the territoriality which was in-built in the regulation of copyright, Ireland was excluded as a distinct participant in the debates on international copyright. As a result of the reforms and developments during the nineteenth century, Ireland became enmeshed in a system of copyright which was inappropriate to her level of economic development.

Models of regimes which might have been more favourable to Ireland were available in the nineteenth century, most notably in the United States, but also in Canada. Indeed, the latter might have been the ideal model for Ireland. Canada's relationship with the US bore a strong resemblance to Ireland's relations with Britain in terms of cultural production and consumption. Canada developed a strong sense of the importance of copyright as a cultural agent, and a tradition of debate, negotiation and study of copyright developed, which informed Canadian policy in the nineteenth century, and which laid the foundations for a continued Canadian interest in copyright as a cultural matter of political importance in the twentieth century. By contrast, Ireland in the nineteenth century was not a significant forum for debate on copyright, and hardly any traces of debates on the cultural consequences of copyright are to be found. Copyright became naturalised in Irish legal and regulatory thinking at this time, and no substantial groups emerged, even at independence in 1922, to argue for either a repudiation of British copyright practice, or even for a thoroughgoing examination of the purposes and consequences of the regulatory system.

Despite the indifference in Ireland to copyright as a tool in the hands of the regulators, the country became in the later nineteenth century a substantial producer of cultural intellectual property which was traded in international markets. Irish writers formed a significant part of the creative force which underpinned the publishing industries of other countries, particularly Britain, but also the United States. This export of intellectual property, coupled with the importation of the finished cultural goods, such as books, continued to be the norm for Irish writers and the Irish population until the second half of the twentieth century, and indeed this remains the dominant pattern. The ineluctable attraction of the London book trade on Irish writers was counterpointed by the existence of only a small publishing industry in Ireland.

¹ This process began with bi-lateral agreements based on reciprocity between states in proximity to each other, and developed into multi-lateral agreements beginning with the Berne Convention. The arrival of multilateral agreement in itself was indicative of the improved nature of physical communications, and of the degree of international trade in copyright goods.

² Drahos (1999, 15 - 21) distinguished territorial, international and global phases of copyright.

Some commentators pointed out the inappropriateness of this pattern, but, for a variety of reasons, Irish publishers failed to create in Dublin a competing cultural centre of gravity.

Contemporary commentators blamed the destruction of the Irish publishing industry in the early 1800's directly on the imposition of copyright. There is some value in tracing the decline to the 1801 Copyright Act, but it coincided with a radical change in Irish society, caused by the coming into force of the much more significant Act of Union. The continuing failure of Ireland to develop a publishing industry commensurate with its output of intellectual property requires additional explanations. Changes in the nature of the local market, consequent upon the loss of the political class, impinged on the publishing industry. The emigration of many booksellers to the United States diminished the publishing sector. The dominance of the market by British publishers, and the natural gravitation of Irish writers to the most commercial publishers, meant that Irish publishers were unlikely to succeed in competition.³ However, even factors such as an alleged preference in Ireland for newspapers⁴ over books, and the relatively small size of the social class with the leisure to devote themselves to reading, meant that a local market for books might not have provided an adequate market for a viable publishing industry.

However, this period was an interregnum, in relation to the debates on copyright in Ireland, since copyright was regulated uniformly across political territories, and since there was little debate on copyright specifically in relation to Ireland. The issue disappeared early as a matter of live controversy or debate, and it would appear that the more inventive policies being implemented in other jurisdictions were rarely even a matter of comment. This contrasts with the well-documented interest in London in, for example, the American and Canadian regulatory systems, and the reason for the contrast is obvious. Having seen off in 1801 the competition which Ireland presented to them, British publishers were in potential and sometimes actual commercial conflict with American and Canadian publishers. Consequently, British publishers engaged in debate, (by way of litigation, written debate, gentlemen's agreements⁵ and contracts) with their competitors, as they sought to secure a form of regulation of the marketplace in books which was profitable, of low-risk and predictable. Ireland simply did not

³ Despite competition from London publishers, Edinburgh continued to be a publishing centre of some importance throughout the century. Evidently, the reasons for Dublin's relative failure were complex.

⁴ Martin (1848, 151-2) showed that the number of newspaper titles in Ireland increased from 25 in 1800 to 90 in 1839, and that in Dublin, the number had increased from 7 in 1800 to 27 in 1848. The official total circulation of newspapers in 1840 was more than six million copies. Indeed, despite the decline of Dublin it was the only city other than London in the UK which published a daily newspaper.

⁵ American publishers in the nineteenth century operated a system of customary recognition of rights to reprint foreign which replicated the Dublin practice of the eighteenth century. (*Report of the Copyright Commission*, 1878, xxxvii and 43).

have publishers⁶ who were large enough to be of consequence, or whose publishing output was likely to be in conflict with Canadian or American publishers.

Copyright regulation was extended to new forms of published works, as a result of a combination of socio-political, legal and technological changes and transformations. The basis of modern copyright law and regulation was established over the course of this period. In particular, the practices of according first bi-lateral protection to the copyright works of citizens of other states, and subsequently the development of the system of international unions governing international copyright became standard. By the end of the period, Ireland was part of a copyright territory in which intellectual property rights were strongly protected. It was a territory in which the concept of copyright had become entirely naturalised and freed from any fundamental challenge as a legal or regulatory concept. Finally, it was a territory closely bound by the agreements of the Berne Union, as applied by the 1911 Copyright Act.

All of these circumstances arose in the context of the United Kingdom of the time as a major international player in the production and export of copyright works. This circumstance, true as it was for the United Kingdom territory taken as a whole, was not true of the Irish Free State which was carved out of the United Kingdom in 1922. In spite of this, as the Free State at the end of this period embarked on its project of nation-building, its copyright regulatory system and its international responsibilities were more appropriate to a state of a very different scale and at a different stage in development, both in respect of its society and of its publishing industry. This was despite the fact that this political project derived in part from a body of published work by a new political class pervaded by literary nationalistic ideals, mainly derived in the 1890's, though with antecedents in the 1840's.

Technological changes, by expanding the quantity of reproduction and increasing the rate at which reproductions could be made, impinged on the copyright debates both as a result of the consequently increased markets for printed goods, and because of the ease with which printed goods could be reproduced without permission of the owners. Technological advances throughout the century required the adaptation of copyright regulation to new forms of the production of intellectual property goods.⁷ Advances in printing technology contributed to a fall in the cost of printed goods, and led to the possibility of printing larger editions of books more quickly than had been possible previously. The increase in literacy levels over the period, largely as a result of the introduction of state school systems, increased the size of the available

⁶ An export trade of sorts in Irish-published books did exist, however, in the case of the export of books to the Irish emigrant population of America. There are references in various sources to large readerships in the United States for the works of Charles Kickham and Canon P.A. Sheehan, (Garvin, 1987, 58).

market. This was the cue for citizens and legislators in certain circumstances to favour what is now termed a “cheap books policy.” It was precisely this issue which motivated much of the copyright policy decisions of the United States, where literacy was seen as an unalloyed good in social terms, and as a valuable advantage to the developing economy of the new society.

1 The Legislative Changes in 1801

When the Act of Union came into force on 1 January 1801, the new United Kingdom of Great Britain and Ireland was not a comprehensively united territory for various legal purposes (Ward, 1994, 30). For example, the Exchequers of Britain and Ireland remained separate, distinct Irish and British currencies continued in circulation and the two elements of the United Kingdom retained their separate Revenue collection administrations⁸. The Act of Union provided for Ireland and Britain to constitute a free trade area, but this did not take effect until 1824 (Daly, 1981, 63). It was a gradual unification which was destined never to be entirely complete, in the sense of being a unitary state uncontaminated by diversity of regulation. This opened the potential for a non-uniform territory for copyright purposes.

It would not have been remarkable if Ireland had also continued to be treated as a separate copyright territory, with Britain having a copyright law and Ireland not having any copyright regulation. Since modern copyright legislation was in a state of development, solutions to regulatory problems other than the eventual orthodoxies were potentially available. In such an initial, exploratory phase of regulatory development, regulatory innovation can take several different paths. The fundamental requirement of the uniform application of copyright regulation across entire territories might not have acquired its unassailable status, if other outcomes had resulted. The issue of the incorporation of Ireland within the British copyright territory was raised in 1876 at the British Copyright Commission (described in a later section), when one witness argued that as a “consequence of the Union, and in consequence of legislation which is only forty years old, artistic copyright being then introduced, the people of Ireland are much worse off than they were.”⁹ Macfie argued that the extension of the British copyright regime should have been managed in a fashion more appropriate to Irish

⁷ For example, major technologies such as photography, music recording, film production and even minor advances, such as the manufacture of pianola rolls.

⁸ Indeed they continued to levy duties on goods traded between the two islands. (Ward, 1994, 32).

⁹ Evidence of Robert Andrew Macfie, *Report of the Copyright Commission*, 1878, 138.

circumstances: "when that extension of area was given to publishers and authors, some terms might have been judiciously made on behalf of the public."¹⁰

Copyright law in Ireland could have been regulated differently, or transitional measures could have been introduced, to allow the Irish publishing industry to adjust in a gradual manner to an impending imposition of full compliance with the high British standard. Since Irish publishers had had no requirement to hold copyright before 1801, they were in a particularly disadvantageous position. British publishers held copyrights, and these copyrights were now extended over the entire territory of the United Kingdom. Possible alternative courses of legislative action would have been to have required that the copyrights be re-sold, since the copyright territory had changed, or to have maintained Ireland as a separate copyright territory. There was no debate on the rightness of having copyright territories coinciding with the boundaries of sovereign states, as might have been both appropriate and unremarkable.

However, in 1801 the Westminster Parliament enacted a Copyright Act¹¹ which explicitly extended to Ireland the provisions of the copyright regime which prevailed in Britain. The reasons for the swift enactment are unclear, as no record of the debates exists, but it can be presumed that the anxiety of British publishers, articulated throughout the preceding twenty years, to have Ireland adopt the same copyright statutes as Britain, had considerable persuasive force with the legislators and administrators of the new Union. The Union, though primarily intended as a security measure in the face of political upheaval in Ireland and on the continent, was also intended to have beneficial economic consequences. In the case of writing and publishing, it was claimed by Irish commentators in the nineteenth century that such advantages as arose from the 1801 Act accrued solely to British economic interests.

2 The decline of Irish publishing after 1801

The standard view of the state of Irish publishing in the period after the Act of Union is of calamitous decline and decay. There are some good grounds for accepting this,¹² even if it can be challenged on points of detail. It is clear that the prestige book-publishing industry was wiped out after 1801, since it amounted almost entirely to a reprint industry, publishing

¹⁰ Ibid.

¹¹ The long title of the Act was "An Act for the further encouragement of learning, in the United Kingdom of Great Britain and Ireland, by securing the copies and copyright of printed books to the Authors of such books, or their assigns, for the time herein mentioned [2d July 1801] 41 Geo III c 107. The purpose of the act was to re-enact the provisions of the Statute of Anne of 1710, and the act consists largely of the text of that earlier statute.

¹² "... the apocalyptic event for the Irish book trade, the Copyright Act which came into force on 2 July 1801." (Kinnane and Benson, 1993, 139-50)

material without paying copyright fees. While the principal reason for the decline was the extension of the Copyright regime to Ireland¹³, other factors also played a part.

Maxwell has argued convincingly that the major cause of decline was the absence in Ireland after 1801 of a large political class and political institutions.¹⁴ The transfer of the centre of political life to London meant that much of the market for books disappeared¹⁵. One nineteenth century writer, recording that there was a decline in many trades in Ireland between 1788 and 1810, claimed that publishing was particularly hard hit, though not primarily from the effects of the extension of the Copyright Act, but from the removal of the upper class domestic market for information goods. From evidence, the writer argued that "it may be seen ... what a disastrous effect the loss of a resident nobility and gentry had upon the printing and publishing trade and kindred branches, as well as other trades, in Ireland, and particularly in Dublin."¹⁶ Pollard argued that while the bookselling, printing and publishing trades did not collapse as a result of the Act of Union and the subsequent extension of the Copyright Act to Ireland, the nature of the trade changed radically, and importation of books became the chief activity in the Irish book trade (1988, 223).

It was certainly the case that the causes were more complex than simply the imposition of the copyright law.¹⁷ The publication of elite or high-quality material, both in terms of its content and of its physical presentation, was obviously a luxury industry, catering for the upper strata of Irish society. The effective abandonment of the Dublin social season after 1801 also reduced the importance of Dublin as a centre of consumption of luxury goods (Daly, 1981, 66). White described the Ascendancy culture (particularly music) of Dublin in 1800 as "impoverished" and cites a source which noted that, while in 1742 there was a considerable musical establishment available for the performance of Handel's music, "in 1800, instrumental music of all sorts, it would seem, had almost vanished" (White, 1998, 99). The likelihood is that the combination of two factors in particular, the imposition of copyright and the removal of the Parliament, together were the primary causes of the decline in publishing output (O Ciosain, 1997, 56).

¹³ O Grada (1994, 45-6) argued that the general impact of the Union was "in the short run minor. Manufacturing output and trade continued to grow".

¹⁴ However, Maxwell also allows that the Act of Union, and in part the Copyright Act of 1801, had a role in the decline of the Dublin publishing industry. "The Act of Union certainly curtailed the intellectual activities of Dublin. The amount of printing in the Irish capital, for instance, almost immediately slackened off" (Maxwell, 1997, 182).

¹⁵ One cause of the decline in the output of Irish printers was that fewer official publications were issued in Ireland, since the Irish legislature was abolished.

¹⁶ *Irish Builder*, 15 January 1878, p 21.

¹⁷ Hogan, dealing with a span between 1780 and 1830, wrote that "[a]s the demand for music waned the number of music businesses decreased, and music publishing became another of the Irish crafts which declined and never revived" (1966, 105). While Hogan acknowledged that the Irish music publishing industry which was successful before 1800 benefited greatly from the

Official recognition of the decline in Irish publishing: The Revenue Enquiry of 1821-2

The Revenue Commissioners conducted a series of official inquiries into the state of the Irish economy in the early nineteenth century. The Third Report, issued in 1822,¹⁸ gives a picture of the Irish printing industry, and thus of the Irish publishing industry, in terms which agree with the standard view of a sudden collapse:

“At the time of the union the copyright act was extended to Ireland, and the Irish publisher was thus deprived of the power of reprinting British publications for the supply of the home market. The extension of the law, however just in principle, has had the effect of nearly destroying the trade of publishing in Ireland; and the press, at this time, affords no supply beyond that of a few tracts of local interest and some school books.”¹⁹

Charles Palmer, a Dublin bookseller, in his evidence to the Enquiry concurred in the view that output had dwindled in Ireland after 1801, and that the extension of the Copyright Act had been the cause of the collapse. The discussion of copyright in the Revenue Enquiry was secondary.²⁰ The main focus of the enquiry in relation to the publishing industry was the effects of the excise duty on paper and of the countervailing duty on books traded between Britain and Ireland.

The surviving Irish publishing industry

The transitional period after the passing of the Act of Union is the only period in which it is unquestionably legitimate to admit the passing of the Copyright Act as an important issue in relation to debate in Ireland. After the 1830's, debate on the rightness of the Copyright Act had declined from being a vivid issue in the thought of publishers and others and had become in the minds of commentators a matter of historical regret, if even that.

absence of copyright, she attributed the decline in music publishing more to the larger-scale changes which took place in Irish society at the Union (1966, 10-11).

¹⁸ The Third *Report of the Commissioners of Inquiry into the Collection and Management of the Revenue Arising in Ireland*. (Benson (1990, 58, n2) gives 1825 as the date of publication.)

¹⁹ Cited in O'Brien (1921, 368-9).

²⁰ In its findings in relation to the Copyright Act's effects, the Commissioners stated that "...the effect of regulation has been wholly to the prejudice of Ireland; she has been deprived of an advantage without receiving an equivalent, and has lost the privileges of separation without acquiring the benefits of Union" (Report, 1825, 5). The remedy suggested by the Commissioners was, however, not to repeal the provisions of the Copyright Act as it applied to Ireland, but to ameliorate the position by removing the duties in

While the publication of high-prestige books declined, in the case of published material which did not fall into this category, the position was more complex. The publishing industry supplied the local market with Irish newspapers.²¹ Similarly, a local industry developed which serviced the market for books of purely local interest to Ireland. Maxwell cites an unnamed writer of 1815, stating that the Dublin publishing trade was by then confined to the production of 'devotional and moral tracts, the printing of handbills and playbills, some half a dozen newspapers, and one or two magazines' (1997, 182). The Irish book trade therefore appears to have retreated into producing low quality books, abandoning the production of prestigious literary works. Thomas Davis claimed in the 1840's that some Irish printers, in Dublin, Drogheda, Cork and Belfast lived on the "immense sale" of poorly-produced ballad sheets, which reproduced songs by native songwriters like Moore, Griffin, Banim and Callanan. "Were an enterprising man to issue the choice songs of Drennan, Griffin, Moore, on good paper, and well printed, he would make a fortune of 'halfpenny ballads'" (Davis, nd, 227).

By the 1830's, "publishing was in a parlous state"(Comerford, 1989, 392). Nevertheless, between the 1830's and 1869, one Dublin publisher, James Duffy, issued a large number of works, some of them of a political nature, but mostly catholic devotional books. Charles Gavan Duffy, while he wrote that James Duffy later became "the national publisher," characterised the output of his press in the earlier years as being "without a single exception ... works of Catholic piety" (1890, 139). In addition to the domestic market, Duffy developed an export market for the books, sending them to North America, Australia, New Zealand, India and Britain (Comerford, 1989, 392). Casteleyn records that on his death in 1871, Duffy was described by the *Nation* as "the most extensive publisher that Ireland had produced [and] that he had done more for the literature of Ireland, sacred and profane, than all the other publishers who had preceded him" (1984, 150).

When Irish publishing did appear in any way to threaten the profits of British publishers, British publishing interests made their objections known. The State in the mid-nineteenth century became a major publisher in Ireland, issuing school texts, in addition to the ordinary run of voluminous official publications characteristic of government in the Victorian era. This was greatly resented by the British publishing industry, and in particular since Irish school texts were being exported to Britain. The British publishers maintained that for the state to publish books for sale on the ordinary market was contrary to the ideology of free trade to which the government was committed in the 1840's. From 1831 the (Irish) Commissioners of National Education published their own texts. "These, besides their captive domestic market, succeeded

books, and give Ireland unfettered access to the British market. The belief was that this would encourage Irish publication activity, by giving it "the prospect of a wider field for its exertions" (ibid).

well in the export trade" (Benson, 1990, 53). The success of these publications was so great that in 1850 rival publishers in England, Longman & Co and John Murray complained to the Prime Minister, Lord John Russell, that very large quantities of Irish school texts were being sold to English schools, both directly and through London agents, to the detriment of the commercial interests of English publishers. Plant documented the indignation of the British trade at this, and also their efforts to have the Irish exportation of state-published school texts suppressed (1939, 440-1). The defensiveness of the British publishing trade in the face of Irish competition had therefore outlived the passing of the Act of Union and the Copyright Act.

By the mid-nineteenth century, there was a substantial body of original publication of Irish medical texts (Benson, 1990, 54). This might have been expected, given the high international standing of Irish medicine at the time. Similarly, from the 1820's on there was a marked rise in the number of Irish law books being published.²² Benson's work also confirms that a considerable Irish publishing industry developed in the religious and educational books sectors. This industry, which has escaped the attention of many other writers who concentrated more on the publication of novels and such high prestige publications, was of importance even as an export industry. The publishing output of the Kildare Place Society, for example, reached 185 000 books in 1821 and fell slightly to 173 000 in 1824 (O Ciosain, 1997, 141).

Stewart summarised some of the publishing output of Irish publishers, particularly anthology publishing and works derived from the periodical press of the nineteenth century (1998, 108 – 111). It is apparent that the output of the publishers of that time concentrated on works likely to appeal to a local or émigré audience on grounds of nostalgia, chauvinism or national interest. There was little evidence of Irish publishers issuing titles for the markets of the world. Gavan Duffy, on examining the advertisement by a prominent Dublin bookseller in the *Nation* newspaper in December 1842, found that only two out of fourteen novels were by Irish writers, 48 of 53 periodicals were British, none of the thirteen poetry titles were by an Irish writer.²³ Flanagan draws attention to the fact that among the material published in Ireland in the 1830's to 1850's were editions of antiquarian books, and editions of Irish manuscripts, such as the *Annals* and Hardiman's *History of Galway* (1989, 500-4).

A writer towards the end of the 1870's wrote that "at present the Irish publishing trade is almost non-existent. Our publishers are nominal booksellers in fact, and mere English and

²¹ Myers, for example, gives some detail of *the Dublin Evening Mail*, published from 1823 onward (1994, 119-155).

²² Benson cites an advertisement in the *Nation* newspaper of 23 November 1844 in which an Irish publisher, Hodges and Smith listed more than sixty law books on their list (1990, 54).

²³ Gavan Duffy (1890, 139).

Scottish publishers' agents."²⁴ Another issue for censure was the practice of publishing books and journals in London which purported to come from Dublin, "and some of these by pronounced and professing patriots." The writer claimed that Irish publishing in the late 1870's consisted of job-printing, newspapers, financial printing, railway printing, government printing contracts and some printing for the University Press and for the scientific societies. Otherwise "it may be truly said – 'Great cry and little wool', for we have no book-publishing trade, and we are unable to predict the advent of a wished-for better time, plenty of sham patriotism exists but there is little public spirit, or true *amor patriae*" (ibid). The report on the 1883 Cork Industrial Exhibition²⁵ lamented the decline in the Irish paper industry since 1815 and particularly since 1826 (1886, 253). Despite the capacity of Irish printers to produce good quality work, "very little book work, except Parliamentary papers and school books is done in Dublin" (1886, 254).

Importation of published work and exportation of literary property

Over the course of the century, with the improvement of cross-channel physical communications, British newspapers and periodicals came to be sold in Ireland on a large scale. The Irish taste for books became more aligned to British tastes and so it was unavoidable that the Irish market should be supplied from the source. Political consequences were also traced to this development. Thomas Davis argued that the improvement of communications in Ireland in the early nineteenth century had had intellectual effects on the population, by introducing philosophical and political ideas from Britain.

"Tracts, periodicals and the whole horde of Benthamy rushed in. Without manufactures, without trade, without comfort to palliate such degradation, we were proclaimed converts to Utilitarianism. The Irish press thought itself imperial, because it reflected that of London" (Davis, nd, 245).

Hayley, writing of the failures of periodical publications in the 1830's in the light of a survey of the content of several publications notes that "[p]eriodicals of all kinds comment on the country's emptiness and apathy; they regret that since the Union, Ireland has lost her identity, her life, her trade, and that her writers and intellectuals have all left Ireland for London, taking their 'absentee talent' with them to fill the pages of the English press" (1976, 93). Charles Gavan Duffy supported the emigration thesis: "national literature .. like all our native

²⁴ *Irish Builder* 1 June 1878.

²⁵ Cork Industrial Exhibition 1883. *Report of Executive Committee, Awards of Jurors and Statement of Accounts*, Cork: Purcell and Company, 1886.

institutions, had emigrated to England” (1890, 54). Gavan Duffy suggested that the best Irish poets and writers were in England, and that Lady Morgan, “after attempting for a time to sustain a national salon in Dublin, followed the tide and established herself in Mayfair” (1890, 55).

Carleton’s statement on the export of Irish literary property in 1843

An important statement on the export of Irish cultural property was published in 1843 by a leading Irish writer, William Carleton. In particular he noted the dissociation of Irish writers from the publishing trade of the country, and argued that it was proper for Irish writers to publish their works in Ireland. This was a particularly early expression of such views, in which an assertion of the propriety of the linkage of cultural production to cultural reproduction was made in Ireland.

“For nearly a century we were completely at the mercy of our British neighbours, who probably amused themselves at our expense with the greater licence, and a more assured sense of impunity, inasmuch as they knew that we were utterly destitute of a national literature.

Unfortunately the fact could not be disputed. For the last half century, to come down as far as we can, Ireland, to use a plain metaphor, instead of producing her native intellect for home consumption, was forced to subsist upon the scanty supplies which could be procured from the sister kingdom. This was a reproach which added great strength to the general prejudice against us ... Our men and women of genius uniformly carried their talents to the English market, whilst we laboured at home under all the dark privations of a literary famine.

“In truth until the last ten or twelve years an Irish author never thought of publishing in his own country, and the consequence was that our literary men followed the example of our great landlords; they became absentees, and drained the country of its intellectual wealth precisely as the others exhausted it of its rents.

“Thus did Ireland stand in the singular anomaly of adding some of her most distinguished names to the literature of Great Britain, whilst she herself remained incapable of presenting anything to the world beyond a school-book or pamphlet; and even of the latter it is well known that if the subject were considered important, and its author a man of any talent or station in society, it was published in London.” (1990, orig. 1843)

Carleton decided in this circumstance to have his work published by Curry, a Dublin publishing house. While he indicated that he had expected that the two first volumes of the work would be successful in Ireland, the work was also well-received in England and in Scotland. In addition to having made a self-conscious effort to contributing to the development of an Irish literature,

Carleton noted that "so far as resident authors were concerned, it was now clearly established that an Irish writer could be successful at home without the necessity of appearing under the name and sanction of the great London or Edinburgh booksellers" (1990, vi).

Carleton believed that at that time the "first signs of life" were to be detected in literary life in Dublin, but that this was not yet secure. Several periodicals to which he had contributed had failed in the immediately preceding years, "because Ireland was not then what she is now fast becoming, a reading and consequently a thinking country." (1990, vi - vii). Carleton was confident of the progress of literature and publishing in Ireland, since "the number, ability and importance of the works which have issued from the Dublin press within the last eight or ten years ... would ... satisfy the reader that Ireland in a few years will be able to sustain a native literature as lofty and generous, and beneficial to herself, as any other country in the world can boast." (1990, vii).

This rare example of awareness by a writer of the desirability or propriety of publishing in Ireland was not, however, influential on literary or publishing debates at the time. It remains an isolated instance the expression of a nationalistic consciousness in relation of publishing, and no practical consequences have been traced.

Periodical Publishing in Ireland

Hayley, who reviewed the body of periodical publications in Ireland in the first half of the nineteenth century, showed that "less than a quarter of the publications lasted more than a year, although many were of a high literary standard" (1976, 83). Their physical appearance was poor in the first thirty years after the Union²⁶. The majority of the publications of the first three decades to which Hayley refers were religious or politically partisan in character²⁷; the religious publications included both Protestant and Catholic publications.

A dividing point in the nineteenth century was the Catholic Emancipation Act of 1829, since it diminished the political usefulness of the sectarian polemics characteristic of the preceding three decades. Hayley noted that, after 1829, Ireland was "at last ready for an upsurge of literary interest after the religious and political preoccupations of the first part of the century"

²⁶ "...most Irish magazines were like tracts in appearance and contents: dreary productions on coarse paper with rough type and crude woodcuts..." (Hayley, 1976, 84).

²⁷ For example, in dealing with a non-political publication which failed within a year in 1820, she states that "the climate was not yet right for apolitical magazines" (Hayley, 1976, 86).

(1976, 89).²⁸ In the post-1829 period, the number of periodicals dealing with literary subjects or with Irish material increased, yet these magazines tended to fail. Whereas they were now produced to a generally much higher standard of technical achievement than before and whereas they now published the work of Ireland's leading writers, in early attempts consciously to encourage Irish writing, these publications continued to fail commercially. This was in spite of many of their editors attempting to encourage Irish writing.

The periodical literature from the 1850's onward is less important,²⁹ since by then mass market newspapers became important, and other forms of the dissemination of published material came to the fore, including circulating libraries.

The Young Ireland Movement and *The Nation* in the 1840's

The *Nation* newspaper, as the organ of the Young Ireland movement, was important in fostering a widespread sense of Irish nationality.³⁰ The newspaper began publication in October 1842, and among its aims was the fostering of an "interest in Irish history and literature; to keep Irish writers for Irish work; to educate and inform like the penny magazines" (Hayley, 1976, 104). Its editorial purpose was to create a national literature,³¹ and in furtherance of its aims, it reviewed new Irish publications and became a medium for the circulation of new Irish literature, in particular politically-informed ballads and essays. While it certainly enlivened the Irish literary scene, it cannot be said to have in itself contributed greatly to the quantity of Irish book publishing.³²

In 1845 Thomas Davis himself wrote that writing in Ireland was hampered by particular disabilities, which included "the diseased suction of London" which had led to the absence from Ireland of legislators, gentry and officials and thus resulted in "the want of a large, educated and therefore book-buying class" (Davis, nd, 180-8). Davis argued that the rebuilding of an Irish literary effort would be one of the great engines in the political reawakening of Ireland. Because, he argued, a sense of nationality derived in great part from the availability of national literature, "it is important to increase and economise the exertions of the literary class

²⁸ The author cites a passage from the first issue of the *Irish Catholic Magazine* of April 1829, from which the following is drawn: "There is, at length, a popular mind in Ireland enlightened and organised... We are becoming a reading and thinking nation ..."

²⁹ However, Irish trade journals began to be published, including the *Irish Builder*, which was published from the 1860's into the present century.

³⁰ Oliver showed the extent to which the ideals of the Young Ireland movement were bound up in literary expression for political purposes, (1994, 86-107).

³¹ Gavan Duffy wrote that Thomas Davis and others "were slowly, half unconsciously, laying the foundations of a national literature" (1890, 140-1).

³² Hayley listed a number of flaws in the enterprise, and of particular relevance here is her view that "the attempt to create a new literature as a manifestation of race was too precipitate - it is hard to build a literature on political demand" (1987, 41).

in Ireland.” Davis believed that this was not occurring in Ireland in the 1840’s, and that the energies which could have been applied to this endeavour were being applied to ephemeral initiatives.

Davis claimed that, from 1842, literature had acquired a more prominent role in the political formation of the population. “A Press, Irish in subjects, style and purpose, has been formed - a National Poetry has grown up ...” (Davis, nd, 246). While expensive Irish works were available to the upper classes, and while newspapers and other periodicals were available more cheaply, those who wished to read serious Irish literature were less well served by Irish publishers, and were forced to rely on imports until the 1840’s, when the Library of Ireland series was launched with the aim of giving Ireland “a National Library, exact enough for the wisest, high enough for the purest, and cheap enough for all readers” (Davis, nd, 246).

The Young Ireland movement mobilised a standing army of poets in particular through the columns of the *Nation* newspaper. This fed into two anthologies, the *Spirit of the Nation* (1843) and the *Ballad Poetry of Ireland* (1845) “in which Charles Gavan Duffy gathered the best of the poetry that had crammed the postbags of Thomas Davis’s *Nation*” newspaper (Stewart, 1998, 106). Despite the high opinion of *Spirit of the Nation* expressed by some English critics, the publishers were unable to find a London distributor for the work, and were forced to rely on back street newspaper sellers and vendors of Catholic religious works.

The aims of the Young Ireland movement, as articulated by Davis, would have involved protecting Irish industry behind tariff barriers, and this would perhaps have contributed to the development of an Irish printing and publishing industry. However, the failure of the 1848 Young Ireland rebellion and the subsequent suppression of the *Nation* newspaper had a considerable effect on publishing in Ireland. In addition to the effects of the emigration and exile of writers and of the political leaders, broader industrial and cultural effects were discernible, even in the immediately succeeding decades. Following the Famine and the failed rebellion, the health of the publishing industry seems to have been a minor matter in literary and political life.

3. Debate and Litigation in relation to copyright

Debate in Ireland in the nineteenth century on issues concerning political economy generally took place in print, in the university and at the meetings of the Irish learned societies, such as the Royal Dublin Society, the Royal Irish Academy and the Statistical and Social Inquiry

Society. Litigation is in a sense also a form of debate, since law courts are a location where disputes, primarily financial or economic in nature, are aired and resolved. However, these fora appear not to have been the location of debates concerning the policy implications of copyright regulation in Ireland. The Royal Dublin Society, which had the greatest potential interest in developing a publishing industry, does not appear to have concerned itself with the issue in any serious fashion.

The Royal Dublin Society (RDS)

The RDS concerned itself with the general economic development of Ireland. It had existed since the eighteenth century, and had involved itself in disseminating information on innovations in agriculture and industry and in the general improvement of conditions in Ireland. Only one recorded case has been found of copyright being discussed in the RDS, at either a full meeting of the Society or at a meeting of the Council of the Society. A note appears in the Minutes for 1 July 1858: "The consideration of a letter (no 1243) from the President of the Congress for the Protection of Literary and Artistic Copyright, Brussels, was postponed."³³ The meeting in Brussels in 1858 was the first step in the process which led ultimately to the Berne Convention of 1886. Drahos argues that this meeting was "the first crucial international meeting" and that the various intellectual property conventions were the "product of such meetings" (1999, 18). There is no trace of the Council returning to this postponed discussion at any later time. Ireland's lack of international negotiating capacity, coupled with evident lack of interest by the RDS, appears therefore to have denied her a voice in the preparatory phases of the Berne Convention.³⁴

Litigation

Litigation can give an indication of the controversial, contested or unsettled points in law and regulation. In Ireland, litigation in relation to copyright in the period under review appears not to have had any lasting influence on the development of legal copyright practice. Such cases as there were in that period concerned the importation into Ireland of books from the United States, rather than domestic book piracy. Only a few cases are recorded in the legal digests, and these concern technical matters and breaches of commercial arrangements in the main. Litigation, though it appeared a likely source of important material for this work, has not been

³³ *Proceedings of the RDS*, Vol 95, 1858-9.

enlightening. In the later decades of the nineteenth century, litigation in Ireland continued to be concerned with ordinary technical and civil matters and the record casts no light on the debates on copyright.

4. The Copyright Enactments between 1801 and 1911

This chapter does not treat the legislation in detail, since this complex field is of only tangential relevance to the general purpose of this chapter. Several detailed works on the legislation and debates of the nineteenth century in Britain have been published. There appear to have been few specifically Irish contributions to the debates, but references to specific Irish issues are included when they are of relevance. The conclusion cannot be avoided that, apart from the case of the period immediately after the Union, discussion in this chapter of copyright regulation in relation to nineteenth century Ireland is artificial and strained.

The legislation between 1801 and 1911 is characterised by being applied throughout the UK, and indeed, whenever possible, the legislation was applied throughout the Empire, either directly or by local law. The legislation was chaotic in form and was non-systematic, because of the piecemeal manner in which it was enacted to answer particular immediate industry requirements. It was criticised on these grounds even by contemporary commentators. Sherman and Bently (1999) review the administrative reasons for this chaos. Even the 1842 Act, which served as a partial unification, if not codification, of the legislation was criticised in 1878 and again in 1909, by government commissions on copyright.

The 1801 Copyright Act had the major effect of extending copyright protection to Ireland. The 1836 Copyright Act made a minor change in relation to Ireland, concerning legal deposit obligations on publishers. The purposes of the various copyright acts were generally to adapt the legislation to technical progress,³⁵ or to vary the term of copyright protection.³⁶ In Britain (and thus in Ireland) after 1801 copyright in books was granted for a term of fourteen years, with the possibility of an extension of a further fourteen years if this was claimed by the copyright holder. The position changed with the 1814 Act which legislated for “one period of 28 years or the author’s life, whichever was the longer” (Clarke and Smythe, 1997, 174). The 1842 Act amended this by providing for copyright protection for the author’s life and seven years, or for 42 years after first publication, whichever was the longer. The 1842 Act created

³⁴ Some states sent official delegates, but in addition “there were unofficial representatives from each major European country, as well as the United States” (Rickatson, 1987, 42).

³⁵ Principally by recognising copyright in information goods produced by new technologies, such as photography, sound recording etc.

the legislative framework which was used in Britain and Ireland until the passage of the 1911 Act. However, in the intervening years, many adaptations and extensions of the Act were brought into force.

The British Copyright Commission, 1876-8, leading to the 1911 Copyright Act

This was the first systematic examination of the legislation. Previously, copyright legislation emerged either through the personal initiative of individual members of parliament, or to remedy a particular weakness which had become apparent in the legislation. No Irish publisher gave evidence to the Commission, though Edinburgh publishers were represented by a principal of the Blackie publishing house.

This Commission, which was notably inconclusive,³⁷ examined the entire range of copyright enactments in the United Kingdom, not simply literary copyright, but also issues of design copyright and engraving. The Commission, in its examination of the purpose of copyright, considered the replacement of the exclusionary proprietary-based copyright with a royalty system³⁸ under which an author would have an absolute right to payment for the publishing of his works, but that any publisher could issue an edition. The expectation was that such a system would allow the issuing of cheap editions of works, thereby answering a public policy desideratum. However, for practical reasons, the Commission rejected the proposal, since it was believed that such a system would work against publishers taking risks in publishing original works, which could be immediately undercut by competitors. Other later enquiries, such as that of the Gorrell Committee (1909), were conducted, and in general these recommended that the law should be systematised, and that the provisions of the Berne Convention should be carried into British law.

The 1911 Imperial Copyright Act, which took effect throughout the British Empire, other than in Canada, was highly influential internationally, and formed the basis of British law until 1956. Following its re-enactment in Irish law in 1927, it was the basis of Irish copyright law until 1963. The Act itself, in British terms, attempted to take account of the Gorrell Committee (1909) recommendations, following on the 1878 Commission report. It repealed the plethora of separate acts governing copyright, and in particular, the chaotic 1842 Act, which had hitherto formed the centrepiece of British law. The Act also took account of the technological developments of the time, in such technologies as pianola rolls and similar contrivances. One

³⁶ The general thrust was towards longer terms of protection for copyright works.

³⁷ The report is accompanied by a series of detailed minority reports and reservations, which in effect left many issues open.

of the legitimate criticisms which can be made of the Irish 1927 Act is that it did not update the 1911 Act in the light of technological advances, but enacted a pre-war statute in the late 1920's, when there had been rapid and radical advance in the technologies of communication in the intervening years.

5. Colonial copyright, with particular reference to Canada

In his evidence to the 1878 Copyright Commission, Charles Trevelyan, stating that Canadians read considerably more than did the mass British public, may have identified one of the reasons for difficulties between Britain and Canada in relation to books. "Large and intelligent as these populations are, they read in far greater proportion than our poor English people do, and are far more intelligent and make more use of books, and they are increasing far more rapidly than our English people" (1878, 5). In this way, the Canadian population resembled the American, and consequently, represented a potential market opportunity for British publishers. It was also a population which could be expected to demand from their own government a copyright and trade regime appropriate to their demand for books. Modification of colonial copyright was seen as necessary by the Commission, for cultural and political reasons, since "it is highly desirable that the literature of this country should be placed within easy reach of the colonies". (1878, xxx).

Two major attempts were made in Canada to adopt copyright statutes which would be preferentially advantageous to Canada, but disadvantageous to British publishers, one in the 1840's and a second in the 1890's. In both cases the British publishing industry succeeded in defeating the Canadian initiatives. Efforts were made by the Britain government, and indirectly by the British publishers, to have the British copyright regime exported to Canada by legislation. Canada remained opposed to the proposed British changes, for broadly similar reasons to Ireland's refusal to accept the British system in the 1780's. National legislation in Canada was intended to protect local Canadian copyright, and to protect Canadian publishers from international competition, and at the same time to maintain the North American tradition of cheap books.

Canada was not entitled to legislate purely in its own interest, but was subject to an ultimate British veto. Some colonial legislatures were empowered to legislate for copyright, but the British government retained the authority to overturn legislation, to refuse the necessary Royal Assent to colonial legislation or to legislate directly for the colony. This reserved power to legislate for colonies was an issue of contention between London and the colonies, since

³⁸ *Copyright Commission Report*, 1878, ix.

Britain's interests and the interests of the colonies frequently diverged. Britain was forced to decide to act either in its domestic interests or in the interests of the Empire as a whole. The issue of competing interests became particularly prominent in the case of Canadian copyright, from the 1840's onwards.

The British 1842 Copyright Act was the first to address the difficulties of the British colonies, particularly those whose book markets were being penetrated by publishers from outside the Empire. Canada, whose market was being dominated by US publishers, was the intended beneficiary. In addition to changing the period of protection for copyright works domestically, also included provisions for the protection of foreign works. No one in the British dominions could print any copyright work without the proprietor's consent (Nowell-Smith, 1968, 23). In addition, the importation of books for sale in an edition printed outside the British dominions, where the books had been first printed in the United Kingdom, was prohibited.³⁹ A Customs Act of 1842⁴⁰ also included a provision for the limitation of the right to import books into the United Kingdom where they were in copyright in Britain (Nowell-Smith, 1968, 24). This provision did not apply explicitly to the dominions and consequently, the North American colonies which would constitute Canada made use of the loophole to continue to import books from the US (Nowell-Smith, 1968, 25). This loophole was closed by the two 1845 Customs Acts.⁴¹ However, the colonial legislators and public expressed the view that it was oppressive for Britain to insist on their maintaining the same regime against imports, and argued that the relative poverty of the colonial bookbuyers meant that they ought to be permitted to buy foreign editions of books in copyright in the United Kingdom. This case was pressed most forcefully by the legislatures of the Canadian colonies⁴²

The 1842 Copyright Act⁴³ applied to Canada, where its effects were felt in particular by English-speaking Canadians who had become accustomed to importing cheap American reprints of books published in Britain. From quiet beginnings, opposition in Canada to the imposition of the 1842 Act grew to a "torrent of complaint" by 1845-6 (Barnes, 1974, 138). The Canadians complained that they were being educationally disadvantaged through the exclusion of American reprints, and that the high price of British imports of copyright editions placed them beyond the reach of most Canadians. In terms which reflected the earlier attitude of Irish consumers, the Canadians presented themselves as relatively poorer people than the British and

³⁹ In 1844 the International Copyright Act prohibited entirely the importation of copyright works printed abroad without the written consent of the copyright holder. (Nowell-Smith, 1968, 24).

⁴⁰ 5 & 6 Vict, c 47, 1842.

⁴¹ 8 & 9 Vict., cc 84 & 93, 1845 (Nowell-Smith, 1968, 26.)

⁴² "For years the Canadian provinces and the West Indian islands, avid for cheap reading matter, had relied on imports from the United States. ...the local legislatures sought to legitimate [the evasion of the customs regulations] by enactments of their own, justifying the exclusion of expensive editions and the importation, not of piracies as such, but of books the poor colonials could afford" Nowell-Smith, (1968, 25).

argued that, if they were required to pay for full price British editions, they would be deprived of the cultural output of England. This was a forceful argument which carried political weight in London.

Canadians felt that they had a moral entitlement to cheap editions from Britain, since the legal importation of books from the United States had been closed. Accordingly, they put pressure on the British government, and Gladstone, then a minister at the Board of Trade, impressed on British publishers that there was a requirement for cheap 'colonial' editions. The Board of Trade was prepared to intervene in the market to ensure that colonial readers had access to cheaper books, if the publishers did not supply books at a low enough price (Barnes, 1975, 142). However, the Treasury held to a strong line and were not prepared, on ideological grounds, to agree to lower postal charges for the transmission of books to the Canadian market, seeing this as an unwarranted public subsidy of private enterprise. For those publishers who were prepared to issue cheaper colonial editions, there arose the fear that these cheaper edition might be re-imported to Britain, undercutting the British market. The British publishers continued to be concerned by this problem, which involved no breach of the law, for decades afterwards, and sought agreements with the Canadian booksellers that the books would not be reintroduced into the British market.

A second possible mechanism for supplying the Canadian market with books of British origin was to grant reprint rights to Canadian publishers. The British publishers were opposed to this, because their margins depended on printing large editions for international sale. By granting reprint rights to foreign publishers, the marginal cost of producing copies in Britain increased. In addition, the printers opposed the reduction in business which would ensue. No Canadian publishers were granted reprinting rights until 1875, and even then the right was restricted (Barnes, 1975, 283, n. 11). One major British publisher, John Murray, took the initiative of issuing a 'Colonial Library' beginning in 1843, with the express purpose of protecting the copyrights of British authors. There was a parallel political intent in the editorial policy of the Colonial Library. The works chosen were of a patriotic character, intended to counter American works which were "sapping the principles and loyalty of the Subjects of the Queen by the democratic tendency of the native American publications."⁴⁴

⁴³ An Act to Amend the law of Copyright, 5 & 6 Vict. C 45 (1842). See Sherman and Bently (1999) and Seville (1997).

⁴⁴ Letter by John Murray, 20 November 1843, cited in Barnes, (1975, 144). Murray's Colonial Library was not a success and was discontinued in 1849. The books chosen were considered by Canadians to be unsuited to Canadian taste, and were in any case generally older books which had been already available in the Canadian market from other sources.

The Foreign Reprints Act 1847

The British government in the 1840's became disillusioned with effect of the 1842 Act on the colonial market. Gladstone dissociated the Government from the legislation, noting that the Act had not been a government measure, but had been passed as a result of private initiatives "adopted by Parliament on the suggestion of an individual member of the House of Commons in deference to a strong public sentiment" (Barnes, 1975, 147). Gladstone became convinced that Canada deserved a more congenial regulatory environment and as a result of Gladstone's conversion to the Canadian cause, a new act was passed in 1847, the Foreign Reprints Act.

The intention of this Act was to allow a colony to pass its own domestic copyright legislation, which, on the condition that it protected the copyright of British authors adequately, would be entitled to British approval and thus to enactment.⁴⁵ The Province of Canada immediately passed a copyright measure, the most important provision of which was to protect the copyright of British authors whose work was printed and published in the province. The Act was approved by the British government, but the Canadians neglected to request the British government to suspend the provisions of the British 1842 Act, which had prohibited the reprinting in the colonies of works in copyright in Britain. When it was later realised that this was necessary to allow the provisions of the Canadian Act to have legal force, political changes in the British government and a heightened awareness among British publishers of the consequences of the Canadian legislation led to Britain's refusal to suspend the 1842 Act's effect in Canada.⁴⁶ The Canadian book trade was "sacrificed to the interests of the Canadian reading public on the one hand and to the British authors and publishers on the other, a plight which it endured throughout the nineteenth century" (Barnes, 1975, 149-50). While the Canadian government made further efforts to secure its aims of allowing the circulation of cheap reprints in Canada, through both the copyright legislation and customs regulations, even in the late nineteenth century, Canadian publishers were not entitled to reprint British copyright books.

Despite the impediments placed in the way of Canadian publishers, paradoxically American publishers were in a position to export their reprints legally to Canada, under the terms of new legislation, where a duty of 12.5% was levied on British copyright works imported to Canada from the United States⁴⁷ (Novell-Smith, 1968, 88). Between 1851 and 1855, Canada imported four times as many books from America as it did from Britain. Canadians were not allowed to

⁴⁵ i.e., to receive a form of Royal Assent, and thus be placed on the Statute Book.

⁴⁶ Feather described the effect of the 1847 Act as "undermining the very concept [of 'Imperial copyright'] almost as soon as it was recognised" (1994, 171).

carry on their publishing trade in the same manner as the Americans, despite the effective acquiescence of the British government in the importation to Canada of American reprints of British copyright works. "Only the American reprinters and the Canadian consumers gained. As was true in the United States, the mania for cheapness won out over the interests of the literary community" (Barnes, 1975, 152).

While British interests were prepared to accept that the 1847 Act could be applied for the relief of the analogous difficulties of the West Indies,⁴⁸ India represented a particular concern for British publishers (Novell-Smith, 1968, 86). Charles Trevelyan informed the Copyright Commission in 1878 that there had been a "great controversy" in 1835 when the Government of India "declared that the great object of the British Government ought to be the promotion of European literature and science among the natives of India, and it became at once obvious that a cheap literature was a necessary complement to a system of national education."⁴⁹ In the 1870's Trevelyan urged that colonial copyright should be amended to allow Indian publishers to reprint English works cheaply, "equally to the benefit of the people of India and of the copyright owners," and indeed, he saw similar benefits for the people of South Africa, Australia and New Zealand (1878, 3). India and other colonies with relatively poorer populations than Britain would thus be in a position to enjoy cheaper literature than Britain or Ireland, where books might remain at their traditional higher price, at least in the first years after publication. In India in the 1870's most of the demand for books was met by American publishers (1878, 4).⁵⁰ Indian publishing at the beginning of the nineteenth century was "an historical phenomenon unprecedented on a global scale. It was the first fully formed print culture to appear outside Europe and North America" and it was "distinguished by its size [and] productivity" (among other characteristics) (Dharwadker, 1997, 112).

Later Canadian Legislation

The Dominion of Canada was created by the British North America Act 1867, and for some years afterwards, the extent of Canadian legislative independence was a matter of controversy.⁵¹ Parker (1976, 45) argues that the Canadians, realising that Britain was intent on

⁴⁷ Barnes detailed the duty levied under regulations issued in 1851, the proceeds of which were intended to flow to British authors of copyright works (1974, 151).

⁴⁸ The West Indies also legislated under the terms of the 1847 Act, but the small scale of the colony (in effect Jamaica) meant that its legislation had little commercial effect on Britain. *Copyright Commission Report*, evidence of Frederick Daldy, 1878, 54.

⁴⁹ *Report of the Copyright Commission*, 1878, 1.

⁵⁰ In 1872 Trevelyan wrote that certain "British Colonies and India ... are at present deluged with United States reprints of English copyright works." Reprinted in Appendix 1 to the Report of the Copyright Commission, 1878, 328.

⁵¹ For example, Frederick Daldy, a member of the Copyright Commission, referred in 1878 to Canadian legislative independence as a "theory which has been broached recently," in the context of discussing whether Canada had the competence to legislate in the area of copyright. (1878, 53).

trading off the Canadian market as a token prior to making a bilateral copyright agreement with America, passed “a series of copyright acts designed to jeopardise Anglo-American negotiations.”⁵²

A Canadian Act of 1869 was not approved by the British government (O'Neill, 1993, 109). Following extended negotiations, a new Canadian Copyright Act was passed in 1875, and was given effect by an enabling British Copyright Act in the same year. Under this Act, a new Canadian copyright was created in books printed in Canada, and British works could be copyrighted under the Act. However, under the terms of agreement to the Canadian Act, Britain insisted on excluding Canadian editions from the UK⁵³, despite very cogently argued and apparently unanswerable evidence to the Commission in support of the Canadian publishing industry from T.H. Farrer of the Board of Trade, which was at the time the department “specially charged with legislation affecting copyright.”⁵⁴ Parker described Farrer’s apparent support for the Canadian industry as “sinister” and claims that its was “given only in the hope of frightening the Americans into a reciprocal-copyright agreement” with Britain (1976, 45).

The Canadians experienced continuing difficulties with copyright, and once America passed its Copyright Act in 1891, the situation became even more difficult.⁵⁵ Canada decided to answer the difficulties presented to it by the forces of American and Imperial copyright by introducing a form of manufacturing clause to its legislation, in its Copyright Act 1889. Canadian copyright could be acquired by a foreign rights owner only by printing an edition in Canada to supply the Canadian market within one month of the publication of the first edition, otherwise the work would fall into the public domain in Canada and be available to any Canadian publisher to issue an edition.⁵⁶ This law represented such an affront within the Empire to British publishers that the 1889 Copyright Act did not come into effect because of British opposition.⁵⁷ When the Canadians imposed a tariff in 1893 on imports of books from the US, the US threatened retaliatory action on Britain (Parker, 1976, 47). In 1894 Canada removed the duty levied on imports of copies of reprints of books by British authors and, in a Copyright Act of 1900, excluded British editions of works for which an exclusive right of publication already existed

⁵² These were the Canadian Acts of 1872, 1875, 1889 and 1900.

⁵³ *Copyright Commission Report*, 1878, xxxii.

⁵⁴ *Copyright Commission Report*, 1878, xxxv.

⁵⁵ This Copyright Act, the so-called Chace Act of 1891, introduced a manufacturing requirement. Unless books were printed in the US, they did not receive copyright protection there. This is discussed in a later section of this chapter.

⁵⁶ Feather, (1994, 196).

⁵⁷ The Society of Authors were influential in ensuring that the Canadian Act did not become law, through lobbying both in London and Ottawa, and by persuading the Canadian government that the 1889 Act was as much contrary to Canada’s interests as it was to Britain’s (Bonham-Carter, 1978, 163). The 1889 Act failed not once, but several times, as the Canadian Parliament passed the Act in each year between 1889 and 1894, and on each occasion, the British government refused to allow it (Parker (1976, 47).

in Canada (Bonham-Carter, 1978, 233).⁵⁸ Canadian copyright did not finally come into line with Britain's until 1924, later than all other colonies, following the terms of the 1911 Act.

O'Neill has shown that before the regularisation of the situation in 1924, Canada suffered considerable cultural disabilities in its relations with the US, partly as a result, of "the various copyright acts of the nineteenth and early twentieth centuries" (1993, 105). Britain and the US sought to come to an accommodation in their own interests and without regard to Canada. The enactment of the US Chace Act 1891 led to the domination of the Canadian music publishing industry by US works. Although the regulatory system was amended in 1909, a pattern of the trade had by then developed of American publishers sending plates to Canada to be printed, published and registered, and this continued after 1909. Between 1895 and 1923, of the sheet music registered for copyright in Canada, only "slightly over 50 percent" was of Canadian origin, and that American domination of Canadian popular culture intensified as a result. (O'Neill, 1993, 114).

Tension within the Empire: the US – Canadian Problem

The Gorrell Committee⁵⁹ reported in 1910 that they were aware of a proposal to convene a conference of the Colonies, to discuss copyright within the Empire, and that "it seems of the utmost importance that the Colonies, as parts of the British Empire, should come into line with Great Britain, and that, so far as possible, there should be one law throughout the Empire."⁶⁰ No such conference took place, but efforts continued through the 1920's to maintain uniformity of copyright throughout the Empire. Indeed, Britain objected strongly in the 1920's to the suggestion that the Berne Convention, for example, was in effect between the Dominions, since this detracted from the legal unity of the Empire, and gave comfort to those who argued for Dominion sovereignty.

The special arrangements which were agreed for Canada in 1914⁶¹ were a response to the unusual situation in which Canada found itself, and allowed it (or any state in a similar situation) to limit its protection for works by authors from non-Berne states which did not offer similar levels of protection for authors from 'Berne' states. The United States retaliated against Canada, expressly excluding Canadians from the protection granted to composers under a new presidential proclamation covering rights in recorded music. Consequently, Canadian

⁵⁸ See also Parker, (1976, 51).

⁵⁹ This British Parliamentary Committee laid the ground for the 1911 Copyright Act.

⁶⁰ Report of the Gorrell Law of Copyright Committee, London, 1910, p 29.

⁶¹ The Additional Protocol to the Berne Convention, 1914, addressed Canada's difficulty of proximity to a country outside the Berne Convention. The Berne Convention is discussed in the next section..

composers were placed at a further disadvantage in the sector of the cultural industries which was becoming commercially dominant.

The Canadians, between 1919 and 1923, drafted copyright bills, which proposed manufacturing requirements for musical and printed works, and were prepared to impose these requirements even on authors from Berne signatory states, such was the pressure on the Canadian music and publishing industries. This was opposed by the states of the Berne Union, but also, more critically, was particularly opposed by the American government. As a result of negotiations in 1923 between the US and Canadian governments, the two states reached an international copyright agreement, and a new Canadian Copyright Act was finally passed in 1924. One feature of the agreement, which demonstrates the relative power of the states and their industries was that, while the American manufacturing clause would continue to be imposed on Canadians, the Canadians agreed that their manufacturing clause would not apply to Americans. Thus, an American writer or composer had only to register his work in Canada to secure copyright protection, whereas a Canadian author, to acquire American copyright, had to have his work published in the US (O'Neill, 1993, 116 - 7).

From the passing of the 1891 Chace Act in the US, the Canadian market for cultural goods was in effect "surrendered to American interests" so that British interests "would receive more favourable consideration in the US," and the ultimate result after 1924 was that Canadians were forced to have their works published in the US. This had detrimental effects on the cultural development of Canada (O'Neill, 1993, 118).⁶² Vipond (1980), in a discussion of the circumstances of the passage of the Canadian 1924 Copyright Act, emphasised the intensification of cultural nationalism in Canada. Canadians were then at a point of indecision about whether their identity was British or North American, and there emerged a concern about the dominance of the cultural world and media by the US. Writers began to argue that American domination was already causing cultural and political problems. There was massive importation of American literature, and the identity of Canada was becoming Americanised. A movement developed which sought to assert a distinctive Canadian identity, on grounds of literature. The purpose was to create a Canadian literature, and, implicitly, a corpus of national myths. Among the charges made against the Canadian population was that the market demanded 'second-rate literature', the equivalent of the penny dreadfuls of the nineteenth century, the bulk of it emanating from the US. It was argued that "if Canadians wanted to read second-rate literature, and obviously they did, they should at least be persuaded to read second-rate Canadian literature" (Vipond, 1980, 77). However, Canada moved inexorably out of the

⁶² Smythe characterises the influence of the US on the Canadian publishing industry after 1891 as the imposition of "the American 'one way' free flow of information" (1981, 121).

cultural ambit of Britain, and a conjoint US-Canadian cultural identity began to coalesce. Copyright relations between the three countries were clearly an influential factor in this cultural change,

6 International Copyright

The increasing internationalisation of copyright in the nineteenth century emerged from a tendency for states to conclude bilateral agreements between themselves, as books and printed goods were traded in large quantities between countries. Even relatively small states (such as the smaller German states and the Italian states) concluded bilateral agreements. Drahos lists 69 bilateral intellectual property conventions which had been concluded by 1883 (1999, 17). The growth of the number of English speakers, subject to the laws of different countries, made international copyright a particularly acute concern for British publishers and legislators in the nineteenth century.

In 1838, the first British International Copyright Act was passed (Feather, 1994, 157). This gave the British government the power to grant reciprocal protection in the United Kingdom to works of foreign authors. No orders for reciprocal protection were granted under this act, however, but nevertheless, the fact that provision was made suggests that the issue was a real concern at that early date (Nowell-Smith, 1968, 20-1). The first effective International Copyright Act passed in Britain was the 1844 Act, which repealed the 1838 Act but aimed at the same purpose: bilateral agreements with foreign states, giving reciprocal protection to the works of foreign authors. An agreement under the terms of the act was concluded in 1846 with Prussia and this agreement provided for the right of accession to the agreement of German states which were members of the Zollverein, the German Customs Union, and for the accession to the agreement of any states which joined the Zollverein after that date. The multiplicity of German states, conducting their own international affairs, meant that there was an extended series of agreements between Britain and the German states (Nowell-Smith, 1968, 32). In 1852 a further International Copyright Act was passed, to give effect to an agreement with France which had been concluded in the previous year.

While a trend towards international agreements was evident, Britain was bound by relatively few international copyright treaties for several decades. When the Berne Convention came into effect in 1887, Britain had agreements on copyright only with Germany, France, Spain, Belgium and Italy. She had no formal copyright relations with much of Europe, where Dutch

piracy remained a considerable problem (Nowell-Smith, 1968, 33), nor with the United States. The Berne Convention did not initially include the United Kingdom, which only later gave domestic effect to the Convention.⁶³

The United States

The US presented a major problem for English-language publishers in relation to copyright. Britain was the largest economic power in the 1880's, yet by the late Nineteenth century the US had an even larger population of actual or aspirant English speakers. Consequently, the absence of international agreement on copyright with America was felt more strongly by British publishers than was the absence of agreement between any other pair of states. In the nineteenth century the United States protected its own authors' copyright, under the terms of the US Constitution and also under federal legislation. Moreover, the US 1831 Copyright statute explicitly drew attention to the fact that there was no prohibition on the reprinting in the US of the works of foreign authors (O'Neill, 1993, 106). This was for explicit policy purposes of encouraging literacy and gaining resultant economic improvements,

Before the enactment of the Chace Act of 1891, no copyright was available to foreigners in the US (Novell-Smith, 1968, 66). Even foreign residents in America were not entitled to acquire copyright, unless they applied for citizenship (Feather, 1994, 166). American citizens were entitled to US copyright in all their books, whether they were manufactured in America or elsewhere. This meant that, if a book by an American were published in Britain, it would also be entitled to US copyright. This too was a clear expression of social and economic policy, carried into the cultural sphere.

The United States was using the differential application of copyright law to its domestic advantage at this time. "As a country nineteenth century America was akin to a present-day underdeveloped nation which recognised its dependence on those more commercially and technologically advanced, and desired the fruits of civilisation in the cheapest and most convenient ways. Reprinting English literature seemed easy and inexpensive, and so American borrowed voraciously" (Barnes, 1975, 50). Indeed, the market in the US for works by its own authors was limited by the preferential reprinting of works by foreign authors (O'Neill, 1993, 106). This was an obvious negative consequence of the policy.

⁶³ An Act of 1886 gave the British government authority to accede to the Berne Convention. (Nowell-Smith, 1968, 68).

The British 1878 Copyright Commission concluded that copyright relations with America gave rise to “the greatest hardships” and that the irritation was particularly difficult to deal with, owing to the friendly relation between Britain and America, (1878, xxxvi). The Commission argued that the result of American publishers’ reprinting practices, which diminished “the inducement to publish original works,” was “to check the growth of American literature, since it is impossible for American authors to contend at a profit with a constant supply of works, the use of which costs the American publisher little or nothing.” (1878, xxxvi). John Blackwood, the Edinburgh publisher, told the Commission that the availability of cheap reprints of English books in America operated as “a dead check upon American literature” (1878, 43). The Commission also suggested that the negative consequences for American literature from the absence of reciprocal copyright was even more pronounced in the case of music: “In a country which is so flourishing in every other respect as America it has always been a matter of wonder that there are so few musicians of eminence” (1878, 92).

The US policy had detrimental consequences for some Irish writers, in common with all foreign writers. Dion Boucicault suffered from the absence of an Anglo-American copyright agreement, since he presented some of his plays in America before they were performed in the United Kingdom. British law considered performance of a play to be the equivalent of publication, which was the contrary of the American position, and consequently prior performance in America deprived him of copyright in Britain. The Copyright Commission was informed that as a result, “A great many of Mr Boucicault’s plays have no copyright in England; ‘Colleen Bawn’ and others are played all over England without payment, there being no copyright.”⁶⁴

The United States Manufacturing Requirement

In 1891, the United States adopted an international copyright act, commonly known as the Chace Act.⁶⁵ Various attempts had been made in the United States in the 1880’s to have her enact an international copyright law, but these failed in the face of opposition from a number of powerful forces. These included the reprint publishers, arguing on commercial grounds, and political forces, arguing against any introduction of competing products. The most significant opponents, however, were the printing unions, who feared that imports of copyright-protected books into America would lead to unemployment (Feather, 1994, 168). When ultimately America did legislate for recognition of foreign copyright, it was hedged around with

⁶⁴ Evidence of John Palgrave Simpson, Secretary of the Dramatic Authors’ Society, Copyright Commission, 1878, 126.

restrictions, including that books had to be not just published in the US, but printed there from type set up there, the so-called 'manufacturing clause'. This led to a classic case of foreign subsidy of a domestic industry. The limited cultural value of the manufacturing clause is clear, since it was US printers and not US writers or even publishers who benefited directly from the legal requirement. Indeed, it is likely that it led to an undesirable form of substitution, since it would have been cheaper to publish imported works incurring no copyright charge, rather than the copyright works of American writers.

Boyd called the manufacturing clause "the longest-lived U.S. nontariff trade barrier" (1991, 64). Protection was given to foreign works where the foreign edition was deposited in Washington "on or before the day of publication in this or any foreign country."⁶⁶ Books had to be published simultaneously in the United States and in the United Kingdom, if they were to secure copyright protection in both territories (Feather, 1994, 162). One provision of the Chace Act, which derived from the earlier 1870 American Act, was that the President could issue a proclamation declaring that another country had granted "the benefit of copyright on substantially the same basis as its own citizens."⁶⁷ This form of mutual, though not automatic reciprocal protection, became an issue for Ireland in the 1920's, as legislators took care to shape the legislation in terms which would allow this presidential proclamation to be issued for Ireland.

The Chace Act was a direct American response to the Berne Convention, but it was a response informed by the American philosophy of protectionism. The appearance on the international scene of the Berne Convention served to point up the isolation of America from the developing international copyright network (Feather, 1994, 165). Despite this, however, America remained indifferent to the effects of such isolation and ultimately other states were forced to come to particular terms with America, because of the size of her market and of her export output.

7. The late nineteenth century articulation of Irish nationalism through culture. Cultural production dissociated from copyright protection

The development in the later nineteenth century of an active cultural nationalism in Ireland, initially among a small minority, grounded on a philosophy of cultural exceptionalism, was a

⁶⁵ Nowell-Smith records that between 1843 and 1886, eleven international copyright bills failed in the United States Congress (1968, 60-61).

⁶⁶ Cited in Nowell-Smith, (1968, 65.)

⁶⁷ Text of the Chace Act, cited in O'Neill, (1993, 112).

potential moment for a debate on the desirability of strongly linking Irish cultural production with the Irish cultural industries.

However, certain characteristics of the form of cultural nationalism, in its literary guise, gave rise to evident ironies. The literary revival, which relied on drama for much of its energy, did not concentrate on publishing as a mode of communication. Theatrical cultural production, in the high culture forms chosen by the literary revival, was a minority taste, and was quantitatively overwhelmed in Dublin by the commercial theatre, which retained links with and was deeply influenced by English popular theatrical forms. Foster warned of the need to be aware that the market for Irish plays in the early twentieth century remained relatively small, compared to the audiences for 'light opera', London-derived farces and the music hall (1988, 452).

Conflicting views exist on the state of literary activity in Ireland at the turn of the century, and on the quality of the output of both writers and publishers. Flanagan suggested that there was in Ireland at the turn of the century "a literature lacking in creative energy" (1989, 499). However, Yeats argued that "more books about Irish subjects have been published in these last eight years than in the thirty years that went before them, and these books have the care for scholarship and the precision of speech which had been notoriously lacking in books on Irish subjects" (1901, 89).⁶⁸

Irish language literature

Irish language literature was a relative minor component of Irish publishing output in the nineteenth century. . As would be expected, at a time when there was a large Irish-speaking population, "the high point in the production of popular print in Irish was the period 1800-1850" (O Ciosain, 1997, 158). The material published comprised Catholic and Protestant religious texts and ballads published as broadsides. The quantity published was small in absolute terms. Cullen suggested that the small scale of the output was related to the lateness of the development of publishing in Ireland, when English had become established as the language of print, and the fact that the urban centres of publishing were removed from the rural location of the Irish-speaking and manuscript-writing populations (Cullen, 1990, 15 – 44).

⁶⁸ Yeats, *The Literary Movement in Ireland*, in *Ideals of Ireland*, Lady Gregory (Ed), London: 1901, pp 85 - 102. Reprinted New York, 1973.

However, a wider awareness of the importance of cultural and linguistic nationalism developed from the late nineteenth century onwards. The foundation of the Gaelic League led to an increase in the publication of books in Irish. Until then there was a scarcity of published work in Irish, with the notable exception of scholarly works⁶⁹. The League's intention to transform Ireland into an Irish-speaking nation, had it been fulfilled, would inevitably have led to the development of a native publishing industry commensurate with the size and demands of the market for published goods. Stewart wrote, on Douglas Hyde's involvement in an anthology of Irish literature published in America in 1904, that " ... the general effect was to lend credibility to the efforts of the Gaelic League in resuscitating Irish as a living and – what is more – a printed literature" (1998, 114). The Irish Literary Society in London, the National Literary Society in Dublin, the Irish Literary theatre and the Feis Ceoil Committee contributed to the revival of Irish literature. Most important was the Gaelic League, "which has worked for the revival of the Gaelic language with such success that it has sold fifty thousand of its Gaelic text-books in a year" (Yeats, 1901, 89-90).

The intention on the part of some of the nationalist writers to restore the Irish language, and to sustain this through the publication of books and periodicals in that language, is of relevance to the interface between writing and copyright. This is so particularly in relation to translation rights, which entered the international debate in the mid-nineteenth century and came to greater prominence as the decades advanced. In addition, the developing sense of Irish writing being new writing in the Irish language published in Ireland meant that there was little possibility of foreign publishers owning that section of national cultural property. Finally, the copyright in English language material came to be seen to be of lesser significance in the minds of Irish nationalists, who may have presumed that English would cease to be the spoken language of the country.

The Gaelic League's intention of transforming Ireland into an Irish-speaking society necessarily involved an indifference to the question of supporting English-language publishing in Ireland. Hyde's preferred option of reclaiming an Irish literary past through Gaelicisation lost out over time to the aims of Yeats, Synge and George Moore, whose bias was towards the creation in Ireland of a national literary and dramatic culture in the English language, but whose interest in the industrial underpinning of cultural activity was underdeveloped.

⁶⁹ Throughout the nineteenth century, various cultural and historical associations existed, where Irish literature, language and antiquities were cultivated. Comerford lists organisations such as the Gaelic Society of Dublin (1806), the Hiberno-Celtic Society (1818), the Irish Archaeological Society (1840), the Celtic Society (1845) and the Ossianic Society (1853). R.V. Comerford, Nation, nationalism and the Irish language, in Thomas E. Hachey and Lawrence J. McCafrey (Eds) *Perspectives on Irish nationalism*, Lexington KY: University Press of Kentucky, 1989, 20-41, p24.

Once cultural nationalism had become almost inextricably bound up with linguistic issues, there was an inevitability about the nationalist theorists' failure to consider the issue of developing a publishing industry in the English language. After the foundation of the State in 1922, the issues which concerned the legislators in relation to publishing centred on censorship, (which had been prefigured in much of the periodical publishing on the Catholic nationalist side in the preceding two decades), and on translation rights.

A censoring mentality leading to calls for the cultivation of native literary production: the linkage of native production of cultural material with moral questions.

Arguments were advanced early in the twentieth century for developing an Irish literature, on the grounds of cleansing Ireland of imported material on moral grounds, rather than for reasons of cultural development. In 1905 *The Leader* published an article on the utility of creating an authentic Irish national literature in order to overcome English literature (Garvin, 1987, 69). Garvin cites evidence from an official report that Irish men and women who had worked in London at the turn of the century "returned to Ireland ... disseminating 'healthy Irish literature' to counteract the 'debasing influence' of the cheap 'English sensational fiction' that was circulating among the 'peasant classes in Ireland'".⁷⁰

Douglas Hyde announced a cultural project in his 1892 lecture "The necessity for de-anglicising Ireland."⁷¹ It would not have involved the exclusive substitution of Irish for English, but instead the elevation of Irish and Anglo-Irish literature over imported English literary forms: the "use of Anglo-Irish literature instead of English books, especially instead of English periodicals. We must set our face firmly against penny dreadfuls, shilling shockers and, still more, the garbage of vulgar weeklies like Bow Bells and the Police Intelligence."⁷²

Eoin MacNeill argued in 1891 that a movement aimed at restoring the Irish language would counter the inroads of English culture on Irish Catholicism.⁷³ Foster quotes an argument by an

⁷⁰ Garvin, (1987, 88), citing H.C. *Final Report of the Commissioners on Intermediate Education (Ireland)* C 9511, 1899, Appendix, 484.

⁷¹ Published as Douglas Hyde, "The necessity for de-anglicising Ireland" in Charles Gavan Duffy, George Sigerson and Douglas Hyde, *The Revival of Irish Literature*, London, 1894, 117-61. Citation derived from Brian O Cuiv, "Irish language and literature, 1845-1921", (1996, 402).

⁷² Quoted in Kiberd, (1995, 144). Garvin quotes the report of this address from the Irish Catholic, 25 Jan. 1902, as Hyde urging an audience of Athlone schoolchildren to 'read Irish-language weeklies rather than "penny dreadfuls, shilling shockers, police intelligence, garbage and snippets ..."' (1987, 82).

⁷³ Garvin (1987, 51), citing MacNeill. Garvin also cites an article in the periodical by an Irish priest, who held out the possibility that a restoration of the Irish language would preserve Ireland from 'corrupt literature in English', as a Flemish linguistic revival was held to have protected Belgium from the 'inroad of corrupting French literature'. This fear of foreign corrupting literature would become a more potent force within three decades.

organisation, the Daughters of Ireland, which aimed to “discourage the reading and circulation of low English literature, the singing of English songs, the attending of vulgar English entertainments at the theatre and music hall, and to combat in every way English influence, which is doing so much injury to the artistic taste and refinement of the Irish people” (Foster, 1988, 450). The capacity for outrage at theatrical productions was a well-cultivated accomplishment. Garvin records various attacks in the *Leader* on a ‘dirty play’ and ‘putrid filth’ (1987, 69).

The view that the market in Ireland was for poor quality material of low cultural value continued to be advanced. One major contemporary authority appeared to find as much fault with domestic output as with publications imported from Britain.⁷⁴

“The state of literature, and thought, and original intellectual activity of any kind had dropped to a low level. The ‘Irish National’ literary output chiefly consisted of a few penny magazines in which the most commonplace rhymes were passed off as ‘Irish’ poetry... Then the great rise of cheap periodicals came about in England, and the market in Ireland was flooded with them. Ireland being a poor country, the cheapest class of periodicals only is within the popular resources, and it soon became evident that a grave evil was threatening us, and that Ireland was largely feeding on a questionable type of British reading matter” (Moran, 1901, 32–3).

This strand of thinking continued to be articulated in the twentieth century, particularly from certain cultural critics in the 1920’s.

The cultural debates in the period between 1900 and 1922, which appear to have been dominated by assertions of the value of Gaelic culture, must be balanced against both the existence of the actual English speaking majority in the country, and the extent to which Ireland was by then culturally incorporated into the multi-national British state. The fact that this continued after 1922, and that the linguistic shift to speaking Irish, far from taking place, was reversed even more strongly, demonstrated that the building of an Irish literary culture in the English language would have been one appropriate policy for the Irish government.

8 Conclusion: Absence of debate on literary property

The development of a self-conscious cultural nationalist agenda in English language and Irish language writing did not go hand-in-hand with calls for the legal protection of a body of Irish literary property. The concepts were from separate categories, and it would be absurd to expect

that the concerns of a primarily literary school of thought would lie in a legal or regulatory direction. Political debate did not extend to any discussion of protecting or encouraging Irish intellectual property, or of using it as a lever for social, economic or cultural development. Indeed the possibility was not contemplated in any of the Home Rule Bills which were introduced up to 1912. Copyright was also specifically excluded from the competence of the parliaments to be established under the Government of Ireland Act 1920.

In a manifesto of the organisation which would become Arthur Griffith's Sinn Féin, a position was adopted "to advance the cause of Ireland's independence" by, among other means, diffusing knowledge of Ireland's resources and industries; the study and teaching of Irish history, literature, language, music and art ... the discountenancing of anything tending towards the Anglicisation of Ireland ..." (Foster, 1988, 457). This might seem fertile ground for a consideration of a position to develop a publishing industry in Ireland, yet there is a lack of evidence that a Canadian- or American-style policy instrument in the form of copyright legislation was planned.⁷⁴ A cultural policy of a form of national regeneration along new lines existed; a policy of developing Irish industry existed, though in some ways this was less strongly held. The two policies were not drawn together in a way which might have been appropriate to a cultural nationalistic body of opinion bent on the achievement of objectives by radical means.

Writing in 1919 about what he called "the failure of our literary revival," George A. Bermingham explained this "failure" on the grounds that

"Ireland, in spite of its springtime of promise, has failed to create a national kind of literature because Ireland does not want literature of any kind, national or other. Men do not write for Ireland because Ireland does not read."⁷⁵ This argument would be repeated particularly in the 1920's, and as late as the 1950's. Bermingham contrasted Ireland with Denmark and Holland, where publishers sought translation rights for English novels; the Irish were not publishing books, because the people were unwilling to pay for them. "Men get the thing they want by paying for it, and if they don't want a thing all the talk in the world will not induce them to pay for it. Denmark wants books, and the Dane will go so far as to pay an English author for the right to translate his works. Holland wants books, and the editor of a Dutch paper will pay to be allowed to publish day by day a translation of an English novel. Ireland – the island of saints and scholars – does not want books and does not get them" (Birmingham, 1919, 102 - 122).

⁷⁴ A fascinating inversion of the purposes of the Gaelic League was reached when the *Catholic Bulletin* recommended the publication of suitable books in English to act as substitutes for the English 'penny dreadfuls' (Garvin, 1987, 62).

⁷⁵ Admittedly, Griffith envisioned the use of protective tariffs to encourage and sustain industry, which could presumably include a publishing industry. "What might now be described as import substitution" was to be a feature. (Garvin, 1987, 113 and 131).

The collapse of the Irish publishing industry in the nineteenth century was caused as much by the emigration of the market to London and of the many of the publishers to America as it was caused by the imposition of copyright. What happened in the post-1801 period was the Anglo-Irish political and intellectual class decamped to London, following the Anglo-Irish writers, who had been making the journey for decades before. The publishers and printers, drawn from a sub-gentry stratum of society, were, in the nature of printers and publishers, drawn by the political, intellectual and commercial possibilities offered in the American republic.

A native publishing industry did develop in Ireland from small beginnings in the nineteenth century. The defeat of the Young Ireland rebellion appears to have led to a hiatus around mid-century, and a second attempt to build a publishing industry had to be made. This was complicated by the attachment of many intellectuals from the 1890's onwards to the Gaelic League and to similar ideals, and to the struggle for political independence. This meant that much of Irish intellectual activity was directed to satisfying an internal commercial, political, linguistically-based and cultural appetite, which, while successful in its own terms, meant that the eastward exodus of Irish writers addressing international audiences continued.

The sequence of more than one hundred years of legislative and diplomatic activity concerned with copyright was largely unquestioned in Ireland over the period. In 1922, there was no widespread clamour for a change in the regulatory framework, nor were there any sustained calls for a repudiation by the new state of the international copyright obligations entered into by the previous administration. This attitude contrasts strikingly with the attitudes taken by British colonial governments from the nineteenth century onward, and also with the attitudes taken by newly-industrialised countries in the twentieth century.

The direct linkage of writing to national political, economic, social and cultural development seems to have been noted in the nineteenth century in other countries, such as Canada and the United States, but not in Ireland. The fact that these countries had legislative structures of their own and consequently the apparatus to develop regulatory systems suitable to their own conditions marks them off from Ireland. The absence of an Irish debate on the issue is a logical outcome of circumstances, but not a necessary result. A country priding itself on its cultural distinctiveness and on its literary output could reasonably be expected to generate a debate on how to encourage and protect this, and on how to enhance the cultural, social and economic benefit to be derived from it. The following chapter deals with the first opportunity when Ireland had the opportunity to regulate copyright in the interests of its own society.

⁷⁶ George A. Bermingham, *An Irishman Looks at his World*, London, New York and Toronto: Hodder and Stoughton, 1919

Chapter 5: Copyright Regulation in Ireland between 1922 and 1949.

5.1 Introduction

The Irish Free State established in 1922 was the political heir to a cultural nationalist tradition which had been shaped by forces including the Irish Literary Revival and the Gaelic League. It was linked to a strand of thinking on independence predicated on cultural distinctiveness which had become well-established in the 1840's, at the latest. While the new state gave legislative and administrative effect to its purely political legacy over the ensuing decades, its active response to its cultural legacy was considerably less committed. Mass popular support and political engagement with the ideals of the Gaelic League diminished after 1922, as the political arena opened up. The linguistic and cultural ideals of the League had correspondingly less influence on the conduct of national policy than its pre-independence influence might have suggested. Any expectations that the new state might adopt a revolutionary approach in economic or cultural matters were not realised. To a considerable extent the 'Irish Revolution' was revolution in nomenclature and appearance, rather than one of substance, and the economic stagnation of the 1920's left little room for costly practical policy innovations.

The founding of the new state led to the substitution of a new political, cultural and intellectual establishment for the old. Conservative cultural critics who gained influence on the conduct of policy were in tension with the more progressive intellectual and cultural forces and movements which had been associated with the independence movement. Many of the disputes between the opposing forces took place in the cultural arena, and writing and publishing in particular were the locus of intense disagreement between opposing forces. During this period many Irish writers published their work abroad in the period, and as a result, Irish writing bifurcated into a two-stream cultural activity. On the one hand was the writer for the international audience, commonly denied an Irish market through censorship. On the other was the writer for the domestic market, whose work would have had little sale outside Ireland and whose publisher expended little energy in marketing his work abroad.

Legal deposit is excluded from this discussion, although the issue was one of the most contentious in the parliamentary debates in the 1920's. The issue was to some extent bound up in the question of the extent of Irish independence, because of the requirement on publishers to provide books to libraries in Britain free of charge. However, despite the extent of the debates, no change in the law was seriously entertained by the government, and no profound insights can be discerned in the record of the debates.

State-Building and International Consolidation

The Free State embarked in 1922 on a programme of 'state-building,' a process allied in certain respects to 'nation-building.' State-building in this sense comprised, among other elements, the development of an administrative structure, the inception of social schemes, the beginnings of state-directed industrial development and the addressing of social and political problems. However, the new Cumann na nGaedheal government drew the much of its electoral support from sectors of society which were ill-disposed to radical state intervention in economic life. Consequently, the extent of state involvement in cultural markets remained relatively low, other than in a restrictive regulatory sense.

The Irish administration believed itself to need to demonstrate internationally, and particularly to Britain, that it was competent in the administration of a state. This attitude was associated with an objective of not deviating from British regulatory norms, which was shown in the 1920's in the government's desire for Ireland to remain a member of what it termed the Commonwealth Copyright Union, even when government policy objectives placed its continued membership at risk. Government regulatory and legislative actions were also informed by an attitude of earnestly seeking to appear to be at the forefront of technological and other advances. In international affairs, the new state sought to make a considerable impact in international bodies, including the League of Nations and the Commonwealth. This self-conscious endeavour to participate in the international community of states led to the Free State becoming deeply involved in international negotiations on issues like copyright in the 1920's, at a time when its independent actions were opposed by Britain as unjustified pretensions to equality in the international community. It led also to the Irish State operating internationally in relation to copyright contrary to its objective cultural interests.

Structural Absences in the Irish Administration and Society

Industrial and general political objectives were accorded priority over cultural objectives in the drafting and implementation of the copyright legislation. While the IFS did not support a Cultural Ministry, it was not entirely bereft of government cultural intervention. State support for the Abbey Theatre, the establishment of a state publishing house and the establishment of a state broadcasting service on a public service model were cases of state support for cultural activity. This recognition must be counterbalanced, however, by a recognition that a strict censorship regime was imposed, both on films and on published work in the same period.

Certain other absences in Irish society, such as the absence of a music recording industry and of a major publishing export industry, created the conditions for a restricted debate on copyright. In other countries, the impetus for debate came from the clash of a wider range of economic and artistic forces. The Irish debate was confined to a narrower field. There was a relative lack of interest among administrators and politicians in the issues surrounding copyright regulation, an absence of Irish innovation in domestic policy and an absence of Irish policy proposals at international copyright conferences.

The pattern of debate on a recording industry in Ireland at the time of one of conscious non-interest. Music recording was seen as a foreign concern, and the efforts of Irish actors were confined to seeking to make advantageous accommodations with international interests. Admittedly, the relatively low status accorded to Irish traditional music in the early decades after independence weakened any cultural or commercial initiatives which might have led to the development of an industry.¹ Even in the 1950's, Radio Eireann would dismiss the Irish recording industry as being merely the producer of "a few pressings" and as such devoid of standing in the debates on copyright.

Sovereignty

In this chapter, an account is given of the mobilisation by the administration of copyright regulation as a tool in emphasising the full sovereignty of the Irish Free State. This issue above all other dominated government thinking on copyright, and indeed turned the focus of the debates from a proper consideration of the intrinsic issues related to copyright. The right of the Free State to act independently in its copyright policy led to minor disputes in relation to translation right and the use of copyright material in school textbooks. Of more moment was the question of whether the Free State was entitled to join the Berne Union in its own right.

Copyright law was used by the government for purposes unconnected with its intrinsic purpose of the protection of cultural goods and activity. Since Irish government actions in this area amounted to the assertion of certain sovereignty rights by secondary means, these actions are properly considered a misuse of copyright law, and a dissipation of energy which might have been more productively directed in considerations of copyright in its appropriate cultural sphere. The Irish state in the early decades used international negotiations as a mechanism for

¹ However, some writers, notably Hanly (1931) accorded a much higher cultural status to Irish music than was generally the case. I would argue, however, that this was a minority view at the time.

the assertion of the full legal personality of the Irish state, in the face of British opposition in particular.

Copyright also became bound up in a dispute about the right of appeal from the Irish to the British courts, at the end of the 1920's. The Irish and British governments stood firm on their respective positions on this issue, although I would argue that for the Irish government the issue of principle was more fundamental than for the British. Whereas the British government was acting in support of the financial position of the Performing Rights Society, the Irish government concentrated on the diminution of Irish sovereignty implicit in the British position. In these various ways, copyright was subordinate in the official mind to questions of sovereignty. Indeed, a primary objective of the government's in legislating for copyright in the 1920's was merely to clarify the law, and to ensure that the pre-1922 copyright regime would broadly continue in effect.

Questions of sovereignty and of the extent of Irish independence informed many of the interventions in the debates. This was not confined to the issue of relations with Britain. A widespread fixation on the formal attributes of sovereignty is evident in the debates, and this tended at times to drive contributors to making extravagant demands on the government. There was in some cases a failure to understand that actions in relation to international copyright which were perfectly rational and feasible for the United States might be inappropriate for a small, peripheral state such as Ireland, notwithstanding that Ireland had the theoretical freedom to act in the same manner.

The actors

Various actors engaged in the debates in the 1920's. Of these, the publishers, the printers and the writers were the most influential non-government contributors. External influences were confined largely to the British government, although there were some official contacts with other international actors, through the mechanisms of the Berne Union.

Publishers and Printers

The publishing and printing interest in Ireland used their influence to try to secure a form of a manufacturing or printing requirement as a prerequisite for copyright protection. While this pressure was ultimately unsuccessful, it was one of the issues which was most seriously advanced as a distinctive Irish policy proposal in the debates. The publishing interests in Ireland at the time sought various forms of protection from the state. Tariff protection was one

of the most obvious modes of state intervention which was available. However, I argue that even the censorship system amounted to a hidden support for publishers, because of its tendency to exclude foreign competing literature from the marketplace.

Conservative philosophical positions

Social and cultural issues had a strong impact on the nature of the debates at various times. Conservative cultural forces were vocal, if ultimately not particularly successful, contributors. Nevertheless, the tenor of the cultural debate was frequently set by such contributors. Among the issues which emerged from this quarter was a belief that Irish writers owed a debt to Ireland which they could discharge by making special advantageous terms with Irish publishers. A view was expressed that Irish writers who published abroad were less deserving of regulatory support than those who published at home. Indeed, a view that works published in English were less worthy than works published in Irish can be found in the debates.

Difficulties with the US

Copyright protection for the works of Irish writers in the United States was one of the main initial spurs to the enactment of a Copyright Act in the 1920's. The relationship between Irish writing and the American market continued to present difficulties for the Irish side until the 1950's, although the situation appeared to be resolved in the 1930's.

Translations

The government took two minor steps to distinguish Irish copyright law from British. It used a provision of the Berne Convention to allow for the publication of translations of works into Irish without payment to the copyright owner, in certain restricted circumstances. I argue that this was done for two reasons, to be seen to take action to support cultural reproduction in the Irish language, and also for the simpler purpose of emphasising the Free State's right to adopt a position at variance with Britain's.

School texts

The second of the minor actions which the government took at the time was the enactment of what was termed the School Anthologies Reservation, which permitted publishers to use copyright material without payment in school textbooks. This was done to make schoolbooks

cheaper, and to act as a cost-free subsidy to the Irish publishing industry. At this time, most of the book publishing industry in Ireland was financially dependent on schoolbook publication.

New Technology

New technologies were of slight concern to policy makers, and did not feature strongly in the debates of the time. Radio broadcasting was a minor feature in the cultural landscape in the 1920's, while the music recording industry was almost non-existent. This circumstance obviously influenced the selection of issues of political or economic importance at the time. It also meant that Ireland was not influential in international debates in these areas, which would later come to dominate the content industries.

The sequence of legislative initiatives in Ireland in the 1920's.

A Copyright Bill was introduced into the Dail in 1925, which aimed to clarify the situation in Ireland across the entire field of intellectual property law.² The Bill was referred to a special Joint Committee of the Oireachtas, and a report was issued in 1926, which was critical of many of the Bill's provisions. The government chose to withdraw the Bill, and to reintroduce a new Bill later. This Bill became the 1927 Industrial and Commercial (Protection) Act, and formed the basis of Irish copyright and IPR law until 1963.

The Bill was later found to be flawed, as a result of a court action, which will be described below, and a short Act was passed in 1929, the Copyright (Preservation) Act, to remedy the situation. In addition, a second Industrial and Commercial Property (Amendment) Act was also passed in 1929, which made minor changes of a technical nature to the copyright law.³

Absence of a systematic debate on the purpose and effects of copyright regulation

The debate on copyright in the Free State in the 1920's was extraordinarily limited in its range and depth. A failure on the part of legislators and others to grasp fully the purpose and possibilities of copyright legislation led to the pedestrian nature and the irrelevance to Irish conditions of much of the parliamentary and extra-parliamentary debate. The range of policy objectives and the modalities of copyright regulation proposed were limited in inventiveness.

² *Industrial and Commercial Property (Protection) Bill, 1925.*

³ The Act clarified Ireland's international copyright obligations, by allowing (but not requiring) the Minister to provide reciprocal protection only the extent that it was offered by another copyright territory. The translations reservation was further defined and regulated by this Act. Among other provisions, copyright was created in currency notes.

The state had certain non-intrinsic objectives which it sought to achieve through copyright regulation. The limited objectives of some other forces in the debates were ultimately undermined largely through a recognition of the venality of the motivation of their proponents.

Murdoch detailed the accession of the Free State to the revision of the International Patent Convention at The Hague in 1925, and noted some unusual circumstances surrounding that accession. He remarked that the mid-1920's was "an ideal time to weigh up the merits and demerits of membership, especially for a small agricultural country, with little or no industry. But no such discussion took place" (1971, 38). He continued that the reasons for the accession might have been that it was necessary in 1925 for the Free State to accede, since its membership might have lapsed in 1921⁴, or "because the Saorstat wished to show its independence".⁵ The attitude of desiring to appear responsible and part of the vanguard of the modern developed world was pronounced, but was of doubtful relevance and of doubtful advantage to an under-developed state emerging from a devastating civil war.

A particular characteristic of Irish copyright regulation was its adherence between the 1920's and 1960's to the use of reservations and derogations from the full provisions agreed in the international conventions. Instead of formulating schemes for the protection and encouragement of Irish cultural activity through a systematic examination of the law, followed by the enactment of a regulatory system specifically fitted to Irish conditions, Irish regulatory policy confined itself to fiddling with the edges of the law.

Doubts about the status of copyright protection in Ireland in the 1920's

There appears to have been a concern in official circles at least as early as 1923⁶ that the 1911 UK Copyright Act might not have been in force in Ireland. There was also doubt about the protection of patents in the Free State. Patents were being registered in the Ministry of Commerce, but, in reply to a question from Thomas Johnson, the Labour Party leader, the

⁴ The doubt is similar to the doubt about the Free State's membership of the Berne Union, and is similar to the doubt about the continuance in force in the Free State of the 1911 Copyright Act.

⁵ Murdoch researched the practices of the Free State in the 1920's with regard to its adherence to international conventions. It appears that a number of accessions to international agreements took place without any debate in the Oireachtas. Regarding the accession to the International Patent Convention, he wrote " ... what is even more extraordinary is that all this [a convoluted accession to the Patent Convention], of most vital importance to the State, took place without a word being spoken by the elected representatives of the people as to the merits or demerits of the arrangement, and without the accession to the Convention begin formally presented to the Oireachtas." Murdoch (1971, 39).

⁶ Partridge suggested that the refusal of the US Copyright Office in Washington to register the copyright in books published in Ireland was the most obvious reason for the early post-independence interest in copyright legislation (1938, 142, n1).

government indicated some doubt on the extent of protection for these applications. In May 1923, Cathal O'Shannon asked the leader of the government, W.T. Cosgrave, "when it is proposed to introduce the Bill to adapt the existing law of copyrights, as promised in the Ministerial statement last December⁷ and further, to ask whether he can indicate at this stage the nature of the adaptations which it is proposed to make in the existing law."⁸ The Assistant Minister for Industry and Commerce announced that a new Copyright Law was being contemplated. In July 1923 W.T. Cosgrave announced that a Copyright and Patents Bill would be introduced before the next election.⁹ The question arose again in December, when the Minister for Industry and Commerce was again asked about the steps being taken to introduce intellectual property machinery.¹⁰

⁷ I have not been able to trace this Ministerial statement, although it may have been published in the press.

⁸ DD 16 May 1923, Col 896.

⁹ DD, 19 July 1923, Col 1083.

¹⁰ DD, December 1923, Col 1719. Question from Peadar Ua Dudhghaill. Cited in Murdoch, 1971, 35.

Table of output and employment for the Irish printing and publishing industry.¹¹ (Output given in £ sterling. Employment: individuals in employment)

	1926	1929	1931	1932	1933	1934	1935
Printed books	106 164	134 378	121 646	111 227	111 100	116 965	117 947
Magazines etc ¹²	99 267	114 426	103 919	107 755	99 647	105 892	96 865
Total publishing	205 431	248 804	225 565	218 982	210 567	222 857	214 812
Total printing ¹³ etc	1 177 752	1 794 007	1 883 867	2 025 445	2 059 607	2 025 170	2 216 105
Employment	5 109	5 249	5 743	5 867	6 061	6 366	6 472

¹¹ Source: Gross Output figures 1926 - 1951, derived from the Census of Industrial Production, Central Statistics Office.

¹² Magazines includes trade journals and similar publications, but excludes newspapers, for which separate data was collected for the Census of Industrial Production.

¹³ Total printing includes engraving, bookbinding and publishing

	1936	1937	1938	1939	1940
Printed books - Irish ¹⁴	28 762	22 997	24 746	23 177	21 289
Printed books - other	91 773	109 802	116 071	130 746	154 156
Total Books	120 525	132 799	140 817	153 923	175 445
Magazines etc	104 969	119 078	122 719	121 823	108 594
Total publishing	225 494	251 877	263 536	275 746	284 039
Total printing etc	2 375 824	2 517 964	2 539 074	2 582 465	2 672 473
Employment	6 127	6 202	7 057	n/a	n/a

¹⁴ A change was made in the categorisation of data from 1936, with books in Irish being distinguished from other books.

	1941	1942	1943	1944	1945
Printed books - Irish	14 958	16 389	17 168	15 949	15 675
Printed books - other	182 436	181 659	134 724	150 601	156 986
Total Books	197 384	198 048	151 892	182 499	172 661
Magazines etc	105 197	103 384	118 354	126 974	151 984
Total publishing	302 591	301 432	270 246	309 473	324 645
Total printing etc	2 565 155	2 539 718	2 788 615	2 920 154	3 320 094
Employment	n/a	n/a	n/a	6 176	5 989

	1946	1947	1948	1949	1950	1951
Printed books - Irish	18 779	n/a	n/a	n/a	23 461	30 736
Printed books - other	210 053	n/a	n/a	n/a	172 655	243 186
Total Books	228 832	n/a	n/a	n/a	196 116	273 922
Magazines etc	207 605	n/a	n/a	n/a	314 308	381 591
Total publishing	436 437	n/a	n/a	n/a	510 424	655 513
Total printing etc	3 986 635	4 741 363	5 298 841	5 551 578	6 068 602	7306 762
Employment ¹⁵	6 480	7 566	7 700	7 877	7 513	7 788

¹⁵ Employment data is not readily comparable, as returns were made at different times in different years.

5.2 The Irish publishing and cultural industry.

Disputed evidence

In the 1920's, the condition of the Irish publishing was a matter of contention between several actors. The output figures for the industry show a steady increase in value, with a larger increase occurring at the end of the 1930's, due mainly to changes in political and regulatory circumstances. Employment levels also increased over the period, according to official statistics. However, certain contemporary sources disputed the conclusion that the industry was healthy, and offered some private statistical data in support. Trade unions, printers' representatives and politicians spoke in the 1920's of a decline in output and employment in the industry. The Fianna Fail opposition gave public support to the printers. A major protest meeting held in Dublin in 1926, attended by political and industrial figures, heard calls for the protection for the Irish printing trade, on the grounds of worsening unemployment among printers.¹⁶ At the same time, direct representations were made to the Government by trade unions, seeking tariff protection for the printing and book industries.

In contrast, industry sources recorded that between 1930 and 1933, the printing trade was in a healthy state. Little unemployment was reported in the printing industry in 1930.¹⁷ In 1931, "the state of the trade is reported to be very good."¹⁸ The industry was also supported at the time by large government printing contracts. The "Economic War" with Britain led to a depression in the industry in the mid- 1930's, as British markets were restricted.

Closures and Difficulties for Publishers and Printers

Brown argued that in the 1920's the tide of the Literary Revival waned, and that an effect of this was the closure in 1926 of Maunsel and Roberts, probably the leading publishing house in Ireland, and one of those most associated with the Literary Revival (1981, 124). However, an unexpected indication of the ambitions of provincial printing in Ireland was also revealed in 1926 by Edmund Downey, who recorded that his

¹⁶ *Irish Times* 11 November 1926.

¹⁷ *Progressive Printer and Newspaper Publisher*, July 1930, 7(7), 106.

¹⁸ *Progressive Printer and Newspaper Publisher*, June 1931, 8(6), p 81.

Waterford firm had published complete editions of public domain works, such as complete editions of Balzac's and of Charles Lever's novels.¹⁹

Newspaper failures occurred in the 1920's, including the closure of a national daily, the *Freeman's Journal*. However, the market supported periodical publishing. While some high quality publications, such as the *Irish Statesman* and the *Dublin Magazine* were issued, most popular publications were very poor, in terms of content and of production quality. This contributed to the attractiveness to the buyer of imported material. A tariff imposed on imports of periodicals in 1933 contributed to a depression in retail sales by newsagents of 45%. Irish periodicals did not substitute for the reduced imports. A newsagents' trade association implied a reason for this particular failure: "Home-produced periodicals, with a few notable exceptions, are poor stuff and must have very small circulations in the majority of cases,"²⁰ In 1935 a 5% tax on imported paper was introduced. Deputy Fitzgerald-Kenny argued in the Dail that such a tax would create further difficulties for those seeking to establish magazines of high literary and artistic worth. "There was ... a great deal of literary talent in Ireland and at present many books of enormous circulation written by Irishmen were published in England. He had hoped to see the day when Irish publishing houses would be able to undertake this task," but the minister was handicapping the Irish publisher in competition with American and British competitors.²¹

According to a submission by the printing company Cahills to the government in 1939, "very few papers" had been started in Ireland in the 1930's, despite a protective tariff imposed on imports of periodicals, although the circulation of already existing periodicals had increased as a result of the protection afforded.²² A claim was made in 1939 that there was an "increase in interest in publishing magazines, including a replacement for the gap left by the *Irish Statesman*."²³ *The Bell*, which was started in 1940, to some extent filled the gap left by the *Irish Statesman*, but it was a monthly rather than a weekly, and, as a primarily literary and cultural journal, it focused less on politics than had the earlier publication. While it sold two thirds of its monthly print-run of 3000 in Ireland, this was insignificant in terms of the total potential readership in the country (Brown, 1981, 203).²⁴

¹⁹ *Irish Times* 18 November 1926

²⁰ *Progressive Printer and Newspaper Publisher*, May 1933, 10(5), 65.

²¹ Cited in *Progressive Printer and Newspaper Publisher*, July 1935, 12(7), p 93

²² NAI 1&C, TID/1209/12 Duty and Novels printed in English. Submission by Cahills, 3 March 1939.

²³ *Progressive Printer and Newspaper Publisher*, March 1939, 16(3), 34.

²⁴ By contrast the *Siandarad*, a weekly Catholic newspaper, sold 50 000 copies weekly (Brown, 1981, 161).

Some efforts were made by printers to export general material or material with no specifically Irish content. Cahills, for example, produced a series of cheap paperbacks for the British market in the 1930's.²⁵ These efforts were hampered by the international tariff regime in the 1930s, and more particularly by the so-called Economic War between Britain and Ireland. Irish printers also undertook printing work on behalf of British publishers in the 1920's and early 1930's, and a substantial export printing industry developed; this, however, had no discernible cultural impact on either Britain or Ireland.

Protectionism: Tariff Protection

The printers welcomed any legal provision which supported their interests, whether this was tariff protection, censorship or special copyright provisions. Tariffs on imports of books of particular classes were sought and were imposed. While most tariffs in the 1920's were intended as revenue earners, rather than as supports for industry, in some cases protective tariffs were also introduced. Efforts were made in 1924 and later²⁶ to induce the government to introduce a protective tariff on 'printed matter' more generally; this was criticised in the *Irish Statesman* on the grounds that "the highest tariff which could be imagined would bring about the printing of but few books here because as the statistics of our imports show, the reading public is very limited."²⁷

Tariff protection for printing was actively sought by a number of printing and allied trade unions and associations in 1926. The justification for the protection was an alleged increase in unemployment in this sector, claimed to be a result of imports of books and printed material. Some evidence was adduced, including details of unemployment benefits paid by the DTPS (Dublin Typographical Provident Society).²⁸ The official employment statistics for the printing sector are available only from 1926, and are known to be defective for that year, partly because the industrial survey of that year, the first for several years, was incomplete. The DTPS claimed in 1926 to have 25%

²⁵ In 1936, Cahills printed 3 750 000 books for English publishers. *Progressive Printer and Newspaper Publisher*, 13(1), 1. 1936.

²⁶ An editorial set out the advantages to the printing industry of a tariff: *Progressive Printer and Newspaper Publisher*, November 1927, 4(17). 1156 -7. The issue was again raised in 1931. 8(11), November, 170. Government policy was opposed in principle at this time to tariffs as a form of intervention in the market. This changed with the coming to power of the Fianna Fail government in 1932. De Valera had supported the printer's claims since 1926, at the latest. Lemass was also highly sympathetic to the printing interest.

²⁷ *Irish Statesman*, 21 November 1925, 324.

²⁸ Memoranda to the Ministry of Industry and Commerce, 1926. National Library of Ireland [Reference Number Ir 600 p8]. [hereafter Memoranda]. Submission by the DTPS.

unemployment among its members, directly as a result of importation of books, newspapers and other printed material. The Irish Bookbinders and Paper Rulers Union referred to their lengthy discussions in 1926 with Ernest Blythe, Minister for Finance, in which they “believed we had convinced him of the necessity of a tariff for the [prayerbook and stationery] industry.”²⁹ Their confidence was misplaced on that occasion.

The sole cultural argument in favour of tariff protection in the submissions to government from the trade unions in 1926 came from the Irish Women Workers’ Union, who argued that an Irish industry producing good-quality lithographic reproductions of Irish works of art “would not only give considerable employment, but would enrich the cultural life of the country.”³⁰ Later, in 1930, the printers argued for protection for their industry on broadly cultural-nationalistic grounds. Calling again for support for domestic printing, they argued that “the Press of a country is a strong factor in its social life and culture. It helps to build both these. Its power, indeed, is so great that it could almost change the mental outlook of a nation.”³¹

There was opposition to tariffs from some printing and publishing interests, as well as from cultural commentators, such as Russell writing in the *Irish Statesman*. The manager of the Talbot Press, the leading nationalistic quality publisher, argued in 1926 that the publishers should not seek a protective tariff, but should instead concentrate on having the Copyright Bill amended to impose a form of manufacturing requirement on copyright owners.³² When this objective failed, attention was concentrated more firmly on seeking tariff protection.

In the 1930’s, when government policy on tariffs changed,³³ publishers sought and secured more tariff support.³⁴ Tariffs were imposed on a range of specific classes of books. The domestic prayer book trade, which had sought a tariff since the 1920’s, were rewarded in the 1930’s. A 30% tariff, proposed in 1934, was introduced in 1935.³⁵

²⁹ NLI Memoranda p 9. [Irish Bookbinders and Paper Rulers Submission]

³⁰ NLI Memoranda p14. [Irish Women Workers’ Union Submission.]

³¹ Editorial, *Progressive Printer and Newspaper Publisher*, October 1930, 7(10), p 153.

³² W.G. Lyon, Letter, *Irish Times* 16 November 1926.

³³ Eamon De Valera had in 1926 professed himself “unhesitatingly in favour of Protection as a general policy for all industries.” He promised the printing industry that, as a result of his independent inquiries into the state of the printing trade, he “would support the claim of the printing trade [for tariff protection] in every way.” *Irish Times* 11 November 1926.

³⁴ *Progressive Printer and Newspaper Publisher*, November 1931, 8(110) 170. “A case for tariffs: safeguarding the printing industry.”

³⁵ *Progressive Printer and Newspaper Publisher*, July 1935, 12(7), 93.

In the Finance Act 1932, an import duty of 30% (or 20% in cases of books originating in 'preference' states) was imposed on books in English, other than novels, in leather or imitation leather binding.³⁶ Further tariffs were later imposed. By the end of the decade, when the Revenue Commissioners sought to have the tariff on imported novels removed,³⁷ on the grounds that the administrative costs no longer justified the collection of duties,³⁸ they were strongly opposed by Cahills, which claimed that the firm's commercial viability depended on the existence of the tariff. Cahills argued that it "secures the home market for Mellifont Novels and kindred publications in Ireland, and enables us to export to England and abroad."³⁹ Without tariff protection, they argued, they would not be able to sustain production of the books in Ireland; Cahills were then producing 4 million books per year in 1939, of which only 500 000 were for the domestic market. Sean Lemass, Minister for Industry and Commerce, supported the publisher on this occasion, on the grounds of protecting employment.

It is difficult to decide whether tariff protection had the dramatic positive effect claimed for it by the publishers. Output was relatively stable over the 1930's, but rose after 1938. This coincided with the end of the Economic War with Britain in 1938, when, for example, Cahills received a major printing order from Hutchinson of London, for the first time since 1932. Cahills were, however, insistent that tariff protection was essential to their trade. I&C officials also believed that the Talbot Press relied to a small extent on the cushion provided by tariff protection.

Irish language publishing

Government policy of supporting the Irish language was pursued in several policy fields. Among the initiatives were the enactment of a special provision for translations in the copyright law, and the establishment of a state publishing house. Optimistic statements were made from the late 1920's about the prospects for publishing in the Irish language.

³⁶ DD 13 June 1934, col 175-6. Parliamentary Question.

³⁷ NAI I&C, TID/1209/12 Duty on Novels printed in English. Submissions of 9 December 1938 and 3 January 1939 to the Minister (Lemass) from R.C. Ferguson, Secretary of I&C. The Revenue Commissioners, the Department of Finance and I&C were agreed on the removal of the tariff in December, but following detailed representations from Cahills, Ferguson and Lemass were convinced to retain the tariff.

³⁸ Official figures for 1934-5 showed that the duty on imported novels realised only £3 095, compared with £58 693 from the duty on newspapers. cited in *Progressive Printer and Newspaper Publisher*, October 1935, 12(10), 139.

³⁹ NAI I&C, TID/1209/12 Duty on Novels printed in English. Letter of 14 December 1938 from Cahills to the Department of Industry and Commerce. The Mellifont Novels were a series of paperback pulp fiction, produced by Cahills.

One trade paper asked if there would be “a printing boom through Irish.”⁴⁰ There appears to have been at the turn of the decade a belief that a linguistic transformation in Ireland was a possibility, if not a likelihood.

J.B. Browne, President of the Dublin Master Printers, said in 1930 that the printing trade had been “helped ... by the Gaelic revival.” He believed that the quantity of Irish language material suitable for publication was such that “only the fringes” of the potential printing had been touched, and that Irish language printing “would provide much work for the Dublin printers for many years to come.”⁴¹

Despite the optimistic statements of the early 1930's, the scale of Irish language publishing declined until the middle of the war, when the output in the Irish language fell to a low level. While some publishing houses, such as Sairseal & Dill⁴², did issue general books in the Irish language, the bulk of the output was either for the captive market of schoolchildren, or must be excluded from consideration as commercial publishing, having been subsidised by the state. The low level of commitment of Irish publishers to printing books in Irish was further demonstrated by Yeats, when he revealed that, due to the absence of Gaelic type in Irish publishing houses, scholarly books in Irish were being printed and published abroad, notably in Copenhagen and in Germany.⁴³

The Irish government publishing house, An Gum, established in 1925, published school texts and general literature in Irish. Translations were undertaken, sometime from continental languages,⁴⁴ but generally from English.⁴⁵ Cronin noted that “more conservative critics saw translation into Irish as a filter, a form of pre-emptive censorship, that would cleanse the Irish mind of foreign impurities” (1996: 150).

⁴⁰ *Progressive Printer and Newspaper Publisher*, September 1929, 6(9), 137.

⁴¹ Interview in *Progressive Printer and Newspaper Publisher*, June 1930, 7(6), 96.

⁴² Founded in 1947.

⁴³ SD 4 May 1927, col 1116

⁴⁴ Dail Eireann PAC Report 1931, p 53. The Accounting Officer stated that the Department published a number of translations from French, German, Spanish and Greek.

⁴⁵ *Progressive Printer and Newspaper Publisher* noted in December 1929 that by then 37 translations had been printed, including works by Canon Sheehan and Charles Kickham, as well as Conrad's *The Nigger of the Narcissus* and Stevenson's *Treasure Island*, “and, in addition, translations from French, German and Italian.” 6 (12), 185.

Music as a cultural industry

The export market for recorded music in Ireland was non-existent, due to the lack of a recording industry (Quinn, 1997: 26-8).⁴⁶ While Irish traditional music was recorded and sold, these were imports from the United States of recordings which were either made by emigrant Irish musicians, or were re-imports to the country of recordings made in Ireland by US interests. Between the 1920's and the end of the 1950's, "the Irish market was supplied with increasing numbers of US-made recordings" (Quinn, 1997: 27).

While sheet music of Irish traditional music and of art music based on traditional idioms had been published in some quantity since the nineteenth century (O Canainn, 1978, 10-26), sheet music exports were inconsequential in comparison with the scale of musical activity in Ireland at the time.

Radio broadcasting

Radio broadcasting, which commenced in Ireland in 1926, had a pronounced cultural impact on Ireland. In copyright terms, the relative penury of the station forced it to make accommodations with powerful international commercial interests in relation to its use of recorded music.

The concept of providing copyright protection for radio broadcasts was underdeveloped in the 1920's, and the mechanism used at the time was to treat broadcasts (and cinematograph productions) as derivative of the primary work used. The Rome Revision Conference of the Berne Convention 1928, while obviously important, made little progress in advancing authors' rights (Rickatson, 1987: 104). Its greatest interest lies in the partial adaptation of the Berne Convention to the developing information technologies. Provision was made to protect broadcast works, and some new provisions were agreed on the protection of cinematographic works. Ireland ratified the Rome Act of 1928 in June 1935.⁴⁷

⁴⁶ The absence of a recording industry impinged directly and negatively on the efforts to promote the revival of the Irish language. The 1931 Public Accounts Committee minutes record that the Department of Education was involved with the Berlin State Library in 1929-30 in the production of records of native Irish speakers, for use in advanced Irish-language instruction, and that the copyright in these recordings was to be held for ten years by the Berlin library. After ten years, the Department of Education could issue its own edition of the recordings (PAC Report, 1931: 55).

⁴⁷ *Saorstát Éireann Treaty Series, 1935. No 6. International Convention for the Protection of Literary and Artistic Works, Rome, June 2, 1928.* Irish Accession took effect on June 11, 1935. Dublin: Stationery Office, 1935. In April 1935, a memorandum from the Secretary of the Department of External Affairs to the Secretary of the Executive Council sought permission for the IFS to adhere to the Rome Revision of Berne. (NAI I&C, S75/14/27. Berne Copyright Union (International Union for Protection of Literary and Artistic Works) Adherence of An Saorstát.) An enclosed memorandum noted that the IFS was bound by the Berlin

The Irish radio service opposed Ireland becoming involved in further proposed international action to strengthen copyright protection for phonographic recordings, partly on the grounds that there were “no producers in the Saorstat to protect.”⁴⁸ The natural antipathy on the part of the Irish broadcaster to phonographic interests remained and was expressed in later decades with even more vehemence.

5.3 The actors in the debates on copyright

The principal interested parties in the debates were publishers and authors, and a clear delineation of the difference in interests between these broad groups can be seen.

Authors and other creators of cultural intellectual property

Irish writers were associated with musicians, with authors outside Ireland, and with collecting agencies like the Performing Right Society. International authors organisations and *ad hoc* caucuses also sought to influence the debates on behalf of authors. The Berne Copyright Union administrators were also associated with the authors' interest. Playwrights in Ireland were an influential sub-group in the debate, and were credited by the Minister with lobbying for particular provisions.

The first 1925 Copyright Bill was intended to restate the law broadly as it had been in the British 1911 Act, with a small number of amendments. The amendments were inspired by a memorandum to the Department of Industry and Commerce from the Irish Playwright's Union. McGilligan, the Minister, described them as in the main 'minor points'. The principal issue of concern to the Playwrights' Union was that of redress for infringement of dramatic copyright.⁴⁹ Given the relatively high status accorded to drama in Irish cultural life at that time in particular, dating from the time of the Literary Revival, it is unsurprising that government should have responded to a performance right difficulty experienced by creators in that sector.

revision of the Berne Union since 1927. As part of the argument advanced for adhering to the Rome Revision, External Affairs noted that “a considerable advance was ... made regarding protection of the press in matters of reproduction, while the Articles dealing with radiocommunication and cinematographic reproduction were amended to clarify the position and afford more effective protection.” The government approved accession on 10 April 1935.

⁴⁸ NAI D/FA 30/37. Letter to Secretary of the Department from the Director of Radio Eireann, 25 November 1935.

⁴⁹ DD 26 May 1927, Col 2315.

Publishers and printers

The publishers were associated in the debates with the printers, with the trade unions and with the trade associations. Secondary users of material, such as broadcasters and theatre proprietors, can also logically be associated with this group. The publishers drew support from certain cultural critics, particularly those associated with religious and other non-commercial publications; the motivation of these forces activity was related to seeking to exclude imported material, on cultural and moral grounds. The association of the printers with these forces is clearly grounded in commercial interest in this debate.

While the authors' interest group extended to authors outside Ireland, Irish publishers, in contrast, were in opposition to the interest of foreign publishers during the period under review. The more extreme proposals which emanated from the publishing interests in the debates sought to undermine the proposed copyright regime, or to abandon copyright protection in Ireland for foreign works.

Tensions between Writers and Publishers

A tension became apparent in the debates between the "content producers" and the printer / publisher interests. Since the Irish debates on the publishers' side were dominated by the printers' interests, a priority was given to the employment and financial interests of the printing industry. Broad cultural issues, the encouragement and just remuneration of content producers and the likely cultural benefits to the population as whole were less emphasised in the debates at the time. While individual authors did support the printers and publishers in the debates, it is apparent that these individuals were generally not professional writers, or were not financially dependent on writing.⁵⁰

Cultural Forces in the debates

The cultural debate was intense. One on side were progressive forces, which believed in giving authors a legitimate return on the profits made by the sale of his work. However, even cultural critics were divided on the issues in the debates. Some, such as George

⁵⁰ "I think when our correspondent refers to the debt Irish writers owe to their country he should know that the sales in Ireland of the works of even the most famous Irish writers would not give them a weekly income equal to that of printers, who wish to rob them." George Russell in the *Irish Statesman*, 18 December 1926, Vol 7(15), pp 352-3.

Russell, were outraged at some of the industry supports proposed, such as the manufacturing clause, the suggestion that no copyright should be allowed in Ireland to Irish writers, and the special support through copyright for school-book publishers.

Opposed were such figures as Rev. R.S. Devane, and some of the legislators, who believed that authors had a special responsibility to return to Ireland some economic advantage for the inspiration which they had derived from living in the country. The dichotomy rested on the issue of to whom the economic advantage was to flow, to the writer or to society. However, this position concealed the reality that by making a return to Ireland, perhaps through the abandonment in Ireland of the copyright principle of restitution to the author, the advantage would flow immediately to the publisher or printer. The public interest was deliberately confused by certain forces with the publishers' interest.

Cultural arguments emerged from within the administration, from the Department of Education, which supported the publication of works in Irish, and which supported a provision to allow the reproduction of copyright material for use in schools. Both of these interventions in the copyright relationship between author and market were to the advantage of publishers and printers. The educational press, which was largely an adjunct to the general publishers,⁵¹ pursued a nakedly commercial interest in the debates.

It is apparent that a complex of interests developed in the 1920's, between, in particular, certain conservative publishers and individuals in various cultural debates. The interests in each case generally pointed in one (conservative) direction. Adams noted that a campaign against the "Imported Press" developed, supported by the Catholic bishops, certain other clerics such as Fr Devane SJ, the *Irish Independent* newspaper and others. It was conducted through the press, including what Adams terms "numerous right-wing political and Catholic journals" (1968: 17-20). The moral concerns of the ideologues appear to have coincided fortuitously with the political, moral and financial interests⁵² of the publishers. Adams concedes that the campaign was not "highly organised or centralised", and also that the campaign was directed against cheap newspapers,⁵³ and

⁵¹ The Educational Company, for example, was a subsidiary of the Talbot Press,

⁵² For example, the Talbot Press issued works by Deputy Magennis in its series Every Irishman's Library, in the company of titles by Douglas Hyde, Padraic Colum, Tom Kettle and Alfred Percival Graves, as well as older 'classic' material (Dunne, 1971, 6).

⁵³ For example, there is Devane's publication *Evil literature: some suggestions*, Dublin, 1927. Devane's abhorrence of imported work continued until the publication of his late work *The Imported Press: a National Menace*, Dublin, 1950.

not directly at books.⁵⁴ D.P. Moran's *Leader* was to the forefront of the campaign against imported literature. The issue of restricting the importation of newspapers became entangled in the copyright debate, and it appears that the copyright issue was seized upon conveniently as another means of censorship, in the interest of excluding British newspapers. It is not surprising that this should have appealed the newspaper proprietors, who could cloak a commercial aspiration in the garb of moral concern.

5.4 The main issues debated in the 1920's and 1930's in Ireland.

The parliamentary debates and the limited extra-parliamentary debates on copyright did not concern themselves with a systematic examination of the wide range of policy options which were available to the new state. The public debates centred instead on five principal issues. These were (i) a proposed manufacturing clause, (ii) translation rights, (iii) school anthology rights, (iv) legal deposit and its reciprocation with Britain, and (v) protection for Irish writers against US piracy. A sixth issue which formed part of the background to the Irish treatment of copyright regulation, but which was not debated openly, was the political use of copyright for other purposes. Issues such as varying the term of copyright protection, increasing the protection of dramatic works, the copyright protection of official publications and the copyright protection of currency notes are excluded from this discussion, on the grounds that they were of no real consequence, and had no particular influence on cultural production or circulation in Ireland. The debates on these issues were in any case conducted in a perfunctory manner in the debates.

Only the proposed manufacturing clause had any genuine potential in supporting the building of a native publishing industry⁵⁵ and thus of a cultural industry. Translation rights were wrongly thought to offer a possibility of assisting the industry, but social and cultural influences negated their potential.

Protection for Irish writers from piracy, especially in the US

The protection of Irish writers in relation to use of their work in the US was an issue of considerable importance to the writers as an economic right. It had less significance as a

⁵⁴ However, O'Sullivan noted that the Dublin Industrial Development Association had proposed a prohibitive tariff on imported books in 1924, a proposal he termed "not only useless but pernicious". *Dublin Magazine*, November 1924, Vol 2(4), p 219.

⁵⁵ By means of support for the printing industry.

cultural issue, except to the extent that just recompense to authors in Ireland for exploitation of their work abroad acted as an additional financial encouragement for cultural production. Yeats questioned the delay in introducing the revised copyright bill in November 1926. "because we Irish authors are under the difficulty that we cannot at present copyright our books in America."⁵⁶ The *Irish Statesman* noted in 1927 that the American copyright law had "roused indignation all over Europe", and that a letter of protest at the American piracy of James Joyce's *Ulysses* had been signed more than 150 "of the most famous writers in Europe."⁵⁷

The issue was of US piracy was of little interest to Irish printers, and they were at that time prepared to forgo an agreement with the US, in furtherance of their own financial interests. While an agreement was reached with the US during the 1920's which ameliorated the difficulties of Irish writers, difficulties for publishers remained into the 1950's. In 1943, an article in *The Bell* claimed that Irish copyright were still not recognised properly in the US. The writer claimed that books published in Ireland were not being accepted for copyright registration and could be freely pirated in America.⁵⁸

Commercial Value of Irish Intellectual Property in the United States

Irish writers' work became desirable commercial prospects for American publishers in the late nineteenth century. From the late nineteenth century onward, "there was a growing market for Irish fiction among Irish Americans and a growing willingness among American firms to publish it" (Murphy, 1997: 2). This presented threats as well as opportunities for Irish writers. Before 1922, Irish writers were protected in America once their books were printed there. This arrangement unravelled after independence, and the danger arose of a large market being lost to the Irish writer. Because the American copyright law imposed a domestic printing requirement, this issue was of marginal commercial concern to an Irish publishing trade dominated by printers. Since they could not take advantage of the American Act, they showed little interest in the copyright difficulties of Irish writers. This emphasises the practical division of interests which existed between Irish authors and publishers at the time, and is a forerunner of continuing tensions in relation to intellectual property between content producers and owners of the means of communication or of distribution. In 1929, by which time the difficulties for writers, if not for printers or publishers, had apparently been resolved, it

⁵⁶ SD, 24 November 1926, Col 1133

⁵⁷ *Irish Statesman*, 5 March 1927, 7(26) 612.

⁵⁸ *The Bell*, 1943, V (4), p 323

was asserted that US piracy of the work of Irish writers had been “to the great financial loss of the authors concerned.”⁵⁹

Hopeful assertions of US dissatisfaction with its own copyright laws in the 1920's

Darrel Figgis in 1925 suggested that the Minister for I&C should make enquiries regarding the effect of the proposed Irish copyright law in relation to the United States.⁶⁰ He was aware of Ireland's weakness in seeking better terms from America: Britain had failed in her efforts to improve the situation and "the Minister might legitimately and fairly say that where Great Britain has failed it is hardly likely that the Irish Free State will succeed." Drawing on his own experience as an author and as a solicitor acting for Irish publishers, Figgis asserted that American firms still pirated the work of Irish authors. He proposed that the Irish diplomatic representative in Washington should endeavour to see if a reciprocal agreement with the United States could be reached, as would be the case in the countries adhering to the Berne Convention.⁶¹ McGilligan, the minister, stated that "the question of the American system of copyright was examined at great length before the present Bill was introduced" and that his advice was that "the American people were so dissatisfied with their present system of copyright that they had determined that they were going to fall into line with or become adherents of that of other countries." ⁶²

Yeats spoke positively of the proposed Irish copyright legislation, since it gave “better protection to the Irish designer and dramatist - especially the dramatist - than is given by contemporary English legislation.”⁶³ Yeats was worried about the difficulty for Irish authors in registering copyrights in the United States⁶⁴. The Registrar of Copyrights in Washington was refusing to register the copyright of Irish authors. “I know of one Irish author who, acting on legal advice, has published nothing for many months and thereby has suffered considerable financial loss. If you publish in England or Ireland, publication

⁵⁹ *Progressive Printer and Newspaper Publisher*, November 1929, 6(11), 169.

⁶⁰ DD 9 June 1925 Col 531-2

⁶¹ Major Cooper in the debate said "Copyright outside Ireland is of very much more value to the Irish author than a copyright inside Ireland. No Irish author has ever written a book that would keep him alive through the sale of that book inside Ireland ... if we want to encourage literature here, and I have no doubt we do, we must not have an unduly rigid copyright law without making some reciprocity with other countries." DD 29 May 1925. Col 2650.

⁶² DD 9 June 1925 Col 534

⁶³ SD 24 February 1927, col. 345.

⁶⁴ Yeats intervened later in the debate to describe the United States manufacturing clause “an international scandal.” SD 24 February 1927, col. 350.

in America has to be practically simultaneous, and if you cannot register your American copyright you may, for the time being, lose it.”⁶⁵

Yeats recognised that the Government was trying to deal with the situation, and in particular to deal with those cases which had arisen in the “interregnum,”⁶⁶ and asked for urgent action, through the grant of retrospective protection in America, “because serious loss is being suffered by Irish writers.”⁶⁷ McGilligan was prepared to consider this point, but said that it would involve coming to an arrangement with the American government.⁶⁸

Bilateral Copyright Agreements with the US

In February 1929 legislation amending the main 1927 copyright law was passed,⁶⁹ allowing for the imposition of formalities before granting bilateral copyright protection. A government amendment was moved “to deal specially with the case of America and with the obtaining of copyright privileges there.”⁷⁰ McGilligan stated that, in order to secure the American Presidential Proclamation that was required before Irish citizens could obtain copyright in America, “it is for us to show that we are granting exactly the same copyright conditions here. This is conferring on American citizens the same privileges here as their law confers on our citizens in America.” The difficulty was that America did not have a translations reservation, and the amendment was to allow the executive to except American authors from the operation of Ireland’s translation reservation. In the Senate Debate, the Parliamentary Secretary stated that the government “wished to meet our promise that we would take whatever steps might be found possible to secure that books like ‘My New Curate’,⁷¹ copyrighted in America, would be put on our market on reasonable terms.”

⁶⁵ SD 24 February 1927, col. 345

⁶⁶ Yeats used this term to refer to works published after Irish independence and before the enactment of an Irish Copyright law.

⁶⁷ SD 24 February 1927, col. 345

⁶⁸ SD 24 February 1927, col. 351-2

⁶⁹ The Industrial and Commercial Property (Protection)(Amendment) Act, 1929

⁷⁰ DD, 21.3.29, Col 1696.

⁷¹ A novel by Canon Sheehan. Deputy Dolan, Parliamentary Secretary to the Minister for Industry and Commerce, SD 12 April 1929, Col 134.

5.4.1 The Proposed Irish Manufacturing Clause

A proposal for a manufacturing provision was made in various forms in the 1920's, emanating from the printers, and intended solely as a support for the printing industry. The proposal did not have either government support or the support of most Irish writers. While appeals were made to North American and, in particular, to the Canadian regulations, the policy intention in the Irish debate was not to develop Irish cultural production, but simply to provide a boost for employment in Ireland, and to stabilise the domestic market for the printers.⁷² The provision which was proposed repeatedly in the parliamentary debates between 1924 and 1927 was a narrow manufacturing provision.⁷³

Support for the printing industry, while certainly a part of the justification for the printing requirement, was not the sole purpose of the American clause, which had nobler policy objectives, including the provision of cheap books to the population, the increase in the literacy and general cultural level of the public, the development of a native cultural industry through the creation of new 'content' and the development of an enhanced American sense of national distinctiveness. It was argued in the Irish debates that a similar market for native books was available in Canada to Canadian authors.⁷⁴

It was proposed in 1927 that the manufacturing proposal might apply only to Irish writers whose work was not printed in Ireland, but not to writers of other nationalities. Given the relative weakness of writers, and particularly of new writers, in relation to publishers, Irish writers were unlikely to be in a position to demand of their publishers where their books were to be printed. The *Irish Statesman* drew attention to this fact in 1927, when the issue of the manufacturing clause had been resurrected in the Senate debate. "Anything more cruel to young Irish authors could hardly be devised. It is hard enough for young writers to get publishers at all, but young Irish writers, if the amendment is passed, must come to publishers shackled with the legal obligation that their works cannot be copyrighted in their own country unless printed there also."⁷⁵

⁷² Lacroix and Tremblay (1996, 46) distinguish between cultural industries, in which they include publishing and book distribution, and support industries, which they include book printing, and which they characterise as "little different from other manufacturing industries."

⁷³ Seumas O'Sullivan wrote in 1924 that "... even if the clause in the American Copyright Act, which compels printing in the United States, were adopted here, it would only prevent the importation of books by those who need them." *Dublin Magazine*, November 1924, vol 11(4), p 219.

⁷⁴ Senator Dowdall advanced an argument that in order to secure copyright protection in their own country, Canadian writers, having established their reputation in London, still had to have their work printed in Canada for the Canadian market, where there was a native demand for and interest in their work. SD 4 May 1927, Col 1110.

⁷⁵ *Irish Statesman*, 5 March 1927, 7(26), 611.

The intention behind the proposed Irish manufacturing requirement

In Ireland a meaner logic was followed in relation to the manufacturing provision than in either America or Canada. Legislators argued in favour of a simple printing requirement, with little concern being given to cultural or developmental issues. The proponents of the manufacturing clause argued openly that they did not seek to develop a publishing industry, but merely a printing industry. There was no apparent desire to animate the people through the creation of a active cultural industry. This must be placed in the general cultural context of the mid-1920's, when the energies of many legislators and other social leaders were directed at the orientation and construction of cultural expression and consumption in Ireland along conservative lines. It is instructive to note that there was considerable common interest between some of the supporters of the manufacturing clause and the supporters of censorship. It is also important to emphasise that the motivation of the pro-manufacturing clause supporters were sometimes apparently venal, as they were themselves involved in the printing or publishing industry.

The difference in scale between the IFS and the US

There was a failure on the part of the pro-manufacturing clause lobby to understand the practical consequences of the difference in scale between the US and the Free State. In Irish political culture, a lack of recognition of the difference between the symbolic and the substantive attributes of sovereignty⁷⁶ has led legislators from time to time to propose radical courses of action out of keeping with the scale of the Irish state and heedless of the fact that the formal equality of states in international law is tempered in practice by considerations of realpolitik. The government position on the manufacturing clause was that it would exclude the Free State from the Berne Convention. The United States, with an economy on a continental scale, could endure such exclusion, yet even there the sentiment was alleged to be gaining ground that she should join the Berne Convention.

The editor of the *Irish Law Times* referred to the attempt to include a manufacturing clause in the Act: "Even the United States, with its immense area and population, has been forced to conclude private conventions with several of the great Powers in order to

⁷⁶ This distinction in the scale of sovereignty is drawn in, for example, Harden (1985, 14-5).

provide the protection denied her by her abstention from the Union.”⁷⁷ George Russell also drew attention to the difference in scale between Ireland and the United States, arguing that a printing requirement could have “some economic results in a country like the United States where there is a population of one hundred and ten millions and where the possibilities of sale exceed those of any other country. ... The effect would be a practical denial of copyright in Ireland to Irish writers whose readers are far more numerous in Great Britain and America than they are in their own country.”⁷⁸ Russell argued that there was some sense in the US manufacturing requirement, since “there is an audience of 110 000 000 to devour books there. Here there are 3 000 000, the vast majority semi-illiterates, who read nothing.”⁷⁹

Arguments against the manufacturing provision: Opposition from writers and other actors.

The arguments against the clause ranged from the principled objection of simple equity to writers to pragmatic arguments, such as that the market for books in Ireland was so small as to make an Irish manufacturing clause meaningless or practically ineffectual. If Ireland introduced a manufacturing provisions, its writers would not be entitled to protection for their works in foreign markets, under the terms of the Berne Convention. There was a perceived real danger of Irish writers fleeing the country and taking on other nationalities, in order to retain copyright protection in other states. However, the fact was that many writers were in any case what might be termed ‘intellectual émigrés’, in respect of their works published abroad. In addition, Senator S.L. Browne noted that an Irish author who wished to be published in Britain could go to Britain, renounce his Irish citizenship, become a British citizen; “Immediately he does so ... he can snap his fingers at this amendment.”⁸⁰

The government itself was opposed to enacting a manufacturing clause. The Minister argued that, no matter how few Irish authors were then published in Ireland, if the manufacturing amendment were carried, no Irish author would be published in Ireland, “because you can take it definitely that the sale of any Irish book is bigger in England

⁷⁷ *Irish Law Times and Solicitors' Journal* LXII, No 3213, 25 August 1928, p 201.

⁷⁸ *Irish Statesman*, December 11 1926, Vol 7(14), p 317-8.

⁷⁹ *Irish Statesman*, 5 March 1927, 7 (26), 612.

⁸⁰ SD 11 March 1927, col. 597

than it is here."⁸¹ He also claimed that applying a manufacturing obligation to all works sold in Ireland, would make the IFS "a land of literary pirates."⁸²

Some writers were opposed the proposal, on the grounds that, not alone would it destroy Irish writing, but that it would also remove the possibility of developing a high-quality, economically viable publishing industry in Ireland. Russell argued that manufacturing amendment was "a piece of impertinence, for it insinuates that printers have rights over what ought to be the sole property of the author; it amounts to an assertion that if they do not get their whack out of what an author writes they will deny him any rights at all. They are not content to rely on the technical excellence of their work to secure contracts but point a pistol at the head of the author."⁸³ He criticised the proposal repeatedly in the *Irish Statesman*, calling it a "tax on literature"⁸⁴ and argued that no support, whether by means of a manufacturing proposal or a protective tariff would increase the production of books in Ireland because "the reading public is very limited." Russell also claimed that the proposal would lead to the denial of Irish copyright to Irish writers, because their foreign publishers would not print a special Irish edition in Ireland⁸⁵ since the bulk of the readership of Irish writers was in Great Britain and America.

An Alternative to a Manufacturing Clause: Developing Irish publishing - through good copyright practice and good publishing practice

"Dublin seemed to be coming into its own again as a publishing centre - the quality of the matter published, no less than the printing and the format of the books, attracted attention throughout the world. But time and the public have altered all that, and now the work of the best Irish writers must be sought for in the announcements of English publishers" (O'Sullivan, 1924, 147).

It was argued by some commentators that a publishing industry could be built up in Ireland, partly through the adoption of good publishing practice, high standards of physical production and good standard copyright practice.

⁸¹ DD Col 564. 7 Dec 1926

⁸² DD Col 565 7 Dec 1926

⁸³ *Irish Statesman*, 18 December 1926, Vol 7(15), pp 352-3.

⁸⁴ *Irish Statesman*, November 21 1925, p 324.

⁸⁵ *Irish Statesman*, 11 December 1926, 7(14), 317.

Yeats insisted that the proposed reliance on Irish writers alone to boost the printing and publishing industry was wrong-headed: Ireland had to develop a modern, high-quality, export-oriented industry based on international sources of material. He rejected the argument that the output of Irish writers would provide sufficient business for Irish printers: "If you have all the Irish writers that exist printing here in Dublin they are not sufficient to keep your printing presses busy for half a year."⁸⁶ At the time Irish printers were printing some material for English publishers; if the amendment were passed, Yeats held that the Irish printing trade would be "snuffed out" as a result of international pressure and mobilisation of opinion by the Publishers' Association and by the Society of Authors. He argued that Ireland was in 1926

"intellectually in the position Edinburgh was at the beginning of the nineteenth century. Gradually Edinburgh became a great centre of publishing and printing. Edinburgh had great intellectual prestige. We have given you intellectual prestige. It will be your fault if you do not make Dublin a great centre of printing, but you will not make it a great centre of printing unless you retain the good-will of the publishers and writers of England and the British Empire."⁸⁷

Drawing on his own experience as a publisher with the Cuala Press,⁸⁸ Yeats asserted that, if the printers were to use the services of "men of taste" it would be possible to create a printing and publishing industry in Dublin.⁸⁹

"You can make a great centre of publishing and printing here, because Ireland has a good literary prestige in the world now. ... You will certainly not do so by what will be considered all over Europe as pirating. The educated opinion of Europe sees no difference between the property in a book and the property in an article of manufacturing."⁹⁰

Yeats supported his claim of the international revulsion to piracy by referring to a protest letter concerning an American pirated edition of *Ulysses*⁹¹; the protest was signed

⁸⁶ SD 4 May 1927, col 1118.

⁸⁷ SD 4 May 1927, col 1119.

⁸⁸ A craft printing house, producing small fine editions of works by Irish writers. It could not be described as a commercial publishing house.

⁸⁹ This formulation of Yeats' follows closely one of George Russell's, when he listed the desiderata of well-produced books in the *Irish Statesman*. The entire debate on copyright was closely paralleled in this journal. Yeats and Russell seem to have been largely of one mind, re-using the same forms of expression. In addition, the letters columns gave a forum to their antagonists associated with the printing lobby. Again there was a certain regularity and uniformity in expression and thought on that side of the debate.

⁹⁰ SD 11 March 1927, col. 604

⁹¹ He did not name the book or author, but it is clear from the context.

150 “men of great eminence all over Europe”. He asked if Irish publishing houses could survive if they carried out piracy, in the light of such an attitude to copyright.

The manufacturing provisions were strongly opposed by the British government, following representations from publishing interests. However, it was at all times unlikely that the proposals would be carried, given government opposition. The government was opposed, on simple grounds of fairness, out of a desire to appear to adopt good international practice, and, perhaps most importantly, due to a strong desire to join the Berne Convention in its own right as a sovereign state.

Arguments in favour of a manufacturing clause

Debt of writers to Ireland as a corporate entity

A vague sense that writers used Ireland as inspirational raw material was drawn on in the course of the parliamentary debates. A view was advanced that writers had an obligation to return some tangible benefit to Ireland (or, more accurately, to the Irish printing industry) for what they had drawn from living in Ireland. While this peculiar idea had echoes of an unpleasant chauvinism, it also clearly demonstrates an unwillingness to accept that written work is the product of individual genius.

Extra-parliamentary intervention in the debates on this issue came directly from publishers. W.G. Lyon, one of the principals of the Talbot Press,⁹² wrote “... the authors ... get their books published in England, and as they draw their inspiration from the land of their birth, and exploit its legends and its lore, would it be too much to ask that they do something for their country by stipulating that their books should be printed at home.”⁹³ Arnold Marsh proposed that publishers in the Free State of books by Irish writers should lose their copyright protection and instead should receive a “compensatory right to a small fixed royalty on the publication of their books by anyone in the Free State, regardless of any arrangements he might make with publishers elsewhere.”⁹⁴ Marsh saw this as being “to the very great enrichment of Irish intellectual life.” He based this proposal on the grounds that the income of most people in Ireland was so low that they could not afford the high prices charged for imported editions:

⁹² With which Magennis was also associated.

⁹³ *Irish Statesman*, 18 December 1926, Vol 7(15), pp 352-3.

⁹⁴ *Irish Statesman*, 12 March 1927, Vol 7(21).

“[u]nder these conditions Irish cultural goods can hardly be expected to have a large sale here until this becomes a rich country.”

The appeal to American copyright practice, specifically to the manufacturing position, was attractive to some commentators, since the market for Irish books in America was largely for a nostalgic form of writing, unlike the work of Irish writers who published in London. Material of this kind emanated from some of the Irish publishing houses. Professor Magennis argued in the Dail that there were two classes of Irish authors, those who would continue to publish in Britain, and would thus retain the protection of Berne, and those “whom I will call distinctively Irish, and of Irish appeal, write for buyers here, and for buyers in America, particularly. America is outside the Berne Convention; the Berne Convention question does not affect that class of author in the slightest degree.”⁹⁵ Magennis asked if it was not too much to expect of an Irish writer, in return for the monopoly right of copyright granted to him, to return some advantage to Ireland. “It simply means securing for the Irish printing trade in return for a copyright monopoly a wider and better occupation.”⁹⁶

It was argued in the Dail debate that the Irish writer had a moral obligation to bring economic advantage to Ireland. Senator Cummins claimed that “no well disposed author in this country would question the claim that the people of this country have a right to expect that he should get his books done in Ireland.”⁹⁷ He claimed that Lady Gregory had her work printed and published in Ireland, at no detriment to her literary reputation. He did not allude to the extent of that writer’s financial independence. Senator Bennett appealed to the Canadian situation, asking why Irish writers would do less for Ireland than Canadian writers were supposed to have done for that country.

“These men should, without hesitation, say: ‘Yes, we are no less patriotic than the authors of Canada are, and we are not willing to injure in any way our fellow authors. We are prepared to do what Canada has done. We accept the Berne Convention that our work shall be printed here and published wherever we desire.’”⁹⁸

⁹⁵ DD Col 565 7 Dec 1926

⁹⁶ DD. 7 Dec 1926, Col 547

⁹⁷ SD 11 March 1927, col. 591

⁹⁸ SD 11 March 1927, col. 596.

Restoring Dublin as a centre of printing through the enactment of a manufacturing provision

It had been argued on the anti-manufacturing clause side of the argument that a substantial publishing industry could be developed in Ireland if the country adopted international good practice, under the terms of the Berne Convention. The contrary was also argued, that a printing industry, if not a publishing industry, could be developed through the adoption of a manufacturing requirement. Senator Cummins described the object of his manufacturing amendment⁹⁹ as

“primarily to make Dublin what it once was - a great centre of printing, one of the leading centres, perhaps, in the British Isles, when it turned out quality of work equal to any. ... Another object, of course, is that incidentally you give employment to a very large number of members of the printing trade in Dublin, who are at present largely unemployed.”¹⁰⁰

In the Dail, Magennis supported the Free State becoming a land of literary pirates and he looked to the 18th century as a golden age of Irish publishing.¹⁰¹ Cummins criticised a threat by Yeats to cross the border the manufacturing clause was passed.

“Even if a few authors suffer a small financial loss.. [t]here is on the other hand a balance, the prospect of opening a field for an Irish industry that was closed down perhaps 100 years ago, which shows a wonderful prospect of revival, and which should be extremely advantageous and have good economic effect on the printing trade of Dublin”.¹⁰²

The Defeat of the Manufacturing Clause

The manufacturing clause was defeated, largely as a result of the government's parliamentary majority, but also because of the influence of figures such as Senator S.L. Brown, who was acknowledged as the expert in intellectual property law. British and other foreign opposition were influential on the government's thinking on the issue. In particular, the anxiety of the government to ensure Ireland's membership of the Berne Union meant that a manufacturing clause was in practical terms a non-starter. Ireland's

⁹⁹ SD 11 March 1927, col. 593.

¹⁰⁰ SD 11 March 1927, col. 590. This claim is not supported by the official statistics, but there is contrary evidence, as shown above, in the Memorandum from the printers and in the pages of the *Progressive Printer and Newspaper Publisher*.

¹⁰¹ DD Col 566 7 Dec 1926

¹⁰² SD 4 May 1927, Col 114-5.

proximity and cultural inter-dependence with Britain in literary production and circulation made the proximity of two radically different copyright regimes effectively unworkable. The Fianna Fail party members, who had supported the printers and printing workers in a public demonstration in 1926 did not influence the parliamentary debates. Since one of the primary inputs into the decision to regularise Irish copyright law in the 1920's came from the Irish Playwrights' Union, and since the international prestige of the Irish theatre was high, the opposition within government to the printers' arguments are understandable.

Moreover, the evidence from the statistics for the publishing industry demonstrated that the printers and publishers were making evidently unsustainable claims for the destruction of their industry. While some firms were in difficulties, the lack of energy displayed by many publishers in seeking to develop their businesses was both a probable factor in their commercial difficulties, and in their efforts to create a national reserved market for themselves through the law.

5.4.2 Translation rights

Nature of the Translations Provisions

A translation reservation was enacted domestically in 1927 and carried into effect in Ireland's adherence with reservations to the Berne Convention in the same year. The reservation provided that if the owner of the copyright in a work had not issued or permitted a translation into Irish within ten years of the work's original publication, the work could be published in translation into Irish without permission or payment. The Minister for Finance, Ernest Blythe, who was responsible for the State's Irish language publishing initiatives, had previously called for the translation of large quantities of material into Irish (Cronin, 1996, 156).

Despite opposition to the Irish translation provisions from Britain and from international authors, the provision was enacted and it remained part of Irish law until the late 1950's.

McGilligan reported that the Department of Education and others had “stressed the importance of having the right to translate modern authors into Irish if the translation was not made in 10 years by the authors themselves.”¹⁰³ He noted, however, that the Italian government, in preparatory documents for the Rome Revision Conference of the Berne Convention of 1928, had proposed the removal of the right to adhere with reservations to the Berne Convention.

Britain opposed the Irish translations reservation, both during its passage through the Oireachtas, and later when Ireland sought to accede to the Berne Union with the reservation. In a despatch to Leo Amery, the Dominions Secretary, in May 1927, Desmond Fitzgerald, Minister for External Affairs, in reference to the translations reservation, stated that “..the Government of the Irish Free State has come to the conclusion that the proposed amendment is essential.”

Irish Efforts to retain the translations reservation at the Rome Conference 1928

The Secretary of Industry and Commerce noted that the Italian government had invited the IFS to be represented at the Rome Conference,¹⁰⁴ and that the IFS should be represented by the Controller of the Patent Office. A hand-written note¹⁰⁵ from W. Boland of the Department of Finance approved the attendance of the Controller: “Apart from the general consideration mentioned ... I understand that an important topic will be the question of translations. Having regard to our Government publications service for the production of general literature in Irish, it is of importance that Mr Bradley should be especially well posted on this question.”¹⁰⁶

Later in April 1928, Michael MacWhite, IFS Representative to the League of Nations, was authorised to accompany Bradley, because “a political issue of great importance has developed between Ireland and Britain. Our Act is based on the Berne Convention. The British propose something for themselves and Dominions that is based on the 1911 Act.” There was evidently an intention within the Irish administration that Irish interests

¹⁰³ SD 23 March 1927, Col 647.

¹⁰⁴ NAI .Memorandum to the Secretary of the Department of Finance in April 1928. The Irish Free State is recorded as acceding to the Berne Union on 5 October 1927. (Ricketson, 1987: p 99, n 111).

¹⁰⁵ Dated 12 April 1928

¹⁰⁶ Reply dated 12 April 1928

should be distinguished from British, and also that the translations reservation issue should be pursued in conformity with government policy.¹⁰⁷

Ireland modified its regulatory provisions in relation to translations in 1929.¹⁰⁸ The purpose was to encourage translations into Irish by allowing for a licensing system, where the Government could allow a translation into Irish without royalty, if no translation had been made into Irish and published in the Free State within ten years of the first publication of the work in any Berne Union state. This change meant that there was, in a sense, a registration system for translations undertaken under this provision.

Actual Null Economic or Cultural Effects of the Translations Reservation Policy

The translation reservation had little effect in Ireland, and was more an irritant to some publishers than any positive advantage to publishers, authors or the public. In the case of states in which an international language was not spoken, it is obvious that there was a practical value in using this provision. In the case of Ireland, with almost every citizen speaking English, the purpose was probably principally symbolic, or indicative of good intentions in linguistic policy. George Russell argued from the alleged disinclination of the Irish to read, that it would not matter whether the population was literate in Irish or English; the identical national disposition would limit the market for books.

“The only trouble here is that the percentage of our population inclined to literature is not great enough to give even the most famous Irish writer royalties which would equal the income of an agricultural labourer. That is why literature here is largely an export trade. We wonder if the percentage will be any higher than elsewhere when everybody in the Free State can speak Irish? We suspect they will be just as interested in discovering the ‘winners’ when they speak Irish as they are when they speak English”¹⁰⁹

The translation reservation was known from an early date to be neither commercially or linguistically successful (O'Connell, 1932: 185). The Report of the Committee of Public Accounts (PAC) for 1929-30 (1931: xi-xii) reported that a sum of £182 10s had been paid by the Department of Education for the translation of five books into Irish. “The work was suspended when it had reached a point approaching publication, because a

¹⁰⁷ NAI, I&C, S75/14/27. Berne Copyright Union... Adherence of An Saorstát. Memorandum of 1 May 1928 to Secretary of Department of Finance.

¹⁰⁸ The 1929 Industrial and Commercial Property (Protection)(Amendment) Act

¹⁰⁹ *Irish Statesman* 5 October 1929, p 85.

certain firm, which held the copyright of the books,¹¹⁰ refused permission to have them published, save on condition that the translations were in Gaelic type.” The difficulty centred on the fact that government policy required that the translation be published in Roman type.¹¹¹ O’Duffy, Accounting Officer of the Department of Education, said that the Department did not have difficulty in publishing Irish translations of works held by the large English publishers: “... most of the large English publishers were not exacting on the whole. We had possibly more trouble with some Irish publishers or holders of copyrights than with the large English firms.”

Effective abandonment of the translation policy, and therefore of the justification for the translation provisions

By 1940, the policy of the Department of Education in relation to translations into Irish had changed: “The present policy ... in connection with the publication of books in Irish is to publish only works that are required by the secondary schools, or for which there is likely to be a demand by readers and students of Irish.”¹¹² While the translation reservation was continued until 1958, it had had no practical effect on the industry, or, arguably, on the status of the Irish language. Nevertheless, although the reservation was dropped without dispute, its removal flowed from the provisions of the Universal Copyright Convention of 1952, which Ireland wished to ratify, to enhance protection for Irish authors in America. The fictitious support which the reservation gave to Irish-language publishing was abandoned in exchange for a substantial gain for the rights Irish writers and publishers mainly of works in English in the United States.

5.4.3 School anthologies - An Educational Exception

A provision for a school anthologies reservation, allowable under the Berne Convention, was enacted in 1927, in the face of opposition from Britain and from foreign publishers and writers. While there was an educational purpose in the provision, the fact that many Irish publishers relied on educational sales made this in reality a trade support provision. George Russell wrote of school children being a ‘captive audience’ for the publishers: “... school books, of course, because children are compelled to study them, but apart

¹¹⁰ Presumably within the ten-year period.

¹¹¹ According to O’Duffy, in 1929, government policy on translations was that one third of translations would be in Roman type. “The proportion increased the following year and at present all works must be in Roman type.” (PAC 1931: 54).

¹¹² DD 6 November 1940, Col 346.

from these we doubt if the Irish demand for books would lead to the extra employment under protection of a dozen printers.”¹¹³ A view was abroad that reliance on this provision was a less than noble commercial practice on the part of publishers.¹¹⁴

The direct cause for the pressure for a Schools Anthology, the poverty of the literary property holdings of Irish publishers

The Dail debated the school anthologies provision in December 1926, and in particular the publication of collections of extracts from copyright works, including poetry. McGilligan remarked on the relative difficulty for Irish publishers, who did not have at their disposal the bank of material from which to draw for use in school texts. The Bill proposed to allow Irish publishers to reprint small extracts under strictly limited conditions for use only in schools. This was a deviation from the provisions of the 1911 Act, and thus from the Commonwealth Union position. However, McGilligan asserted that the proposed clause was permitted under the terms of the Berne Convention.¹¹⁵ McGilligan proposed¹¹⁶ that limited extracts from copyright works should be permitted for school texts.

“I explained the facilities it was intended to give Irish publishers in order in some way to try to take away the difficulties under which they labour in opposition to English publishing firms, which have an amount of general copyright matter at their disposal which they may use without payment by agreement with the author, and for which an Irish publishing house would be made to pay for, and pay heavily.”¹¹⁷

British Government Objections, based on Publishers’ Representations

In late December 1926, work began on drafting a despatch seeking the views of the British government on the schools anthologies provisions¹¹⁸ and to clarify whether the provisions of the Bill would exclude the Free State from the so-called Commonwealth Copyright Union. This related to the practice of certifying under Section 25 of the

¹¹³ *Irish Statesman* 21 Nov 1925, p 324.

¹¹⁴ However, Hutton, (1997: 42) has shown that the literary output of the Talbot Press depended on the cross-subsidy provided by the Educational Company subsidiary.

¹¹⁵ DD 8 Dec 1926 Col 591

¹¹⁶ On 15 December 1926.

¹¹⁷ DD Col 818 16 Dec 1926

¹¹⁸ The first draft was dated 24 December 1926. This was revised on 30 December 1926, and the final despatch was sent by the Governor General on 3 January 1927.

British 1911 Act that a dominion's provisions¹¹⁹ were in practical terms fully in accordance with the terms of the Act.¹²⁰

In its reply of January 1927, the Dominions Office stated that the Board of Trade objected to the school anthology provision in principle. They welcomed the intended limitation in the permissible length of extracts but suggested that the limitation should be set at 100 lines or one third of a poem. The Board also made clear that such school anthologies could not be exported for sale to Britain, under the terms of the 1911 Act. While they found the provisions of the amendment regrettable and objectionable, in their view the Bill as amended would still confer rights within the Irish Free State "substantially identical" with those of the 1911 Act, and would not remove the Irish Free State from the Commonwealth Union.

Effect of the Schools Anthologies Provision

This provision must be assumed to have been beneficial to the Irish publishing trade, since so much of its activity was in that sub-sector of the industry. However, since the intellectual or literary property which was availed of under this provision would have tended to derive from an Anglocentric literary canon, it would have had no appreciable effect on literary creativity in Ireland. Because of the concentration of Irish publishers on the educational sector, this provision was probably of relatively more commercial benefit in Ireland than a similar provision might have been in a country with a more diversified publishing industry.

5.4.4 The political use of copyright legislation internationally

Irish instrumental use of copyright for non-copyright purposes

Ireland's use of copyright for unrelated political purposes is evident in three ways. Firstly, the Free State chose to adhere in its own right to the Berne Convention, contrary to the position of the British government. Secondly, the Free State refused to acquiesce

¹¹⁹ For example, following the enactment of the Canadian 1921 Act, 11-12 Geo 5, c 24, the Secretary of State in the Dominions Office certified that the rights conferred by the Canadian Act were substantially the same as those conferred by the British 1911 Act, (Hayhurst, 1996: 287) and that therefore Canada was within what the Irish ministers were calling the Commonwealth Copyright Union.

¹²⁰ "The phrase 'substantially identical' later allowed the IFS divergent provisions to remain within the terms of the Section.

in a British presumption that there would be an "Empire position" on copyright at the Rome Conference in 1928, which revised the Berne Convention. Thirdly, in the late 1920's and 1930's, the government became involved in a civil action between an Irish local authority and the British Performing Right Society. Eventually the government acted to neutralise the effect of a judgement of the British Privy Council which had overturned an Irish Supreme Court decision on copyright.¹²¹ The Irish government in these three ways harnessed copyright for policy purposes which were not intrinsically concerned with copyright, but rather with the intention of consolidating the independent status of the Irish state.

The diplomatic and political use of copyright for non-intrinsic purposes

Ireland's participation in international conferences as a fully independent member, which was opposed by Britain, was used as a means of demonstrating the full independence of the Free State (Murdoch, 1971; Ricketson, 1986). The government availed of the negotiation of the Rome revision of the Berne Convention in 1928 as a diplomatic tool, and not for purposes concerned with copyright itself. In pursuing this issue almost exclusively for non-copyright reasons, Irish diplomats were successful in their own terms. However, there was a striking disparity between the diplomatic energy expended and the minor gains which were made by Ireland in these international discussions. While Irish negotiators did seek to achieve certain purely copyright objectives, such as the retention of the translations reservation, the primary purpose was to demonstrate that the Free State was a fully independent member of the international community. The Secretary of the Department of Foreign Affairs observed that at the Rome Revision of 1928 "... a definitely political principle is involved affecting the status of the Saorstat and the interpretation of the decisions come to at the Imperial Conference of 1926."¹²² This, as much as the preservation of the translation reservation itself, was the impetus for Ireland to take an active part in the Rome conference.

The attitude of the Irish Free State to its adherence to international treaties which had been entered into by the British Government before 1922 differed from that of the other British dominions. In a formal statement in 1933 De Valera indicated that the IFS adopted what he (wrongly) termed "the general international practice" of accepting or

¹²¹ Under the heading 'The International Status of the Free State', George Russell wrote that "There is nothing rankles more in the mind of a self-governing nation than any suggestion of inferiority.. *Irish Statesman*, October 16 1926, pp 126-7.

¹²² NAI, I&C, S75/14/27. Berne Copyright Union... Adherence of An Saorstat. Memorandum of 1 May 1928 to Secretary of Department of Finance. The reference is to British acceptance of a measure of Dominion sovereignty in 1926.

rejecting the obligations of the treaties “by express declaration, or by conduct (in the case of each individual treaty) as considerations of policy may require.”¹²³ The Berne Convention was among the treaties to which the territory of the Free State had adhered before the secession of that territory from the United Kingdom. Whereas the other British dominions took the view that they succeeded to British treaty obligations, the Irish position was less clear-cut. According to Ricketson “it seems reasonable ... to conclude that the Irish Free State remained bound by the Berlin Act after 1921 although it was not formally a member country of the Union. However, in 1927, the Irish Free State acceded to the Berlin Act in its own name, subject to a reservation as to translation rights¹²⁴ and this led the International Office to conclude that the Irish Free State had left the union upon becoming a ‘new state’ in 1921, and that this was therefore the accession of a new member of the Union” (1986: 785).

Lack of initiatives by Ireland in relation to copyright

Despite its activism in the political sphere at international conferences, the Free State was unimaginative in relation to actual negotiations. No initiatives can be traced to the Irish representatives, and no evidence that any were considered was found in the archives. Despite the official Irish interest in developing the country's distinctive national culture, no provisions were proposed for the protection of folk cultural works, such as traditional music, for example. It must be conceded, however, that any considerable administrative and political interest in Irish music as a worthy expression of national genius can be dated only to the late Thirties, by which time international discussion of copyright itself had fallen into abeyance.

Ireland joined the Berne Union in its own right

In July 1927, Ireland requested Britain to notify the Swiss Government that the Irish Free State wished to enter the Berne Union, and to accede to the terms of the Convention in its Berlin revision and of the 1914 Additional Protocol,¹²⁵ subject to the substitution

¹²³ Cited in O’Connell, 1967: 123.

¹²⁴ Six states acceded with a reservation as to translation rights: Estonia, Italy, Japan, the Netherlands, Greece and Ireland. The reservations issue was a difficulty for the Union, and the Rome conference was intended to remove the right, as the Union was becoming inordinately complex and unwieldy. Ireland retained its reservation after the 1948 Brussels Revision, and gave legal effect to the reservation even in the 1957 Industrial and Commercial Property Act. (Ricketson, 1986: 99, n 117)

¹²⁵ The Additional Protocol of 1914 arose originally to cater for the particular needs of Canada. At the Imperial Copyright Conference which Britain convened in 1910 to discuss the ratification of the Berlin Act 1908 by the self-governing dominions of the Empire, the Canadian problem with the manufacturing clauses

Article 5 of the Additional Act of Paris of 4 November 1896 for Article 8 of the Revised Convention.¹²⁶ In July and August 1927, Britain and Ireland agreed to reciprocation of copyright protection.¹²⁷ In 1936, when Belgium issued an invitation to the IFS to attend a proposed revision conference, there was satisfaction in Dublin that the invitation had come directly, rather than, as in 1928, through the Dominions Office in London.¹²⁸

Ireland taking a negotiating position contrary to Britain's interests

Irish officials, while accepting a British invitation to attend a meeting of Dominion diplomats in London in 1928 before proceeding to the Conference in Rome, at which the "Empire position" was to be agreed, did not accept the principle that there should be an Empire position. Indeed, they argued in Rome in favour of the translations reservation, in opposition to the British position.

Ireland and Britain disagreed strongly on whether the Convention even applied between Britain and the other Dominions. Britain held that international conventions could not be applied between the members of the British Empire (the so-called *inter se* doctrine): "Intra-imperial affairs were (held to be) wholly distinct from international relations" and they stated that ... "it is not possible for us to accept the principle that the (Berne) Convention is applicable between various members of the Commonwealth".¹²⁹ McGilligan insisted that, as a result of the Irish 1927 Act, copyright relations between Ireland and the members of the Commonwealth could only be conducted through the mechanism of the Berne Union, and that the Rome Convention must also apply,

At the Conference itself a serious dispute arose again, when Britain asserted its right to sign the Convention on behalf of the members of the Commonwealth, with the other

which had been carried into the United States 1909 Copyright Act presented a difficulty. At Canada's request, Britain in 1914 proposed the so-called Additional Protocol, which allowed a Berne Union country to restrict protection of works by citizens of non-Union states which did not protect the works by authors from Union countries adequately. Only Canada took advantage of this provision, and gave effect to this in its 1921 Act (Ricketson 1986: 97-8). The fact that the Irish Free State adhered specifically to the protocol indicates that the possibility of its taking advantage of the protocol was not discounted. A bilateral agreement in the 1930's with the US removed the need for Ireland to use the Additional Protocol.

¹²⁶ A letter from G.H. Villiers of the Foreign Office, London is on the file, stating that the Swiss Government had been informed of the accession of the Free State. Dated 27 September 1927. NAI I&C S75/14/27. The Berlin Act 1908 was the last pre-1922 revision of Berne.

¹²⁷ On 30 July 1927 the British government sent a draft of an Order in Council to the Minister for External Affairs, declaring the Irish Free State to be a self-governing Dominion for the purposes of the Copyright Act 1911. J.P. Walsh of the Department of External Affairs, on 18 August 1927, stated that it was proposed to bring Section VI of the 1927 Act into force on the assumption that reciprocal Orders would be issued by Britain at an early date.

¹²⁸ NAI I&C S75/14/27. Berne Copyright Union. Memorandum from Secretary I&C to Secretary F.A. 9 May 1936.

¹²⁹ NAI Taoiseach S5433A. Copyright - International Conventions and Copyright. Coded Telegram from Dominions Secretary to the Minister for EA. 27 May 1928.

Commonwealth members appending their signatures to the British signature. MacWhite, the Irish representative, noting that the 1925 Hague Convention on Industrial Property had been signed separately by each member, insisted that Ireland would sign in its own right.

The political implication of international conferences continued to be prioritised over their intrinsic purposes. In 1936, the Belgian Government invited the IFS to attend a conference to be held in September in Brussels, to revise the Berne Convention. A note on the file recorded that there were two primary Irish interests. One was the political issue of the state attending in its own right;¹³⁰ the second issue was translation rights: "We were also influenced by the fact that the question of translations, which was to be an important topic at the Convention, was of interest to us in view of the publication of translations undertaken by the Department of Education in connection with their scheme for the production of works in Irish."¹³¹ The translations reservation, though known by then to be of little practical utility in supporting an increase in the availability of Irish language material, remained a high priority for officials, effectively on political grounds.

The Collecting Societies - giving rise to an international dispute. Copyright again implicated in the international status of the Free State

The Performing Right Society (PRS) in London took an interest in Irish performing right regulation in the 1920's, when the status of the copyright system was in doubt in Ireland. It appears from despatches between the Dominions Office and the holders of copyright that there was a determination on the part of the Performing Rights Society to test the legal situation in the Irish Free State with regard to copyright from about 1925 onwards. This was in spite of the fact that the Free State government was making efforts to clarify and regularise the situation about intellectual property rights. In 1926 the PRS commenced legal action against two local authorities.¹³²

In October 1927 the action began in the High Court. The facts of the case were that Bray Urban District Council (UDC) had given permission for a public music recital in August

¹³⁰ "No difficulty [of a political nature] is likely to arise gain, as the invitation has been received direct from the Belgian Government and not through the Dominions Office in London, as in 1928". Memo apparently by Doolin, NAI, I&C S75/14/27. Berne Union ...

¹³¹ NAI I&C S/75/14/27. Berne Copyright Union. Memorandum from Secretary I&C to Secretary F.A. 9 May 1936.

¹³² Dun Laoghaire Borough Council and Bray Urban District Council. *Irish Times* 2 December 1926.

1926, and a charge was made to attend.¹³³ The rights of the German composers of the music performed had been assigned after 1922 to the Performing Rights Society. The judge held that the rights of the composers were infringed by the performance without payment of their works in Bray in 1926 "if there was any law of copyright which protected the plaintiffs in Saorstat Eireann on the date in question". Bray UDC had argued that the rights of German nationals had lapsed immediately with the coming into force of the Constitution of the Irish Free State, that the Constitution "contains nothing that reserves any copyright in respect of such compositions" and that the 1927 Irish Act did not apply. The PRS won the case, and Bray UDC appealed to the Supreme Court.¹³⁴

The UDC argued that the 1911 Copyright Act had never applied in the Irish Free State. The argument of the PRS in the Supreme Court appeal turned on the question of why the Irish 1927 Act had repealed the 1911 Copyright Act, if it was not in force in the Free State until the passage of the Act. The Supreme Court held that the 1911 Act had not been saved and that the PRS's copyright in the named works was " 'neither confiscated nor extinguished', because it never existed at all so far as the Irish Free State is concerned. It is certain that the Copyright Act was never subsequently extended to the Irish Free State by the Oireachtas". The result of the appeal in the Supreme Court was widely publicised, and the Free State was denounced in newspapers throughout Britain.¹³⁵

The PRS indicated that it proposed to appeal the case to London.¹³⁶ In the Dail, Deputy Esmonde¹³⁷ asked if the "recent action of the Judicial Committee of the Privy Council in granting special leave to appeal [in the PRS case] ... was taken in accordance with the wishes of the Executive Council of Saorstat Eireann." McGilligan, Minister for I&C, stated that it had been "made abundantly clear that the Executive Council are opposed to the hearing of any appeal from the Supreme Court and the action to be taken in the matter is under consideration". This appeal was highly contentious in Ireland, and

¹³³ [1928] IR 506, p 515.

¹³⁴ The Supreme Court appeal was heard in March 1928; judgement was delivered in July 1928.

¹³⁵ NAI D/FA LN 6/8 in the National Archives includes press cuttings. Among the extracts are reports from the Observer, from provincial British papers, and from newspapers in the United States and South Africa. The general tenor of the reports is critical of the Irish Free State. The file also includes the texts of speeches by Ernest Blythe, Minister for Finance, criticising the court action and the decision.

¹³⁶ Appeals of this nature were strongly opposed by the Irish government, as being a diminution of Irish sovereignty. The right of appeal to the Privy Council in the Irish Constitution was one of the confidence-building measures and protections for the unionist minority. Since 1922 the Irish government had been working actively for its removal by agreement (Harkness, 1969: 204).

¹³⁷ DD 14 November 1928, Col 6.

aroused the wrath of Irish officials and ministers, and indeed incurred the criticism of commentators.¹³⁸

The government acted to ensure that the decision of the Irish Supreme Court should stand, whatever the outcome of the Privy Council Appeal. A Bill¹³⁹ was introduced into the Dail in 1929 to copperfasten the Supreme Court judgement, but also because "the intention of the legislature, as expressed here during the course of the debate [on the 1927 Act] ... has not in fact been carried out"¹⁴⁰ McGilligan said that the aim of the new legislation was to be fair to both parties in the PRS case. The Society had taken an action on the presumption that the law was as the government had intended it to be, while the Bray UDC had acted as the law was in fact found to be by the Supreme Court. The Minister's purpose was to "patch up the breach of continuity" which had occurred, and to ensure that no damages could be recovered for any breaches which might come to light. In effect, he intended to clarify the PRS rights, but to remove any possibility of their securing damages for breaches between 1922 and 1929.

The British government published the correspondence which passed between London, Dublin and the PRS in relation to the 1929 Copyright Preservation Act,¹⁴¹ presumably to exert pressure on the Irish government. The correspondence shows that the PRS was aware on a day-to-day basis of the legislative passage in the Oireachtas of the 1929 Copyright Preservation Act, and it sought on several occasions to have the British government make representations to the Irish government on its behalf. The Dominions Secretary appealed to the Irish government to "devise some method of alleviating the heavy burden of costs which ... will fall on the Society."¹⁴² McGilligan's final letter in the published correspondence rejected the request from Britain. He noted that the purpose of the 1929 Copyright (Preservation) Act was to preserve copyrights, in the light of the Supreme Court decision. The Irish government was not prepared to compensate the PRS since "the highest judicial tribunal in the Irish Free State" had held

¹³⁸ George Russell, responding to a British House of Lords debate critical of the IFS, later remarked that "in the case of the Copyright Protection Act the intention of the Oireachtas was not to deprive the plaintiff of the rights he had, but to confirm him in those rights. We cannot but feel that there are a good many both in the Lords and Commons who have not yet come to acquiesce in the creation of the Free State, and who have sufficient vindictiveness left to use every opportunity which presents itself to put the Free State in a bad light as a State which does not keep its treaty obligations." *Irish Statesman*, 23 November 1929, p 224.

¹³⁹ Copyright (Preservation) Bill 1929.

¹⁴⁰ DD, 13.6.29, col 1296. McGilligan also said that the Supreme Court was "of course ... recognised as the highest authority on what the state of the law is at any time in this country".

¹⁴¹ Correspondence regarding the Irish Free State Copyright (Preservation) Act 1929, Cmd. 3457. London: Stationery Office, 1929. A copy of the printed correspondence is in the file D/FA D5831 in the National Archives. This file also contains other documents intended as items for cabinet discussion in 1929.

¹⁴² Letter, 30 July 1929 from Passfield to McGilligan. Letter No.8, Correspondence regarding the Irish Free State Copyright (Preservation) Act 1929, page10.

that copyrights did not exist at all in the Irish Free State at the time of the alleged infringement. This marked the effective end of Irish official concern with copyright until the 1950's, with the exception of a bilateral agreement with the US, concluded in the 1930's.

5.4.5 Other Technologies

Adaptation of Irish copyright law to technological advances

In the period under review, broadcasting copyright was not a major concern in Ireland,¹⁴³ and serious Irish consideration of broadcast copyright did not begin until the 1950's, and then only as a result of international pressure. The pattern in Ireland in the twentieth century of relatively late adoption of technological in the mass communications field led to a certain retardation in bringing legislation into line with the demands of technology. The impetus for change commonly arose either from external direct commercial pressure, from fear of potential external pressure, or from international negotiations. Rarely were Irish domestic actors, such as musicians or film-makers calling for legislative change to protect their intellectual property in new technologies. This contrast markedly with the situation in Britain, the US, France, Italy, Germany and in other countries.

In the period under review, Ireland was unwilling to become involved in certain discussions because of, for example, its lack of a recording industry. As a consequence, Ireland effectively absented itself from the debates in certain fields, through lack of foresight. Consequently, international regulatory frameworks were adopted which did not benefit from Irish direct involvement. For example, the Italian and Belgian suggestions in the 1930's for additional conferences on phonographic rights were not enthusiastically supported within the Irish administration.

¹⁴³ Ireland was, of course, aware of the international negotiation on copyright in this period. In 1935, for example, an official noted that the Rome Revision of 1928 had made amendments of the radio and cinematographic copyright provisions, "to clarify the position and afford more effective protection." NAI I&C S75/14/27. Berne Copyright Union. Memo from Sec. E.A. to Secretary to the Government, 26 March 1935.

Recorded music

In the early legislation, Irish provisions for recorded music copyright derived from contemporary international practice. In March 1927 McGilligan proposed that additional intellectual property rights in recorded music should be created, both in relation to the original copyright in the music, and in the subsequent rights in gramophone reproductions. The primary right was the right of prohibition of the recording of a work. A composer could decide to withhold the right to record a work by gramophone or perforated rolls; however, once a right had been given to one individual to record the musical work, the same terms had to be available to all.¹⁴⁴

In April 1935, a memorandum from the Secretary of the Department of External Affairs to the Secretary of the Executive Council sought permission for the IFS to adhere to the Rome Revision of Berne.¹⁴⁵ An enclosed memorandum noted that the IFS was bound by the Berlin revision of the Berne Union since 1927. As part of the argument advanced for adhering to the Rome Revision, External Affairs noted that "a considerable advance was ... made regarding protection of the press in matters of reproduction, while the Articles dealing with radiocommunication and cinematographic reproduction were amended to clarify the position and afford more effective protection."¹⁴⁶

5.4.6 Nature of the debates

In the 1920's the Irish government introduced an unusually wide-ranging Bill, covering all aspects of intellectual property. The reasons for the willingness of some legislators and officials in the 1920's to consider enacting legislation on copyright which was outside the narrow bounds of the apparently possible will be examined. The legislators were engaged on a larger project of giving practical effect to certain cultural policies which had been influential in the pre-independence period. This included a serious attempt to change the linguistic dominance of English of Ireland. It also involved giving effect to the remnants of ideas of making Ireland self-sufficient industrially and otherwise.

¹⁴⁴ SD 23 March 1927, col. 647

¹⁴⁵ NAI I&C, S75/14/27. Berne Copyright Union (International Union for Protection of Literary and Artistic Works) Adherence of An Saorstat.

¹⁴⁶ Saorstat Treaty Series, 1935. No. 6. International Convention for the Protection of Literary and artistic Works, Rome June 2, 1928. Irish Accession took effect on June 11, 1935. Dublin: Stationery Office, 1935.

The ideological position that Ireland would be transformed into an Irish-speaking country was not supported by a realistic effort at publishing books and other material in the Irish language, even though Ireland did in that case prepare the ground for such activity in its copyright law. The official attitude to traditional music and to the developing technologies of recording music were short-sighted. Decisions were taken even in the mid-1930's for Ireland to absent itself from proposed conferences to discuss intellectual property rights in recorded music. This was despite a developing market for such recordings in the United States, and the beginnings of an import trade in Ireland for recordings of its own music.

The public debates on copyright were rudimentary, small-scale and non-systematic. The industrial contributors to the debates were motivated almost exclusively by mean-spirited self-interest, and rarely revealed awareness of grander industrial or cultural possibilities, other than slight enhancements of contemporary conditions. While the debates were concerned with particular detailed aspects of copyright regulation, the legislation which was passed still conformed to the norms of British-influenced legislation internationally. There were few genuinely imaginative proposals, either from the government or from interested parties. Policy formation within the administration was particularly pedestrian, and in fact became even less imaginative after 1950.

A factor which contributed to the restricted nature of the public debate in Ireland was the secretive, or at best, confidential manner in which the Bills were drawn up. In contrast to British practice, no public enquiry or Copyright Commission has even been established in Ireland. The draft legislation was formulated in a finished form within the administrative structure, and was less susceptible even than British legislative proposals to radical revision, in public or parliamentary debate. Even when the first 1925 Bill was found to be seriously defective in 1926, the response from government was to withdraw and redraft the Bill in private, rather than to engage in public debate on the basic policy objectives of the legislation.

5.4.7 Conclusions

Independence offered Ireland the potential to devise a regulatory framework for cultural production in a distinctive manner, appropriate to existing industrial and cultural conditions and in conformity with objectives for development. However the potential for using regulatory initiatives for policy purposes was not grasped. A significant factor in

the un-inventive, non-interventionist attitude of the State was the fact that the Cumann na nGaedheal government in 1926 and 1927 was opposed on principle to State intervention in markets. A Fianna Fail government might have adopted a different policy, particularly in relation to the proposed manufacturing clause, given the support that party gave to the print workers and proprietors in 1926 and in the 1930's.

Two extraneous factors in particular coloured the environment in which copyright regulation was formulated in Ireland. Firstly, a consensus had developed among the majority of opinion formers that the circulation of books and films should be restricted. This was achieved in a formal sense through a system of official censorship. Around this formal regulatory apparatus, a penumbra of unofficial censorship and self-censorship developed, which led to the diminution of the usefulness of Irish publishers to Irish writers, and to an intensification of the pre-existing drift of commercially-viable Irish writers towards London publishers. While many commentators in the copyright debates were critical of those Irish writers who published outside Ireland, the dominant view was that these writers' works were unwanted in Ireland; they were certainly unwanted by conservative Irish publishers. A reinforcing negative feedback cycle developed, in which many successful writers whose works were published by foreign publishers could not and would not be published by Irish publishers. As a consequence, Irish publishers had little to gain from the international book market, since their output became restricted to material of national interest which conformed to the mores of the censorship mentality which prevailed. This led to a deepening of the division between the interests of Irish publishers and those of Irish writers whose work could be sold abroad.

The second non-copyright factor which had an effect on the environment in which copyright regulation was developed was the ideological underpinning provided by an anticipated linguistic transformation of Ireland into an Irish-speaking society. The most significant government-sponsored divergence from full adherence to the Berne Convention was its insistence on a translation reservation. Great stress was placed on this, in the late 1920's and even in the mid-1930's, when the official translations policy was known not to require the reservation. The conclusion to be drawn from the contrast between the intense activity to secure the translations reservation and the general governmental disinterest in developing the national publishing industry must be that there was a genuine belief that a large-scale linguistic shift to Irish was imminent. If this expected change had materialised, the Irish publishing industry would have secured the single most important advantage which the Berne Union could at this time confer on it, namely the right to use copyrights freely after ten years if no Irish translation had

appeared. This dream was explicitly supported by the printers in the early 1930's, when a boom in printing in the Irish language was predicted.

Coming to an appreciation of the direct motivations and attitudes of the various actors in the debate is difficult. It is apparent that the Irish publishers saw an opportunity to enhance their market position within Ireland by seeking specific legislative advantages. Their lack of sympathy for writers, and in particular for high-culture writers, is striking. The extent to which they were supportive of censorship and of a general limitation of the range of material available to Irish readers is indicative of a strong conservatism. This was either coupled with or alternatively disguised as a sensitivity to a form of nationalism and a putative national interest. The conclusion is unavoidable that, while also motivated in part by their own personal interest, Irish writers such as Yeats and George Russell generally exhibited a greater nobility and sense of the public good in their interventions in the debate.

Government activism

The government was the dominant force in the Irish debates on copyright. It achieved in its own terms its primary objectives for the legislation which were to clarify the regulatory framework, to secure Irish copyrights in the United States, to support the translation of books into Irish, to assert Irish independence on the international stage and, by adopting the highest standards of copyright protection, to demonstrate Ireland's membership of the developed world. A non-interventionist Irish government, whose primary political objective was enhancing formal and actual political independence, engaged in intense activity in the copyright sphere, but not primarily for purposes of fashioning a copyright regime ideally suited to Irish conditions. The legislative undermining by the Irish government of the Privy Council decision on the *PRS v Bray* UDC case was an instance in which an issue which was not intrinsically concerned with copyright itself was taken up for its political utility in larger arguments. Government activism on this issue contrasts starkly with the generally languid approach of the responsible minister in the parliamentary debates on issues more directly concerned with copyright.

The development of the legislation shows no trace of a methodical consideration of the national or public interest. No review of the potential of copyright regulation to influence cultural activity was undertaken. There is no evidence of a weighing up of a

range of different policy options, even though actual examples of different copyright regimes were known to the government from North America. Unlike the established British pattern of taking evidence in public in advance of major legislative reform, the Irish legislation was drafted in private, and there is no evidence of a systematic review of the range of possibilities available to the government. On the contrary, the first draft Bill in 1923 was so closely modelled on the British 1911 Act, that it consisted for the greater part of pasted up sections of the British Act rearranged, with the necessary terminological changes made to accord with the new Irish situation. Thereafter, the government was disinclined to deviate from the model. The attitude was that the Berne Convention was normative, with copyright being a natural regulatory condition of the publishing industry. Despite arguments derived from the Canadian example in particular, ministers were unmoved by suggestions that it was possible to construct a copyright regime on other models.

The political composition of the Irish government at the time was critical in deciding the direction of copyright policy. Because the Irish copyright system happened to become established in the 1920's under the Cumann na nGaedheal government, that party's political philosophy of non-intervention in markets meant that the regulatory system would not be used other than for its direct, primary purpose of securing adequate recompense for his labour to the author for a limited period in a bargain with the public. While other countries then and later chose to use copyright regulation to advance cultural, social and educational policies, the Irish government was prepared only to modify the copyright system in minor ways for social and political purposes. The translation reservation and the school texts reservations were not strongly opposed by commercial actors. Any opposition from these actors was motivated by an objection to the principle, rather than to the likely negative commercial results of the provisions. The government remained largely aloof from the various interest groups in the copyright debates. It faced down the efforts of the printing interests to introduce a manufacturing requirement. It was more open to allowing the diminution of the domestic copyrights of Irish writers, but ultimately the proposals from the printers on this were defeated.

After 1932, the Fianna Fail government intervened in the economy to a far greater extent, through the use of tariffs,¹⁴⁷ import quotas and restrictions on foreign ownership of industry. However, this government did not amend the copyright legislation, and,

¹⁴⁷ This government introduced tariff protection for the printers in the 1930's, and later opposed pressure from officials to remove this protection. Lemass in particular remained a supporter of the printing workers into the 1960's.

apparently came under no significant domestic pressure to do so.¹⁴⁸ The Fianna Fail party leadership had aligned itself with the printers and print workers during the 1926 protests, and so the direction of any potential change in the legislation would have been in the interests of those actors.

Government action, and extra-parliamentary and social pressure for changes in the legislation, were belated by international standards, largely through failures in perception of the importance of the substantive issues. There was a failure to foresee that technological advances demanded development of copyright law, a failure to mobilise state intervention to develop a native cultural industry, a failure to appreciate the potential export and domestic value of Irish cultural output, an inattention to the need for awareness of international developments, and a failure to recognise the value of assisting in the shaping of the international regulatory norms. Despite the fact that a market for Irish music existed in the US, for example, few efforts were made to develop a native recording industry. Even as the commercial possibilities of Irish traditional music became clearer, the administration did not seek to provide copyright protection for this cultural output.

The absence of a cultural ministry at the time mean that there was no official body charged with the responsibility of taking a synoptic view of the entire cultural landscape. Significantly, those areas of copyright regulation in which Ireland deviated from British practice and which had a cultural character both fell within the remit of the Education Department (translations and school texts). This Department, for functional reasons, partially took on the role of a state cultural apparatus, and as a consequence gave an educationalist and utilitarian hue to the initiatives undertaken. Had there been a true Cultural Ministry, it is not unlikely that other facets of copyright law might have been addressed.

The state radio station, established in 1926, does not appear to have influenced the copyright debates to any effect, due to its small scale, to its position within the Post Office and to its recent establishment. This organisation, however, became active in the copyright debate in the mid-1930's, and by the 1950's was one of the dominant cultural actors in the copyright debates. If the primary Irish debates on copyright had occurred when its radio broadcaster was properly established, it is likely that the debate would have extended to the cultural sphere more broadly defined.

¹⁴⁸ The only exception to this was the incessant pressure from some quarters to remove the legal deposit obligations.

The Irish government was a reactive member of the Berne Union in this period. No initiatives on copyright can be traced to the Irish government. Official activism in this sphere can be seen in rearguard actions in relation to the ultimately ineffective translation reservation, for example. When the possibility was presented in the mid-1930's of developing a technologically-appropriate copyright regime for recorded music and radio broadcasts, Ireland's administrators and politicians turned their faces away from the opportunities.

Writers versus Publishers - Content producers in opposition to media owners

Writers and other creative actors ultimately had little influence on the outcome of the debates. In addition, the broad social consensus favouring the restriction of the circulation of cultural goods in Ireland at the time militated against the effectiveness of those writers who were most successful in export markets. Most Irish writers appear to have been uninterested in the copyright debates. Yeats took an active part, and argued that he spoke for Irish writers, and in particular for those whose work was endangered in the US by the absence of a copyright agreement. The record shows little intervention in the debates from other professional Irish writers. The playwrights' caucus was influential, again as a result of the problem with US copyright, but their actual aspirations were pragmatic and self-interested, and the details of their representations remain obscure.

The printers and publishers, though vocal in the debates, failed to achieve their primary objective of enacting a manufacturing clause. Their strenuous efforts from the mid-1920's, through public meetings, letters to the press and parliamentary pressure were defeated. While their degree of success in the formulation of the legislation was remarkably limited, it must also be acknowledged that this interest group did not produce a systematic analysis of the copyright regulatory framework, nor the scheme of a complete Copyright Bill which would meet their sectional objectives. Instead, a somewhat incoherent coalition of pro-printer legislators repeatedly introduced divergent variants of manufacturing clause amendments to the government's legislation, each of which was either withdrawn or defeated. The extent of the self-interest of the publishers in advancing their arguments, and their attitudes to writers, ranging from disregard to active disdain, made their proposals easy targets for the more focused arguments of the writers' representatives.

The printers did succeed in gaining tariff protection for their industry, and retaining this against civil service advice. They were also advantaged by the effects of official censorship, which gave a particular commercial advantage to the type of output which they were disposed to issue from their presses.

Those publishers who concentrated on the production of school texts were guaranteed both a reliable market and freedom to use copyright material. The fact that the output and employment levels of the Irish publishing industry seem to have continued on a generally steady upward course during and after the passing of the Copyright Acts of the 1920's demonstrates that the provisions of the Acts were, at the very least, not devastating to the Irish industry. It is probable that the widespread censorship and partial restrictions on the importation of books from abroad were greater supports to the Irish publishing industry, since they reduced competition and gave a partly-captive market to Irish publishers. It is likely that in a society where electronic media were at an early stage of development, there would have been an unvarying absolute minimum requirement for books in Ireland, almost regardless of quality. As a result, once they had protected themselves against some foreign competition through censorship and, once they had obtained advantages in issuing translations into Irish, Irish publishers were relatively well-placed to develop a market adequate to their requirements and to their undemanding ambitions for commercial development.

Irish publishers' efforts in the export market remained slight, and were almost entirely confined to an émigré market in Britain, the United States, Australia and the other English-speaking countries. This meant that a market for sentimental material could be targeted, and that undemanding conservative material could be marketed abroad as well as domestically. With the doubtful exception of Cahills' output of pulp fiction, few energetic attempts appear to have been made to create a genuine export market for serious works by Irish writers, or for works with commercial potential on their literary merits. This of course led to a complacent industry, supplying the home market and the small over-spill market. Even in those cases where commercial co-operation with foreign publishing houses developed, the main focus of the industry was on the captive school text market. In its concentration on supplying the domestic market, the publishing industry in Ireland remained little different to many manufacturing industries in Ireland at the time. However, it should have been apparent that cultural production was in a different category from other forms of industrial production, and that the publishing industry did itself and the country a disservice through its inactivity.

Linguistic policy and copyright

While intensive efforts were made in the late 1920's to preserve the translations provision, (and to gain British acceptance for the school anthologies provision), and while the Department of Education insisted that the provisions were essential, the output of translations from An Gum was so low that it is clear that the energy and belief in the national linguistic project were dissipating. It was admitted as early as the 1930's that the translation provision was unnecessary, yet it was retained, either for purely symbolic reasons, or as a residual threat of last resort against recalcitrant publishers. While some commercial printers predicted a surge in the publishing of such works at the beginning of the 1930's, commercial publishing of Irish language material remained on a small scale. A possible factor in this may have been the fact that the very low purchase of cost of An Gum publications undercut commercial publishers.¹⁴⁹ Translations may have been privileged in the administrative mind, if there was a genuine belief in the likely success of the linguistic project. It may have been envisaged that the Irish industry would have been able to rely on translation, if the market became dominated by Irish language publications.¹⁵⁰

Effects of the scale of the market on publishing and on the practicalities of copyright

While it is banal to state that Irish publishing industry was small in international terms, the more significant observation is that the Irish publishing industry was small also in relation to the actual and potential size of its market. Ireland was and remained a net importer of books; indeed, for various reasons, some of which are relevant to this discussion, it was even an importer of books written by Irish writers. In addition, it was not a significant exporter of books.¹⁵¹ While the American market was closed to Irish publishers in the 1920's, due to the American manufacturing requirement, Irish publishers do not appear to have entered into agreements with American publishers on the basis of the exchange of rights. Since Irish publishers in the 1920's had access to the

¹⁴⁹ As a state publishing house An Gum was clearly the beneficiary of a hidden subsidy.

¹⁵⁰ The nationalistic cultural critics who dominated the debates on Gaelicisation addressed themselves to a fanciful conception of the population composed of high-minded readers of demanding, high culture, Gaelic books. This was a non-starter. Admittedly, Blythe and others noted that popular, mass market material such as detective stories should be translated. However the DTPS president's idea of there being a large market for translation of Irish classics was both idealistic and doomed to failure.

¹⁵¹ This is intentionally to leave out of account the small-scale export activity of most publishers, usually through postal sales.

British market, it would for example have been possible for Irish publishers to issue and export editions of the works of American writers to Britain.

While Ireland in the post-1922 period did not use copyright regulation to the extent that it could, it is indisputable that it was not possible for it to replicate the development of, for example, the United States, in the nineteenth century. The value of the comparison of the Irish-British relationship with the United States-Canadian relationship becomes clear in this way. Even when Canada was in a position after the mid-nineteenth century to act in its own interests in relation to copyright, the differences in scale between it and the United States counted against it. Advantages for industrial and cultural development could have been achieved if Ireland had been a copyright territory in its own right in the nineteenth century, but even then the fact would have remained that Ireland could not have developed print-culture self-sufficiency to the same extent as did the much larger United States.

Particular failures and missed opportunities

The failure by Ireland to treat copyright as a policy lever and instead to treat it as part of the natural order of economic interaction had detrimental consequences for the country in the course of the twentieth century. Because of the perceived lack of importance of copyright and intellectual property rights at official level, Ireland's international negotiations and agreements tended to support the strong view of international copyright being advanced by the major states involved in international agreements. States such as the Britain, America, Italy, Germany and France, which were among the largest producers of books, were also becoming producers and exporters on an immense scale of a new universal media product, recorded music. Irish regulators showed little appetite for becoming involved at an early stage in defining the outlines of the copyright regime for these new forms of intellectual works. Irish publishers and authors had become habituated to treating copyright as merely a natural right, and that there was little thinking on the abstract issue of there being a "national cultural capital" meriting legislative protection and economic support in furtherance of cultural goals.

The absence of substantial variation from the British model in the copyright regime in Ireland supports the view that Irish cultural producers failed to influence the Irish regulatory authorities to a degree proportionate to their cultural importance. I remain intrigued by why this might have occurred. In the context of a country which emerged as

an independent state from a milieu in which national identity was particularly stressed on a cultural axis, and in which a strand of thought favouring the development of indigenous industry had considerable influence, this circumstance is especially difficult to explain. Writing, publishing and cultural activity in its relations with the sphere of economic activity would appear to have been particularly well-placed to attract the attention of Irish legislators and regulators. The persistent shadowing in Irish regulatory policy of the initiatives of the British state in this area which bears so clearly on cultural identity is remarkable.

The post-1945 period marked the first time when a debate took place which addressed the creation of a copyright regime in the interests of Irish industry and culture. The dissemination of new technology, a greater awareness of the impact of regulation on culture and an appreciation of the importance of culture in social life contributed to this new seriousness. The following chapter deals with the high-point of serious, nationally self-interested consideration of copyright as a proper matter of concern for a self-consciously culturally distinct society.

Chapter 6: 1950 to 1963

6.1. Introduction

In the post-war period, debates on copyright in Ireland extended beyond a concentration on traditional rights in books and printed matter to the consideration of rights which regulated works dependent on the developing media technologies. Because of the underdeveloped state of Irish media industries at this time, these debates on the new technologies were prompted by external actors. Even in the case of older rights in published material, the debates were influenced strongly by external forces, even as Ireland became party to new and more exacting international agreements on copyright.

The structure of the international copyright regime for book publishing reached a mature state in the 1950's, and by the end of the decade Ireland had given domestic legal effect to this regime. It was accomplished with surprisingly little domestic debate. Indeed, at least one international commentator¹ noted the silence of the Irish publishing industry in the debates. This can be explained by the small scale of the industry, by its limited commercial ambitions, and by its concentration on certain sectors of the domestic market. Only when their commercial interests in the US market were threatened did Irish publishers make serious representations to government for amelioration of their difficulties.

In the years immediately after the war, the Irish industry experienced difficulties as a result of British restrictions on imports and because the copyright relations of Ireland and the US had not been finally resolved. Publishers and commentators called for state intervention in support of the industry. These included calls for tariff protection and for direct state financial support. Censorship continued to exclude many potentially competing books from abroad, while commentators continued to extol the value of indigenous, rurally-inspired cultural production as being superior to imported cultural goods. Mercier Press, one of the new publishing houses, published a proposal for the development of the Irish industry, which was founded on a premise of the moral superiority and the potential commercial value of Catholic and culturally nationalistic intellectual property. However, the debates on the publishing industry *qua* industry were limited in scope, and were confined largely to the period of greatest commercial

¹ Georges Straschnov, legal advisor to the EBU, in 1956.

difficulty in the immediate post-war years, although the debates on the difficulties in relation to the US market were more prolonged.

The debates which led up to the 1963 Copyright Act concentrated on the regulation of copyright in respect of the new media technologies, as the copyright structure for books had been effectively settled by the 1957 and 1958 Industrial and Commercial Property (Protection) Acts. The debates on new media copyright were contentious, and again this was because domestic interests were involved, in the shape of the state broadcaster. Whereas book publishing in Ireland disseminated mainly domestic intellectual property primarily in the domestic market, broadcasting was forced to use imported intellectual property. Consequently, larger, external forces came into the debates, and novel problems, both of a technical and a policy-based character, had to be resolved in Irish legislation.

This domestic legislation was framed within the context of international agreements which Ireland had signed and, in most cases, ratified.² The scope for an individual state to legislate in its domestic interests was therefore circumscribed. Ireland participated in the 1948 Brussels Conference of the Berne Union, at which agreements on broadcasting copyright and copyright in recorded music were made, at a time when broadcasting in Ireland was confined to radio. The European Broadcasting Union took the view that the 1948 agreement was primarily intended to defend the interests of broadcasters, and not those of other actors. The approach of the Department of Industry and Commerce[I&C] to negotiations on intellectual property remained broadly one of adopting 'international good practice' on Ireland's behalf, with less concern for particular sectional domestic interests. The actions of the responsible government department were apparently directed at demonstrating Ireland's application of the highest standards of regulation.

An important factor in the conduct of the debates was that the Irish broadcasting service was part of the central civil service, and therefore, the intensely fought debates on copyright were conducted to a great extent confidentially within the state apparatus. The major counterweight to the broadcasting interest in Ireland, the Department of Industry and Commerce, adopted a stance of supporting the interests of rights-owners in the debates, and argued strongly that Ireland should adopt its vision of international good practice in relation to copyright. The broadcaster was supported by its parent department, the Department of Posts and Telegraphs [P&T]. Even when the television

² Ireland gave legislative effect to its obligations under the 1952 Geneva Conference of the UCC in its legislation in 1957 and 1958. This legislation governed copyright relations between Ireland and the US.

service was established in 1961 as a semi-independent entity, P&T continued to support it strongly in the disputes over copyright with I&C.

The absence of a large music recording industry was an important influence on the conduct of the debates.³ The local broadcaster was endeavouring to have legislation framed in its commercial interests (and in its conception of the national interest), yet there was in Ireland, unusually, no counterweight in the form of an opposing commercial domestic interest. Because most of the actors opposed to the broadcaster in Ireland were external, and were commercial, the broadcaster was able to characterise its position as one motivated by a public service ethos, and to characterise itself as a defender of Ireland as a whole against illegitimate international commercial exploitation. The fundamental circumstance that Ireland was a small state which did not support a domestic commercial cultural industry in the most lucrative fields of cultural production unquestionably skewed the debate. The pervasive sense that Irish intellectual property was being exploited for industrial and commercial gain by external forces, either legally or through piracy, further coloured the debates.

The broadcasting interest in Ireland was supported and indeed guided by the European Broadcasting Union, the EBU. It appears to be unlikely that the debates in Ireland would have been as intensely fought had this not been the case, and that the Irish copyright law might otherwise have been framed in a manner uncongenial to broadcasting. The broadcaster itself had little active interest in copyright until it came under pressure from the EBU. The reason for the strong EBU interest in Irish copyright law became apparent in the course of the debates, where the record shows that the EBU believed that Irish legislation, if drafted differently from the British 1956 Act (which the EBU considered to present difficulties to broadcasters), could be influential in other states, particularly those of the Commonwealth.

³ Even in the case of traditional Irish music, the Irish market, from the 1930's to the late 1950's "was supplied with increasing numbers of US made recordings" (Quinn, 1997, 27).

6.2 Book publishing in Ireland

6.2.1 Scale of the publishing industry in the 1940's and 1950's

The Irish publishing industry operated in a market in which, for reasons of relative scale, was dominated by British publishers.⁴ Regulatory and interventionist initiatives were proposed by publishers and commentators in the 1950's to counter the disproportion of imports over domestic production. Ultimately, only the commercial development of the publishing industry in Ireland, coupled with an increasing interest in and willingness to buy books about Ireland, led to an increase in the sales of domestically-produced books. This later had its most noticeable effect in the proportion of sales of non-fiction titles published by Irish publishers. By the late 1960's an Irish publisher argued that "in the field of Irish non-fiction, the Irish publisher can in most cases outsell his London colleague" (Feehan, 1967, 20).

The output of the Irish publishing industry had increased in the middle of the Second World War,⁵ and a number of new publishing houses were established during and immediately after the war, including Mercier (1945), Clonmore & Reynolds,⁶ Sairseal & Dill,⁷ and Fallons.

However, the scale of the publishing industry remained small, since it "lacked either the financing or the distribution to make it a major force" (Fallon, 1998, 225). Despite this there was still in absolute terms a scarcity of Irish-published material well into the 1950's. There was a mismatch between the potential of the market and the output of the publishers.⁸ Lack of commercial energy on the part of the publishers, the lack of investment in Irish industry at the time and the absence of government initiatives to support the cultural industries⁹ contributed to this situation.

⁴ One contemporary writer described the Irish publishing industry as "an impotent dwarf, submerged in the flood of printed matter which pours unendingly from foreign publishers to Ireland's shores." (Murphy, 1951: 7).

⁵ See table in previous chapter.

⁶ Publishers of high quality material, including scientific studies.

⁷ This small publishing house, founded in 1945, was publishing O Cadhain's and O Riordain's work, and by the 1950's a revival of Irish-language publishing was under way (Brown, 1985: 231).

⁸ "The dearth of books on Irish themes was not because of a lack of demand, because good books on Irish themes published either in Ireland or abroad sold well. It was either a failure of the publishing houses, or a slowness on the part of authors in coming forward. In fact, it was as much a failure of authors as of anything else, a circumstance illustrated, for instance, in the shortage of books on Irish history." (Cullen, 1989: 378).

⁹ Government support for An Gúm was small, and for purposes of linguistic policy, rather than cultural policy.

In the late 1940's and early 50's some schemes were proposed to improve the situation, including the establishment of a co-operative of Irish publishers in foreign markets, state financing for publishing, and the development of internal distribution networks in small towns and villages in Ireland. These suggestions did not come to anything, however, and Irish publishing remained a minor economic and cultural force, outside the school textbook sector. Irish publishers continued to rely on school book publishing as a major proportion of their output. The export market for Irish publishers in the Catholic schools of Northern Ireland, where denominational education created a market for culturally acceptable texts, was important. This market was endangered at the end of the 1940's by British import restrictions,¹⁰ and the commercial weakness of Irish publishers was exposed by the admission by publishers that the closure of that market might have had extremely serious consequences for their commercial viability.

In 1950, *Envoy*, a new cultural and literary review, attempted to open a debate on the state of the Irish publishing industry. In the context of a large growth in Irish exports from £39m to £46m between 1947 and 1948, the journal noted that the value of books and printed matter (excluding newspapers) exports had fallen from £289 364 to £176 595. "Obviously, there is something seriously wrong with our publishing industry when figures as low as those quoted represent our total annual exports."¹¹ The slight Irish publishing output was contrasted with that of other small European countries.¹² In the years between 1938 and 1948, the total for output rose to a high of 80 titles in 1946, and fell in 1948 to 55. " ... from a consideration of its status in the international field, we can plainly see that Irish Publishing as a live progressive industry is practically non-existent" (Murphy, *ibid.*). Clearly, Irish publishing was in a poor condition and had become dangerously reliant on the privileges given to it in the 1927 copyright law which had led to an increased concentration on schoolbook publishing.

¹⁰ The Talbot Press saw the likely loss of the Northern Ireland market as "a particularly bitter blow from a Nationalistic aspect" (*The Bell*, 1948, 3-11).

¹¹ *Envoy*, 1950, 10. The author asserted also that the bulk of the figures were accounted for by 'pulp.'

¹² In 1938, when Irish publishers issued 33 titles, publishers in Norway issued 2 384; Sweden 2834, Denmark (in 1927) 3293. (Murphy, 1951, 3-4).

6.2.2 Commercial difficulties and the debates generated by difficulties

After the war Irish publishers experienced export difficulties in their two main potential markets. The case of the United States market, which was effectively closed due to the manufacturing requirements of US law, is discussed in a later section.¹³

Temporary difficulties also arose in the British market in the late 1940's from the imposition of importation restrictions. Trade restrictions which were imposed by Britain in 1948¹⁴ exposed the weaknesses of an Irish publishing trade dependent on schoolbook publishing, and in particular, the export of these books to denominational schools in Northern Ireland. The Board of Trade restricted by quota the commercial importation of books and periodicals into Britain from Ireland.¹⁵ The previous year, paper shortages had led to the Board of Trade restricting the supply of paper to publishers, leading inevitably to a shortage of books for sale in Britain,¹⁶ and so the British market was then especially attractive to Irish publishers, since they were not affected by the British paper restrictions.¹⁷

While the restrictions were of limited duration¹⁸ and did not fully exclude Irish books and periodicals from Britain, their imposition provided the catalyst for a debate on the Irish publishing industry, mainly in the literary magazine, *The Bell*. This debate, which was one of the few public reflections on the state of the industry and on its potential for development, consisted largely of warnings of impending disaster for the industry. From the 1920's, the printing industry had tended to adopt a rhetorical position that it was a marginal activity, susceptible to any variation in market conditions and usually liable to catastrophic collapse. The new literary magazine, *Envoy*, argued that the publishers had been disingenuous in their claims. "The fuss raised in 1948, and during the last year, by

¹³ This was despite an agreement reached in the 1930's; authors' rights were recognised, but publishers were still disadvantaged by the manufacturing requirement, and were effectively precluded from exporting to the US.

¹⁴ Because of a post-war financial crisis in Britain, the British government had imposed measures to restrict the outflow of sterling. Browne and Nolan, the Irish publishing house, recorded that "The nigger in the woodpile appears to be Article 9 of the American Loan Agreement" (Bell, 1948, 6). In the same issue of *The Bell*, the Metropolitan Publishing Company urged the Irish Government to approach the American Government on the question.

¹⁵ It remained permissible for individuals in Britain to take out postal subscriptions to Irish magazines and to import single copies of books. Among the restrictions were that importers generally could not import more than the value of bound books which they imported on 31 August 1939; in the case of fiction, 'superior standard' paperbacks and children's books, importers were required to re-export 50% of the material imported. Browne and Nolan noted that the static value was in effect a reduction, owing to price inflation after nearly ten years. (*The Bell*, 1948: 2).

¹⁶ These difficulties applied also to British publishers: Brophy recorded that, to obtain a copy of the Concise Oxford Dictionary, a buyer had to wait for eighteen months (1947: 133).

¹⁷ Ireland had a relatively large domestic paper industry at the time.

¹⁸ The restrictions on importation into Britain were lifted in 1949.

the publishers about the effect of the British ban on Irish writers was largely dishonest. By and large, our writers, with one or two exceptions, did not suffer one whit as a result of the ban.”¹⁹

6.2.3 Cultural consequences of a weak publishing industry

Browne and Nolan Publishers claimed that, under the British restrictions on exports, authors would not submit books to Irish publishers. Irish authors would have to go to British publishers, since they continued to have unrestricted access to the market in both countries. The Metropolitan Publishing Company argued the effect would be that “new and unknown authors” would not be published while the restrictions were in force, although it would still be possible to publish “the very well-known Irish authors”, yet even in this case difficulties were foreseen as “their loyalty to their publishers is bound to be tested by their greatly decreased returns in royalties.”²⁰

Irish fiction writers continued to have their books published in London and America in the 1950's and 1960's, primarily because foreign publishing houses were in a position to market the books more successfully, and because there was a greater prestige in publishing in those centres. There was an awareness that there were cultural disadvantages to Ireland in this situation. Murphy argued that Ireland was at a commercial and economic loss, but that the “cultural ... loss to Ireland has been greater still” (1951, 5). He argued that those Irish writers who were best known abroad were almost exclusively published in London. “If they were to depend on the ingenuity of our native publishers for their sales, there would not be much bread and butter on their tables. ... so long as this position continues ...there will be a net a loss of income and prestige to Ireland” (1951, 11).

The underdevelopment of the Irish publishing industry, characterised by a lack of investment and a failure to engage in effective marketing abroad sustained this situation. The editor of *Envoy* laid the blame on the publishers for their “short-sightedness,” noting that “extra employment could be provided and extra money earned for us in these economically troubled times by the ‘repatriation’ of our foremost writers - not to speak of the prestige that would accrue to the country.”²¹

¹⁹ *Envoy*, 1950: 12.

²⁰ *The Bell*, 1948, 7.

²¹ *Envoy*, 1950, 12.

Chauvinistic criticism of writers who were financially impelled to publish abroad, so common in the 1920's, had not finally dissipated in the 1950's. Murphy regretted the position of the Irish literary ex-patriate. "He is that 'raris avis' the literary half-breed, the Irishman writing for the foreign not the Irish Market" (1951, 5).

6.2.4 Calls in the 1940's and 1950's for government intervention in the publishing market

Some calls were made in the 1940's and 1950's for government intervention to protect or encourage the publishing industry. For example, The Metropolitan Publishing Company urged that the government should intervene in the market, buying up unsaleable stock, to prevent the publishing industry "from going into decay, just at the moment when it is beginning to make real progress."²² The publisher Maurice Fridberg,²³ who claimed that 87% of his sales went to Britain, and only 6% were "sales in the Homeland," called for government subsidy for publishing, particularly to encourage Irish writers to use Irish publishers.

Martin J. MacManus of the Parkside Press,²⁴ while arguing that the British restrictions might "prove a blessing in disguise" if reciprocated,²⁵ proposed the provision of low-interest state loans to booksellers and newsagents, in order to improve the distribution of indigenous publications (*The Bell*, 1948, 69). However, the government consistently ignored the intermittent appeals made on cultural grounds for financial support for the publishing industry. The government was disposed to seek to assist Irish writers and publishers through the formulation of regulations, but not through direct financial support.²⁶

The era of protectionism for Irish industry was drawing to a close from the end of the 1950's, and the likelihood of the government intervening in the book market declined still further. The trend towards the encouragement of international trade and towards the

²² *The Bell*, 1948, 7.

²³ Fridberg began an Irish publishing venture in 1945, with Frank O'Connor's translation of *The Midnight Court*, but that the venture lasted only a few years (Fallon 1998: 225).

²⁴ Cahills Printers, one of the largest Irish printing companies, and the beneficiary of many state printing contracts.

²⁵ Be "How could there be a wide sale of *our* books to-day when they are swamped in the book-stores and newsagents under mountains of imported rubbish." (*The Bell*, 1948, 71).

²⁶ In 1958 Senator Stanford argued that Irish authors were even then publishing in London, for financial reasons, to the general disadvantage of the country. SD 16 July 1958 Col 898.

removal of tariffs was beginning, and, under Sean Lemass and T.K. Whittaker, a more outward-looking attitude to the world was replacing the DeValera paradigm of reposing cultural and economic faith in domestic virtues alone. "Ideologically the fires of economic nationalism and the quest for cultural self-sufficiency was waning" (Brown, 1985, 221).

The increase in the number and scope of international agreements and treaties, including those regulating the protection and trading in cultural goods, coincided with the cultural and economic changes which took place in Ireland from the late 1950's. The government readily repealed the special provisions which had been passed in the 1920's to support publishers of school texts and translations. Similarly, Ireland adopted the highest standards of protection of intellectual property, by ratifying post-war international agreements and by enacting legislative provisions which were contrary to the demands of Irish actors in the IPR debates.²⁷

6.2.5 The Mercier Press manifesto for the development of English language publishing in Ireland

A revealing, if ineffectual, early post-war contribution to the debates on developing an Irish publishing industry came from the Mercier Press, which published a document setting out a proposed course for the development of publishing in Ireland (Murphy, 1951). The tenor of the publication was culturally and economically nationalistic. It was clearly characteristic of the early 1950's in being imbued with a philosophy of developing Irish cultural life through the large-scale publication of Catholic devotional and theological works. While the more radical recommendations of the pamphlet were not carried into effect to any appreciable extent, the document was a significant contribution to the debate because it introduced some serious proposals which had not been raised in earlier decades, and because it emanated from a self-consciously culturally nationalistic publishing house.

Murphy urged the publication in Ireland of translations of "the large number of worthwhile and valuable books by Continental Catholic writers which still await translation" (1951, 11). Feehan, Murphy's publisher, later noted that in the 1940's he

²⁷ This would be seen most clearly in the strenuous opposition by I&C to the representations made on behalf of the Irish television service in the late 1950's and 1960's.

had obtained “options on more than one hundred Continental books for translation”, books on theological and philosophical topics (1967, 129-30). Murphy argued for the publication of non-copyright books. If this were done, Irish publishers “could, by their mutual action so control imports by their own planned restriction of such competitive lines, that Ireland would thus offer a market for such titles” (1951, 11).

Murphy argued that the whole English-speaking world was “Irish Publisher’s oyster waiting to be prised open” (1951, 8). To take advantage of this export potential, he called for the establishment of a co-operative of publishers to crack the market initially in America, England, Australia and New Zealand, and he also called for the foundation of several new large publishing houses. He made the radical proposal that a market should be developed in English books in Central and South America by Irish publishers. “Could not Irish Publishers print non-copyright books from these countries? Holland is one of the largest buyers of English books on the continent. Europe and Scandinavia are open markets. Why take it for granted that all the English-speaking countries are the sole and God-given preserves of the British and American Publishers” (1951, 11-2).

Murphy proposed that Irish publishers should refuse to assign rights in any books to American publishers for American editions, as they would be left themselves with the mediocre remnant only (1951, 8). Feehan himself later dismissed the idea of building a major market for Irish books in the United States. Despite writers’ tenaciously held belief that this must be a major market, he recorded that he had tried circularising Irish-American audiences, in hopes of a ‘dollar best-seller’ and “each time it has failed. Unfortunately, many Irish in America hardly know where Ireland is” (1967, 45).

The Mercier Press Manifesto had no appreciable effect. Nevertheless, it is interesting that its publication coincided with some increased awareness of the possibilities of publishing in Ireland, which is evident from the articles about the publishing industry which appeared in *The Bell* and in *Envoy* in the years around 1950.

6.2.6 US copyright protection for Irish publishers

Concerns about the absence of copyright protection for Irish published works in the United States, and the associated concern of publishers that a potential market was lost to them, led to calls in the 1940’s and 1950’s for the conclusion of a proper copyright agreement with the US. In 1949, it was asserted in a parliamentary question that the

absence of an agreement had led to "grave loss .. suffered by playwrights, authors and others due to the wholesale pirating and reproduction of their works without permission."²⁸

The fact that Irish publishers' output had a potentially large sale in the United States was complicated greatly by the copyright difficulties which were experienced there, as a result of Ireland's incomplete bilateral copyright agreement with the US. Even when Ireland had signed the UCC in 1952, there was a delay in giving legal effect to the Convention in Ireland. The Managing Director of Hodges Figgis wrote to Eamon De Valera on the question in 1957, pointing out that "On account of the huge demand for ... which we have just published, Ireland is at an immediate loss of \$17 000 and a potential loss of about \$100 000 owing to the delay in ratifying the Universal Copyright Convention ... It is pretty frustrating to be out here trying to build a market for Irish books and being forced to refuse sales..."²⁹ In 1958 Professor Stanford spoke of an example of an Irish publisher who experienced difficulties in the US the previous year in relation to selling a book by an Irish author, printed and published in Dublin.³⁰ "Owing to the fact that this convention (the UCC) was not ratified at that time, he experienced great difficulty in meeting the most encouragingly heavy demand for that Irish book in the United States."³¹

In January 1956 Georges Straschnov, Legal Director of the EBU, who had been urging a reluctant Radio Eireann to seek to have the Irish copyright law amended in the interests of broadcasting, was struck by the fact that Irish publishers were not demanding the amendment of the 1927 Copyright Act "in order to obtain less complicated and costly protection in the United States."³² Matthew Doherty of Radio Eireann responded that he could not understand why the publishers were not seeking amendment of the Act: "Perhaps they are, but they may not be able to put the necessary heavy pressure behind their demand."³³

Straschnov realised that Ireland could not accede to the UCC unless the 1927 Act was amended, "but, to do this the Copyright Act would have to be amended on certain

²⁸ DD 6 April 1949, Col 2383. Question by Deputy Moran. Moran's assertion was not accepted by Liam Cosgrave, Parliamentary Secretary at I&C, who stated that no representations had been received to that effect by his Department from interested parties.

²⁹ NAI Taoiseach S5433 C Letter from S.F. Allen Figgis, MD of Hodges Figgis, 16 October 1957 to Eamon DeValera.

³⁰ It can be assumed that the publisher was Hodges Figgis.

³¹ SD 16 July 1958 Col 597.

³² 13 January 1956. NAI P&T. TW 33937 Copyright Bill.

³³ 15 January 1956. NAI. P&T. TW 33937.

points, particularly with regard to the definition of the country of origin. It was mainly this point that led the British Board of Trade to prepare the Copyright Bill now before Parliament.” Straschnov provided Radio Eireann with a list of suggested amendments and innovations for a new Copyright Act.³⁴ His analysis of the existing legislation went beyond broadcasting, and he suggested various amendments which were later incorporated into the minor 1957 and 1958 Acts.³⁵

Irish Ratification of the Universal Copyright Convention

The Department of External Affairs argued strongly for Ireland’s ratification of the UCC.³⁶ “It is very much in the interest of Irish authors, composers and publishers that Ireland should ratify this Convention.” The Cabinet decided in September 1958 to ratify the UCC.³⁷

In 1959, a Memorandum for Government from I&C recorded that even at that stage, matters had not been finalised in relation to the United States. “... protection of Irish works in the United States ... has not been finalised by the Department of External Affairs, but the Embassy in Washington has been informed that it is almost certain that the terms of copyright in the US in regard to works of Irish origin will be 56 years.”³⁸

6.2.7 Irish Language Publishing

The most important change in relation to Irish language publishing in this period was the willing abandonment in the late 1950’s of the translations reservation. This reservation had brought no benefit to Irish language publishing, initially because foreign publishers did not place difficulties in the way of translators, and ultimately because the output of the State publishing house, in terms of titles and units produced, declined rapidly in the 1930’s. Because the proportion of readers of Irish language books in relation to the population as a whole was low, there was little incentive for commercial publishers to enter the field.

³⁴ 13 January 1956. NAI. P&T. TW 33937.

³⁵ Straschnov suggested, for example, that Ireland needed to calculate the terms of protection differently, and to repeal the provision for compulsory licenses for translations.

³⁶ NAI Taoiseach S5433 C. Memorandum for Government 28 August 1958. Ratification of UCC, Geneva, 1952.

³⁷ NAI Taoiseach S5433 C. Cabinet Minutes 2 September 1958. Ratification took place on 20 October 1958. [Ireland. Treaty Series, 1958, No 21.]

³⁸ NAI Taoiseach S16574A Copyright Orders under Section 175 of 1927 Act. Memorandum dated 12 March 1959.

A complicated situation arose in the 1950's, by which time Ireland was a member of the two large Copyright Conventions, the Berne Union and UCC. Each convention had differing provisions, with the boundaries of acceptable national regulation defined differently in each case. It would have been possible for Ireland to have retained a form of translation reservation in respect of UCC countries, but not in respect of Berne Union countries under the amended Convention. Ireland's accession to the Geneva UCC agreement, which "was the culmination of action begun by Unesco in 1947,"³⁹ was aimed at acquiring copyright protection for Irish authors in the US and through the Pan-American Union. The UCC did not, according to the parliamentary speech, involve any fundamental change in Ireland's law. The 1957 Act⁴⁰ provided, in respect of the UCC, for a licensing system so that translation into Irish should be allowed seven years after first publication, unless a translation had been undertaken by or on behalf of the author.⁴¹

In 1958, the second of the two 1950's Bills was introduced.⁴² Sean Lemass, Minister for I&C, told the Senate that the purpose of the Bill was to bring "our copyright law, as regards the translation of works, into line with our obligations under the Berne Convention."⁴³ The government proposed to remove the translation reservation, which had applied since 1927. In the Dail debate, Lemass referred to an examination of the legislation passed between 1927 and 1957, in relation to ratifying the UCC. It was realised that the legislative position in Ireland, under the 1957 Act, was in contravention of the provision of the UCC.⁴⁴ Lemass stated that "It has now been represented to us that (the) provision (for licensed translations for UCC states after seven years) is in conflict with our existing obligations under the Berne Convention." The option available was to have two separate codes, one providing for a ten-year period for Berne States, and a seven-year for Geneva states, with payment to the author in the latter case. Lemass argued that the administrative difficulties would be excessive and confusing. He saw particular difficulties in the case of works published simultaneously in New York and London, where the US was a Geneva state, and Britain a member of both unions.

The redundancy of the translations provision was underlined by the Department of Education. Lemass reported that it had had no difficulties in obtaining permission from publishers to translate works: "It has not been found necessary in the whole period of 30

³⁹ SD 4 July 1956 Col 340. Bartley, Parl. Sec. to the Minister for Industry and Commerce.

⁴⁰ Industrial and Commercial Property (Protection)(Amendment) Act 1957

⁴¹ This was a reduction from the ten years stipulated in the 1927 Act.

⁴² The 1957 Act had been found to be defective.

⁴³ SD 16 July 1958, Col 892.

years to invoke that compulsion clause, and no reason is seen for its continuance in our legislation.⁴⁵

6.2.8 Conclusion

The regulation of copyright in books was largely settled in Ireland by 1958, and the debates which led up to the enactment of the 1963 Copyright Act centred much more on the regulation of new rights and new types of cultural production. Broadcasting and recording of music and other performances raised problems of two main classes.

The first class of problems involved deciding on what rights were created when works were stored or transmitted in the newer media. More than one right might exist, depending on the use which might be made of a work. In the case of books, the issue was relatively straightforward, where the author enjoyed clear rights to the exploitation of his work through publishing and sale of a book or other printed work, or in the subsequent theatrical adaptation. In musical works, the original musical work attracted protection on the same basis as a book. However, the performance of the work and the storing or performance of the work created additional rights.

The second class of problems arose from the fact that intellectual property rights can be considered to be contingent on the conferral of state recognition of particular rights. While this presupposes a philosophical consensus that acts of certain types lead to the creation of rights, in practical terms the economic consequences of these putative rights depend on legislative validation of any new rights. This means that copyright and related rights are the outcome of negotiation between contending interests, and that they have economic effect only when legitimated by state action. In Ireland at the time, the advent of television gave rise to a relatively strong state interest in shaping copyright law in a manner congenial to the interests of a broadcasting service.

Ireland's pattern of legislation in the late 1950's reveals the beginning of a move away from its previous stance of protectionism for native industry. This general pattern was reflected in the changes which were made in its copyright legislation at the time. In order to allow additional freedom of trade for Irish publishers wishing to export books to the United States, Ireland had joined the UCC. It also removed the annoyance of the translation reservation from its domestic legislation. It observed Britain's examination of

⁴⁴ DD 9 July 1958 Col 154

⁴⁵ SD 16 July 1958 Col 895.

its copyright law in the 1952 Gregory Committee Report and initially the responsible government department decided in effect to re-enact the new British copyright provisions in Irish law.

The decision to establish a television service in Ireland coincided with the decision to adapt the copyright law to the changed technological and political landscape. This coincidence, coupled with the presence in influential positions within the civil service of a small group of cultural nationalists who were being advised by the EBU, led to protracted and frequently ill-tempered internal disputes within the Irish administration on the model of a copyright law to be enacted. Only the coincidence of the new British 1956 Copyright Act, inspiring Ireland to modify its law, and the proposal to establish a television service led to this intense debate. In other circumstances, it is clear that the model of the British Act would have been re-enacted in Ireland almost without controversy. Despite the debates being conducted over a long period, the resulting Irish law did not in fact deviate to a great extent from the British, except where the television service had demanded more advantageous terms.⁴⁶

6.3 Broadcast Copyright

6.3.1 Introduction

The reconciliation of Irish copyright regulation to technological advance in other cultural industries was furthered mainly in the domestic legislation of the 1960's.⁴⁷ New intellectual property rights were created, influenced by four main factors: technological development; the consequent development of new forms of the fixing and circulation of intellectual property goods; the country's adherence to international conventions on the new rights and, critically, the development of television broadcasting in Ireland.

The records of the debates are fuller for this period than for the immediately preceding decades. Because of the commercial and legal importance of the new rights under discussion, and because different interests could be favoured by particular configurations

⁴⁶ "Although it is a rather tired joke, the quip that the enactment by the Oireachtas of the Copyright Act 1963 infringed copyright in the U.K. Copyright Act 1956 neatly expresses the extent to which the former was modelled upon the latter" (Coughlan, 1992, 93).

of regulation, the debates were characterised by real and deep involvement by the actors. The new rights legislated for in the 1963 Copyright Act covered the field of broadcast, electronic, cinematographic and mechanical copyright, in the context of contemporary technological possibilities. Broadcasters operated under particular pressure, because of the voracious appetite of broadcasting for material, much of which was the copyright property of other rights owners. The circumstances were in place for a hard-fought, strongly argued debate.

Although in some other countries there had been a widely-held belief that “national culture cannot survive without significant help from the state,” Lacroix and Tremblay, (1997, 98). such an idea did not form part of the texture of Irish cultural-regulatory debates in the 1950’s and 1960’s. Canada, from the 1920’s, had asserted its national distinctiveness and culture in the sphere of radio broadcasting. By contrast, even though the producers of cultural goods were mainly external and even though revenues were going off-shore, the inclination of Irish regulators was to replicate in Irish law the provisions of British law, when Britain was one of the largest exporters of cultural goods, and Ireland was a minor producer, and, by a wide margin, a net importer.

6.3.2 Outline of the manner of conduct of the main debates

The main debate on regulating copyright in the new technologies extended in Ireland between the years 1957 and 1963, when the Copyright Act was passed. The debate was largely conducted within the government apparatus until 1961, when the draft Bill was published. At this point, and continuing until the Bill was finally enacted, many issues were again discussed in the public and parliamentary debates. This dual character of the debate was to a great extent a consequence of the secretive formulation of legislation in Ireland. No formal public means of actively eliciting input from interested parties was used.

6.3.3 The main actors in the debates

The debate involved three different classes of actors: the public or consumer interest, organisational and sectional interests and individuals who personally carried out the

⁴⁷ The Copyright Act 1963 and the Performers’ Protection Act 1968.

negotiations. The public was ostensibly represented by the state and by the legislators, and were an implicit rather than active party to the debates. The organisational and sectional interests were the dominant forces in the debates. However, individual personalities were the direct primary shapers of the debate.

Different conceptions of the aims of copyright law underlay the attitude of some of the actors. There was the normalising view, advanced by personnel from the Patent Office, that copyright was an absolute property right, which deserved protection from any threat of diminution by state or other agencies. Opposed to this was a coalition which, while motivated primarily by a wish to facilitate broadcasting, acted out of a nationalistic cultural paradigm which would subordinate the absolute property rights of largely foreign copyright owners to their conception of the Irish public good. Other Irish actors were relatively silent in the debates. Irish writers in particular do not appear to have become involved. This implies a failure to appreciate the change which was occurring as technology made cultural goals relatively more important in the economy.

6.3.4 The organisational forces in the debate

The Department of Industry and Commerce [I&C] and the Patent Office

The Department of Industry and Commerce, which drafted the legislation, asserted its neutral stance in the debates on broadcast and recorded music. A distinctive characteristic of the debate was that this powerful government department opposed the proposals of the state broadcasting service on copyright.

The level of understanding of the importance of creating a broadcasting-friendly regulatory framework was particularly underdeveloped in I&C. It took an instrumental, economic view of the issues, and in particular adopted an internationalist, right-based approach, drawing in part on the authority of the new British Copyright Act 1956. In taking on so fully the principles and purposes of the British legislation, it accepted as normative the legislative outcome of earlier debates in Britain. In pursuit of what it saw as objective, reasonable standards, it prioritised the interests of largely foreign industries. Because the cultural and industrial landscapes of Ireland and of Britain were so different, this was obviously a flawed approach. This occurred despite the evident understanding on the part of some I&C figures that there were significant differences in social patterns and relevant industrial stakes between Britain and Ireland.

I&C appeared to be unconcerned about the inherent inequalities in the power relationships governed by copyright, and unaware of the possibilities of using copyright regulation for developmental or remedial industrial and cultural purposes. Copyright was considered to be value-neutral and policy-neutral. While the state broadcaster was the potential beneficiary of any distinctive Irish regulatory provisions, I&C and the Patent Office took a line opposed to RE, while holding themselves out as disinterested shapers of the regulatory landscape.

The Department saw itself as creating a level playing field upon which the various economic and cultural actors would meet on equal terms. An excessively legalistic and formalistic conception of the person lay behind this attitude. Authors, recording companies and broadcasters were conceived of as individuals meeting in a market; issues like the geographical location of these actors and of their relative commercial scale did not weigh with the Patent Office. Patent Office officials had a misapprehension of the strength of the authors and musicians. They consistently took the side of the authors, composers and musicians, seeing them as the weaker forces in the debates. In doing this, they blinded themselves to the fact that these creative individuals were represented in the debates by some of the most powerful collective actors, the collecting societies, such as the PRS. A sentimental image of the singular author may have given rise to this simplistic opinion. The interests of the PRS were also strongly supported on the grounds that a regime congenial to their interests had been established in Britain in 1956, which the Patent Office was anxious to replicate in Ireland, possibly for reasons of ethical principle.⁴⁸

The Department of Posts and Telegraphs [P&T] and Radio Eireann

The Department of Posts and Telegraphs was the second major state participant in the debates. This department controlled the state broadcasting service, Radio Eireann, and prepared the technical framework for an Irish television service. In the absence of a Cultural Ministry, the "Post Office - Radio Eireann" complex functioned in some senses as a surrogate. Although other government departments were charged with the regulation or support of other aspects of culture, the P&T / RE axis, at least in the

⁴⁸ An argument was also advanced by JJ Lennon of the Patent Office that Irish copyright law should re-enact British, since the Irish courts depended on the judgements of British courts for guidance, particularly in an

copyright debates, notably extended its concerns outside its areas of formal responsibility to make policy proposals related to other aspects of cultural production or consumption.

RE, and its parent department were particularly aware of the consequences for Ireland of unsuitable copyright regulation, not only from the point of view of assisting the television service, but also as a result of an understanding of the cultural consumer-producer relations of Ireland with other countries. The rest of the state apparatus, including I&C and the Education Department, was disinclined to give consideration to international cultural and related industrial relationships. Radio Eireann failed to convince the government that its public service role should allow it to encroach on private intellectual property rights to the extent that it initially argued it needed for public good purposes. The strongly-held belief within the administration of the absolute importance of private property rights and an unwillingness to modify those rights extensively led to the broadcaster ultimately having to come to an unwilling accommodation with the copyright owners.

European Broadcasting Union [EBU]

The major external organisational force in the Irish debate was the European Broadcasting Union, of which Radio Eireann was a member. The EBU was deeply involved in the debates, to some extent on the merits of the Irish case. A larger issue for this organisation, however, was the likely influence which Irish law might have on other states, particularly on the former British colonial possessions which were then gaining independence. The EBU had a strong influence on the shaping of the South African legislation, and it made a serious proposal in 1956 that it should be allowed to draft the Irish Copyright Bill in its entirety.⁴⁹ The EBU's attempts to take control of the drafting of the entire Copyright Bill implied a lack of confidence in the capacities of the Irish administration to draft suitable legislation.

The organisation was more farseeing than RE or any domestic Irish actors, in identifying the likely new rights which could be created, in realising the potential effects of those new rights on broadcasting and in sensing that there were larger economic and cultural

area in which little domestic litigation was expected. Policy considerations were thus to be relegated in importance below judicial and administrative convenience.

⁴⁹ Indeed, Straschnov, its legal advisor made claims to have written the South African Copyright Act.

implications arising from the choices which Ireland might make. Broadcasting presented major new challenges to the existing copyright regime, and the EBU worked internationally to obtain a modification of copyright laws, in opposition to the interests and views of the collecting societies, primarily to facilitate broadcasting. Because of the quantity of the copyright material which broadcasters needed to use,⁵⁰ the EBU recognised that on cost grounds, and on ground of administrative convenience, it was in the interests of its members to construct a regulatory system which would facilitate their operations.

The Collecting Societies

One of the most influential actors in the debates was the Performing Right Society [PRS], the British-based collecting agency, which represented in Britain and Ireland the interests of composers of many nationalities through bilateral agreements with agencies in other countries. In the main it represented external producers of content, and it repatriated performance fees from Ireland to these content producers.⁵¹ It successfully recruited the Fine Gael parliamentary opposition in 1962 and 1963 to its campaign against certain provisions of the Bill.

Irish Trade and Professional Associations

The Irish Musicians Federation [IFM] opposed certain provisions of the proposed legislation, in the interests of supporting the performance of live music. The IFM was overwhelmingly composed of part-time musicians, working at night in dance bands. The relatively low penetration in Ireland of recorded music and of the technology to use it in commercial settings was combined with cultural and social preferences for live music. This created conditions which supported a large live music industry.

The economic status of the IFM members appears to have been exaggerated in the debates. Because of the difficulty of discriminating in legislation between the interests of part-time musicians and professional musicians, the needs of the IFM appear to have

⁵⁰ In the US in the 1940's and earlier, in the absence of wide-ranging agreements between radio stations and rights owners, much of the musical output had to be confined to public domain material.

⁵¹ The fact that payments of copyright fees in Ireland were made to external agencies was noted in the debates, not by an Irish contributor, but by Georges Straschnov, the legal advisor of the EBU. The propriety of the British PRS being the collecting agency for Ireland did not seem to give rise to any objections among serious Irish contributors to the debates.

been granted excessive consideration in the discussions.⁵² The attitude of I&C to musicians appears to have been greatly influenced by the views of the minister, Sean Lemass, who took a particular interest in them as a group of workers.

The Irish Photographers Association and representatives of the Irish film industry also contributed in a minor and ineffectual manner to the debates by making representations directly to the Taoiseach, following the Second Stage debate in the Dail.⁵³

The Irish recording industry

The Irish recording industry in the 1950's period was small, and the country was a net importer of records. While some companies produced records in Ireland, these were mainly pressings from imported masters. The Dublin music retailer Waltons issued some recordings of Irish music, but the scale of their production was so low as to be considered inconsequential in commercial terms. Certain factors militated against the development of a music recording industry in Ireland, including the absence of a strong tradition of classical music composition, the practice of Irish songwriters having their work disseminated by foreign companies and the establishment in Ireland of retail subsidiaries of British record companies.

RTE encountered difficulties with American exporters of records in late 1940's. Because there had not been an agreement between America and Ireland on performance rights in recorded music, the makers of sponsored radio programmes broadcast by RE were refusing to pay fees to the collecting agency. An RTE official, O Shea, discussed the problem with L. Wallenborn, an official of the EBU. It had arisen in 1948⁵⁴ "following the imposition of drastic restrictions on the type of records that could be broadcast in commercially-sponsored Programmes. The firms began to use American records and refused to pay [a royalty] of 10s. per record side to Phonographic Performance Ltd." The problem at the time was overcome by avoiding the issue: the programme makers, with one exception, ceased to use American records.

⁵² This was specifically denied, however, by the Secretary of the Department of Industry and Commerce in 1962.

⁵³ 11 December 1962. NAI Taoiseach S17008 A, Copyright Legislation. They were opposed to the reduction in the term of protection for photographs from 50 to 25 years, arguing that "most photographers are self employed and rely on their efforts during their younger days to build up an insurance to provide a supplemental income for themselves and their dependants in their later less productive years."

⁵⁴ The first page of O Shea's letter is not intact. NAI TW 33937.

6.3.5 The influence of individuals on the debates

While the organisations were the formal parties to the debates, individuals within these organisations were highly influential, due in part to the small scale of the Irish administration. The personal convictions of individuals determined the negotiating position of their organisations to a considerable extent.

Dr J.J. Lennon, The Controller of the Patent Office

Lennon exercised enormous influence on the debates, largely contrary to the interests of the Irish broadcasters. The personal antagonism between Lennon and the RE representatives was the primary factor in the long delay between 1958 and 1962 in finalising the legislation. Lennon took the position that Ireland should follow the British 1956 Act closely,⁵⁵ and in general took a legalistic, narrow view of the policy consequences of shaping the copyright regulatory framework. His second principle was that the rights of the authors had to be protected from the depredations of what he saw as the powerful force of broadcasting.

Leon O Broin, Secretary of the Department of Posts and Telegraphs

O Broin, who was both a cultural nationalist and a practical supporter of the requirements of the proposed television service,⁵⁶ took a strong line in the debates against commercial interests and favoured a variation of the copyright law from British norms to take account of Irish conditions. He was a cultural commentator in his own right,⁵⁷ and adopted a distinctive view of what was desirable in copyright law for broadcasting. In particular he tenaciously opposed Lennon's view that foreign record producers' rights should be as strongly protected in Ireland as they were in their own countries.

⁵⁵ However, O Hannrachain, the RTE legal affairs officer, (1963, 37) later appeared to agree that there was value in such a position as Lennon's: "... there are many advantages to be gained from having parallel legislation in a matter such as copyright."

⁵⁶ Savage described O Broin as "an indefatigable champion of an Irish public service throughout the 1950's" (1996, 209).

⁵⁷ Fallon referred to O Broin as the "eminence grise of Radio Eireann" and also credited him with a perceptible influence on the Irish folk music revival of the 1950's (1998, 254).

Georges Straschnov, Legal Advisor of the EBU

Georges Straschnov was a towering figure in the debates. He had been the Monaco representative at the Brussels Conference in 1948, and he had deep involvement in the 1950's in the drafting of copyright legislation in other countries.⁵⁸ His interests in the Irish copyright legislation extended beyond broadcasting and recording, and he was one of the few commentators to examine the Bill seriously to identify provisions which would be detrimental to Ireland's cultural production in other spheres. At an early stage he identified the value of involving Irish publishers in a common front with the broadcasters in the debate on copyright.

Matthew Doherty, Official in RTE

Doherty,⁵⁹ the Administration Officer of Radio Eireann until 1961, was the main contact between RE and the EBU. His interests were primarily to ensure the development of a regulatory apparatus which would facilitate the new television service and the existing radio service. Like O Broin, he had an appreciation of the cultural value of RE's activities, and sought to protect these using the copyright law.

Certain other individuals were also involved in the debates, but in these cases their involvement was more role-determined. Officials of the Department of I&C, such as Andrew Kennan and J.C.B. MacCarthy, while they were deeply involved in the discussions, strove to maintain a distance from the contentious cultural issues, and in particular distanced themselves from the RE position, as inappropriately partisan. The government ministers, Michael Hilliard in P&T and Jack Lynch in I&C acted on the advice of their officials, and they did not themselves advance innovations in policy. The Taoiseach, Sean Lemass, who had been Minister for I&C when the Bill was being first drafted, had an interest in copyright, although in this case, his interest stemmed from a longstanding belief in the need to support the printing workers, which dated back to supporting them at public meetings in 1926.

⁵⁸ His interests covered the entire range of the regulation of television. In a wide-ranging article published in Dublin on international television broadcasting, he identified the territorial aspects of performers' rights as one of the crucial issues in international broadcasting. Straschnov (1967) The future of television in the European and world context, *Administration*, 15(3) 249 - 256.

⁵⁹ Named O Dochertaigh in many documents throughout the archival record.

6.3.6 Outline of the Chronology of the Agreements, Enactments and Debates

Ireland's ratification in 1958 of the Brussels Act of 1948 placed reform of copyright regulation on the political agenda. In the course of the internal civil service debate before the 1963 Act, Ireland signed the Rome Convention of 1961.⁶⁰ Another powerful influence on the Irish legislative programme was the enactment in 1956 by Britain of a new Copyright Act, which meant that Irish and British copyright law then diverged significantly for the first time since 1801. British law had come to terms with some of the demands of developing media technologies, while Irish law remained shaped by the technical possibilities and the cultural practices of the 1920's.

Internal debate within the Administration between 1957 and 1963

The internal debate on a major revision to the Copyright legislation opened in 1957, when a draft Bill was produced by I&C. The P&T strongly opposed the Bill's provisions for broadcasting and for recorded music. Discussions and internal debate continued on the issues in contention until 1961, with a gradual coming together and trading off between the two sides. The inter-departmental difficulties were so acute that at one stage it appeared as if the civil service would not be able to give a single view to the government on the proper course to take. Such an interdepartmental dispute coming to government for adjudication was in reality unacceptable either to government or the civil service, but the insistence of the P&T in being prepared to force the issue demonstrates its deeply held conviction that its amendments were necessary.

The scheme of the Bill was finally agreed by government in May 1961, and authority was given to draft the Bill itself. Despite this, however, P&T hardened its position on certain issues, following O Broin's attendance at a meeting of the Council of Europe in June 1962, and it made efforts to re-open negotiations with I&C.

⁶⁰ The International Convention for the Protection of Performers, Producers of Phonograms and broadcasting Organisations, Rome 1961, which regulated 'Neighbouring Rights'. The terms of the convention were legislated for in Ireland in the Performers' Protection Act 1968.

Public and Parliamentary Debate 1961 - 1963

Once the Copyright Bill was published in 1962, other actors entered the debate, which then entered a public phase, in which many of the issues previously debated were reconsidered. External actors, who were not previously in a position to become involved, due to the secrecy with which the previous debate was conducted, went over much of the contested ground again.

Copyright Act 1963

The Bill was finally passed in 1963. Maurice Gorham, a senior official of RE, later wrote that RTE had gained what it wanted from the Bill, while the RE Legal Advisor published an article in the EBU review which was broadly approbatory of the Act's provisions in relation to broadcasting (O hAnnrachain, 1963).

6.3.10 Concern that Irish cultural property was being pirated abroad

A particular concern for many rights holders has been the fixing as a permanent object of a performance of a work disseminated by a flow technology, such as radio. The two broad categories of the new delivery systems for cultural production, fixing and flow technologies, were thus brought into a relationship which offered the potential for easy infringement of copyright. This was a concern in Ireland as early as the 1950's, when evidence was found that radio broadcasts were being recorded and sold in the US. While RE had begun to record and broadcast traditional music, and while some small record companies had emerged in Ireland, large scale exploitation of Irish folk music was then some distance in the future. In addition, although a concern developed that Irish folk music might be appropriated by foreign interests, the nature of a property right in anonymous but distinctively Irish musical works was not addressed in the legislation of the period.

In November 1958, Doherty wrote to Lennon to complain about the practice of off-air recordings being made of RE broadcasts, and then being exported, "in connection with the point touched upon in our recent discussion as to whether Radio Eireann broadcasts

would need to be protected in the forthcoming copyright legislation.”⁶¹ He enclosed an extract from the *Evening Press* on the subject: “Irish Folk Music has become a big business ... So great is the demand abroad that pirated tapes of Radio Eireann broadcasts are being ‘flogged’ at high prices to American collectors...” Doherty did not believe that “the practice referred to about ‘flogging’ Radio Eireann records is widespread ... but apparently the market for Irish folk songs and stories in the USA is sufficiently attractive to induce persons here to take the recordings of the programmes from the air and send them to the USA.” RE itself supplied recordings to US interests, once they satisfied themselves that the copyright holders interests were protected, but Doherty argued that “it would be intolerable if side by side with that, other people were taking recordings off the air and sending them abroad without permission...”

6.3.11 Attitudes within the administration to copyright

The Irish administration did not take an early initiative to reform copyright law systematically in the 1950’s. Although Ireland had joined the UCC, and this required minor amending legislation in 1957 and 1958, the government had decided to avoid a major reform of copyright law. It is inescapable that it was awaiting the outcome of the British consideration of copyright before moving. The fear of the complexity of copyright among officials was as great as among legislators.⁶² The government was unprepared to consider what it termed ‘novelty’ in copyright regulation, and in particular was unwilling to proceed in advance of international agreements in relation to developing technologies. The government was exclusively reactive in its approach, and throughout a poor understanding of the potential or importance of the cultural industries was evident. In international negotiations, it was passive, never advancing imaginative proposals in national, authors’ or industrial interests. The pattern by which support was given to the publishing industry in Irish IPR legislation, from the 1920’s onwards, was not through a systematic review of the landscape and the fashioning of a regulatory system appropriate to conditions and policy objectives, but instead through the use of reservations and exceptions. Consequently, the underlying presumptions of Ireland’s legislation were negative, and industry supports were never made through positive acts nor, indeed, through repudiation of international agreements.

⁶¹ NAI P&T TW 33937. 14 November 1958.

⁶² In 1959, N.S. O Nuallain at the Department of the Taoiseach wrote to T.J. Malone, Controller of the Stationery Office: “As I needn’t tell you, copyright is a tricky business.” 1 May 1959.

6.4 Early EBU efforts to induce Ireland to amend its copyright law

6.4.1 Broadcasting Copyright - Initiative by EBU in 1952

Radio Eireann was uninterested in the early 1950's in proposals for reform of the copyright law, both because the issue was not a live concern for the broadcaster, and because copyright law fell within the remit of another government department. The EBU position was that, in the light of the publication of the Gregory Report on Copyright in 1952 in Britain, there was a danger of I&C proceeding to draft a Copyright Bill which would be effectively immutable once drafted. This was prescient, since I&C proved ill-disposed to amending its legislative proposals on copyright once they had taken shape in the late 1950's. In 1952, Wallenborn, Director of the EBU, wrote to the Department of Posts and Telegraphs in Dublin, suggesting that the moment was opportune for reform of the Irish copyright law, in light of the Gregory Report, which had been summarised in the EBU Bulletin.⁶³ Wallenborn asked "whether the time has not come for your organisation to approach the Irish Governmental authorities about the preparation of a bill to amend the Irish Copyright Law." He suggested that P&T might make proposals to the government on amendments to the law, and that he would work with them on the text.

Doherty replied in June 1953, revealing that P&T had been in contact with the I&C about possible changes in the copyright law, and that, while it had been decided to amend the law to be in a position to ratify the 1948 Brussels Act, it was possible that IPR legislation might be divided in the future in Ireland into separate acts, covering the different rights.⁶⁴ As a result, "it is unlikely ... that the Department ... will be ready to put forward its proposals for a considerable time." Doherty also noted that, apart from the earlier difficulty in broadcasting commercial records "we have had very little trouble about copyright matters, and as the present copyright legislation is reasonably satisfactory we intend to wait until the Department ... sends us its proposals before suggesting any amendments of our own."⁶⁵

Wallenborn replied within days, pointing out that experience in other countries showed that "once a Government has laid down certain principles, it becomes extremely difficult

⁶³ Letter from Wallenborn, 3 December 1952. NAI. P&T TW 33937.

⁶⁴ This was the pattern which emerged, with three main Acts in the early 1960's replacing the 1927 Act; Copyright, Patents and Trademarks.

⁶⁵ Doherty's information on this matter had come from McKenna of the Patent Office, which had effective control at that time of copyright matters.

for all concerned to effect any further changes. If, for instance, your legislators strengthen provisions for the protection of authors one way or another, the Performing Right Society will certainly exploit any advantage thus gained to the full, and it will not be easy to induce the Government to go back on its own text.”⁶⁶ O’Shea of P&T responded to Wallenborn in 1953:⁶⁷ the Department had considered the issue, and had again decided against making representations to I&C. This was partly on procedural grounds, since I&C had effective control and right of initiation in that area of policy, and presumably would have resented any appearance of interference by another Department on its territory.

6.4.2 A new EBU Initiative in 1955

In 1955, Georges Straschnov, the Legal Advisor to the EBU, embarked on a sustained campaign to encourage Ireland to enact a copyright law along lines convenient to the interest of broadcasters. Straschnov and the EBU were alert to a particular weakness in Irish administration. In drafting legislation on copyright, the government never equipped itself with any public expert advice, as Britain did before each of its major legislative acts.⁶⁸ Instead, the consultation process consisted of private representations, primarily to I&C, though sometimes directly to the Taoiseach.

6.4.3 Inaction in P&T, RTE and the Irish administration generally

Neither RE nor the Patent Office had a real interest in 1955 in reforming the copyright law. The lack of interest in RE was typical of Irish practice at the time, of not foreseeing the likely consequences of technological developments, and of being a late adopter of regulatory systems necessary to control new forms of communication.⁶⁹ The unspoken underlying consolation for the administrators was the knowledge that Ireland would re-enact British legislation. Since Britain had (in the Gregory Committee in 1951 and 1952) engaged in an exhaustive consideration of all aspects of copyright in relation to social, cultural and technological conditions, Ireland was not inclined to ‘re-invent the wheel,’ even if its economic and cultural interests were very different to those of Britain.

⁶⁶ NAI P&T TW 33937. 16 June 1953.

⁶⁷ NAI P&T TW 33937. 20 July 1953.

⁶⁸ Major investigations were carried out in 1878, 1909, 1952 and 1977.

⁶⁹ However, O Broin and P&T were active from 1950 onwards in preparing the ground for an Irish television service. Even then, the presumption was that such a development was some distance in the future.

Setting the scene in December 1955, where the British Bill was being debated in parliament, and supposing that Radio Eireann officials were “following the debate with interest,” Straschnov wondered “whether it would be a good thing if you were to set about having your own Copyright Act amended too, not necessarily along the same lines as the British Act.” Straschnov saw the British Bill as having “some interesting solutions for broadcasting.” He offered to send suggested amendments to the Irish legislation to Doherty, which would be advantageous to broadcasting, yet would not conflict with Ireland’s obligations under international conventions. Doherty replied in December 1955⁷⁰ that the issue was still not of “immediate interest to us.” However, Doherty asked Straschnov to examine the Irish 1927 Act and to indicate the main areas where P&T should seek changes. In response Straschnov identified the issue of “ephemeral recordings,” which would be a bone of contention between the departments for several years into the future.

6.4.4 EBU proposals for amendment of the copyright legislation

In January 1956⁷¹ Straschnov wrote to Doherty, surprised that I&C considered the matter to be “lacking urgency.” He had a very clear understanding of the Irish legislation, and wondered why Irish publishers “were not demanding the amendment of the present Act in order to obtain less complicated and costly protection in the United States.”⁷² He realised that Ireland could not accede to the UCC unless the 1927 Act was amended.

Straschnov provided a list of suggested amendments and innovations for a new Copyright Act.⁷³ His analysis of the existing legislation went beyond broadcasting, and he suggested certain amendments which were later incorporated into the 1957 and 1958 Acts.⁷⁴ He noted the utility of providing protection for television broadcasts on the new

⁷⁰ NAI TW 33937 23 December 1955.

⁷¹ NAI TW 33937 13 January 1956.

⁷² Doherty replied that he could not understand why the publishers were not seeking amendment of the Act: “Perhaps they are, but they may not be able to put the necessary heavy pressure behind their demand.” NAI P&T TW 33937 15 January 1956.

⁷³ On general matters, he suggested that Ireland needed to calculate the terms of protection differently, and to repeal the provisions for compulsory licenses for translations. In relation to broadcast copyright, he listed ephemeral recordings, current events reporting, cinematographic and television film copyright, suppression of the right of record producers to authorise or prohibit broadcast and public performance of records, and the establishment of a copyright tribunal as issues which needed to be addressed. NAI P&T TW 33937. 13 January 1956.

⁷⁴ Indeed, if his advice had been taken, the 1958 Act might have been unnecessary, since he saw the issues with more clarity than, apparently, did I&C. The 1957 Act was technically flawed.

British model “in view of the possibility that, in Ireland, a television service might be operated by more than one organisation.” Straschnov later provided a document⁷⁵ in which he provided a “Synopsis of provisions favourable to broadcasting in recent Acts and Bills” in various states.⁷⁶ He noted that “use has been made only of those provisions that may be regarded as being advantageous to the broadcasting organisations, or that are necessary to clarify the meaning of such provisions.”⁷⁷

6.5 The major issues in contention in the Irish debates in the 1950’s and 1960’s in relation to broadcasting

6.5.1 The use of films in television broadcasts

Films presented particular problems for television broadcasters, because of the nature of a film as a composite work. A film might be an adaptation of a pre-existing work. Its production would always require the involvement of more than one individual, and would generally have music or other works embedded in it. The issue of a right of prohibit broadcasting on the part of a copyright owner had the potential to create difficulties for broadcasters, and in general they sought to extinguish all rights of prohibition in favour of a right to remuneration alone. In addition, broadcasters, as the commissioners of films, were interested in having the copyright in their commissions assigned to them, even if the organisation did not itself make the film. Difficulties also arose internationally in ascribing authorship to films, where continental and Anglo-American practice diverged.⁷⁸

In 1959 Straschnov supplied a detailed document⁷⁹ to RE, in response to a request by Doherty⁸⁰ which had set out RE’s position on film copyright. Straschnov proposed that it was important for the future of television that the maker of a film should hold the copyright, and in particular that the television service, if it made a film, should itself

⁷⁵ Dated 27 December 1957.

⁷⁶ Including Austria, Germany, Britain, Yugoslavia, Norway, Sweden and Italy.

⁷⁷ The issues he addressed were compulsory licences, schools broadcasts (a feature of German law), performers’ rights, record producers’ rights, the control of and appeal against the practices of PRS-type societies and the issue of Copyright tribunals.

⁷⁸ The Anglo-American position was that the film producer was the author; in continental countries films were considered to be collective works. (Porter, 1991, 8).

⁷⁹ NAI P&T TW 33937. 9 March 1959

⁸⁰ NAI P&T TW 33937. 26 February 1959.

hold the copyright in the film. He also proposed that, once a film had been made, that the owners of the prior works⁸¹ would not be in a position to prevent the film being televised. This was in any case discouraged, although not outlawed, in the Brussels Act.⁸²

6.5.2 Ephemeral rights

The issue of ephemeral rights in music led to disputes between RE and I&C. It arose from a technical requirement where broadcasters needed to record music and other works for transmission some days or weeks later. Musicians and other live performers had an interest in limiting the length of time such recordings could be retained, and limiting the number of repeat broadcasts. If the recordings could be kept permanently and used indefinitely, the demand for performers would accordingly diminish. The debates on ephemeral recordings centred on whether they should be allowed in any circumstances and, if allowed, how long they might be retained and how often broadcast. The use of ephemeral recordings was treated in the Brussels Act of 1948, but the agreement did not prescribe precisely how the matter should be regulated.⁸³ This imprecision led to the issue becoming one of the most contentious issues in the inter-departmental debates in Ireland.

I&C attitude to rights in ephemeral recordings

J. Connor of I&C wrote to O Broin at P&T in 1959,⁸⁴ seeking detail on the issue of ephemeral recordings. "As the proposal is one which limits the rights of the owner of primary copyright, it is desirable that the minister should be in a position to justify the provisions." Connors noted that the Brussels Act did not explicitly require the destruction of ephemeral recordings although "there is a strong implication of this in the phrase" used. He sought details of the financial saving which a provision allowing

⁸¹ Such as novels, stories and operas.

⁸² Berne Convention, Brussels Revision, Article 14 bis, 2(b); retained in the Paris Revision of 1971.

⁸³ The Canadian government report *A Charter of Rights for Creators* (1984, 60) noted that "most copyright laws, even in those jurisdictions which are most protective of authors, provide exceptions to copyright liability to permit broadcasters to make ephemeral recordings." Canada itself did not allow such a right, however, even in the early 1980's.

⁸⁴ NAI P&T TW 33937. 26 May 1959.

ephemeral recordings would make for RE, and on the nature of the sound recording mechanisms to be used.

EBU information on international practice on ephemeral recordings

Doherty wrote to Straschnov⁸⁵ requesting examples from countries where provision had been made for ephemeral recordings which differed from the British law. He noted that, while Britain required the destruction of ephemeral recordings after 28 days, the South African legislation allowed for the retention of ephemeral recordings for six months.⁸⁶ He suggested that the practice of destruction of recordings was adopted as a practical means for the collecting societies to be assured that a recording would not be used a second time, rather than for any other purpose.

Straschnov dealt with the question of ephemeral recordings, in the light of the Brussels Act.⁸⁷ He said that he had been “closely involved in the drafting of the clause” on ephemeral recordings.⁸⁸ His position was that the Conference was of the view that ephemeral recordings were of an entirely different character from commercial recordings,⁸⁹ since they were “not used indefinitely” and were “only an accessory of the broadcast.” While a commercial record was intended primarily for private use, for which the producer was paid, a broadcast recording was of a different character. The rights owner was paid a fee for the public performance of the work. “In all fairness a further charge for the mechanical rights is not in order.” The Conference had also recognised that the repeat broadcasting of an ephemeral recording should generate further fees for the rights owner.

According to Straschnov, the Conference was aware that ephemeral recording was to the benefit of performers, since recordings could be made at times when the broadcast itself could not be transmitted, and in this manner it gave greater freedom to the performer,

⁸⁵ NAI P&T TW 33937. 3 June 1959.

⁸⁶ The logic of this difference was that, while the BBC, a multi-service broadcaster, could easily find an outlet for a recording on one of its services within 28 days, the single-service South African Broadcasting Company would not as readily be in a position to schedule the recording.

⁸⁷ 23 June 1959. Straschnov indicated that he had been present at the Brussels Conference in 1948 as the delegate of the Monegasque Government.

⁸⁸ Berne Convention, Brussels Revision, Article 11 bis (3).

⁸⁹ Indeed, the insistence on the destruction of ephemeral recordings emphasises that they were intended as adjuncts of flow technologies and that a fixing technology was used purely for technical convenience.

since the performer could work elsewhere at the same time as an ephemeral recording was being broadcast. Since national legislation would regulate the use of ephemeral recordings, each state could regulate the matter in its own interests, as long as the principle of the short life of the recording was adhered to.

Straschnov believed that there would not be intense opposition from the societies to ephemeral recordings, and that even in the British case the PRS had not been able to prevent the adoption of ephemeral recording provisions. He argued that the societies in fact needed the broadcasters, and would have to come to some terms with them. RE expressed a preference for paying performance fees to performers for the use of ephemeral recordings, in order to avoid the possibility of having to make payments for their use at the higher scale used for commercial records.⁹⁰

6.5.3 The terms for the use of commercial records in Irish broadcasting

Right to remuneration or a right of prohibition

A major tension had developed between broadcasters and record producers in relation to the broadcast of commercial records. While many record producers offered records free of charge⁹¹ to RE, the British record industry in particular held the view that records were sold in the ordinary retail market only for private use. They argued that permission was required to use them in broadcasting, and that payment should be made for the broadcast. RE and the EBU were generally prepared to accept the principle of paying for the broadcast of commercial recordings, but were opposed to any right of prohibition.

The owners of rights in commercial recordings in practice had a right to remuneration both for the performance of the recorded work⁹² and for the broadcast of the recording,⁹³ arising from a British 1934 legal case,⁹⁴ which was believed also to state the law in Ireland. The broadcasters, and the EBU, were intent on having suppressed what they

⁹⁰ Doherty wrote to the Secretary of I&C stating that the fees already paid by Radio Eireann for ephemeral rights in respect of radio amounted to only £600 per year, in contrast with a payment of £19 000 for performing rights. Though he was unable to give an estimate of the likely cost which would be incurred on the establishment of the television service, he suspected that it would be higher. NAI P&T TW 33937 27 June 1959.

⁹¹ That is, free of retail charge; the issue of remuneration for the actual broadcast was separate.

⁹² This remuneration would be derived from a performing right payment and would be 'earned' at the time of the sale of the recording.

⁹³ This remuneration would be 'earned' at the time of the broadcast.

⁹⁴ The Carwardine case. "Flushed with their success in the Carwardine case, the gramophone manufacturers set up an international pressure group called the International Federation of the Phonographic Industry (IFPI) ... to lobby governments around the world for the introduction in their domestic laws of rights similar to those awarded to the manufacturers in the Carwardine case" (McFarlane, 1975, 143).

regarded as an improper right of prohibition of the broadcast of commercial recordings. The argument was that, once a recording was issued commercially, it should be available for downstream use by other technologies, once adequate recompense was made to the rights owner.⁹⁵

Straschnov argued in 1959 that, while record producers should have the right to prevent the copying of their records, their right to authorise or prevent the broadcast of a record should be suppressed.⁹⁶ He raised the prospect that the Draft Convention on Neighbouring Rights, then under discussion, was likely to regulate the rights of record manufacturers in broadcasting. Straschnov was aware that the IFPI was prepared to accept that states could ratify the [Rome] Convention with a reservation excluding records manufacturers' rights in relation to remuneration for broadcasting. He also was aware that IFPI was prepared to accept that the public performance of records should be regulated by domestic legislation, rather than by international convention. In consequence, he argued that Ireland could ratify the Convention on Neighbouring Rights, with the reservation, and could then deal with the issue in national legislation.⁹⁷

Straschnov pointed out that it would be useful to enquire of the record industry in Ireland whether it was really interested in a right of prohibition of the broadcast use of its recordings,⁹⁸ or if its real interest was in fact in remuneration, as he suspected it was. In the international debates on neighbouring rights, he claimed that the industry easily laid aside its right to authorise broadcast, and concentrated on establishing its right to remuneration. Under the terms of the South African draft Copyright Bill, the IFPI could no longer prohibit or limit the air time for commercial recordings. He suggested that in Ireland the remuneration right should be accepted, and a Tribunal set up to deal with cases of conflict between broadcasters and record producers.

⁹⁵ Following the passing of the British 1956 Copyright Act, members of the Commonwealth "tended to include the performing right in records" in their legislation (MacFarlane 1975, 144).

⁹⁶ He had already proposed this to RE in 1956 and 1957.

⁹⁷ The 1961 Rome Convention on Neighbouring Rights eventually agreed to a right of remuneration for the broadcast of a commercial recording. However, this was balanced by the refusal to allow a right of prohibition of the broadcast of commercial recordings. Ireland gave effect to this Convention through the Performers' Protection Act, 1968. Live performers were granted a right to prohibit the unauthorised recording or broadcast of their live performances under the Act. (Clark & Smyth, 1997, 225). This was done, not by creating a right analogous to a copyright, but "by making it a penal offence to do certain acts in relation to performances", Jack Lynch, Minister for I&C, introducing the Performers' Protection Bill 1964 in the Dail; DD 25 Nov 1964, Col 262.

⁹⁸ The basis of the acquisition of the remuneration right in the British court case.

6.6 The Drafting of the major Copyright Bill

6.6.1 The beginning of serious discussions

In 1958 Doherty wrote to Straschnov⁹⁹ to inform him that P&T had been invited to send its observations as part of an examination of the copyright law, “particularly with regard to modern means of expression of literary, dramatic, musical, and artistic works such as by recordings, films, and broadcasting of sound and vision.” P&T intended to inform I&C that it would be a considerable time before they would be in a position to propose amendments. He asked Straschnov to provide the wording for amendments which he considered necessary or desirable, and, for cases where a proposed amendment did not follow from a Convention requirement, he asked for a short statement of justification.

Straschnov informed Doherty¹⁰⁰ that he “had spent a fortnight recently preparing a new copyright bill for the Union of South Africa.” In the South African case, he knew in advance that the government proposed to base its law on the British 1956 Act, and he had in addition the full co-operation of the Director-General of the SABC.¹⁰¹ He was minded not to confine his suggestions only to sound and television broadcasting, but to cover the entire field, including cinematography, recording, performers’ protection etc., and questioned “whether it would not be preferable to submit a *complete* bill, in view of the fact that almost all the provisions may affect us to a greater or lesser degree.” He suggested that the approval of the Attorney General should be sought, and suggested that he might approve of the provision of a complete draft text, as in this way his “task would thus be considerably facilitated.”

In November 1958, Doherty declined Straschnov’s offer to draft the entire Bill, noting that in his initial contacts with I&C “the first immediate reaction of the senior official in the Department of I&C to whom I mentioned your offer was one of grateful appreciation.”¹⁰² According to Doherty’s hand-written notes on the file copy of the letter, J Connor, the official in question, had informed Doherty that the “view” in I&C was that the Bill would be “based generally on the British Act.”

⁹⁹ 9 October 1958.

¹⁰⁰ 27 October 1958.

¹⁰¹ South African Broadcasting Corporation.

6.6.2 The crystallisation of the common Radio Eireann / P&T position

Discussions between RE and P&T on a joint position

Doherty noted in a minute to O Broin that while RTE were not experts on copyright, they were “constantly rubbing shoulders with it.” He laid out part of the strategy to be used in what would become a battle with I&C, and obtained formal approval to act on behalf of the Department, though from behind the scenes.

Necessity for practical regime to permit television to function

The P&T submission to I&C was predicated on the need to provide for television and sound broadcasting “without undue difficulties and in the best interests of the State.” The response was based on the draft South African Bill, which, it argued, was intended to avoid the difficulties inherent in the British 1956 Act. It pointed out that P&T proposed to offer comments on all aspects of the issue, since copyright in all its guises impinged on television and sound broadcasting.

Ephemeral recordings

P&T proposed that ephemeral recordings made by the broadcaster could be broadcast up to six months after the date of recording, or longer by agreement between the broadcaster and the rights holder. In addition, P&T proposed that recordings could be retained for archival purposes if they were of an “exceptional documentary character.”

Film copyright

The standard practice in common law countries was for the producer of the film to be considered to be the ‘author.’ P&T proposed that copyright in films should be vested in the maker, and that the proposed Irish television station should qualify as the maker if it caused a film to be produced. P&T also sought copyright in sound and television broadcasts, for a period of 50 years, and that this copyright should cover copying, public performance and re-broadcast rights. This issue surfaced as late as 1962.¹⁰³

¹⁰² 5 November 1958

¹⁰³ In December 1962, Lennon urgently asked P&T whether it had any views on the representations made by the “Irish Film Industry,” in which they had asked that the protection for film copyright should be raised from 25 to 50 years. At this time P&T was not opposed, on the condition that the protection for broadcasting should also be so extended. Minute to Secretary I&C, dated 10 December 1962. NAI P&T TW 33937.

Cable Re-diffusion

P&T proposed a limitation of the period within which an action for infringement of copyright could be brought. In relation to cable re-transmission, it proposed that an action should not lie against the Broadcasting Authority “in respect of the transmission of the broadcasters to subscribers to a diffusions service.”

Use of Commercial Recordings in broadcasts

P&T raised the matter of the fees payable to the PRS for performances of copyright works. £19 000 per year was paid in 1958, for the broadcast of works, whether in live performance or in recorded versions. In addition, fees of £4 000 per year were paid to the IFPI¹⁰⁴ for the secondary right of broadcasting of commercial records. IFPI also imposed a limitation in the number of hours per week (needle time) in which commercial records could be broadcast.¹⁰⁵

P&T argued repeatedly that the Gregory Committee¹⁰⁶ had agreed that the additional remunerative performing right had not been intended in the 1911 Act. That Act, passed before the advent of sound broadcasting, had been intended to control the physical copying of records. In 1934 the right to remuneration for the broadcast of commercial records had emerged in a court action, through the court quixotically deciding that broadcasting amounted to ‘copying’.¹⁰⁷ The Gregory Committee had found that the additional right had been “enforced in an arbitrary and autocratic manner”, but did not recommend its removal, due to “vested interests,” according to P&T.¹⁰⁸

P&T argued that the record manufacturers agreed that the additional right was more in the interests of the Musicians Union than of the Record Manufacturers. “The Musicians’ Union wish to enforce the severest restrictions possible on the public performance of gramophone records in the interest of employment. This is a matter, however, that appears to be more appropriate to industrial negotiations than to copyright.” P&T

¹⁰⁴ International Federation of the Phonographic Industry

¹⁰⁵ In an undated Memorandum agreed in February or March 1961 between P&T and I&C, it is recorded that “At the moment Radio Eireann are allowed to play records for fourteen hours a week and, in fact, they play them for only about eight hours.” NAI P&T TW 33937.

¹⁰⁶ Great Britain, Gregory Commission, 1952, paragraphs 127 - 152.

¹⁰⁷ *Gramophone Company v Cawardine and Co.*, 1934. Indeed, MacFarlane claimed that the arguments put forward on behalf of the PRS in the 1934 case “have a fairly devious appearance” (1975, 204).

therefore recommended the abolition of the performing right in commercial recordings, but the retention of the protection of records from copying. They claimed that broadcasting was a free advertisement for records, and that broadcasting, far from reducing the market demand for records, probably increased it.¹⁰⁹ They also called attention to the fact that there were no “vested interests here in the manufacture of records. The matrices (in which the right subsists) are not made in this country.”

Performing Right Tribunal

While RE had not encountered difficulties in dealing with the collecting societies, it envisioned the possibility of future difficulties. The British provisions were for a judicial-style tribunal, which had proved “somewhat inflexible in practice.” Following the South African example, P&T proposed that a more informal tribunal should be established, along the lines of the Fair Trade Tribunal, with freedom to give evidence without the strict application of judicial procedure and with the right to bargain.

6.6.3 I&C decision to base the legislation on British practice and on the British 1956 Act

On 11 November 1958, the first of a series of ‘conferences’ between the departmental parties to the debate took place. RTE was made aware that the intention of I&C was to base the Bill on the British 1956 Act.

Doherty informed Straschnov of the decision to base the Irish legislation on the British Act. He noted that I&C were “not yet in a position to get down themselves to serious thinking on the provision of the Bill and will not be until at least they have got replies from the other Departments concerned.”¹¹⁰ Straschnov replied that “it is even more important that we should try to collaborate in the drafting of the complete Act as there are a great many provisions concealed in the British Copyright Act which are proving unfavourable to broadcasting and require subtle but very frequent changes.” In

¹⁰⁸ It is apparent that the confusion may have arisen in the British courts due to an attempt to fit the existing law to subsequent technological development, with the court failing to recognise that broadcasting and permanent copying were different categories of activity.

¹⁰⁹ Porter noted that arguments of this kind were revivals of earlier arguments about the value to record producers and sheet-music publishers of “‘song plugging’ when live performances of dance bands were broadcast over the air” (1991, 20).

¹¹⁰ The letter was drafted on 11 November 1958, and the final version, heavily amended by Connor at I&C, was sent on 17 November. “The Department of Industry and Commerce officials were appreciative of your

December 1958 Doherty recorded that Straschnov had been asked by P&T for instances of where the British Act was flawed, and for a summary of the broadcasting matters which should be covered in the Irish Bill.¹¹¹

6.6.4 South African Copyright Act and its influence on the RTE position

In 1959 Straschnov sent Doherty a copy of the South African draft Copyright Bill, which he characterised as being “more intelligible and more favourable to our interests.” He asked that organisations like the PRS, MCPS and IFPI should be prevented from “finding out prematurely what is being prepared in South Africa.” Doherty agreed¹¹² that the South African draft was simpler and more straightforward than the British Act and he indicated that he intended to base P&T proposals on the South African draft.

Straschnov believed the South African Bill was a significant improvement on the British legislation. Among the improvements were the provision for the use of broadcasts in schools without infringement, the reversion of records to the public domain after a period of copyright protection, an exception to allow broadcasters to import and use records which might otherwise be infringing copies,¹¹³ the equalisation of the copyright position of broadcasting and cinema exhibitors and the protection for television stations of still photographs taken from their broadcasts, as well as protection for continuous recordings. It is inescapable that the thrust of the SA Bill was in favour of broadcasters. Certain rights held by record producers were extinguished, or were not recognised, while broadly similar rights were newly accorded to broadcasters.

I&C had questioned whether there was any necessity to legislate for diffusion rights. Straschnov argued that there was, since he saw diffusion as a separate issue from broadcasting, involving a possible separate property right. He saw no potential difficulties for RE in relation to the diffusion of its own programmes, since the fees paid to the collecting societies was probably based on the number of receivers in Ireland, as was the case in Britain. He pointed out, however, that a Performing Rights tribunal which might be set up under the act should be instructed by legislation not to accede to requests from ‘petits droits’ societies for the payment of a second fee for diffusion rights. This was necessary, he argued, in the light of a Dutch decision, where the PTT

offer of assistance in this matter, but they must first settle, in principle, the changes or additions that are necessary in the Copyright law, which must then be submitted for Government approval.”

¹¹¹ 15 December 1958. Letter to Connor, Assistant Secretary of I&C.

¹¹² 26 February 1959.

¹¹³ So-called illegal ‘parallel imports.’

was forced by the Supreme Court to pay a second fee in respect of diffusion rights, even though the broadcaster had already paid fees to the collecting society on the basis of the number of subscribers. “... the Supreme Court considered the diffusion to subscribers was a further communication to the public, quite apart from broadcasting.” In relation to the diffusion in Ireland of foreign programmes, he argued for the enactment of the South African formulation, which was a simplified expression of “what is said in much more complicated style in Section 28 of the British Copyright Act”.

6.6.5 Initial P&T Submission to I&C

P&T’s submission included a copy of the draft South African Bill.¹¹⁴ Doherty admitted that the P&T proposals were based on the South African draft, and indeed, “that it was possible to improve the South African draft in many respects.”¹¹⁵ He argued that the performing right in commercial recordings should not be continued. He understood that the reason for the preservation of this right in Britain was due to “vested interests,” but that Ireland had no such interests.¹¹⁶ He argued that the broadcasting of records was a good advertisement, and that further payments for performances of records should not be made.

Doherty later sent a minute to I&C,¹¹⁷ enclosing a copy of a letter from Straschnov¹¹⁸ in which he had argued for special payments to be made by clubs which permitted members of the public to view television programmes. P&T did not see this as either practical or likely to raise any significant amount of revenue. However, it did propose that a residual right should be retained by the broadcaster to prevent abuse of its broadcasts through re-transmission or public presentation.

¹¹⁴ The submission “Proposed Copyright Legislation” was also accompanied by extracts from Straschnov’s correspondence.

¹¹⁵ 23 April 1959.

¹¹⁶ MacFarlane concurs with this view. “Britain still enjoyed in the 1950’s a dominant position in the field of record manufacture, and she still probably had the greatest interest in international recognition of a kind of performing right in favour of the product” (1975, 145).

¹¹⁷ 5 August 1959.

6.7 Negotiations and disagreements

6.7.1 The Inter-Departmental Conference of 1959

A Conference took place in I&C on 29 September 1959, at which JJ Lennon's position became clear.¹¹⁹ Lennon was deeply opposed to the RE proposals for general copyright exemptions in respect of literary, dramatic and musical works, on the grounds that it was a departure from the existing law, and from the British position. He opposed the derogation from authors' rights and he argued that the matter should even be considered further, if the broadcasters could not show that they could not manage without the change.¹²⁰

Lennon argued that decisions on the regulation of diffusion of broadcasts should be left to the Tribunal, and that no direction should be given in the legislation to the Tribunal on how to treat the issue. Lennon's activism on this matter is interesting, since it was likely that he himself would become the tribunal, if one were to be set up.¹²¹ He might justifiably be thought to have been arguing for his own freedom of action. RE argued that the issued needed clarity and a particular direction, in the light of the Dutch decision. "After some hesitation the Industry and Commerce people agreed that at any rate the principle that there should be no double payment was acceptable and suggested that by careful drafting any danger of this could be avoided."

Lennon argued that the only question which arose in connection with copyright in television and radio broadcasts was in respect of the public showing of television programmes. In 1958 at the "World Football Championship" in Stockholm, the organisers wanted the EBU to give an undertaking that the broadcast would not be shown in hotels, cafes, cinemas etc. The EBU had been unable to give the undertaking,

¹¹⁸ 22 July 1959.

¹¹⁹ On the I&C side were Andrew Kennan, Assistant Secretary, JJ Lennon. Controller of the Patents Office, Mortimer (also of the Patent Office) and K. Mangan, who was an observer from the Attorney General's Office. RE represented P&T, and the team consisted of Doherty, Straschnov and Fachtna O hAnnrachain. The record consists of a detailed Minute by Doherty, NAI P&T TW 33937.

¹²⁰ Straschnov argued that the change sought was small, and would not affect the revenues of authors. In France, a society controlled literary and dramatic works, as the PRS in Ireland did musical works. This made the task of dealing with copyright owners much simpler for broadcasters. Britain and Ireland did not have such a system. Straschnov argued that Ireland should legislate on the basis of the right given under Article 10 bis of the Brussels Act, to provide for compulsory licenses. RE proposed that if I&C was unwilling to legislate for a compulsory license, then a right to use a short extract without infringing copyright should be included. I&C could not be drawn on their reaction on this proposal.

¹²¹ As, indeed, he was. O Hannrachain alluded delicately to the prospect facing those appearing before the Controller, in a published discussion of the parliamentary debates: "some fears were expressed that a single person, irrespective of who he might be, might establish a precedent for himself or might embark on a line

and consequently had been forced to make additional payments for notional loss of gate receipts. Further difficulties were expected in the following year, when the Olympic Games in Rome would be televised. It was claimed that, probably as a result of the Stockholm incident, a new draft German copyright law would allow the Broadcasting Authority “to control showing of a television programmes in public for *commercial* purposes.”

P&T noted that, while in Britain no application had been made since 1957 for the right to show a television in programme in public, this was most probably due to the considerable number of television sets in Britain, which removed any impetus for public screening. In Ireland the case would be different, as there would be few sets when the television service would be first established.¹²² Difficulties were foreseen in relation to the relaying of sports events in these circumstances, and also in relation to cinema films. The cinema competitors presumably would have objected to the television station showing recent films if these broadcasts could be seen in public venues. RE was concerned that it might be left to rely on “only old and uninteresting films”, unless the power to control the public screening of television was granted to the Authority. Lennon refused to agree to the suggestion from P&T, and the Chairman said that the Minister would have to come to a decision on the issue.

Protection of commercial recordings

Doherty argued that broadcasting records was an assistance to the record manufacturers through advertising and he claimed that the British 1934 case which had erroneously awarded rights of prohibition and payment had led to abuse. Lennon countered that the position was now accepted in Ireland as in Britain. He said that there were by then manufacturers of records in Ireland and that they had approached the department, seeking the consolidation of the right.¹²³ He claimed that the matter would be contentious and that the Minister would have to have very strong grounds for not following the British example. If the international trend was against these rights, he

of reasoning that would be against the interest of copyright owners or against the public interest generally” (1963, 41).

¹²² Estimates of the number of television sets in Ireland in 1958 ranged between 20 000 and 22 000, (Savage, 1996, 136).

¹²³ Doherty claimed that the only representations which Lennon had received on behalf of record producers had been from British record manufacturers, “apart from people like Waltons who have no standing as Manufacturers.” RE Minute of September 1959. NAI P&T TW 33937

might accept it, but in the absence of such a trend, he would not agree to the RE proposal.

Straschnov argued that internationally there had never been a claim for the exclusionary right. Record producers were “really interested only in money.” Germany had recently legislated to give a right of prohibition to performers, not to producers, so there was no international consensus on regulating the issue.

This was an important matter for RE, which was prepared to accept the remuneration of record producers, but was opposed to the right to prohibit broadcasting. Already RE had experienced difficulties in relation to “celebrity recordings” and difficulties were expected between the new television service and the Irish Federation of Musicians. The IFM had been endeavouring to reduce the ‘needle-time’ allowed on RE and were expected to claim that the interests of their members were being damaged by the use of commercial recordings. While a large broadcaster like the BBC, with a number of orchestras, was in a position to fill more of its schedule with live music broadcasts or ephemeral recordings, RE was not in the same position. RE insisted that there was in any case in Ireland a “shortage of musicians of good quality.” Presumably this would weaken the case for forcing RE to rely on live music. RE also advanced the argument that the IFPI did not collect fees from other venues, such as cafes, but only from broadcasters.

The Chairman agreed that the P&T compromise to have only a remunerative right, not an authorisation right, would be considered. Lennon, however, would not accept any departure from the British position, unless the IFPI provided a statement that it did not have an objection.

Ephemeral Recordings

Lennon did not see why the British provisions, allowing ephemeral recordings to be kept only for 28 days, would not suffice for RE. “In fact he did not seem to have any clear ideas about current techniques in pre-recording, editing etc,” according to Doherty. It was agreed that a period of six months from the date of first broadcast would be used, and that all copies of the recording would then be destroyed.

Television broadcasting of films

Straschnov raised the issue of the televising of films. Lennon indicated that on this point it was proposed to follow the terms of the British Act. Straschnov argued for the scheme of the South African draft, broadly that the person commissioning or paying for the making of a film should be the copyright owner, unless separate contractual arrangements were made. Doherty later noted that "Dr Lennon said the film companies were strong bodies well able to look after their own interests and that it would be better to leave well enough alone." The record shows that he was informed that the matter "was much more complicated than that." The crucial point at issue was not with regard to large film companies, but referred to the case of broadcasters making or commissioning films for their own use, and exchanging these films between themselves. "A small television authority ... would not have the time or the staff to clear complicated questions quickly," according to Doherty.

Desirability of coming to a unified view

Doherty suggested seeking to come to a general agreement on the issues in contention, on the grounds that "It was not right that differences of opinion between Departments on a highly technical matter like copyright should be sent forward for Government decision and every effort should be made to come to an agreement." The Chairman agreed that every effort would be made up to drafting stage so that no major differences of opinion should be evident at the time the Bill was published.

Performers' Protection Bill

The scheme of a Performers' Protection Bill¹²⁴ was discussed in parallel with the Copyright Bill. Doherty was dissatisfied with the manner in which P&T representations on this had been dealt with by I&C, and with a Memorandum which had been issued by Lennon on 18 September 1959. Doherty questioned the urgency of the matter, and at the meeting reiterated the strong RTE view that the Bill should be delayed until after broadcasters' rights had been secured in a new Copyright Act.

Lennon claimed that the Irish Federation of Musicians (IFM) had made representations to the Department urging the passing of a Performers' Protection Bill, though the IFM

¹²⁴ The intention of this Bill was to protect musical and dramatic performers from the actions of persons who might gain from piracy of their performances.

had given no details of specific cases of the making or use of pirated recordings. Lennon said that he thought that the rights given to performers in the Bill were rights which he believed they already had: "if the Minister ... thinks these rights should be defined by legislation, he ... did not see why the matter should be delayed."

Straschnov brought Lennon to agree that radio broadcasts should not be recorded other than for private use. He argued that broadcasts merited legal protection. It was, he argued, technically impossible to make pirate recordings surreptitiously in a theatre, yet that was the primary arena which the existing law was framed to control. If the new Performers' Bill were passed without additional protection for broadcasters, it would give performers rights in the commercial use of recordings which were themselves made illegally from broadcasts. It would appear that Lennon had been influenced by the fact that Britain had legislated in this area in the Dramatical and Musical Performers' Protection Act 1959. Straschnov advanced the idea that an international agreement on Neighbouring Rights would be concluded by the end of 1961, and that British would then be forced to amend its Performer's Act again as a result. P&T were prepared to agree to a Performers' Bill begin introduced concurrently with the Copyright Bill, but urged that action should be delayed on the point until the draft of the Neighbouring Rights Agreement was issued in 1960.

The Chairman agreed that P&T were entitled to have their views on the Performers' Bill put to the Minister separately from those of I&C before a Scheme of Bill was sent to Government¹²⁵. He also undertook to make enquiries on the status of the Draft Neighbouring Rights Convention.

RE reaction to the meeting

Lennon continued to present strong opposition to the RE view. Doherty summarised the background to the discussions with I&C, and detailed the P&T actions and position on the various issues. The development of radio and television broadcasting, and the development of exchange systems such as Eurovision, had led to a situation where the various rights involved were a "nightmare to the broadcasting and television authorities." Their responses to I&C were grounded on the need to secure a workable legal framework for broadcasting. He wrote that "Straschnov immediately formed the impression which we had got from previous discussion that the present Controller of the

¹²⁵ By December 1959, it had been decided not to proceed with the Performers' Bill. Minute from Doherty to Kennan, 16 December 1959.

Patents Office ... was not able to argue against the Post Office proposals on the merits with Dr Straschnov but when argument failed he just declined to argue and said they were not prepared to agree to such and such a proposal.”¹²⁶

Doherty accepted that the British Act had many merits, but that it was not necessarily appropriate for Irish conditions and that “there does not appear to be any reason why the Irish provisions should not be different where there is a case for it.” Similarly, in regard to strong opposition from Lennon to a proposal to allow the broadcast of short extracts from literary or dramatic works, Doherty saw this as being impelled by the proposal’s “going a little beyond what was in the new British Act.”

6.7.2 Impasse between departments

The dispute between P&T and I&C continued. In April 1960, MacCarthy wrote to O Broin, seeking to expedite the P&T consideration of the Bill. “Public announcements of the intention to introduce a new Copyright Bill have been made by the Minister since 1958 and we are anxious to avoid any appearance of delay in getting this to Government ...”¹²⁷ O Broin replied that the Bill did not concern matters that “could be examined in odd periods of relaxation. They require fairly full-time study. If we had secured a greater degree of agreement with your department on the points put forward on behalf of broadcasting and television I think the whole question would not require such an amount of study by us at this stage.”¹²⁸

A second inter-departmental ‘Conference’ was held in I&C in September 1960, and again Lennon’s implacable opposition to P&T delayed agreement.¹²⁹ Kennan called the meeting, in an effort to iron out remaining differences, and to discuss the points raised in a letter from Doherty of 31 August 1960. however,

“Mr Kennan’s hopes remained to a considerable extent unrealised, mainly due to the intransigence of Dr Lennon, who seemed to have his mind made up in advance on every point and was unwilling to listen to argument. ... Detailed arguments ... already been

¹²⁶ NAI P&T TW 33937. Minute by Doherty. Proposed Irish Copyright Act. 3 October 1959.

¹²⁷ Minute of 7 April 1960, MacCarthy to O Broin.

¹²⁸ Minute of 22 April 1960, O Broin to MacCarthy.

¹²⁹ 28 September 1960.

advanced by the Department of Posts ... were often summarily dismissed on the grounds that Dr Lennon felt there should be no derogation from authors' rights."¹³⁰

An argument regarding the broadcasting of operas could not be resolved and the P&T insisted that it should go to government for adjudication. On the issue of 'reasonable extracts' of literary works being broadcast, the two sides could not agree. On Neighbouring Rights and Performers Rights, Kennan inclined to support P&T, while "Lennon did his utmost to dissuade the Chairman and would not give way on any point. He threw doubts on the likelihood of a Diplomatic Conference taking place early next year and on the likelihood of the acceptance of the Draft Convention."

P&T had raised the possibility of making special favourable copyright provisions for schools broadcasting. Lennon resisted this and claimed that he had the agreement of the Department of Education on the point. P&T, acting in the interests of schools and without the support of the Department of Education, had proposed that schools should be permitted to make and use for educational purposes off-air recordings of works broadcast specifically for this purpose.¹³¹ I&C would not agree, Lennon again arguing that such action "would be a serious reduction of the author's basic copyright which the Act is intended to establish."

Terms of the 1961 Draft Memorandum for Government issued by I&C

An undated¹³² Draft Memorandum for Government drawn up by I&C is extant.¹³³ This claims that the British Act, having been a model for legislation in Australia, New Zealand, Canada, South Africa and Ghana, was the model of the Irish Bill. The memorandum argued that the British Act took adequate account of technological developments.

¹³⁰ NAI P&T TW 33937. Minute by O hAnnrachain.

¹³¹ In 1970, the British Society of Authors was opposed to the growing demands from the Open University for the right to use copyright material cheaply in its programmes. The editor wrote that "all the new media are, as it were, streamlined to facilitate copyright infringement. Anyone can now make his own good-quality sound recordings of broadcast programmes and, when systems now being developed are on the market, this will also be true of video-recordings. ... it is almost impossible to enforce ... limits." *Creators and Users, The Author*, Winter, 1970, 147.

¹³² But evidently 1961. NAI P&T TW 33937.

¹³³ It is associated with (and referred to in) Doherty's aide memoir of February 1961, and is described there as the Revised Memo for Government.

A Council of Europe agreement¹³⁴ which Ireland had signed would be given effect in the Bill, and the agreed rights were later to be extended to foreign broadcasters by Order. The Bill was intended to give rights to the producer of films, as if he were the author, as argued for by P&T. The Bill also anticipated the likely agreement which was expected in regard to the protection of records, and aimed to provide protection as was outlined in a draft ILO / Unesco / Berne Union Agreement which had been circulated. A tribunal to regulate the activities of the PRS and of the PPI and IFPI was also to be provided for, with the Controller of the Patent Office being the sole member of the Tribunal.

Continuing dispute between departments

The Departments of Finance, External Affairs, Education and Justice agreed with the I&C proposals. P&T still expressed reservations, and a number of issues remained in dispute. P&T were of the view that authors must be prepared to compromise on the protection of their rights, since they were to be the financial beneficiaries of a wider market for their works in new media. P&T also argued that broadcasters ought to be facilitated, owing to the time demands of their programming, by not having to seek permission for the use of short extracts and by having a blanket right to broadcast any recording available commercially without additional permission. In the case of a compound musical work, which incorporated a literary or choreographic work, P&T wanted to be able to obtain full permission in respect of all rights from the owner of the musical copyright, although being prepared to pay reasonable remuneration to the other rights owners. This was for reasons of administrative convenience. I&C were unwilling to accede to these proposals, in particular to the removal of the right of copyright holders to prohibit broadcast of their records, as it "would be an unjustifiable curtailment of the basic right of the authors ... to authorise or withhold permission to use their works."

P&T and I&C differed on anonymous and pseudonymous works, where P&T wanted the publisher to be in a position to authorise the use of these works, and based this argument on a reading of the Berne Convention. I&C disagreed, on grounds that the publisher had no right to grant such permission.

¹³⁴ Ireland signed the European Agreement Concerning Programme Exchanges by Means of Television Films in 1958, but did not sign the 1960 European Agreement on the Protection of Television Broadcasts. (Porter, 1991, 22). Ireland did sign the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, but did not ratify this until 1979. Council of Europe, *The Private Copying of Phonograms and Videograms*, Strasbourg, (1984: 109).

Commercial records - prohibition

P&T continued to argue that the rights of manufacturers of commercial records should not extend to authorisation and prohibition, but only to a right to remuneration for use. I&C would not accede to the P&T request, on grounds of the necessity for unfettered ownership on the part of record manufacturers, and on the grounds that the right to remuneration flowed from the right to authorise or prohibit. They sought refuge in the ability of the Tribunal to prevent abuse “either by a single recording company or any combination.”¹³⁵

Dispute over film copyright

I&C would not agree with P&T to vest through the Copyright law the ownership of a commissioned film in the commissioner or payer, and insisted that any such arrangements must be made on a contractual basis between, for example, the television authority and its servant.

P&T sought protection in the case of films being broadcast from action by owners of embedded artistic works, such as music, and argued that this was in line with French practice and with the Council of Europe agreement which had been drawn up to cover exchange of films. I&C were unwilling to prescribe a regime in copyright law, and argued that this was again a matter to be dealt with contractually by the maker of the film.

P&T wished the provisions of the Act to apply to all copyright works. I&C proposed that the Act should apply only to works created after the date of the coming into effect of the Act, and that pre-existing copyright should be treated on the basis of the law as it had stood before the passage of the Act.

Government authorises further discussion between departments

Doherty set out the issues which had not been resolved between the two departments.¹³⁶ It would have been regrettable if the Minister for P&T had had “personally to study the disputed provisions of a very complicated piece of legislation.” He noted that his

¹³⁵ NAI P&T TW 33937. February 1961

Minister had obtained government permission¹³⁷ to have the issues examined further in his Department. He hoped that O Broin and McCarthy¹³⁸ would be able personally to handle to the discussion on the issues, since this would reflect RE's view of the importance of the issue.

He criticised I&C, and Lennon in particular, for having a "fear of departing in any way" from the British 1956 Act. Lennon "in particular seems to be prepared to take the British Copyright Office and the British Act as his gospel and opposes everything not in the British Act." He quoted McCarthy as not thinking it "reasonable that authors' rights should be reduced to a lower level than that obtaining in Britain." Doherty noted Lennon's position on the need to "protect the author against the big battalions" but argued that authors and composers were themselves "big battalions," writing that the only interest of P&T was to be able to use copyright work, with remuneration, "without frustrating delays in seeking various copyright owners." The insatiable demand of broadcasting was the only motivation for seeking a practical means of using copyright work.

Doherty argued that MacCarthy was particularly unadventurous in turning down the P&T proposal to abolish the right of owners to prohibit the broadcast of commercial records. While MacCarthy accepted that P&T had logic on its side, "we think, however that these matters will have to be debated in a wider forum, and that the Minister cannot be put in the position of pioneering innovations in such complex and far reaching matters. Some prior international accord would be necessary." Even despite the agreement of the phonographic industry in the Draft Convention to abandon the performing right in favour of a remunerative right, "Industry and Commerce are persisting in giving the record manufactures a right which they have agreed in principle ... to give up. Here again it appears to be a fear of departing from the British Act." He argued that, whereas this made sense in Britain, which had a recording industry, the economic grounds underpinning the argument did not apply to Ireland.

¹³⁶ Proposed Copyright Act. Memo regarding certain provisions in the Scheme of the Bill on which agreement has not been reached between the Department of Industry and Commerce and the Department of Posts and Telegraphs. February 1961.

¹³⁷ On 6 February 1961.

¹³⁸ J.C.B. MacCarthy, Secretary of the I&C.

Approach to agreement

By March 1961, it had emerged that agreement could be reached between the two departments on all issues, except the right of prohibition for commercial recordings, which was proving intractable.¹³⁹ The Minister for I&C was to become involved again on the point. If he was unwilling to accept the P&T position, the two departments had agreed that that single issue should be taken for adjudication to the Taoiseach “who took the decision in the first instance to maintain the right.” O Broin suggested that Lemass had taken the decision because he had “in his mind the possibility of Trade Union opposition to the abolition of the right which enabled them to press the record companies to impose a limit on the broadcasting of records.” He set out a number of arguments, derived from Doherty’s minute, which should influence Lemass in a decision. The workers concerned were mainly the musicians and were members of the international performers’ organisations. These organisations were parties to the draft convention which was likely to sweep away the performing right. Furthermore, he claimed that the part-time membership of the IFM were taking employment away from full-time musicians.¹⁴⁰

O Broin suggested that if Lemass was not prepared to agree to the dropping of the prohibition right in commercial recordings, in advance of international agreement on Neighbouring Rights, then the Bill should be postponed until after the Diplomatic Conference, emphasising the depth of opposition in P&T to the right of prohibition (and, therefore, to the right of limitation of needle time).

An agreed Memorandum¹⁴¹ on matters in dispute between the two departments was prepared. The exclusion of broadcasting from the right to read or recite a copyright literary or dramatic work was deleted. Broadcasting and theatre readings were placed on an equal footing. P&T dropped their proposal to have the copyrights in works embedded in composite musical works, such as literary texts or choreography, automatically included with the musical copyright.

¹³⁹ Minute of 1 March 1961, to McCarthy on the proposed copyright bill, in unsigned copy, but undoubtedly from O Broin, Secretary of P&T.

¹⁴⁰ O Broin also argued that the “standard of musicianship was unfortunately low here and the Federation of Musicians might direct its attention to that matter.”

¹⁴¹ It appears from a later Minute from S O Seaghdha to O Broin of 9 April 1962, that the meeting which led to this agreement with I&C was held on 15 February 1961, between O Broin and JCB McCarthy. NAI P&T TW 33937

I&C reluctantly agreed with P&T to abandon the performing right in commercial records. In agreeing to the P&T position, I&C accepted the bulk of the P&T arguments. In addition to the arguments described above, I&C were motivated by the fact that Radio Eireann did not in fact use the full quota of needle time which it had been allotted by the manufacturers. P&T had claimed that listeners would not tolerate more recorded music. Since the full quota was not being used, it was argued that there would be no practical difference if the right to authorise and prohibit were removed. "This does not mean that the omission of provision for a performing right will not be opposed by Irish musicians and the labour interests which represent them but it does mean that it would be possible to answer their criticisms."

On the vagueness of the copyright ownership of films, the departments agreed that careful drafting would remove ambiguity. I&C agreed with P&T that an author who allowed his work to be used in a film should not be allowed thereafter to prohibit the showing of the film on television. This had been a matter "of very great importance for the Irish Television Authority." P&T agreed to drop their proposals on the educational use of television, as the insistence of I&C.

The only point of disagreement which remained was in relation to transitional provisions. I&C wished the Bill to apply only to works created after its enactment. P&T retained their right to object to any of the transitional provisions which might be proposed.

Apparent Agreement on the 1962 Copyright Bill

The Government gave authority on 2 May 1961 to the Minister for Industry and Commerce to have a Copyright Bill drafted.¹⁴² The Heads of the Bill proposed that a right of prohibition should exist. In the case of commercially issued recordings, it was a requirement that remuneration should be paid; in the case of un-issued recordings, an absolute right of restriction was proposed. The Bill was agreed by the Cabinet on 17 July 1962 and introduced in the Dail two days later.

¹⁴² NAI Taoiseach S 17008 A, Copyright Legislation.

Continued RE interest

Doherty, though he had retired from P&T by April 1962, was retained as an advisor to deal with the Copyright issue, and continued to attend EBU meetings on behalf of P&T.

The Rome Convention of 1961 had made provision for a right in certain circumstances to make ephemeral recordings of commercial records without infringement of copyright. O hAnnrachain wished to have this right accorded in law to RE. He again made a point about the undesirability of carrying over into the Irish draft bill formulations from the British Act and criticised the draft Bill for not taking into account expert published criticism. The agreement on directing the Copyright Tribunal to disallow claims for additional fees in respect of broadcasts also carried on a diffusion service, which had been agreed with I&C,¹⁴³ had not found its way into the Draft. O hAnnrachain wrote to O Broin that this point was "too important to be overlooked."

The formal P&T statement was issued as a Minute¹⁴⁴ to the Secretary of I&C, and, in addition to O hAnnrachain's points, it dealt in detail with the transitional provisions of the Draft Bill. O Broin, while agreeing with most of the Draft, argued that P&T had not been in a position to obtain the advice of copyright experts, because of the confidentiality requirement.¹⁴⁵ The views of P&T were presented in two parts, one dealing with broadcasting, the other with general matters, and were in line with O hAnnrachain's minute of 30 April 1962. Kennan responded to O Broin¹⁴⁶ indicating that I&C now agreed to allow a right to make ephemeral recordings of commercial records, as allowed by the Rome Convention.

P&T / RE drawing back from agreement

By July 1962, O Broin appeared to have turned against even the legal right of remuneration for record manufacturers for broadcasting commercial records.¹⁴⁷ Doherty wrote that there would be "consternation in certain quarters at such a suggestion," although McCarthy, the Secretary of I&C, might not be opposed. He himself had been

¹⁴³ Recorded in a letter and document dated 1 July 1960.

¹⁴⁴ 5 May 1962.

¹⁴⁵ Given Straschnov's involvement with RE, and in particular, the breaches of official secrecy which this represented, O Broin's argument on this point appears misleading, at least superficially.

¹⁴⁶ 25 May 1962.

¹⁴⁷ Letter of July 1962 to O Broin from Doherty: "As a result of some conversation in Strasbourg you were convinced that a decision embodied in our Copyright Draft Bill to grant remuneration to Record Manufacturers for the broadcasting of records was wrong and you proposed to take the matter up - at least to try to get the payment permissive."

opposed from the beginning to remuneration, but claimed Straschnov had “got cold feet”, since he had observed an international trend towards payment.

Doherty urged O Broin to seek to make a reservation to the Rome Convention, to allow Ireland to refuse to pay remuneration.¹⁴⁸ His grounds were industrial. Whereas Britain had a large record industry and it was therefore in her commercial and industrial interest to grant remuneration, Ireland had no industry “except a few ‘pressings’ and the advertisement by broadcasting will give them all the assistance they require.” Doherty agreed that broadcasting supported rather than hindered the recording industry. He argued that the Musicians’ Federation were wrong-headed in their opposition to a change, since their actions were “almost entirely directed towards doing something to the benefit of people living outside Ireland, and [that there was] nothing in the nature of a quid pro quo.” O Broin requested that payment should be on a “permissive’ basis only.

On 24 July 1962, Doherty wrote to O Broin, after the Bill had been introduced to the Dail, indicating that he thought that they would not succeed in abolishing the right to remuneration. However, he believed that it was to their advantage that the musicians and producers were seeking to have their right of prohibition and permission restored. He drafted a response for O Broin to send to MacCarthy, as a “last kick” in their attempt to have the remuneration right abolished. A Minute from O Broin to MacCarthy of 25 July repudiated the suggestion that the remuneration right was the P&T suggestion, and argued that they had been coerced into accepting it in order to secure the abolition of the performing right. “I frankly can see no case for paying the Record Companies for the privilege of giving them immense publicity on broadcasting and television.”

MacCarthy on 30 July 1962 expressed surprise at the *volte face* on the issue by O Broin, since “what is written into the Bill is in fact your Department’s own proposal.” While not implacably opposed to making the change, MacCarthy was not happy to do so, and he copied to O Broin an anonymous internal note on the issue.¹⁴⁹ While I&C was not prepared readily to move from the position agreed on with P&T in earlier meetings, they were prepared to entertain representations from P&T and Radio Eireann once the Bill had been published. They noted, however, that the matter would also be open to

¹⁴⁸ This was permitted under the Rome Convention 1961. In addition to Congo, Fiji and Niger, Luxembourg, “which has no performers, no indigenous record industry, and one of the most commercially aggressive broadcasting organisations in the EC” had entered a reservation on this issue (Porter, 1991, 21).

¹⁴⁹ This included a report from the Attorney General, received in connection with the drafting of the Copyright (Foreign Countries) Order, 1959, which had considered the British 1934 Cawardine court case which had given rise to the unexpected performance right. The legal advice was that the Irish courts would be likely to follow the reasoning of the British courts, if called upon to adjudicate on the issue.

representations from others, and “it will be surprising if strong representations are not made by the Companies when they see the proposed reduction of their rights.”

Economics of Irish record industry in relation to Irish broadcasting

On 8 August 1962, MacCarthy responded, agreeing that O Broin’s suggestion of the removal of the right to payment for the broadcast of commercial records had “considerable merit”, and going so far as to suggest that it might prevail, if the issue was being considered on its merits, rather than in the light of history. While he saw no possibility of the Minister changing his mind on the matter, as the right had existed for many years, he claimed that the representations from the Musicians Union had not been not accorded “undue importance.” O Broin did not leave the matter as it stood, and on 22 August wrote again to MacCarthy, continuing to argue against the remuneration right. “The enormous Record Industry ... must be quietly amused at the Administrations which actually pay them for giving their goods the best advertisement they can get.”¹⁵⁰ O Broin saw the attitude of the record companies as an irrefutable argument that the playing of records was to the advantage of record companies, and that payment should not be made. He asked that the Minister be directly asked to support RE on the issue, saving it £9 500 per year, and saving the producers of sponsored programmes on RE £15 000 per year, since they had to pay £1 for each commercial record played. On 28 August MacCarthy refused to take any further action. In the light of this, RE chose to send the entire correspondence to their own Minister, so that the issue could be discussed at Cabinet, or bilaterally with Jack Lynch, Minister for Industry and Commerce.¹⁵¹

O Broin sent a submission to Michael Hilliard, Minister for Posts and Telegraphs, in which he recorded that the reason for his change of position in relation to the remunerative right arose as a result of a Council of Europe meeting which he had attended in June 1962.¹⁵² He enclosed a lengthy letter which had been received from Straschnov, dated 4 September 1962 on the issue and asked that the letter should be copied to Lynch. Straschnov had reported that four countries in which the British 1911 Act had previously been in force had departed materially from its provisions. Ghana had

¹⁵⁰ He enclosed a cutting from the *Manchester Guardian* which set out the relationship of the record industry to Radio Luxembourg. According to the report, the record companies found “that it pays them better to play their products than to talk about them.” Of the 36 hours of the Luxembourg service in English in one week in 1962, 26 were sponsored, with EMI sponsoring eight hours, and Decca five.

¹⁵¹ Minute from S O Seaghdha to J.A. Irvine, Head of Management, RE, 30 August 1962.

¹⁵² 13 September 1962.

not provided for a performance right in records.¹⁵³ The Canadian Royal Commission on Copyright had proposed the abolition of manufacturers' rights in broadcasts and in public performance,¹⁵⁴ South Africa had provided only for a remunerative right, and Rhodesia and Nyasaland had followed the South African example. While Straschnov admitted that neither Ghana nor Rhodesia and Nyasaland had indigenous recording industries, both Canada and South Africa had. He also set out the provisions of a number of European countries, and in almost all cases, no performing right existed, even in those states which had large recording industries, such as Denmark, Germany, Italy and France. He also noted that the United States, "probably the biggest record producer", did not provide for a performing right, and neither did the other American countries.

Straschnov argued that, on the presumption that there was "not much of a record industry" in Ireland, that the money paid by Radio Eireann was leaving Ireland. "It is therefore economically unsound to enact a right which in fact is for the sole benefit of foreign industries. It would be much more reasonable to introduce a right of this kind into the Act only when there is an Irish industry big enough to warrant protection."

Final decision: Defeat for P&T position

Hilliard wrote to Lynch on 24 September, asking him to read the correspondence and arguing that there was a "very strong case" for agreeing with O Broin's position. Lynch responded on 4 October, refusing to accept the P&T position. A Memorandum for Government of 29 October 1962 records P&T's enforced agreement with these provisions.¹⁵⁵ The Bill could now proceed through its parliamentary stages.

¹⁵³ In 1959, the Irish Embassy in London was requested by the Ghanaian High Commission to provide copies of Irish legislation on IPR. It is possible that this led, indirectly, to the references in Dail debates and elsewhere to the Ghanaian legislation, when arguments were put for following the precedent of the British 1956 Act. However Straschnov, in his letter of 4 September 1962, noted that the Ghanaian provisions departed from the British on the issue of performance rights in records. NAI EA London Embassy Files. L102/4/5 Miscellaneous enquiries regarding Irish Acts and Laws 1947 - 65.

¹⁵⁴ In Canada, these rights had been granted to gramophone companies in the 1921 Copyright Act, although they did not seek to exercise their rights until the late 1960's. However, the rights were abolished in Canada in 1971. (MacFarlane, 1975, 149).

6.7.3 The 1962 Copyright Bill: Parliamentary and Public Debate

Once the Bill was published, the debate entered a second, public phase, much of which went over ground previously argued within the administration.

6.7.3.1 Parliamentary support for the record industry

In December 1962 O Broin wrote to Doherty, having been informed by Lennon that Deputy Dockrell had proposed an amendment to the Bill which would increase the term of protection for gramophone records and photographs from 25 to 50 years.¹⁵⁶ “This is apparently in support of representations made by the industries concerned.” Doherty advised that the response should be as in the case of the increase of film protection, namely that P&T would agree, if RE gained the same protection. Lennon contacted P&T, on 15 December, as a further parliamentary amendment had been moved, whereby ephemeral recordings, as provided for in Section 12, sub-section 8, would have to be destroyed in all cases.

In mid-December 1962, O hAnnrachain, who had been at an EBU meeting in Geneva, sent a minute to O Broin. Straschnov had commented on the Copyright Bill in a letter of 5 December.¹⁵⁷ Straschnov’s view now diverged from those of Radio Eireann in some respects, although this had already been apparent in his early agreement with the principle of a remunerative right for record producers for broadcasts of their property. Straschnov believed that the PRS and the IFPI would make strenuous efforts to have the Bill altered in their favour. “The PRS will take especial exception to the definition of ephemeral recordings (even if, officially, the principal task of the Society is not to protect mechanical rights)”. He expected “vigorous protest” from IFPI. He believed that I&C would be glad to take advantage of the protests from such organisations to delete those P&T provisions which they had accepted only reluctantly. “It would be a good idea if we had ready a justification of all these clauses which are disputed with a view to preserving them unaltered.”

O hAnnrachain¹⁵⁸ noted that Straschnov, in agreeing to the 50 year term of protection for gramophone records, suggested that this should apply only to protection against copying,

¹⁵⁵ 29 October 1962. NAI Taoiseach S 17008 A, Copyright Legislation.

¹⁵⁶ 12 December 1962.

¹⁵⁷ Straschnov made a number of criticisms of the technical drafting of the Bill, on grounds largely of contradictory statements and unrealistic distinctions.

¹⁵⁸ Minute to O Seaghdha, 28 December 1962.

and that the public performance and broadcasting remuneration right should apply for only 25 years. O hAnnarachain thought well of this for “any further bargaining with the Department of Industry and Commerce.” On 1 January 1963, P&T agreed to the provision for the destruction of ephemeral recordings.

6.7.3.2 Representations from interested parties

British Joint Copyright Council

Kennan of I&C informed O Broin of representations which had been received from the British Joint Copyright Council, and sought to arrange a meeting between I&C and P&T.¹⁵⁹ The BJCC¹⁶⁰ made detailed representations.¹⁶¹ They objected strongly to the right to recital and reading on radio and television. Such a right had been excluded from the British Act, “we suggest with reason.” The BJCC argued for various limitations on ephemeral recordings, including the restriction of the recording medium to (gramophone) records and cinematographic films. This would have been expensive and cumbersome.¹⁶²

The BJCC addressed itself to what it termed the reputed “quasi-monopoly” of the PRS, asserting that this monopoly was illusory, because of the existence of the public domain. This was a doubtful compensation, however, given the fact that the bulk of the musical and other works which broadcasters and consumers were interested in were still in copyright.

On the question of PRS attitudes to cinema exhibition rights, the BJCC Memorandum alluded to “the more unscrupulous cinema proprietors, or those whose cinemas were situated in remoter places”, who might be prepared to risk actions against them for infringement, if a compulsory blanket license was not required of them by the Act. Since most films were American, and not covered by the PRS, British film-makers would suffer. The only solution which the PRS saw, in the absence of a requirement for blanket licensing, would be for them to take infringement actions in respect of selected films,

¹⁵⁹ 8 January 1963.

¹⁶⁰ The British Joint Copyright Council, Memorandum on the Irish Republic Copyright Bill 1962, dated 13 December 1962. 15 pages.

¹⁶¹ On behalf of member organisations such as the Society of Authors, the Performing Rights Society, the Mechanical Rights Society and the League of Dramatists.

¹⁶² A marginal note by an official noted the evident exclusion of more practical substrates, “tapes and video-tapes.”

and thereby seek at great expense to establish the law by making cinema owners realise that it was cheaper to take out a license. They did not see this as an attractive strategy.

In relation to the use of music in films, the BJCC argued that RE should take out a blanket license from the PRS. The BJCC saw technical advances leading to the stage where almost all broadcasts would be by means of films, and they were concerned about the effect the 'emasculatation' of authors' rights would have in this circumstance.

Irish Federations of Musicians

The Irish Federation of Musicians sent representations to the Department of I&C early in January 1963. The Federation, which saw the Bill as fraught with many dangers for performers, circulated a letter to all members of the Oireachtas. The IFM opposed the use of records in public places. The provision "would enable very many hotels and holiday camps, including some of the largest and most successful, to use records instead of paying bands without any permission from anybody and without making any payment."¹⁶³

On the issue of appeals to the Tribunal in respect of the setting of equitable remuneration for the playing of records, the IFM was concerned that trade union representatives were not entitled as of right to be party to proceedings before the Tribunal. In what the IFM believed were the absence of performers' rights in recordings, the performers were relying on the record manufacturers' rights as their protection. While they did not object to the right of appeal to the tribunal against a refusal to set an equitable fee for public performance, "we must protest emphatically against legislation that will place the musician on the scrap-heap."

The IFM made reasonable objections to the proposed 25 year period for protection of recorded music, given the "extremely high and durable character" of modern recordings. Performers could easily find themselves in their own lifetimes in competition with public domain recordings of their own performances. They proposed that the period of protection should be increased to 50 years, as in Britain, or there would be an encouragement to Irish performers to have recordings made in Britain rather than in Ireland.

¹⁶³ NAI P&T TW 33937. January 1963

In addition, the IFM objected to the general shape of the legislation, where a range of new rights was being created specifically for Radio Eireann, while no new rights were being created for performers.¹⁶⁴ The Federation maintained that the broadcaster was merely the carrier for the actual creative work of the performer, yet it was the broadcaster, not the performer who was being favoured in the legislation.

Patrick Malone of the IFM also submitted a detailed memorandum setting out the Federation position. He argued that technological development was narrowing the employment opportunities for musicians, and that there would be a resulting serious decline in the standard of musicianship in Ireland. "There will be fewer music students and, for a time, a comparatively small profession consisting of the more expert practitioners remaining." The IFM accused Radio Eireann of using recorded music extensively, and asserted that sponsored programmes consisted almost entirely of recorded music. Their opposition was reinforced by the fact that the records used were mainly imported. The IFM also noted the decline in theatrical employment of musicians, with only the Abbey Theatre then retaining a theatre orchestra.

The Federation argued that dance promoters were also relying more and more on recorded music, and that, since this was to be countenanced legally in the Copyright Bill, they would rely even more on it. Performers should have a right to prohibit the commercial use of their recordings. They did not insist, however, that all recorded music should be excluded on Radio Eireann, since they recognised it might not have the funds to employ live musicians throughout the schedule.

RE Response

Doherty had suggested¹⁶⁵ that pressure might have come on I&C from the Irish Federation of Musicians to "retain the performing right provision to enable them to put pressure on Broadcasting and Television through the record manufacturers to restrict the playing of records." He had proposed that P&T should prepare a two-pronged response to any IFM pressure. Firstly, the membership of the Federation was, he claimed, 95% part-time, and that they were thus in a poor position to claim loss of earnings. More controversially, he claimed that if their musical "standard were reasonably good" they would secure more broadcasting work themselves. The IFM should negotiate directly

¹⁶⁴ A marginal note refers to the proposed Performers Bill, which was not enacted until 1968, although the provisions of that Bill were effectively finalised at the same time as the main Copyright Act.

¹⁶⁵ February 1961

with P&T, and not try to use indirectly the manufacturers' right in recordings.¹⁶⁶ Indeed, O hAannrachain later noted that, while there had been an intense debate on the issue of the reduction in the rights of record manufacturers, this

“did not come from those who expressed concern about the welfare of the record industry (there is no considerable national record industry), but from those who feared that the limitation on the rights of the record manufacturers would have a detrimental effect on the music profession through reducing the scope for the employment of musicians.” (1963, 39).

6.7.3.3 Further amendments of the Bill, under public pressure

The BJCC made further representations in January 1963 to the Department, on behalf of the Mechanical Rights Society.¹⁶⁷ They opposed the legitimisation of ephemeral recordings, as an “erosion of the basic proprietary right of copyright owners.” They noted that the original purpose of the right to make ephemeral recordings granted in Brussels in 1948 was to allow time-shifting to allow one broadcast only, not to allow live and subsequent re-broadcast of the same performance. If the right was to be granted, they argued that it should be on the basis of prior notice to the owner, and on payment of a fee.

Straschnov¹⁶⁸ queried the propriety of the BJCC making direct representation to the Departments, “inasmuch as the Council is not an Irish organisation and has .. no grounds for meddling in Irish affairs. For although the PRS has Irish members, that does not make it an Irish organisation.” He supported Doherty's objection to the BJCC representations being considered.

Straschnov noted that convenient ephemeral recordings provisions were enacted or were in the course of being enacted in the Scandinavian countries, Britain, Italy and Germany. Consequently, the issue seemed easily argued for in Ireland. Ephemeral recording from commercial records was “simply a technical expediency.”¹⁶⁹

¹⁶⁶ The record companies themselves were unsympathetic to the IFM. Doherty claimed that he had been told some years before that “Malone of the Federation was pressing them [the record manufacturers] to restrict record playing here [on Radio Eireann]. They simply referred Malone to us at that time.”

¹⁶⁷ 2 January 1963.

¹⁶⁸ 18 January 1963.

¹⁶⁹ 18 January 1963.

Inter-departmental conference, 1963

In January 1963, a meeting was held in the Patent Office,¹⁷⁰ between Lennon, Mortimer of the Patents Office, Sean O Seaghdha of P&T, Doherty and O hAnnrachain of RE, to discuss Statement A of the P&T submission to I&C of the previous month.¹⁷¹

Disagreements continued between the two sides, with Lennon and RE both objecting to various provisions:

“Jack Lennon and his pals have already cut out all they can. The PRS now start from that point to cut out more through a Dail TD (no doubt well paid). A semi state organisation cannot ask an opposition deputy to help maintain its provisions. For that reason alone it should have the sympathetic support of the Government that set it up. Luckily we have only one or two points to fight, but they are important.”¹⁷²

Allegations by Radio Eireann of improper Fine Gael involvement with the PRS

At a late stage, concerns emerged that the PRS was exerting political influence in a manner which RE could not oppose directly. Doherty drafted a memo to MacCarthy, setting out his concerns about the Fine Gael party making itself available to the PRS, contrary to the interests of the Radio Eireann. While he recognised that I&C had done as much as it could to try to reconcile I&C and P&T,

“the bodies supporting amendments, like the Performing Right Society, have engaged qualified persons within the Dail opposition to propose and push amendments. On the other hand Radio Eireann, a body set up by the Government to do a national job, would consider it quite inappropriate to seek opposition help to have its essential requirements maintained. It has of course no desire to do so. The opposition members are now working on [the agreed] minimum provisions and not on the maximum which could well be in the Bill. R.E. cannot give up any of the provisions agreed upon.”¹⁷³

In a submission to the Minister for P&T, O Seaghdha¹⁷⁴ discussed the large number of amendments which had been put down for discussion at Dail committee stage. “It is clear from recent correspondence and discussions with the Department of Industry and Commerce that Opposition T.D.s who have put down amendments have done so at the

¹⁷⁰ 26 January 1963.

¹⁷¹ Statement A concerned broadcasting issues; Statement B was RE stepping outside its own area of interest, to comment on the Copyright Bill in general.

¹⁷² NAI P&T TW 33937, Memo from Doherty to O Seaghdha, 29 January 1963.

¹⁷³ Memo, January 1963. NAI P&T TW 33937.

urging of the Performing Rights Society, record manufacturers and other such bodies.” He urged his minister to write to Lynch, pointing out that RE had compromised in the drafting stage, and that the Bill as it stood was the minimum necessary to enable radio and television broadcasting to function. The proposed lengthy amendments, deletions and substitutions, would, if passed, have greatly changed the ultimate regulatory effects of the Bill contrary to the interests of the broadcasters.¹⁷⁵ However, the opposition amendments were defeated and the Act was passed in 1963, broadly as previously agreed between P&T and I&C.

The reception of the 1963 Act.

Despite the disputes which had continued until a late stage in the consideration of the legislation, RTE was broadly content with the shape of the legislation which was passed in 1963. Radio Eireann succeeded in most of its aims with regard to copyright law in 1963 (Gorham, 1965). O hAnnrachain, who had been less opposed to the I&C proposals than other RE personnel during the inter-departmental negotiations, also saw the Bill as a suitable regulatory mechanism for broadcasting in Ireland. He commented “the new Irish Copyright Act represents a considerable achievement in Irish legislation, and it affords profound satisfaction to all concerned in any way with copyright matters in Ireland to contemplate that such a comprehensive and up-to-date statute will come into force long before any further revision of the Berne Convention is likely to take place” (1963, 43).¹⁷⁶ O hAnnrachain’s general satisfaction with the Act derived largely from the fact that the provisions of the act in relation to broadcasting were expedient, and were, in RTE’s terms, an improvement on the provisions of the British 1956 Act.

The extension of the public recitation right to cover broadcasts was welcomed by RTE. Similarly, the extended period of six months for which ephemeral recordings could be retained was advantageous to RTE: “it is considered that the provisions ... meet the requirements of broadcasting organisations, especially those with limited programme services like Radio Eireann, better than those of the 1956 Act” (O hAnnrachain, 1963, 38-9).

¹⁷⁴ 4 February 1963.

¹⁷⁵ From documents of the file. O hAnnrachain (1963, 37) later noted that there were 81 proposed amendments to the Bill at the Dail Committee stage, further amendments at Report stage and that the Bill was further amended in the Senate.

¹⁷⁶ O hAnnrachain noted that the Irish legislation had arisen “consequent on the passing” of the British 1956 Act (1963, 39). Smyth and Clarke (1997) also noted the powerful influence of “external forces” on Irish debates on copyright regulatory policy.

The interests of the record producers were advanced in the course of the Bill's parliamentary passage in relation to the compulsory licensing of works. The original intention of the Bill had been that a record company intent on recording a musical work which could not reach agreement with the owner of the rights would pay a "fair royalty" and that the dispute would be referred to the Controller of the Patents Office. At Report Stage, this had been amended so that the manufacturer could "avoid infringing copyright by paying 5% of the ordinary retail price of a record on account to the copyright owner pending the hearing of the dispute" (O hAnnrachain, 1963, 39).

RTE's aim of preventing record producers from limiting 'needle time' by prohibiting the use of commercial records had been realised in the Act, which provided for the equitable remuneration for the broadcast of commercial records.¹⁷⁷ O hAnnrachain noted that the extensive debates on this issue had not been conducted with the interests of the record industry in mind,¹⁷⁸ but because of concerns that a limitation of the rights of record producers to prohibit broadcast would "have a detrimental effect on the music profession through reducing the scope for the employment of musicians" (1963, 39).

O hAnnrachain was broadly happy with the provisions in Section 19 of the Act, which gave RTE the same copyrights as had been granted in Britain to the BBC and ITA companies under the 1956 Act. Similarly, other provisions which facilitated RTE were welcomed. Section 48 relieved RTE of administrative and legal difficulties in respect of musical works embedded in films which it broadcast. The prior agreement between the owner of the copyright in the musical work with the film maker alleviated the burden on RTE to seek the permission of the music rights holder to broadcast the embedded work. This was not provided for in the 1956 Act and "its terms clearly indicate the manner in which the legislature was looking ahead and had regard to present day thinking and trends." (1963, 42).

6.8 Conclusions

Efforts were made within administrative circles in this period to fashion a regulatory scheme for Ireland, or more particularly, for the state broadcasting service, in line with the market, society and culture of the country. Unlike larger countries, which dealt to a

¹⁷⁷ In the 1980's, the 'needle time' relationship was altered, with the introduction by the Independent Radio and Television Commission of a requirement on commercial radio stations to broadcast a minimum of 30% Irish music content in their broadcasts. Clancy and Twomey (1997, 38), citing an IRTC report.

considerable extent with domestic actors, the Irish debates were characterised by the interventions of external or transnational interests. In some cases, such as Straschnov, these were well-intentioned interventions, and indeed were more obviously concerned with the development of cultural life in Ireland than were some domestic actors. Others, however, such as the record producers and the British collecting societies, were clearly operating in the interests of mainly external economic and cultural interests, and in opposition to the interests of some Irish actors, in particular the broadcasting service.

The cleavage between the normative approach adopted by the I&C officials, and in particular, by Lennon, contrasts starkly with the organisationally self-serving but marginally inventive approach adopted by RE, by P&T and by O Broin, in particular. The absenting of itself by the Department of Education from the debates appears extraordinary, the more so when P&T and the EBU sought to secure advantageous terms for the use of TV in schools.¹⁷⁹ A conservatism in relation to the delivery of education may have lain behind this stance. In addition, the ready abandonment of the translations reservation by the Department of Education in the late 1950's may have led the department to ignore all other possibilities of using copyright law for the furtherance of educational objectives.

Lennon's approach of asserting that he was protecting the authors against the 'big battalions' may have emanated from his primary vocational involvement with the patenting apparatus, where the solitary character of inventors at that time in Ireland may have disposed him particularly towards this posture. Nevertheless, his attitude of immovability in the discussions retarded the introduction of the Copyright Bill by several years, and may have allowed the opposition to the RE proposals to cohere and gather strength.

The involvement of the Fine Gael party in the Dail in opposing many provisions of the legislation, which may have been purely for opportunistic political reasons of opposing government legislation, nonetheless suggests an identification with largely external forces which were demonstrably contrary to Irish interests. An anathema towards television broadcasting, particularly state broadcasting, may possibly also have coloured the party's attitude. The party was in addition historically unenthusiastic about public expenditure: Savage noted that McGilligan, the Fine Gael Finance Minister in 1950, had

¹⁷⁸ "There is no considerable national record industry" (O hAnnrachain, 1963, 39).

¹⁷⁹ The Department of Education actively declined to become involved in the discussions.

been opposed even to research on television broadcasting, on grounds of conserving state financial resources (1996, 9).

RE's status as a primary cultural force in Ireland, as a recorder and medium for the dissemination of Irish music, for example, should have given its concerns enhanced standing in the debates, although factors such as the station's attitude to the standard of the musicians of Ireland call its own attitudes into question. However, closer examination, and in particular an understanding that the Irish musical standard was in fact low due to the amateur, part-time composition of the musicians' union, lends some credibility to this RE position.

The absence of a sizeable recording industry in Ireland, which in itself coloured the debates, did not appear to lead to the conclusion that RE itself should have become involved in the production of records. This limitation is particularly striking, since, on its own evidence, RE's broadcasts were being recorded and pirated in the US market, and could have formed the basis of a commercial enterprise.

The unwillingness to deviate in any substantive way from British law was a major failing for Ireland's copyright policy development. Administrative convenience is one obvious explanation. Lennon argued that, because Irish jurisprudence depended on British case law, it would not be appropriate to deviate from British law. Since Irish independence was motivated to a considerable extent by the cultural nationalistic movement, this was a curiously conservative proposition. More fundamentally, the unwillingness to deviate from British practice in the regulation of cultural production was extraordinary, and calls attention to the discrepancy between the rhetoric about political independence and the practical exercise of this legislative independence.

The 1963 Copyright Act was the last major copyright measure passed when Ireland was in a position to legislate through copyright in its particular national interests. Indeed, by the time of the enactment of that Act, Ireland had become more deeply enmeshed in the network of international agreements which committed it to protecting intellectual property in certain standard ways. This international system was bolstered by a series of additional bilateral agreements with the more important countries. Admittedly, Ireland remained for many years afterwards an adherent to penultimate revisions of certain conventions, but by the 1990's, Ireland had accelerated and brought its formal treaty obligations, if not its legislation, up to the highest international standards.

Irish inaction in international affairs in relation to copyright is another aspect of the conduct of its affairs at the time which merits comment. While the country took part in the various international conferences, in 1948, 1952 and 1961, it was a largely passive participant, subsequently deviating from international norms by the negative option of delaying its ratification of the Rome Convention, but never promoting a policy proposal of its own. This feature of the national attitude, born in part from the remarked on belief that copyright was uniquely difficult of understanding, was also carried into national debates, where I&C, for example, refused to be inventive in any aspect of copyright law, even where there would arguably be a benefit to the population or to an industry.

Ireland was distinctive also in being a country with a living, popular folk culture tradition which was accessible to modern technology, through music recording in particular. Despite this characteristic, Ireland did not advance proposals for the protection of folk cultural works. Innovations of this kind emanated later from such countries as Ghana and Nigeria, countries which might have looked to Ireland for a lead some years previously. The likelihood that Ireland could be influential in the Commonwealth was noted by the EBU, but this potential for international leadership in the cultural regulation sphere was not harnessed, or even recognised, by government.

The next chapter deals with the decades after 1963, during which copyright regulation disappeared from the official agenda, until external forces forced the administration to take account of technological development and of direct political pressure for regulatory change. While copyright as a mechanism for the encouragement of cultural activity and reproduction did not feature in the cultural debates, other legislative initiatives were adopted, to raise the level of cultural activity in the state, and to raise the social status of cultural activity. Changes in the publishing industry also led to an increase in the proportion of works by Irish writers being published in Ireland. It is significant, however, that these changes occurred with no active or preferential support from the state's IPR regulatory structures.

Chapter 7: Copyright in Ireland from the enactment of the Copyright Act 1963 to the 1990's

7.1 Introduction

In this chapter I deal with the period after the enactment of the 1963 Copyright Act. In those years, Irish legislation was not amended in any fundamental way, and the regulatory framework in which the cultural industries operated became progressively outdated as technology advanced. The changes which were enacted in the 1980's and 1990's amounted to reluctant capitulations in the face of primarily foreign pressure for more stringent penalties for infringement of copyright owners' rights. Admittedly, a Performers Protection Act was enacted in 1968, but this was in reality a coda to the debates which led up to the passing of the 1963 Act, and can be considered a piece of legislative tidying up.

The absence of legislative initiatives in this period was paralleled by an absence of domestic debate on copyright reform. There were few references to the need for updated copyright laws in the parliamentary debates for the 1970's or 1980's. As is clear from the preceding chapters, debates of copyright in Ireland (whether parliamentary or public) tended to be sparked by proposed legislative reform, or by foreign interventions. In the absence of either trigger during much of this period, copyright reform became a dormant issue.

A difficulty which I encountered in attempting to research this period was the unavailability of official documentation or archival material, due to the closure of official papers for thirty years. The departmental files for the 1960's, which were available for consultation, are sparse in their treatment of copyright. It is reasonable to assume that this was also the case for the 1970's and for the early – to mid-1980's. The internal debates in the mid-1980's and in the 1990's must have been extensive, since at this period the Irish government came under strong pressure from the United States to amend its copyright law. By the 1990's the European Union was also active in the copyright field, and this obviously would also have led to internal debates on the reform of copyright law. Unfortunately, the records of these debates will remain confidential for the foreseeable future.

The stagnation in the public debates on Irish copyright regulation persisted until the 1990's. Debates on the cultural industries and on state¹ interventions in support of the cultural industries took place outside the realm of copyright law. In a sense this prefigured the situation which would obtain in the 1990's. By then, it was clear that there was no longer any realistic prospect of using copyright law or any of its analogues as a lever to effect differential advantage for Irish cultural producers or for the Irish cultural industries. State intervention in the cultural sphere was now conducted by other means.²

The chapter begins with a scene-setting section, which sets out the context in which the Copyright Act 1963 came into force. A number of minor issues in relation to copyright and related rights in Ireland in the 1960's are then treated. This involves a brief discussion of events which occurred before 1963, but which were not directly relevant to the discussion in the previous chapter. The first of these is a discussion of an early initiative by the Council of Europe to extend the period of copyright protection. This is followed by discussion of performers' rights in Ireland in the 1960's, up to the eventual enactment of the Performers' Protection Act 1968. The last of these sections considers the debates within the Irish administration of the Stockholm Revision of the Berne Convention in 1967.

The next main section deals with the state of the publishing industry in Ireland, and on the interaction of the state with the industry. This is followed by a discussion of alternative forms of state support for cultural production. Official research into the scale and condition of the cultural industries is considered, and the section concludes with a discussion of official cultural policy in the 1980's.

The third major section concerns the impact on Ireland of the internationalization of the debates on copyright which gathered pace over recent decades. A number of issues which influenced the Irish debates are considered. The most important of these was growing activism of the United States and latterly of the European Union in the field of international copyright law. Ireland's failure to amend its laws and the increasing international and domestic pressure on the Irish government to introduce new copyright laws are examined.

¹ The term "State" is used in this context in its conventional Irish usage, meaning the official apparatus of government and its agencies.

² These included direct financial support for creative workers, favourable taxation measures for individual artists and for specific sectors of the cultural economy, and the commissioning of some economic research into the state of the cultural sector.

There was an intensifying US pressure on Ireland to amend its laws in this period, as part of the general increase in US activism in the Intellectual Property debates.

The final sections of the chapter consist of an examination of the economic value to Ireland of the Cultural Industries, and a discussion of the emergence within Ireland of domestic actors demanding more stringent copyright laws, along the lines demanded by the US.

7.2 The Cultural Industries in Ireland after 1963

Ireland underwent radical economic, social and cultural change in this period. The country had embarked on the First Programme of Economic Expansion in 1958, which aimed to expand the economy through the use of foreign capital. Parts of the industrial protectionist legislation which dated from the 1930's were repealed. The Industrial Development Authority, which had been established in 1949,³ was given greater autonomy by the Industrial Development Act, 1970. With the repeal of protectionist legislation which was then getting under way, there was less likelihood of a government introducing copyright measures which aimed preferentially to protect indigenous cultural production. In any case, the thrust of the copyright and related international conventions was in the direction of according identical treatment to foreign and domestic owners of intellectual property. The scope for policy formulation and application in the preferential interests of domestic actors was therefore considerably reduced.

However, Ireland's extension of protection to foreign authors remained imperfect even in the 1970's, and was not regularised until 1978.⁴ Nonetheless, the archival record shows that there was at least a rhetorical position that Ireland was a long-standing strong-protection state, even if this did not transfer readily or rapidly into regulatory or legislative action.

The Irish publishing industry began a phase of expansion which has continued into the 1990's, yet certain historically established patterns continued. The book publishing industry in particular gained in the new environment and this was most clearly seen in the publication

³ Its received statutory status under the Industrial Development Authority Act, 1950.

⁴ Copyright (Foreign Countries) Order 1978, SI No 132 and Copyright (Foreign Countries) Order No 2 SI No 133. These regulations clarified the law as provided for in Section 43 of the Copyright Act 1963, which regulated the extension of the protection of the Act to foreign countries.

of non-fiction, where a healthy trade developed. Difficulties for publishers continued in the publication of fiction, since the international English-language market continued to be dominated by London and New York publishers.⁵ Fishwick (1987, 62) pointed out that, while Irish publishers were successful in the publication of non-fiction and of children's books, "Irish authors of novels likely to have a wider international appeal tend to have these published by larger companies based in Britain, with large-scale marketing resources." However, even countries whose publishing industries are quite strong may still be significant importers of books, and this applies particularly to smaller countries (Altbach, 1997, 321).

The domestic regulatory landscape in Ireland for the support of creative artists and the publication and circulation of imaginative works changed gradually in the later 1960's. The Censorship Act of 1967 modified and relaxed the censorship system for books.⁶ The Performers Protection Act 1968 gave domestic legal effect to the elements of the Rome Convention of 1961 which had not been enacted by the Copyright Act 1963.⁷ The Finance Act 1969 gave special privileges to writers and other creative artists, to encourage their residence in Ireland and to seek to foster cultural development in Ireland.

Irish musical activity, though it developed and became more commercially important in this period, was internationally even less successful as an industry than was the publishing industry. Nevertheless, the country produced a considerable number of music performers, whose works were exploited internationally by foreign recording companies. The circumstance of the disproportionately high number of Irish musicians who achieved commercial recognition internationally, while commonly ascribed to the innate musical talent of the population, can also be linked to other factors, such as the advantages which the English language offered, and to the demographic bulge which produced a 'young' population.⁸ It remains true, however, as argued by Clancy and Twomey that "Ireland has

⁵ As was shown in previous chapters, non-fiction book publishing was the most successful sector of 'trade' publishing in twentieth century Ireland. This relative success was particularly pronounced in the case of the publication of works dealing with Ireland.

⁶ The Act lifted prohibitions on books twelve years after original banning by the Censorship Board.

⁷ The Explanatory Memorandum to the 1968 Performers Protection Bill noted that the Rome Convention, was signed on behalf of Ireland on 30 June 1962: the Copyright Act 1963 protected producers of phonograms and broadcasting organisations, "but there was no legislation in force to protect performers." NAI Taoiseach 98/6/703 S 17515 Protection for performers of literary, dramatic, musical and artistic works Legislation 1963.

⁸ See, for example, Clancy and Twomey, (1997, 24), who note that "there is a contested view as to whether Ireland is comparatively richer in the number and *quality* of its artists."

achieved considerable comparative success in terms of a number of internationally successful artists quite disproportionate of the size of the country's population" (1997, 20).

Ireland was internationally identified as a copyright piracy "black spot" in this period. Recordings were illegally duplicated, and a significant proportion of the domestic market was supplied by bootlegged cassettes, and later CDs. Video piracy became a problem in the 1980's and 1990's, to such an extent that coalitions of IPR owners were formed to combat it.⁹ The United States, the major international producer, particularly of video and film, adopted a hard line in relation to the piracy of its intellectual property, and Ireland came to be viewed as a major offending nation. The government came under intense pressure from the US, and the country risked being placed on 'watch lists' for infringements of the IPR of its producers.¹⁰ This pressure was first strongly exerted in the early- to mid-1980's. The 1987 Copyright Amendment Act originated in an attempt in 1984 to increase the penalties for the infringement of copyright. Over time, the legal penalties for infringement in the 1963 Copyright Act had been eroded by inflation. A similar difficulty arose in the mid-1990's, when Ireland was again slow in introducing copyright reform. The country was again threatened by the US, and as a result, a short Intellectual Property Act was rushed through the Oireachtas substantially to increase the penalties for infringement.¹¹ Reprographic infringement of copyright was also recognised as a major problem in recent years. An Irish Copyright Licensing Agency was established in the early 1990's.¹² Initially the organisation was an off-shoot of the British Agency, but in 1992 it was established as an organisation of "Irish writers and publishers."¹³

⁹ INFAC – the Irish National Federation Against Copyright Theft was formed in 1982 to protect "the interests of its members and others in the Republic of Ireland against piracy of copyright in cinematograph films, television programmes and all forms of audio visual recordings". *IPA Administration Yearbook*, Dublin, 1999, 338-9. High profile media events were organised by the police, at which seized infringing goods were destroyed.

¹⁰ The so-called Section 301 watch lists. In 1998 the US requested a WTO panel to examine its complaints against Ireland for its failure to protect copyright and neighbouring rights as required under the TRIPS agreement, on the grounds that "US copyright owners had been suffering significant economic losses due to what it viewed as lack of adequate and effective intellectual property protection in Ireland." WTO News, February 1998, p 5.

¹¹ Intellectual Property (Miscellaneous Provisions) Act, 1998. Other than certain administrative provisions contained in this Act, the major change which it made was in increasing the maximum fines for infringement of the Copyright Act 1963 to £100 000. [Section 3]. The Act was introduced under US pressure, before the ongoing systematic review and revision of the Copyright regulatory system had been concluded.

¹² This was a collecting agency for published works, which lobbied for enhanced regulation of copyright, and which licensed reprography of the works of its members.

¹³ Information leaflet issued by the ICLA, early 1990's. A submission to the Minister for Industry and Commerce describes the ICLA as having been incorporated in 1992 "to protect the interests of publishers and writers in their works. It is immediately and specifically concerned with the control of abuse of copyright from photocopying." Submission to Government, July 1993

Reluctance in Ireland to extend the period of copyright protection

The 1963 Copyright Act did not give effect to certain initiatives on copyright which were advanced by the Council of Europe in the late 1950's and early 1960's.¹⁴ However, the official Irish response to them is indicative of Ireland's relative indifference to the concerns of other European states. Only with later fuller integration of European economies was Ireland forced to conform to pan-European needs in relation to copyright protection. For the sake of completeness, Ireland's position on the Council of Europe position is detailed here.

Between 1959 and 1963, the Italian government had sought through the Council of Europe to extend the term of copyright protection beyond 50 years. It proposed that a convention should be agreed "to extend the duration of copyright in all countries to equal the longest period granted" among the fifteen member countries of the Council of Europe.¹⁵ The Italian proposal was made on three grounds: a lengthening average life span, the increasing competition which authors were subjected to as more works fell into the public domain and, evidently from a moral rights perspective, "the possibility of ensuring faithful reproduction for more than fifty years would also be a cultural and social advantage."¹⁶ The German term of protection was presumably the higher term.¹⁷ Extended protection terms were advantageous to the defeated World War II belligerents, since their publishing industries had suffered considerable damage in war, and in the early post-war period, the financial returns to authors remained low.

The proposal was discouraged by the Legal Advisor of the Department of Foreign Affairs on the flimsy grounds that "we have had a spate of Copyright Conventions and legislation."¹⁸ Similarly, JJ Lennon of the Patents Office was opposed, since Ireland had legislated for the Berne Convention term of 50 years. The issue remained live for some years, and in November 1962, A. Kennan of the Department of I&C wrote to the Secretary of External Affairs to reiterate his department's objections to the proposed increase in the term of protection. Kennan argued that the documentation which was being circulated by the Council of Europe did not "pay sufficient attention to the number of countries, including

¹⁴ For this reason, this sub-section was not included in the discussion in the previous chapter.

¹⁵ NAI D/ FA 417/39/269. Council of Europe: European Convention on Copyright. Proposal of the Italian Delegation, 14 March 1959.

¹⁶ Ibid.

¹⁷ This issue was resurrected in the 1990's, when the EU copyright term was increased to 70 years.

¹⁸ Ibid. 9 April 1959.

Ireland and Great Britain which expressed opposition to an extension of the term of copyright.”¹⁹ Kennan noted that the proposed convention was “of concern to only a limited number of countries.” The documents of the 116th meeting of the Ministers’ Deputies, Strasbourg, 28 November - 6th December 1962 recorded that Sweden, Belgium and Turkey were also opposed to the proposal. The issue continued on the agenda of the Council until February 1963, when the deputies agreed that the Italian proposal was premature and it was withdrawn.²⁰

Performers’ Rights in Ireland after 1963

Following the passing of the 1963 Copyright Act (and before the Act came into effect), the Performing Rights Society immediately increased its fees for the use of recorded music in restaurants and cafes. It was claimed in the Dail in March 1963 that charges in some cases had been increased by 50%.²¹ The timing of the increases in fees led to concerns about the motives of the PRS. In May and June 1964, concerns were expressed by some interested parties about the activities of the PRS, which had raised the level of fees charged (presumably in response to the imminent reduction in the evidentiary requirements for convictions, provided for in the 1963 Act). The Minister for Industry and Commerce told the Dail that he was aware that the PRS had increased the fees it charged one Co Cork dance hall proprietor by nearly 300%.²² In 1966 the PRS extended its interest to seeking to charge for the use of television sets in public houses.²³ The historical antipathy in Irish society to paying for the performance of works controlled by the PRS persisted.

¹⁹ Ibid. 27 November 1962

²⁰ Ibid. Minute from B. Dillon, Secretary of EA to the Secretary of I&C. 26 February 1963.

²¹ DD 13 Mar 1963, Col 1120. Neil Blaney, the Minister, informed Deputy Tierney that the PRS had increased its fees, but that there was a provision in the Copyright Bill for the Controller of the Patent Office to arbitrate on licensing schemes. It is noteworthy that the fees were increased by the PRS just as the Bill was completing its parliamentary passage. The Bill was passed finally on 27 March 1963. DD Col 475. (The Copyright Act 1963 was not brought into force by ministerial order until October 1964. DD 25 Nov 1964.)

²² DD 2 June 1964, Col 305. The Secretary of the Provincial Ballroom Proprietors’ Association had provided information on the case to the Department. Under the terms of the 1963 Act, the users of music had no redress against what they considered to be an excessive increase in the fees charged.

²³ DD 23 Mar 1966, Col 2086. This was accepted by the government as amounting to a public performance of composers’ works.

The Performers' Protection Act 1968

Some outstanding issues remained to be tidied up after the enactment of the 1963 Copyright Act, arising out of obligations under the Rome Convention of 1961. The uncertain political situation in the early 1960's had delayed the passing of the main Copyright Act.²⁴ There was little official interest in securing the interests of performers, particularly since this would impose additional burdens on the state broadcasting service. While broadcasters and record producers were accorded rights deriving from the 1961 Rome Convention²⁵ under the Copyright Act 1963, rights for performers themselves were legislated for separately under the 1968 Performers' Protection Act (Clark and Smyth, 224).²⁶ The Bill was debated in November 1964.²⁷ In his Ministerial speech, Jack Lynch stated that the Bill was necessary in order to complete the legislative framework which would allow Ireland to ratify the Rome Convention of 1961. The Copyright Act had regulated the rights of producers of phonograms and of broadcasting organisations, which were the two powerful groups of economic actors, one of which in Ireland was a state monopoly. The performers were in a considerably weaker position, and their rights were actively opposed, by RTE in particular. The eventual Performers' Protection Act 1968 confined its protection to performers alone.²⁸

The performers' rights which were to be regulated in the Bill concerned live performances, fixed recordings and broadcasts of musical and similar works.²⁹ The Convention granted performers the right to prohibit certain acts in relation to performances. The legislation did not propose, in the words of the Minister, to "create a property right in a performance, in the

²⁴ The government did not have a parliamentary majority, following the 1961 General Election, and the dissolution of the Dail in 1961 had itself delayed the legislative passage of the Copyright Act. The occurrence of the 1965 General Election similarly delayed the passing of the Performers' Protection Act.

²⁵ The Rome Convention for the Protection of Performers. Producers of Phonograms and Broadcasting Organisations 1961.

²⁶ This appears to have been at the insistence of Radio Eireann; RTE received its portion of the rights conferred by the Rome Convention in 1963; the performers had to await the enactment of the 1968 legislation.

²⁷ DD 30 Jun 1964, Col 1087. There was little evident urgency about the Bill, from the government's point of view, or, indeed, from RTE's. Internally, however, the bill was described as 'urgent.' Approval for the text of the Bill was sought without following the usual inter-departmental consultation procedure, on the grounds that the Bill was urgent, and that the usual consideration period was not available, as "the text of the Bill could not be completed at an earlier date." Cabinet approval of the text was given 23 June 1964. Authority to draft the Bill had been given in 1963. NAI, Taoiseach S 17515 / 95. Protection for Performers of literary, dramatic, musical and artistic works - Legislation 1963.

²⁸ "It does not extend to recording companies who have obtained contracts with the performers. Loss to the recording companies cannot convincingly be regarded as being, even in part, the mischief which the Act was intended to prevent. The connection of recording companies with the Act is at best tenuous." (Mannion, 1992, 278)

²⁹ The term 'performers' included comedians, variety artists and others. DD 25 Nov 1964, Col 264; Lynch in reply to Liam Cosgrave TD.

nature of a copyright, which a performer could enforce by civil action or which he might assign to any group such as a performers' union for enforcement."³⁰ Instead, it would be an offence to record or broadcast a performance without the performer's permission, or to transmit or otherwise make use of the performance.

The original Bill fell with the Dail dissolution in 1965, and in the intervening period, as described below, RTE and other actors took the opportunity to have the Bill amended further. During the debates on the revived, amended Bill in 1968, the Minister for Industry and Commerce, George Colley, again argued that the bill was not intended to create a "property right in a performance, in the nature of a copyright, which a performer could enforce by civil action,"³¹ because the Rome Convention did not require a copyright to be created. Mannion reasoned that this was a flawed argument (1992, 278). The creation of a criminal sanction against breaches of performers' rights did not carry out the declared intention of the Act, which was to give effect the Rome Convention, Article 7 of which required the right of civil action to be given to performers. Mannion argued that the Act should be construed as granting a right to civil action, and indeed that Irish legal practice would confer such a right on constitutional grounds. Indeed, RTE itself was in favour of civil rather than criminal sanctions being applied to it for breaches of the Act.

The only relevance for this study of the issue is that either the administration was in genuine error in its understanding of the requirements of the Rome Convention, or there was a disguised attempt within the administration to limit the rights to legal relief being granted to performers. Given the activism of RTE in the area in the preceding years, and the presumption of competence which must be accorded to the officials, the latter possibility must be considered the more likely. Throughout the 1960's, RTE and P&T had resisted the regulatory strengthening, legal recognition or economic recognition of any performers' rights which might impinge on the freedoms or on the revenues of the broadcasters. The fortuitous legislative delay between 1964 and 1968 was used to gain further advantages for the broadcasters, who were in effect the only potential defendants in any legal action which might be taken under the Act.

³⁰ DD 25 Nov 1964, Col 262.

³¹ Cited in Mannion (1992, 278).

A generalised opposition to the PRS was evident in the parliamentary debate.³² Brendan Corish, a Labour Party TD, raised the recent increases in PRS fees which had been imposed on “parish halls, restaurants and such places” and which were considered “unreasonable.”³³

Because the Dail was dissolved in March 1965, the original Performers Protection Bill 1964 lapsed.³⁴ Because the Bill would have to be re-introduced, P&T took the opportunity to seek to have some of the provisions changed.³⁵ It is clear from later amendments to the Bill that P&T was seeking to reduce the penalties which might be imposed on RTE for infringements of the rights of performers, and to change the character of the bill from a criminal sanction to one of civil liability. Despite the alleged urgency to enact the Bill in 1964, it took until 1967 before the Bill returned to the Dail. The text of the revived Bill which was discussed internally in 1966, while broadly modelled on the 1964 Bill, had been modified by “a whole lot of small amendments,” which had been made because the Bill as drafted in 1964 “had not been drawn tightly enough to conform with the [Rome] Convention.”³⁶

In November 1967, I&C produced a memorandum for government³⁷ in which the legislative history of the Bill and an account of the negotiations with the interested parties were sketched. It had been the intention in 1964 to amend the Bill in committee, to take account of representations which had been received from P&T and from the Irish Federation of Musicians. The IFM had proposed amendments to the legislation, as was noted in the Dail debate by Corish and by Lynch, and the government was disposed to accept the IFM amendments, to be taken at committee stage. The five changes in the Bill were an increase in the fines for infringement by broadcasters of performers’ rights, to extend the terms of the Bill to include (then non-existent) broadcasters other than RTE, to emphasise that RTE was

³² The offshore nature of the PRS and the lack of a right of appeal of the level of fees which the PRS imposed had been criticised in the debate on the Copyright Bill in 1962. Deputy Barrett said that it was “objectionable” that the PRS should have an arbitrary power to fix a fee” DD 14 Feb 1962, Col 1428.

³³ DD 25 Nov 1964, Col 264.

³⁴ NAI Taoiseach 98/6/703 S 17515. Memo by N.S. O Nuallain, Secretary to the Department of the Taoiseach 23 August 1965.

³⁵ NAI Taoiseach 98/6/703 S 17515. Note dated 24 August 1965: “Inter-departmental consultations are continuing on a matter raised by the Department of Posts and Telegraphs.” NAI Taoiseach 99/1/400 S 17515. Protection of performers, includes a memorandum from I&C, dated 14 July 1964. P&T had suggested that remedies sought against RE for failure to destroy an ephemeral recordings should be a matter for civil action. I&C demurred and argued that, since the 1964 Bill was a penal Bill, the penalties which could be imposed under the Bill had to be criminal. P&T reserved “the right to raise any matter considered necessary in the light of expert advice obtained when the Bill has been published.”

³⁶ NAI Taoiseach 98/6/703 S 17515. Memo by O Nuallain, recording a conversation with JJ Lennon, Controller of the Patent Office, 9 August 1966.

³⁷ NAI Taoiseach 98/6/703 S 17515. 15 November 1967.

entitled to retain ephemeral recordings of an "exceptional documentary character," to provide for a fine for the use without the performer's consent for such an ephemeral recordings and to create an offence of falsely representing that a person is authorised to give a "performer's consent to the making of a record, film, broadcast or transmission."

The Act prohibited the making of recordings or of films of performances without the consent of the performer. Ephemeral recordings or films made by RTE were to be destroyed after 6 months, unless agreement was reached with the performer for a longer period.³⁸ Broadcasting and rebroadcasting of performances required the explicit permission of the performer.

It is clear that the 1968 Act had little effect on the cultural landscape of the country. Its primary effects in Ireland were on broadcasters. Because there was a state monopoly in broadcasting, this led to uniformity in application of the Act. A second consequence was that the limitation in the number of concerned groups meant that the effects of the Act failed to become issues for public debate. The relative weakness of individual performers in comparison with the state broadcaster (or, conceivably, a commercial recording company) gave RTE the dominant hand in the relationship. In the absence of reported litigation, it would appear that the 1968 Act functioned satisfactorily in regulating payment for the use of recordings.

The Stockholm Revision of the Berne Convention 1967

The Stockholm Conference of the Berne Convention in 1967 discussed the question of special copyright provisions for developing countries and a rationalisation of the administration of the Berne Union. The Stockholm Revision was less successful or internationally accepted than earlier revisions, and indeed, Ireland acceded only partly to the Revision.

³⁸ An exception to this blanket prohibition was provided for in the case of material of "exceptional documentary character". The Act also relaxed the general prohibitions in respect of recordings which were made in the reporting of current events, and in cases where a performance was only incidental to "the principal matters" which were featured in the recording.

In advance of the Conference,³⁹ the Swedish government circulated documents which had been produced by committees of international experts. In Ireland the documents were studied by the Departments of Finance, I&C and Foreign Affairs, and there were contributions from other government departments.⁴⁰ Submissions were received from the Arts Council, RTE, NUJ, IFM, Theatre and Cinema Association, Irish Cinema Association, the Authors Guild of Ireland Ltd⁴¹, Institute of Journalists, Irish Publishers Association and Music Association of Ireland.

The official Irish view was that the substantive proposals at Stockholm were concerned with technical changes. These centred on the establishment of administrative organs for the Intellectual Property Union, and the creation of a new International Intellectual Property Organisation. This is significant, since Ireland adopted the terms of the Stockholm only to the extent of accepting the administrative changes. The Revision also included preferential terms for developing countries, which were inimical to the interests of Ireland cultural, broadcasting and publishing industries. While there was some support for accepting these terms, the eventual outcome was that Ireland, after some consideration and in common with many other developed states, did not ratify the Revision in full.⁴² Foreign Affairs recommended signature of the Convention, subject to later ratification and this was agreed by Government in June 1967.⁴³

In December 1967, the Secretary of EA noted that Ireland had not yet signed the Revision, pending government approval.⁴⁴

“It is considered that a satisfactory administrative structure has been provided for the new organisation in the convention. ... In the interest of the extension of the international protection of Intellectual Property, which we have always actively supported, and in the

³⁹ 12 June – 14 July 1967.

⁴⁰ NAI Taoiseach 98/6/921 S 18124A United International Bureau for Protection of Intellectual Property Conference 1967. Memo by Foreign Affairs for government 30 May 1967. Education, Posts and Telegraphs and the Attorney General also commented on the documents.

⁴¹ Richards (1976, 75) noted that this organisation was “a society for the protection of copyright, owned and managed by its members on a non-profit basis. It acts as agent for the control of performing rights and the collection of royalties within Ireland.”

⁴² For administration purposes, Ireland had acceded to the Stockholm revision [articles 22 - 38] on 21 December 1970.

⁴³ NAI Taoiseach 98/6/921. Agreed by the Government on 1 June 1967. Cabinet Minutes. The Irish Delegation to the conference was appointed, consisting of JJ Lennon, Controller and M.J. O Cuinn, I&C. Fachtina O hAnnrachain, Legal Affairs officer of RTE was attached to the delegation as advisor. NAI Taoiseach 98/6/921. Memo by N.S. O Nuallain to Sec EA.

⁴⁴ NAI Taoiseach 98/6/921. Memo by Sec EA, 6 December 1967.

interest of uniformity of administration arrangements for the Paris and Berne Conventions and of the special agreements under the Paris Convention of which Ireland is a party, it is desirable that this country should become party to the Convention.”

Foreign Affairs proposed signature without reservation as to ratification, and this was agreed by government on 12 December 1967.⁴⁵

A Memorandum for government was produced by Foreign Affairs, setting out what were seen as the most important elements of the revision.⁴⁶ The so-called “administrative” clauses included provision for the transfer of the administrative function of the Assembly of the Berne Union to WIPO. The Department argued that it was desirable that Ireland should sign the new revision, but that it was “likely that some amendment of our law will be necessary before we can ratify the new Revision, and before ratification the Government will be asked to approve the required legislative changes.” The Department was doubtful of the value to Ireland of signing the developmental clauses of the revision, although some potential benefit to Irish authors was hoped for.

“The existence of the Protocol may encourage other developing countries which at present give Irish authors no protection at all to join the Berne Union, thereby improving in some degree the protection of Irish authors in these countries.”

Foreign Affairs sought government authority to sign the Stockholm Revision and to give notice under Article 38(2) that Ireland intended to exercise the rights under Articles 22 – 26.⁴⁷ No new legislation appears to have been prepared to give effect to this, and the issue appears to have faded from official consciousness.

7.3 The Development of the Publishing Industry after 1963

By the 1990’s, publishing was recognised by government institutions as an industry as well as a means of dissemination of cultural production. This represented a transformation in attitude from earlier periods, where publishing was generally considered to be a minor

⁴⁵ NAI Taoiseach 98/6/921. 12 December 1967. Cabinet Minutes.

⁴⁶ NAI Taoiseach 99/1/507 S 18124A United International Bureau. 22 December 1967.

⁴⁷ This was agreed by Cabinet on Agreed by Government 2 January 1968.

adjunct to the more important printing industry. In a 1995 report,⁴⁸ commissioned by the Arts Council and five other bodies, the author introduced book-publishing as “one of the ‘cultural industries’ and noted that

“as such its position and status within society, and the benefits derived from it, cannot be viewed solely in economic and employment terms. As such, its cultural value and its strategic relevance and importance in terms of communicating Irishness, Irish culture and the Irish way-of-life to other nations of the world must also be recognised.”

The Irish publishing industry before the 1970’s was small. In the absence of reliable statistics for its scale in the period, the estimate of the Arts Council, based on general impressions, that between 1945 and 1974, Irish publishing in the English language accounted for “no more than 5% of the full market”⁴⁹ cannot be contradicted. Although formally entitled to support literature under the Arts Council Act of 1951, the Arts Council had largely confined its activities until the 1970’s to supporting theatre and the plastic arts.⁵⁰ In 1968 Charles Haughey, as Minister for Finance, announced that the Arts Council would be restructured (Brown, 1985, 315). Under the 1973 Arts Act, its remit was extended and it increased its support for literature and publishing.⁵¹ The initial concentration was on supporting writing, rather than publishing. Brown noted that in the immediately following years, bursaries were awarded to individual writers. This, however, was supporting the production of texts which could be published abroad, rather than concentrating on the fuller commercial exploitation of the texts which was possible through the development of a linked publishing industry. The Arts Council itself, reflecting in 1980 on the situation in 1973, remarked of its previous concentration on support for the individual writer that “this is probably the result of historical accident, in that, when the major development of the Council as a funding agency occurred in 1973 the publishing industry was comparatively

⁴⁸ *The Future of the Irish Book Publishing Industry: a strategic assessment by Coopers & Lybrand*. July 1995. Dublin: Coopers & Lybrand, 1987, p 1.1. [Report-style pagination].

⁴⁹ Arts Council, *Services in Literature*, Dublin: 1985, p 8.

⁵⁰ The Arts Council did support literature and publishing through the award of prizes and awards for writers in particular categories. In its first two decades it also financially supported the publication of works by Irish writers which had gone out of print. In 1964, for example, Messrs Allen Figgis were subsidised to publish plays by Paraic Colum and volumes of poetry by Sir Samuel Ferguson, Joseph Campbell, and Katherine Tynan. This publisher also published a volume of the poetry of the 1916 leaders, and a book of translations from the Irish by Douglas Hyde. Arts Council *Annual Report for 1963-4*, pp 17 - 18. The quantity was small, in any case.

⁵¹ The Arts Act 1973 (Section 11) empowered the Arts Council to establish Advisory Committees, among which were “a committee to advise on music” and “a committee to advise on the drama, literature and the cinema.” The Arts Council, introducing its support for publishers, noted that “support for individual writers can only be fully justified if there are opportunities for publishing” and that consequently, it had begun to support publishing houses. Arts Council *Annual Report*, (1975, 15).

undeveloped and it was left to the Council to decide its own priorities without substantial pressure to maintain existing institutions.”⁵²

Despite the development of the book publishing industry in the 1970's, the industry remained dominated by newspaper publishing.⁵³ In 1970, book publishing accounted for only 11.9% of the output of the publishing and printing industry.⁵⁴ The output of the book publishers declined between 1969 and 1973, when book publishing and bookbinding accounted for only 4.4% of the output of the sector. Imports of books increased between 1969 and 1975 from £1.731m to £5.331m, while exports in the period rose from £0.274 to the still low figure of £7.758m.⁵⁵ More tellingly, the proportion of domestic output as a percentage of total consumption of books fell from 70.6% in 1969 to 44.2% in 1973.⁵⁶ Clearly, Irish publishing was failing to develop its share of the domestic market.

As had been the case since the 1920's, textbook publishing remained a mainstay of Irish publishers. Twelve publishing houses were active in the sector, producing “low cost text books for use in primary and secondary schools.”⁵⁷ The Irish Educational Publishers Association claimed that its twelve member companies commanded 80% of the textbook market in Ireland.⁵⁸ The position was facilitated by the necessity to obtain approval from the Department of Education for textbooks intended for primary schools. This in itself constituted a hidden support for indigenous publishers.

During the later 1970's, what Brown (1985, 317) called a “burgeoning publishing industry” developed. The Arts Council, which described a three-phase model of the post-war development of Irish publishing, termed the 1974 - 1983 period the “revolutionary period” in Irish publishing, with Irish publishers increasing their share of the domestic market from 5% to 25%.⁵⁹ The Dolmen Press,⁶⁰ Gallery Press and Poolbeg Press⁶¹ were among those

⁵² Arts Council Annual Report (1980, 19).

⁵³ A 1971 government report on the paper and allied industries did not consider book publishing in any detail. Report on Paper, Paper products, Printing and Publishing Industry. I. 131/3. Dublin: Stationery Office, 1971.

⁵⁴ CEC. *A Study of the evolution of concentration in the Irish publishing industry*. Evolution of concentration and Competition Series - no 14. Brussels, (1978, 15).

⁵⁵ CEC, 1978, 25.

⁵⁶ CEC, 1978, 27.

⁵⁷ CEC, 1978, 14.

⁵⁸ CEC, 1978, 63.

⁵⁹ Arts Council, *Services in Literature*, (1985, 10).

⁶⁰ This high prestige publishing house, which was in financial difficulty (“Finding its existence threatened by a lack of working capital”), was funded by an Arts Council interest-free loan in 1975 (Arts Council Report, 1975, 15), but ultimately it collapsed in disarray.

which were active at the time. The book-trade periodical *Books Ireland* was established in 1976, which was indicative of the increased importance of domestic publishing.⁶²

The closure of the Irish University Press in 1974⁶³ led to an increase in the availability of trained personnel to staff the new publishing houses. A government publication,⁶⁴ commenting on the fact that its closure led to the availability of many trained people, noted the establishment of successful publishing houses including Wolfhound Press, O'Brien, Poolbeg, Brandon and Lilliput. The Arts Council referred a decade later to the effect of the closure of the Press as a "super nova explosion with new stars of Irish publishing setting up their own firms."⁶⁵ In 1977, the Arts Council reported that four publishing houses were "providing the main outlets for native fiction and poetry."⁶⁶ The output of Irish publishers appeared to achieve some commercial success. The Arts Council reported that "many of the titles assisted by the Council during [1978] featured in the best-seller lists [which showed] that there is an audience for Irish fiction of quality, provided it is properly produced, designed and distributed."⁶⁷ A feature of the new publishing houses was the emergence of drama publishing as a commercially successful genre. Gallery Press, primarily a poetry publisher, and the Irish Writers Co-operative both successfully expanded into drama publishing. Irish poetry publishing was particularly successful at the time, in comparison with fiction publishing. The Arts Council reported in 1975 that "the publication of poetry ... is relatively thriving."⁶⁸

General publishers, such as Wolfhound, Arlen House and O'Brien Press began to publish fiction in the late 1970's, and there was a general increase in the output of fiction at the time. It was estimated in 1979 that Irish publishers had increased their share of the domestic market and that this share was valued at £2m per year.⁶⁹ The Arts Council further widened its focus from direct support of creative writers and gave increased support to publishers, as

⁶¹ Poolbeg Press, which was founded to publish short stories by Irish writers, received a guarantee of Arts Council funding for four years on its foundation in 1975. The press was supported because it "represents an important step towards providing an outlet for Irish fiction, a category that by and large has tended to be neglected by Irish publishers in the past." Arts Council Annual Report 1975, p 15.

⁶² IPA Administration Yearbook, Dublin, 1999, 225.

⁶³ Arts Council, Services in Literature, Dublin: 1985, p 8. The Irish University Press failed when its enterprise of publishing the entire set of the British Parliamentary Papers proved commercially unsustainable.

⁶⁴ *Facts about Ireland*. Dublin: Department of Finance, 1995, 153.

⁶⁵ Arts Council, Services in Literature, Dublin: 1985, p 10.

⁶⁶ Dolmen Press, Gallery Press, Poolbeg Press and the Irish Writers' Co-operative, which were the four primary beneficiaries of Arts Council funding for publishers at the time. Arts Council Annual Report 1977, p 11.

⁶⁷ Arts Council Report 1978, p 11.

⁶⁸ Arts Council Annual Report, 1975, p 15.

⁶⁹ Arts Council Annual Report. 1979, p 15.

an indirect support for cultural production. It recognised “that successful publishing of novels, short stories and plays depends in no small measure on a healthy publishing industry, and in 1979 the Council took a major interest in this area.”⁷⁰

By 1983, the scale of the Irish publishing market was estimated at £16.3m, £11.8m of which was accounted for by schoolbook sales (Fishwick, 1987, 61). At the time, the total value of books sales in Ireland was estimated at £56m. Fishwick estimated that 85% of books sold in Ireland, other than schoolbooks, were imported.

Alternative forms of encouragement for cultural production

Taxation privileges for creative artists and writers

During the final Dail debate on the Copyright Act in February 1963, Declan Costello drew attention in passing to the fact that Irish writers generally lived outside Ireland, in the course of a claim that they would be unaware if a future reorganised (and implicitly a less upstanding) broadcasting station was using their work without permission. “It is an unfortunate but a well-known fact that many of our Irish authors seem to find it necessary to reside outside [the country].”⁷¹ It was becoming apparent that this longstanding situation had a detrimental effect on the cultural life of the country. The most notable response to the situation was the financial inducement to writers and artists to take up residence in Ireland.

The Finance Act 1969 gave taxation privileges to writers and artists living in Ireland. This provision drew the attention of writers in Ireland and abroad, and the Society of Authors in Britain, in particular, publicised the concession. Despite some criticism, on the grounds that the provision and its interpretation by the Revenue authorities did not discriminate between allegedly worthy and merely commercial artists, or between Irish and foreign artists, the provision has been retained and extended in subsequent enactments. By April 1970, in the first year of the Act’s operation, 74 people qualified for the tax privilege, and 47 other

⁷⁰ Arts Council Annual Report. 1979, p 15.

⁷¹ DD 27 Feb 1963, Col 423.

applications were being considered. By September 1971, 327 applications had been received and 249 of these had been granted, with others under consideration.⁷²

It would be difficult to detect any direct cultural or industrial consequences from the law, since there was no obligation on the artist to publish his or her work in Ireland.⁷³ (The disposition towards manufacturing clauses of previous decades had been laid finally aside.) It would appear that the law, while encouraging cultural production, had a negligible direct influence on the publishing or recording industries in Ireland, and was analogous in its effect to that of the Arts Council bursaries, or of the Aosdana *cnuais* or grants of later times. Indeed, since there was no nationality requirement to qualify for the privilege, it would appear that the provision was designed in part, through the expected quantitative increase in cultural activity, to enhance the quality the artistic milieu in the country, rather than to achieve a direct effect on the level of indigenous cultural output. This is supported by an interview with the politician who had been responsible for the proposal. Charles Haughey stated in 1990 that the 1969 taxation provision was “more important as a gesture, as a symbol, than anything else. It was meant to be a statement by the establishment that we valued creative people in our society, and in particular that we wanted them to stay and work in Ireland. It wasn’t a big concession, the financial side of it was relatively unimportant.”⁷⁴ In his budget speech in 1969, he had indicated that the purpose of the provision was to create “a sympathetic environment ... in which the arts might flourish.”⁷⁵

The provision has since then been supported by many actors in the cultural-economic debates: “industrial lobbyists believe that this tax advantage is important in both attracting non-Irish international artists to locate in Ireland and in retaining the residence of some of the most successful Irish artists in the country” (Clancy and Twomey, 1997, 30). The fact that no nationality restriction attaches to the provision would appear to dilute the provision’s effect on the development of an indigenous, arguably chauvinistic cultural industry. However, it is likely that it added to the cross-fertilisation of Irish cultural activity, and thus had a beneficial cultural and economic effect..

⁷² How tax free in Eire?, *The Author*, Winter 1971, LXXXII (4), pp 167 - 8.

⁷³ All international and domestic royalties were tax-free.

⁷⁴ Interview of C.J. Haughey with Paddy Woodward, *Irish Times*, 31 12 1990 reprinted in *The Taoiseach Mr Charles J. Haughey T.D. and the Arts*, Dublin: Stationery Office, 1991. p 12

⁷⁵ Cited in How tax free in Eire?, *The Author*, Winter 1971, LXXXII (4), pp 167 - 8.

The establishment of Aosdana

In 1981 Aosdana⁷⁶ was established, to give financial support to writers and other artists. Among the purposes of this organisation was “to take away the drudgery of day to day living, of the exigencies of every day life from the artist, so that they could be relatively free at least to concentrate on their art.”⁷⁷

Indirect Taxation Measure

In 1983, in response to arguments that the Irish publishing industry was suffering the effects of recession, of an unfavourable exchange rate and of unfair competition with the British publishing industry, the rate of VAT on books was reduced from 21% to 0%. It has been suggested that this gave “impetus to the lively and expanding Irish publishing trade” (Brown, 1985, 355).

Official Research of the Scale and State of the Cultural Industries

The Arts Council Report on the Arts in Ireland, 1976.

The Arts Council survey of Ireland’s cultural production in 1976 provides an insight into the state of publishing in the late 1960’s and early 1970’s. The report⁷⁸ was one of the earliest examinations of the arts in the country which included literature in its remit. The Richards report in general addressed itself to the negative factors which affected the development of the arts. Many of these factors were geographic or demographic in origin, such as a tendency among the artistic community in general⁷⁹ towards isolationism. Among the factors shaping the arts was “the influence of a more powerful and historically dominating neighbour, which often leads to undue reliance on Irishness for its own sake” (Richards,

⁷⁶ “An affiliation of artists engaged in literature, music and the visual arts, established by the Arts Council” in part to support individual artists financially. *IPA Administration Yearbook*, 1999, 335.

⁷⁷ C.J. Haughey, interview with *Irish Times* 31 12 1990, p 12 - 13.

⁷⁸ Richards, J.M. *Provision for the Arts: Report of an Inquiry carried out during 1974-75 throughout the twenty-six counties of the Republic of Ireland*. Dublin: Arts Council / The Calouste Gulbenkian Foundation, 1976.

⁷⁹ This excludes the undoubtedly influential internationalist Irish writers and artists of the time; in comparative quantitative terms, they were less significant.

1976, 8). In relation to literature in particular, there was “too small a population to provide the degree of support for certain of the arts which is taken for granted in these other countries, leading, for example, to Irish writers having to depend on English and American publishers and to the loss of some of Ireland’s best artists by emigration” (1976, 8). The report also drew attention to the absence of a unified arts ministry,⁸⁰ noting that government support and intervention in the artistic life of the country was dissipated among ten government departments.⁸¹

Richards noted the difficulty for writers in getting their work published: “the problem originates in the size of Ireland’s population, which provides too small a market for Irish publishers.” While some Irish publishers had association agreements with London publishers,⁸² the arrangements for bringing the output of Irish publishing houses onto the international market were generally unsatisfactory. Publishers in Ireland were reluctant to become involved in an export-oriented co-operative. “Irish writers in the English language are therefore largely dependent on London publishing houses, where they are up against strong competition and where there is no incentive to cater for or cultivate a specifically Irish market.”

The Richards report revealed that the output of books in the Irish language in the later 1960s was small. An Gúm continued to support educational publishers which issued text-books in Irish. Bord na Leabhar Gaeilge was charged with making recommendations to the Minister for Education about giving grants to publishers of new books in Irish. The intention was to create a corpus of works in the Irish language, as sustenance for the written language. Commercial publishers issued an average of only 41 books in Irish in the years 1966 to 1969. Richards (1976, 74) commented that there was “no reason to think that the output is growing.” Fishwick (1987, 63) more recently ascribed such success as publishers of books in Irish had to state support, and noted that the bulk of the output of these publishers was in the educational publishing sector. The estimated value of sales of Irish-language

⁸⁰ The Devlin Report (1969, 208) had recommended that the Arts Council functions should be transferred to a new Department of National Culture. Report of the Public Services Organisation Review Group 1966 – 1969, Dublin, Stationery Office, 1969.

⁸¹ This administrative incoherence was evident during the debates within the administration in the late 1950’s and early 1960’s, when no organ of the administration was charged explicitly with safeguarding and advancing the cultural interests of the population.

⁸² For example, Gills were associated internationally with Macmillan.

schoolbooks in 1985 was £1.8m, while Fishwick estimated sales of other Irish language books at only £0.4m - £0.5m.

A further major problem for Irish bookselling in the 1970's, which had been noted as early as the 1920's by George Russell, was the absence of a proper distribution system. The Irish Booksellers Association listed only 44 bookshops outside Dublin and Cork, and some counties had no bookshops (Richards, 1976, 74). However, the burden this imposed can be presumed to have fallen as heavily on foreign as on domestic publishers, and was a general limiting factor on the market for books in the country. The reluctance of the population to buy books can be presumed to have persisted from the 1920's until the 1970's, given that the structure of the distribution system had not greatly improved, although there is merely anecdotal evidence for this.

The formal recommendations of the Richards report included a proposal for state subsidy for publication of books,⁸³ both in English and Irish (1976, 100). The report recognised the role of bursaries for individual writers, but continued that "[Arts] Council help to publishing in both English and Irish is very necessary. It would need special financial provision by the Government" (1976, 73) This was a radical departure from the existing policy of providing financial support only for publications in the Irish language.

EEC Survey of the Irish Publishing Industry

The EEC commissioned an examination of the Irish publishing industry in the late 1970's. The report covered all aspects of the publishing industry, but, reflecting the actual composition of the Irish publishing industry, concentrated on the newspaper and magazine sectors. Copyright reform was not an issue in this examination. Nevertheless, the report is an interesting snapshot of the state of the industry at the time. The book publishing industry was admitted to be small by international standards, with only 4 out of 29 publishing houses having more than three editorial staff. The report noted that the majority of books sold in Ireland were imported, and that the bulk of these imports came from Britain.

⁸³ The report also recommended the removal of VAT from book sales. (Richards, 1976, 100).

“These imported books include many by well known Irish authors (such as Edna O’Brien, publishing in paperback by Penguin Books) and many works of non-fiction on Irish subjects (such as the Book of Kells, published by Thames and Hudson). It is a paradox, perhaps, that best selling authors (such as Frederick Forsyth) are encouraged to come and live in the Irish Republic (where they enjoy tax concessions) but that Irish publishers are not geared to handle the output of these authors.”⁸⁴

The Pick Report: Developing Publishing in Ireland⁸⁵

The Pick Report noted that four state agencies⁸⁶ were charged with supporting some aspect of publishing: the Arts Council, Bord na Gaeilge, Coras Trachtála (CTT) and the Industrial Development Authority (IDA). Of these, the IDA was concerned with publishing as an industry, CTT with the export of books, Bord na Gaeilge⁸⁷ with books in the Irish language, and the Arts Council with supporting literature, and thus supporting publishing as an indirect support for industry. The report noted that support was needed by publishers who issued literary fiction in particular, since “non-fiction is an area which has a very good market” (Pick Report, 1988, 8). The report was based on an examination of five “export-oriented publishers,” on advance information supplied by the commissioning organisations and on interviews. It argued that there was scope for the expansion of Irish publishing houses, particularly into the British market. As a result of the report’s recommendations, the Arts Council increased its funding to publishers by 50%.⁸⁸

Pick found that the scale of the Irish publishing industry was such that it could not survive without international trade. The report identified rights as an important resource to be traded, in pursuit of commercial success for the publishing industry. The recommendations extended beyond the pre-existing Arts Council policy of ‘repatriation of rights’ in Irish

⁸⁴ CEC. A Study of the evolution of concentration in the Irish publishing industry. Evolution of concentration and Competition Series - no 14. Brussels, 1978, 14.

⁸⁵ Charles Pick and Peter West, *Developing Publishing in Ireland*, Dublin: Arts Council / Coras Trachtála / Bord na Gaeilge / Industrial Development Authority, 1988.

⁸⁶ A fifth state agency, Bord na Leabhar Gaeilge, gave grant support for the translation of foreign language books into Irish. (Cronin, 1996, 170). The operation of Bord na Leabhar Gaeilge was specifically excluded from the Pick study (Pick, 1988, 10).

⁸⁷ Bord na Gaeilge policy included the provision of grant aid to assist small publishing houses “in the employment of the fulltime staff needed to provide a permanent and professional service.” Bord na Gaeilge Publishing and Book Distribution (Action Plan for Irish 1983 - 1986), cited in Pick Report, p 9.

⁸⁸ Arts Council Annual Report 1989, p 14. Coras Trachtála (the Export Board), the Industrial Development Authority and the Arts Council held a seminar ‘Irish Publishing in the European Context’ in 1988, at which state supports for publishing and the nature of European Commission policy towards publishing were discussed.

works held by rights owners abroad, to a consideration of the “exchange of rights” in a two-way relationship, and that these rights might not necessarily be rights in Irish works. He advocated the importation of rights which were held by foreign publishers, in those cases where Irish publishers “believe they could sell better to the local market than the British publisher who would otherwise cover the territory”(Pick, 1988, 12). The report identified works of Irish writers as the “primary targets,” but did not explicitly confine its recommendations to this category. In a complete breach with the practice of earlier decades, the report clearly distinguished between the interests of publishers and printers, by advocating that the Irish editions should be the “run-ons” from the British publishers’ print runs, with the Irish publishers’ covers and title pages being bound in. Pick drew on the relationship between Canadian and US publishers, pointing out that it had been found that by publishing books through Canadian publishing houses, rather than in transnational North American editions, “international publishers finally learned that they can significantly improve their total sales in Canada” (Pick, 1988, 13). The report urged Irish publishers to convince British publishers of the likely benefits of “splitting out the Irish market.”

Similarly, the report recommended that Irish publishers should not attempt to supply the British or more distant markets themselves from Ireland. Irish publishers tended to sell only hundreds of copies of their titles in Britain, and that these appeared to be sold to the expatriate Irish community in Britain. Pick argued that, if the rights were sold to London publishers, the level of sales might, in some cases, increase by a factor of ten or twenty times (Pick, 1988, 13). The Arts Council took the view in 1985 that Irish publishers would have to rely on exports for growth in the future, since “the industry may be approaching saturation of the domestic market.”⁸⁹

A more recent official government publication⁹⁰ claimed that “one of the most healthy developments of recent years has been the emergence of a thriving book publishing industry” (1995, 153). Following the publication of the Pick Report, state aid to publishing was increased, although on industrial policy, rather than on cultural grounds.

⁸⁹ Arts Council, *Services in Literature*, Dublin: 1985, p 10. By then the value of the industry was about £30m, including publishers in Northern Ireland and also including educational publishers.

⁹⁰ *Facts about Ireland*. Dublin: Department of Foreign Affairs, 1995.

Cultural Policy in the 1980's

Publishing

The 1987 White Paper⁹¹ on cultural policy did not concentrate on publishing, aside from noting that “the cultural dimension of the Department of Industry and Commerce and of the State agencies coming within its control lies in their involvement with the ‘culture’ industries, particularly book publishing and record production. Both book publishing and media recording services have been designated as sectors under the IDA’s International Services Programme” (1987, 60). A second agency, Coras Trachtála (CTT), provided some marketing support for publishing, through its support of the participation of publishers at international book fairs. The White Paper recorded that CTT would “continue to explore the possibilities of increasing exports of Irish books.” The intended supports appear to have been minimal, in the context of the scope of the White Paper, and publishing and the recording industries appear not to have been recognised as considerable components in the scheme of Irish cultural production. Copyright law reform was not identified as an issue of concern.⁹²

One instance of a concern at semi-official level about any national dimension of intellectual property was that the Arts Council in the mid-1980's articulated a policy of seeking the repatriation to Ireland of Irish intellectual property held abroad by foreign publishers. The Council was prepared to assist Irish publishers financially through various modalities, including paying publishers to commission Irish writers and paying for the commission of translations from Irish or other languages. One of the modes of support for publishers reflected an unusual recognition of copyright: “The publisher may wish to bring about the repatriation of rights which currently rest with a publisher abroad and the Council is anxious that rights to Irish works should be held by Irish publishers.”⁹³ However, there is no record of the policy having been put into effect and it is likely that the policy was developed within

⁹¹ *Access and Opportunity: A White Paper on Cultural Policy*, Dublin: Stationery Office, 1987.

⁹² The Department of Justice was stated to be considering the introduction of *droit de suite* regulation (rights in the re-sale of artistic works), as a support for visual artists; the involvement of this department in the regulation of an economic right seems bizarre.

⁹³ Arts Council, *Services in Literature*, Dublin: 1985, p 12.

the Arts Council with the intention of addressing one individual case.⁹⁴ In the 1970's, significant tax advantages became available to publishers who chose to purchase the rights in works by Irish writers, yet the take-up of these tax advantages has been slight.⁹⁵

A more commercial attitude to publishing became influential in Arts Council thinking in the 1980's. The 1980 Annual Report noted that in the previous two years its support for literature had shifted "towards the non-creative, subsidiary aspects of literature" and that, for there to be further development of literature other than as atomised creativity, it was "vital that publishing as an industry be encouraged in every possible way."⁹⁶ Various structures came into being to support the publishing industry. CLE, the Irish Book Publishers Association,⁹⁷ which had been established in the 1970's, was successfully expanding the export market for the output of Irish publishing houses.⁹⁸ A co-operative warehousing and distribution company, Irish Bookhandling, was established with Arts Council support.⁹⁹ Even with these structural changes, however, the position was not optimistic.

"It would be wrong to give the impression that all is well with book publishing in Ireland - that there is a happy confluence between creative output and profitable selling. There is a long way to go for even the more widely popular forms of literature but, in addition, there remain very substantial problems with the less popular or less accessible aspects of publishing, such as plays and poetry."¹⁰⁰

Despite the difficulties, however commentators were in 1981 speaking of "a new flowering" of publishing in Ireland.¹⁰¹ The Arts Council adopted a more critical approach to publishers, by ceasing to measure success in quantitative terms, and by introducing a quality threshold to be attained. Publishing was judged to be relatively secure, and thus capable of being

⁹⁴ The suggestion is that the Arts Council may have been considering funding the purchase of the rights of one major Irish writer, of the literary calibre and commercial prospect of Samuel Beckett.

⁹⁵ The 1997 Taxes Consolidation Act, Section 91 provides that "a lump sum paid to the personal representatives of the author of a literary, dramatic, musical or artistic work as a consideration for the assignment by them, wholly or partially, of the copyright in the work" is not liable for tax, if the publishing house assigning the copyright ceases to trade. The intention was differentially to encourage the retention in Ireland of the rights, in preference to the rights being sold abroad. The provision was originally introduced in the 1970 Finance Act. In the 1990's publishing did not qualify under for a reduced 10% rate of Corporation Tax, and was liable at 38%. Printing, in contrast, did qualify, having been identified by the State as an industry to be targeted for development.

⁹⁶ Arts Council Annual Report, 1980, 19.

⁹⁷ Established in 1970. (Richards, 1976, 73).

⁹⁸ Arts Council Annual Report, 1980, 19.

⁹⁹ Arts Council Annual Report 1979, p 15.

¹⁰⁰ Arts Council Annual Report, 1980, p 19.

¹⁰¹ Unnamed American commentators, cited in Arts Council Annual Report 1982, p 8.

judged objectively in commercial terms as an industry.¹⁰² In 1983, the Arts Council voiced its assessment that the period 1974 to 1982 had been the “take-off phase of the Irish publishing revolution,” and again stressed the necessity to change emphasis from quantitative success to qualitative.¹⁰³

Other cultural industries

In the 1980's and 1990's, the film industry and, to a lesser extent, the music recording industry also developed. The government used taxation legislation to encourage the development of the film industry in particular. Preferential taxation treatment as an aid to general industrial development had become a major component of government industrial policy in the 1960's. In this period, the cultural industries were recognised as being especially deserving of preferential treatment. The government also began to accept that these cultural industries should be valued and supported for cultural, rather than simply for financial reasons. Ireland's status as a net importer of cultural goods (by a huge margin) deserved to be countered on cultural as well as on economic grounds.¹⁰⁴ Rockett (1988, 114 - 22) analysed the faltering efforts by the state apparatus to support the film industry in the 1980's through the establishment of the Irish Film Board.

Clancy and Twomey (1997, 34) argued that the scale of the Irish market for popular music militated against the development of a “viable independent popular music industry.” These researchers dated the emergence of the Irish popular music industry to the late 1960's and early 1970's. Before that time, musical activity had been largely confined to other fields, such as classical, traditional, jazz and ‘folk’ music, and “very little of the popular musical activity was of any economic significance” (1997, 2). The social pattern of a reliance on live music in venues such as public houses and dance halls (although, as was shown by the activities of the PRS, recorded music was used in such venues) lessened the opportunities for the derivation of economic benefit from much of the existing musical activity.

¹⁰² Arts Council Annual Report, 1982, p 8.

¹⁰³ Arts Council Annual Report 1983, p 14.

¹⁰⁴ O Tuathaigh (1984, 97) noted the openness of Irish society to imported cultural goods. Imported books, journals and newspapers were widely consumed, as were foreign television broadcasts and recorded music.

The six major international record companies had established subsidiaries in Ireland by the 1980's, but the commercial intent in these cases was to supply the Irish market with international recordings (Clancy and Twomey, 1997, 3). Of the six companies, some, such as EMI had had a presence in Ireland since the 1960's, and some had been involved in record production in Ireland in the past, "which had ceased circa 20 years ago" (Clancy and Twomey, 15-6).¹⁰⁵ The industry has been dominated by foreign or multi-national record producers, and according to IFPI Ireland, the indigenous sector of the Irish record market accounted for 10% or less of the total.¹⁰⁶ As had been the case with book publishing, the indigenous record industry partly depended on the expatriate market for recordings of Irish traditional music: "traditionally the export market for indigenous record companies has been limited to countries with strong Irish affiliations such as the UK, the US and Australia."¹⁰⁷ Most indigenous Irish record companies, such as Gael Linn, directed their efforts to supplying the domestic market, "although a small number of companies are primarily export-oriented" (Clancy and Twomey, 1997, 40). By 1994, the number of recognised composers in Ireland had risen to more than 1 000.¹⁰⁸ In 1981, Ireland exported £3m of records and pre-recorded cassette tapes, and imported £7.3m.¹⁰⁹ However, over the period 1978 to 1981, the inflation-adjusted value of total domestic sales of such recordings fell by more than 20%.¹¹⁰

A characteristic of the Irish industry, the reliance on traditional music and on other music less time-dependent or time-sensitive than popular music, has been that a return on investment over a far longer time-span has been tolerable to the producers. In addition, the absence of an exclusively commercial motivation for much of the indigenous production also vitiated the commercial character of the industry. This quasi-amateurism may also have lessened any awareness of the potential importance of IP Rights as commercially exploitable assets.

¹⁰⁵ The repeated comments in RTE and P&T in the 1950's and 1960's to the effect that the Irish record industry consisted of the manufacture of "a few pressings," and the dismissal of the efforts of the Waltons Music company as non-commercial, undermine any belief that Ireland had a functioning recording industry with any genuine cultural impact in the 1950's and 1960's.

¹⁰⁶ Cited in Clancy and Twomey, (1997, 17).

¹⁰⁷ Clancy and Twomey, (1997, 18). These authors also noted (1997, 74) that "there is some anecdotal evidence to support the contention that the Irish music industry is facilitated in reaching export audiences through the Irish 'Diaspora.'"

¹⁰⁸ Clancy and Twomey, 1997, 10; based on PRS statistics. By 1996, the number of composers registered with IMRO had risen to 1 500.

¹⁰⁹ Council of Europe. *The Private Copying of Phonograms and Videograms*, Strasbourg, 1984. Table, p 90. The statistics in the report were derived from the Survey of Recording Practices in Ireland, conducted by the Irish National Group of the International Federation of Phonogram and Videogram Producers in 1982.

¹¹⁰ Ibid. p 91.

The question of ownership of traditional music raised some controversy in the period under review. Older forms of ownership or recognition of authorship persisted, in which the rights to a piece of traditional music or music composed in a traditional genre or style were recognised through an honorific system, in which authorship was recognised without recompense. Quinn (1997, 33) cites Shields (1993) on the concept of 'ceolcheart', in which the community recognised the proprietary rights of a particular performer to a song or piece of music. More recently, the extension of formal, legal copyright ownership has been termed by Shields as reminiscent of "an old abuse: the private enclosure of common land,"¹¹¹ and has been the occasion of considerable resentment among the practitioners of traditional music.

7.4 Internationalisation of the Irish Debates after 1963

The Irish debates on copyright and related rights became dominated by external influences in the decades after 1963. While external forces had been influential before that time, in this most recent period, external pressures became dominant. The increase in the relative importance of IPR internationally was the first major factor in changing the context in which regulations were framed. The second crucial issue was the change in Ireland's political and economic condition. The country's integration into the European Union increased national wealth and output. It simultaneously led to the direct importation into Irish debates of agendas originating in other countries. Cultural autonomy, long an issue for some member states, became an issue for the EU as a whole. Similarly, as the trade in information itself gained in relative economic importance, the EU began to draft policies for its regulation. The third important factor in internationalising the Irish debates flows from the increasing importance of information as a tradeable commodity. The United States in the 1980's underwent a sea change in its attitude to international protection of Intellectual Property, and it began to project its influence internationally in pursuit of enhanced protection of its IP by other states. In this context, the importance of domestic Irish debates on copyright greatly diminished. Indeed, Ireland's influence on the formulation of the broad strokes of its copyright law is now largely confined to its interventions in the internal debates of the EU.

¹¹¹ Shields, (1993, 197), cited in Quinn, (1997, 35).

Irish Copyright piracy and related offences

Copyright piracy became a major international issue in the 1980's, as a result of improvements in technology which facilitated illegal duplication of sound and video recordings..

The Irish 1987 Copyright (Amendment) Act, which had first been introduced as the Copyright (Amendment) Bill 1984, was the only primary legislation affecting copyright in Ireland which was enacted between 1963 and 1990.¹¹² The Act, which amended the Copyright Act 1963 in a number of respects¹¹³, increased the penalties for infringement of copyright in films, broadcasts and music recordings. While the intention of the Act was to facilitate the elimination of copyright offences, the legislative mechanism employed was simply to adapt the 1963 Act to changing social and commercial circumstances, rather than to alter the existing regulatory system in any radical manner.

A new, commercial broadcasting system was planned for Ireland in the 1980'. This too led to minor changes in the copyright regulatory framework, with protection now being accorded to independent broadcasters in the Broadcasting Act in 1991. The advantages which RTE had previously sought for itself were then, belatedly, accorded also to its competitors.

Council of Europe Activism

The Council of Europe has trenchantly opposed the piracy of copyright works, on the grounds that it works against the ultimate interests of both producers and consumers. Because of the improved quality of pirated information goods in recent decades, these goods were in a position to substitute directly in the market for the legitimate product. The loss of income which was caused by competition in the marketplace with the legitimate product led to a diminution in the revenue to the producers, performers and authors and "this in turn tends to discourage cultural creativity and future investment, which, by prejudicing the

¹¹² Two university acts, passed in 1989, extended legal deposit privileges to the new universities.

¹¹³ The 1987 Act made minor changes in the law of pictorial copyright and increased the penalties for offences concerned with the circulation or importation of "infringing copies."

diversity and quality of products available, in the long run, can only work against the interests of consumers.”¹¹⁴

The Council of Europe became concerned in the 1980's about the extent of home taping of copyright works. It considered whether “home taping in a given country developed into a market in its own right of the use of intellectual property.”¹¹⁵ The Council argued that states should examine the sales of blank tape, because this was indicative of the extent of home taping in their territories.¹¹⁶ The Council defined bootlegging as the “unauthorised fixation and subsequent duplication for commercial purposes of a performer's live performance.”¹¹⁷ The Council exhorted its member states to become parties to the latest revisions of the Berne Convention, of the Rome Convention, of the Convention for the Protection of Producers of Phonograms against Unauthorised Duplication (Geneva, 1971) and of the European Agreement on the Protection of Television Broadcasts, Strasbourg, 1960.¹¹⁸

Ireland's persistent failures to legislate: international pressure the most effective stimulus to action

Ireland's attitude to copyright was characterised in the period after 1963 by a marked reluctance to amend its legislation, despite involvement in the Stockholm process, and despite membership of the Council of Europe. While regulations were issued from time to time, to clarify or amend aspects of the law, the general scheme of Irish copyright legislation was fixed by the 1963 Act. Even the enactment of the British 1988 Copyright Act did not lead immediately to a change in the Irish law. The government adopted a position of allowing the debates on the development of copyright law to be determined externally. Before the country joined the EEC, British law and the international multi-partite conferences were the primary, though indirect, shapers of Irish regulation. After Ireland joined the EEC, the arena of initiative gradually shifted to Brussels. The other major spur to

¹¹⁴ Council of Europe. Measures to combat piracy in the field of copyright and neighbouring rights, Strasbourg, 1989. p 7

¹¹⁵ Council of Europe. Sound and audio-visual private copying. Strasbourg, 1989, p 12.

¹¹⁶ Some states, led by Germany in 1966, had imposed a levy on the sale of blank tapes.

¹¹⁷ Council of Europe. Measures to combat piracy in the field of copyright and neighbouring rights, Strasbourg, 1989. p 8.

¹¹⁸ Council of Europe. Measures to combat piracy in the field of copyright and neighbouring rights, Strasbourg, 1989. p 8

change in Irish copyright policy was the US, which was in a position to enhance its influence by the threat of economic sanctions.

There are no obvious comparators to measure Ireland's copyright actions against in this most recent period. Comparisons with Canada, for example, are necessarily strained. While Canada was also a party to international agreements, it was not a member of an economic union.¹¹⁹ Ireland's administration did not engage in a consideration of amending its copyright law in the light of technological advances in the 1970's and 1980's. In contrast, Canada conducted an internal debate on copyright law in these decades which was heroic in its detailed examination of the legal position, despite the fact that Canada was in the immediate orbit of the US, and thus susceptible to intense commercial and political pressure.¹²⁰

As the US became more aware of the economic importance of its cultural industries in the 1970's and 1980's, the stage was set for Ireland to come under indirect and ultimately direct US pressure to amend its copyright legislation. In 1976, the United States passed a new Copyright Act, its first major reform since 1909. The US was also becoming disposed to joining the Berne Union, which would have made the UCC redundant. The US was implicitly recognising its transformation from a cheap-books country which used its lax copyright law to develop its cultural industries at the expense of foreign competitors, into a country which now strove to impose the highest standards on other states. This led to a new US activism on copyright, and to an increased interest by American commentators in the activities of alleged rogue states which continued to pirate US intellectual property.¹²¹

The Irish copyright regulatory system in the 1980's demonstrably fell behind the average standard of comparably developed countries, in terms of the low penalties for infringement, and in terms of the technologies which were explicitly regulated. The international climate changed in the 1980's, when developing countries came to agree with the demands of the dominant cultural goods producers of the developed 'North', that weak intellectual property control worked against the interests of all. This ensured that states were encouraged to level up to the highest standards. Primo Braga noted the change in attitude of developing countries, when "there was more recognition of the negative effects of weak protection"

¹¹⁹ The conclusion of the NAFTA Agreement later imposed certain copyright obligations on Canada.

¹²⁰ See Torno (1981), Blomqvist & Lim (1982) and Audley (1983), for example.

¹²¹ Gadbow and Richards (1988) and Sherwood (1990), for example.

(1990, 22). This applied in particular in states in which the local cultural industries like film and television production were economically important, as was the case in India and Brazil.

The direct stimulus to Ireland to strengthen its IPR laws was not confined to international disapproval of Irish video piracy. International software producers understood that Ireland's protection of software copyright was defective, and consequently the transnational software subsidiary companies located in Ireland were potentially endangered.

Some domestic actors emerged during the 1980's and 1990's, pressing for change in copyright and IP law. The debates were characterised by the activism of a more vocal and energetic lobby on the part of the rights organisations and of authors. A number of organisations emerged in different sectors of the cultural landscape, such as IMRO, as an outgrowth of the PRS¹²², the ICLA (the Irish Copyright Licensing Agency), the RIPMA (Republic of Ireland Music Publishers Association) and IFPI (the Irish Federation of Phonographic Industry). These bodies have sought changes in legislation, particularly to achieve harmonisation with EU law, and to have Ireland's law accommodated to the demands of technological development. In many of these cases, the domestic lobby groups were closely aligned to international actors, and consequently the point of view of the external cultural industries was being articulated from within the country as well as from outside.

International Pressures in the 1980's and 1990's

Ireland in this period was much more fully integrated than previously into both the European Union and the 'global economy.' It became clearly established as the dominant, orthodox position that, in international terms, copyright is predominantly an economic right, to be regulated as a tradable commodity. As the developed world, and in particular, the United States came to rely on information and cultural industries to an increasing extent for economic activity, diplomatic and political energy was applied to the achievement of political and regulatory ends. The subsequent shaping of the international copyright landscape has been clearly in the interests of the dominant states in the developed world.

¹²² Clancy and Twomey (1997, 31) noted that the PRS had "been widely criticised for its casual attitude towards the collection of performance royalties of Irish artists" when it was responsible for their collection until 1995.

At the core of the transformation of the international regulatory system has been the radical departure of the United States from its historical lack of concern about the value of international protection of intellectual property. Motivated by domestic economic concerns, the US had by the mid-1980's integrated itself into the world copyright system to the extent that suited its interests. It now enforced its model of good copyright practice on other states, while still refusing to accept the universality of the moral rights conception of copyright which has been integral to the Berne Convention. The strategem of using the mechanisms of the World Trade Organisation to enforce copyright protection to a standard set out in the Berne Convention¹²³ has been the masterstroke of the US, since it hybridises the reciprocal aspirations of the Berne Convention with the rigid enforcement mechanisms of the WTO.¹²⁴

While Ireland is a member of one of the other major blocs in world copyright trading, the political autonomy of EU member states and the residual copyright sovereignty which the member states have retained, have made it a direct target for US pressure in the IPR field. At the same time, a high proportion of the inward investment which has driven Ireland's economic development is of US origin. Thus Ireland has been particularly vulnerable to pressure in furtherance of the US objective of levelling up to the American standard of protection of American intellectual property. In Ireland's debates and discussions pointing to new IPR legislation in the 1990's, therefore, the demands of the US government on it rank as highly as do the outcome of the EU deliberations on copyright at which Ireland's voice has been heard. In the 1980's and 1990's Ireland has succumbed to US pressure on two occasions in relation to copyright regulation. The irony of the conversion of the US from international copyright pariah to international copyright policeman is therefore very starkly evident from Ireland's perspective.

US Copyright Activism and the Berne Convention

The change in US copyright policy was preceded by several years in which the American manufacturing clause had been popular in the US, and there appeared to be little likelihood of its repeal. As late as 1986, there was considerable support for making the manufacturing

¹²³ Oppenheim (1997, 359) argued that, in the interests of developing countries, and in the face of likely future pressure on them from the US and other large content producing countries, that it was "essential that a clear demarcation between the ... areas of responsibility" of the GATT, WIPO and Unesco should be maintained.

¹²⁴ Primo Braga (1991, 175) noted that the US attempted unsuccessfully to insert some IPR issues into the GATT negotiations in the Tokyo Round in 1980, when it proposed an Anti-Counterfeiting Code.

provisions permanent, and indeed for strengthening the statute.¹²⁵ The 1976 Copyright Act's manufacturing clause was due to expire in 1982. The clause's term was extended to 1986, during which time a presidential veto was overturned by Congress. Boyd argues that the US recession of 1982 carried the day, in the interests of the printers, and characterises the retention of the US manufacturing clause as "a classic example of a measure benefiting a narrow, politically aware, and mobilised special-interest group, while imposing mostly indirect and difficult-to-measure costs on the nation as a whole" (1991, 65). The US decision to abandon the manufacturing clause was taken under pressure from the EC, which was prepared to invoke the mechanisms of the GATT to retaliate by targeting US products in other industrial sectors. The American Executive was also opposed to the continuance of the provision. The manufacturing requirement was dropped in 1986.

Throughout the period of the manufacturing clause in the US, between 1891 and 1986, "little opposition was apparent once publishers were appeased. No avid readers testified or visited their congressmen to complain about higher book prices" (Boyd, 1991, 67). The US joined the Berne Convention in 1989, following changes in its domestic law, in which the registration requirements of its law were removed in 1976.

The manufacturing clause was allowed to expire because the much more powerful copyright owners were then able to overcome the printing interests, who typically were not also publishers in the US (Bettig, 1996, 221). America removed the legislative advantage to the printing industry, once the overall gains, accruing to the publishers, were greater. This recalls the relative strengths of Ireland's industries in the 1920's, where the printing industry dominated the publishing industry economically, politically and rhetorically. Bettig describes the book printing industry of the 1980's as a "declining hegemonic faction based in manufacturing," which was overcome by the much more powerful forces of the rights-owning faction, and consequently the latter were in a position to shape the acts of the state apparatus.¹²⁶

¹²⁵ Certain diminutions of the manufacturing clause had been introduced, such as the permitted entry to the US of editions of less than 2 000 copies, works by foreign authors and some picture book. (Boyd, 1991, 64.)

¹²⁶ Bettig (1996, 222) also noted the opposition of the film industry to US membership of Berne, through fear of the moral right implications, where rights owners could object to detrimental treatment of their works. Among the concerns were objections to the colourisation of monochrome films, but the crucial argument was with the threat which was posed to the American film industry practice of buying the rights of screenplay writers outright. Bettig submits that these concerns on the part of the film industry were overcome in the 1980's by the greater threat of new communications technologies, for which Berne protection was necessary. However, once the US acceded to Berne, the legislature imposed a domestic condition, to the effect that the moral rights dimension of

Altbach showed that “copyright compliance comes naturally with economic and social development” (1995, 8). The pattern is demonstrable clearly in the case of the US, but can also be discerned in the case of Russia, China, India and other former infringers. Once the US became a member of the Berne Union, it was able to pose internationally as a virtuous operator, campaigning against piracy, heedless of the country’s own long history of non-compliance in the same arena.¹²⁷

Direct US pressure on Ireland

Ireland’s membership of the European Union did not deflect US criticism of the inadequacies of Irish law to protect US intellectual property interests. The clamour for action from some Irish actors in the debates may actually have attracted excessive international attention to the problem of Irish copyright piracy, since piracy appears to have been less pervasive than in other countries. Lengthy delays in drafting copyright legislation undoubtedly contributed to US impatience. However, the small scale of the Irish administrative structure, coupled with the necessity to reformulate according to Irish legislative drafting practice the large output of EU Directives, rather than active unwillingness to amend the legislation, appear to have been the primary factors in the Irish delay in legislating.

An OECD report¹²⁸ noted that the Irish 1998 copyright legislation had been passed “following a US complaint that Ireland’s law was not in conformity with the WTO [TRIPS] Agreement” (1999, 119). The report recorded that the effect of the legislation had been to shift the burden of proof in civil litigation on copyright “in favour of the plaintiffs”, in

the Convention should not be given effect in the US courts, which Bettig suggests demonstrated “that once again privileged economic rights over those of actual creators of intellectual and artistic works” (1996, 223). The capacity of states to vary the domestic effect of international law and conventions is a complicating factor in how copyright agreements are actualised within states; Ireland, for example, requires that the terms of the Berne Convention be enacted in Irish legislation. However, it does appear that the American disallowing of the moral rights dimension of the Berne Union should disqualify it from membership of the Union.

¹²⁷ The Americans, before they joined the Berne Convention themselves, cynically used the possibility of publishing editions of works both in American and in a Berne state (usually Canada) to acquire the higher Berne standard of protection indirectly (Drahos, 1999, 20). Vaver (1986, 720) suggests that one of the purposes of the UCC had been to obviate the need for non-Berne countries to use “‘back-door’ reliance” on the Revised Berne Convention. The UCC was less exacting on states than was the Berne Convention, both by covering fewer classes of works, and in making lesser demands on the nature of the protection which states were expected to grant.

¹²⁸ OECD Economic Surveys 1999: Ireland

addition to increasing the penalties for offences.¹²⁹ (Ironically, IMRO took an action against the US in 1997, for the minimalist approach which that country took to the responsibilities arising out of playing Irish music recordings in bars and shops. The US, on the basis of a Supreme Court decision, did not fully enforce the Berne Convention requirements that performance royalties be paid for the public use of recorded music.¹³⁰)

The US Ambassador to the WTO, when asking the WTO to establish a panel to examine whether Ireland was not meeting its TRIPS obligations, claimed that Ireland showed “a very broad range of non-compliance” with the TRIPS Agreement, and that Irish regulations facilitated “criminal piracy.”¹³¹

In December 1997, music piracy activity in Ireland was valued at £3m.¹³² Police efforts, in co-operation with IRMA, were “hugely successful” in seizing pirated music and other counterfeit goods, but the enforcers felt handicapped by the absence of strong enough penalties. The *Irish Times* reported in February 1998 that the US was intent on pursuing its WTO action against Ireland on copyright, despite assurances from the government that legislation would be introduced in July 1998.¹³³

EU Activism in the copyright debates

The European Commission was forced by two factors to take an interest in copyright: technological developments, and the necessity to facilitate the functioning of the European Single Market. The EC’s activism in the area, which began in the mid 1980’s,¹³⁴ and which gathered pace in the early 1990’s was therefore intended primarily to secure the internal market in intellectual goods and services. Cultural consequences were also considered.

¹²⁹ The report noted (1999, 148, n 125) unspecified press estimates of Irish software piracy at about 70%. US interest in new Irish legislation was evidently guided by the prospect of revenue losses to software companies, rather than to writers or musicians.

¹³⁰ IMRO received the support of the Irish government and of the EU on this issue; the EU Commission undertook to bring the issue to a WTO Panel for adjudication. Ken Stewart, At Irish Confab, US faulted on royalties issue, *Billboard*, 12 April 1997, 107(15), 6-7.

¹³¹ *Irish Times*, 23 January 1998, Business supplement, p 1.

¹³² Report, *Irish Times*, 13 December 1997, p 10.

¹³³ Report, *Irish Times*, 9 February 1998, p 4.

¹³⁴ Marengo traced the EC Commission’s first initiative in the approximation of copyright regulation to a proposal in 1986 to allow a statutory licence for the cable retransmission of broadcasts, if a contractual agreement could not be reached (1989, 40).

“Copyright and neighbouring rights form the foundation of intellectual creativity and the propagation of culture. Protection of these rights guarantees the maintenance and development of creativity and cultural diversity to the benefit of authors, of performers, of cultural industries, of consumers and ultimately of society at large.”¹³⁵

The Commission was concerned that national legislation might lead to “an obstacle to the free movement of goods and services and to the free play of competition, two of the basic principles of the European common market. Accordingly, this situation can hinder the development of European cultural creativity.”¹³⁶ The Commission committed itself to achieving harmonisation of laws throughout the territory, and to influencing IPR agreements internationally.

After a long period of inactivity up to the 1980’s, the European Commission was finally setting about obtaining harmonisation of legislation in the field of copyright (Dreier and von Lewinski, 1991). The “Television without Frontiers” Green Paper of 1984 was an early policy intervention by the Commission in the field, but the 1988 Green Paper on copyright¹³⁷ was the primary foundation document. The 1992 Single Market project gave impetus to achieving harmonisation in the copyright field.

The Commission sought to achieve agreement in the disparate areas of piracy, home copying, the rental right, computer programs and databases, and, indeed, this fragmented approach was the subject of some criticism from commentators. Purely cultural issues, including the rights associated with book publishing, were not directly treated in the Green Paper, but were addressed in a separate document.¹³⁸ A revised Commission proposal was made in 1990, in which a programme of work in the field of copyright was proposed.¹³⁹ The Commission proposed that all states should accede to the Berne¹⁴⁰ and Rome conventions¹⁴¹

¹³⁵ CEC. *Copyright and neighbouring rights in the European Community: the emergence of Community-wide protection for creativity*. Luxembourg, 1991, p 9.

¹³⁶ Ibid. p 4

¹³⁷ *Green Paper on Copyright and the Challenge of Technology - Copyright Issues Requiring Immediate Action*, COM(88) 172 final, June 7, 1988. Cited in Dreier (1991, 98).

¹³⁸ *Books and Reading: a Cultural Challenge for Europe*, COM(89) 258 final, 3 August 1989.

¹³⁹ *Follow-up to the Green Paper - Working programme of the Commission in the field of copyright and neighbouring rights*, COM(90) 584 final, 17 January 1991. Dreier ascribed the difficulties which were placed in the way of the formulation of a unified EC policy on copyright to the division of different aspects of copyright regulation among different units of the bureaucracy (1991, 101-2).

¹⁴⁰ As revised in Paris, July 1971. Ireland’s conventions obligations were updated, when it acceded to the administrative, but not to the substantive provisions of the Stockholm 1967 Revision. However, this revision, which made special provisions for developing countries, became in effect a dead letter internationally.

This presented a challenge to Ireland, since it had acceded by then only to the 1948 Brussels Revision of the Berne Convention, rather than to the later Paris Revision, 1971.¹⁴²

7.5 The Domestic debate in Ireland in the 1990's

Economic value of the cultural industries in Ireland in the 1990's

Official estimates of the increased value of the Irish cultural industries in the 1990's contributed to an increased awareness of their economic importance. An official report showed that the value of the Irish publishing industry had risen to more than £31m.¹⁴³ The Minister for Arts, Culture and the Gaeltacht, noting that Ireland accounted for only 0.25% of the world publishing industry, proposed that state investment in publishing should lead to Irish writers being the "beneficiaries of investment in publishing, otherwise the current trend of Irish authors going to the bigger English publishers would continue."¹⁴⁴

In March 1998, the government promised that a new Irish Copyright Bill would be introduced. An awareness was developing at the time that Ireland was gaining economically to a significant degree from the musical output of the country. In 1997 the country was "the fifth-highest provider of international hit records on the global pop and rock market," while six Irish musicians had achieved a "minimum retail turnover of £1.25 billion."¹⁴⁵ IMRO identified export sales as the primary growth area for Irish records in the future. Irish records had 1% of the Italian market and 4% of the German market in 1995, and the organisation believed that this could be increased substantially.¹⁴⁶

¹⁴¹ The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations.

¹⁴² The Paris Act 1971 introduced compulsory licensing.

¹⁴³ *The Future of the Irish Book Publishing Industry: a Strategic Assessment by Coopers & Lybrand*, July 1995. Dublin, on behalf of the Arts Council.

¹⁴⁴ *Irish Times*, 19 July 1995, p 2. Report by Katie Donovan.

¹⁴⁵ Ken Stewart, Irish PM pledges c'right update, *Billboard*, 21 march 1998, 110 (12), p 55.

¹⁴⁶ Report, *Irish Times*, 17 February 1995, Business Supplement, p 3.

Emergence of new actors in the Irish debates

The 1980's and 1990's saw the emergence of new Irish actors¹⁴⁷ in the copyright debates, and there was an increased interest by existing sectoral actors in the issue. In the case of some of these actors, a distinct Irish interest was promoted.¹⁴⁸ In others, notably INFACT and the PRS, there was an articulation in the Irish debates of the interests of international cultural producers. INFACT, in particular, which has advanced the view that piracy of intellectual property goods is being conducted with the involvement of subversive or politically-motivated organisations, succeeded in mobilising vigorous official enforcement of the existing law strongly in the interests of the international film, video and music production centres. In this research, it has not been impossible to obtain detailed information on the organisation, activity, funding and membership of INFACT, and, while this may well be due to security concerns, the impression is left that it is the Irish agent of an international cultural industry.¹⁴⁹ Its activities have contributed to an international impression that Ireland has been a major infringer of intellectual property, despite other published estimates that in the late 1990's piracy in Ireland amounts to only 5% of output in these sectors. Ireland would appear to have come under intense US pressure partly as a result of the actions of INFACT, and as a result of the willingness of the state enforcement agencies to allow their recovery and destruction operations to be filmed for international circulation. In comparison with other territories, such as Taiwan, Hong Kong, Korea, Argentina and (egregiously) Luxembourg, the extent of the piracy problem in Ireland has been effectively misrepresented in international debates by over-reporting.

Among the changes in the Irish IP landscape in the 1990's has been the new organisational independence of the Irish collecting agencies, and the tireless efforts of IMRO in particular in seeking to establish a new compliant attitude by businesses to legal obligations to pay performance fees for the use of recorded music. However, as efforts to enforce compliance extend beyond these boundaries, the previously existing tacit educational exemptions and special provisions have come under pressure. Pat Rabbitte, the Minister for Commerce, Science and Technology in 1997, while welcoming the prospect of the amendment of copyright laws world-wide, drew attention to the domestic fallout which was possible,

¹⁴⁷ IBEC, ICLA, IMRO, INFACT. In some cases, existing organisations adopted copyright policies, and are new actors in this sense.

¹⁴⁸ Such as IBEC, IMRO, ICLA.

¹⁴⁹ Clearly, the Irish cultural industries form part of this "international cultural industry".

calling to mind the “attempted IMRO raid on primary schools last year.”¹⁵⁰ In a highly controversial move, IMRO had claimed £64 000 from primary schools in 1996, by introducing a fee of £20 from each school.¹⁵¹ This was seen as the thin edge of the wedge.

The Irish Copyright Licensing Agency (ICLA) was established by publishers in 1992 to regulate reprographic rights. Reprographic processes, such as photocopying, were largely unregulated or were the subject of forms of self-regulation, under the 1963 Copyright Act. ICLA’s activities in seeking payments for reprographic rights has met with some resistance from targeted organisations. Michael Gill, Chairman of ICLA, writing about the problem of illegal photocopying of copyright works, claimed that in 1997 Ireland had “some of the most outdated copyright legislation in Europe” (Whalley, 1997, 29). The Simpson Xavier Horvath report in 1994 made the same point, pointing out that the 1963 Copyright Act was “hopelessly inadequate in the nineteen-nineties and beyond” (1994, 32). Gill identified a desire for a social respect for copyright as one of the aims of the ICLA. Other aims were the provision of a clearing house for reprographic rights as the primary market intervention, and the establishment of reciprocal agreements with foreign agencies (Whalley, 1997. 28-9).

IMRO, which grew out of the London-based PRS, and which took over the licensing functions of the PRS in 1989, did not become wholly independent until 1994. The Simpson Xavier Horvath report recorded that IMRO was at the time a wholly-owned subsidiary of the PRS (1994, 41), but that the question of having a fully independent body was under consideration. There was a strong belief that if there were an independent Irish collecting agency, in the context of the considerable success of Irish music internationally, it might be more effective in optimising the value of revenues from foreign royalties.¹⁵² There was political support from the government for the creation of an Irish collection agency. As IMRO members balloted in November 1994 on whether to dissociate from the PRS, the chief executive claimed that an independent IMRO would see revenue rising from £8m to

¹⁵⁰ Supplied script, p 9; Speech of Minister at the Ireland, Europe and the Global Information Society Conference, Irish Film Centre, 24 April 1997.

¹⁵¹ Ken Stewart, IMRO slammed for billing schools, *Billboard*, 11 May 1996, 108 (19), pp 43-4.

¹⁵² IASC, the Irish Association of Songwriters and Composers, claimed that if IMRO were independent of the PRS, it “would save an estimated \$155 000 a year in the administration and distribution of Irish members’ royalties, as well as providing 12 new jobs and a more efficient service”. Ken Stewart, 1 August 1994, *Billboard* 105 (53), 38, Demand grows for Irish Rights Body. Royalties collected by IMRO increased from £2.83 m in 1989 to £5.8 m in 1992, and a figure of £6.87 was predicted for the 1993 outturn. In 1995, the figure was £8.2m.

£20m per year within five years.¹⁵³ Ultimately, Irish members of IMRO voted to be independent of the PRS.¹⁵⁴

IMRO's actions in seeking fees for the performance of arrangements of traditional works was controversial in 1997,¹⁵⁵ in venues such as public houses and in cultural venues such as those of Comhaltas Ceoltoiri (CCE).¹⁵⁶ This led to a major public controversy, since it appeared to involve the appropriation of collective, traditional or anonymous cultural property by an industry lobby. Traditional musicians were generally opposed to the action. "Musicians see the music as the work of other generations' hands, held in common trust to be passed on, belonging to the nation" (Vallely, 1997, 12). IMRO urged musicians to claim rights in their performed versions or arrangements of traditional works, and to engage in an administrative relationship with IMRO to that end. The organisation sought to impose its wishes by including proprietors of venues where transitional music 'sessions' were held among the 800 court actions which it was taking for rights infringements. While CCE were at the time opposed to the IMRO initiative, referring to the organisation as an "English import", it ultimately came to terms with the organisation.¹⁵⁷ Micheal O Suilleabhain suggested that the attempt by IMRO to extract revenue from and to commodify traditional musical works might have the social effect of altering the musical practice in Ireland, by shifting activity from "free, public spaces to commercial, licensed enclosures", in a manner analogous to the Dance Halls Act 1935, which radically altered another aspect of traditional cultural activity in Ireland by controlling and commercialising it (Vallely, 1997, 12).

¹⁵³ 'IMRO vote may boost music revenue to £20m'. *Sunday Tribune*, 27 November 1994. Niall Stokes, publisher of the music paper *Hot Press*, argued for the independence of IMRO from the PRS on additional, non-financial grounds: the existing system of collection was "a throwback to a time when we were a colony of the British Empire." The primary reasons appear to have been expected financial efficiencies, and a more energetic approach to the collection of specifically Irish international revenues.

¹⁵⁴ *Irish Times*, 7 December 1994, p 20. 95% of the papers cast were in favour of dissociation.

¹⁵⁵ Fintan Vallely, Save the session, *Irish Times*, 4 February 1997, p 12.

¹⁵⁶ In 1999 IMRO and CCE came to a contractual agreement on the payment of fees for the performance of traditional works. Copy obtained under Freedom of Information legislation, Department of Enterprise, Trade and Employment, 1999.

¹⁵⁷ A copy of the IMRO - CCE Agreement, with associated documentation, was provided under Freedom of Information legislation by the Intellectual Property Unit, Department of Enterprise, Trade and Employment.

Mobilisation of domestic actors in favour of legislative reform in the 1990's

Among the domestic organisations which lobbied for changes in Irish Copyright law in the 1990's was IRMA (the Irish Record Music Association), funded by Phonographic Performance Ireland Ltd (PPI).¹⁵⁸ This organisation sought modification of the Copyright Act on the grounds that the existing legislation "almost predates TV, never mind technology." Technological fears, as the Internet developed, were the major impetus for the organisation to galvanise itself towards seeking improved protection for its intellectual property. The organisation was involved in monitoring the incidence of piracy in Ireland, and claimed to be aware of the identities of 38 individuals involved in piracy. It sought increases in penalties, and changes in the burden of proof. Both of these were carried into effect in the 1998 Intellectual Property Act.

The technological datedness of Irish law was evidently becoming a significant threat to sectors of Irish economic activity. Doyle argued that Ireland's failure to update its legislation was "particularly dangerous because the World Trade Organisation is constantly monitoring domestic intellectual property legislation and encourages companies not to locate in countries where protection is weak" (Doyle, 1997, 15). Consequently, Ireland was clearly under direct US pressure, under internal pressure and under less visible but intense pressure from the administration of the WTO to bring its law up to the standards required of the TRIPS Agreement. It is also clear, however, that the commercial arm of the indigenous cultural industry was also anxious to have the highest level of protection, particularly to enforce the law against internal pirates.

In 1993 an industry-based organisation, the Irish Music Copyright Reform Group (IMCRG) was established purely to examine the copyright situation in Ireland, and to lobby for change.¹⁵⁹ This group appears to have recognised that the 1990's was the last period in which Irish copyright law would be formulated only in Ireland; "all new Copyright law will be legislated for in Brussels." The IMCRG were concerned with four issues, rental and lending rights,¹⁶⁰ moral rights, the home taping levy¹⁶¹ and the duration of copyright.

¹⁵⁸ Report, *Sunday Tribune*, 12 January 1997, Business Supplement, p 10.

¹⁵⁹ IMRO, MCPS, RIMPA, CMC and IASC had representation on the board of IMCRG. See Dempsey (1993). [Irish Music Rights Organisation, Mechanical Copyright Protections Society, Republic of Ireland Music Publishers Association, Contemporary Music Centre and Irish Songwriters and Composers Association.]

¹⁶⁰ Under the EC Directive on Rental and Lending Rights, Ireland was obliged to give legal effect to the Directive by 1 July 1994; this did not happen at that time.

The IMRO chairman, welcoming Ireland's extension of the duration of copyright¹⁶² from 50 to 70 years in 1995, noted that "this action rightly recognises the value of copyright and, in particular, music copyright, as one of Ireland's greatest national assets."¹⁶³ However, the extension of the term was criticised on grounds of the obstacles which it potentially placed in the way of literary scholarship in particular, since rights owners were again permitted to prevent critical use of works which reverted from the public domain to copyright in 1995.¹⁶⁴

The MusicBase organisation in 1994 claimed that music piracy was costing the Irish music industry £5 million per year.¹⁶⁵ This industry organisation argued for updating of the 1963 Copyright Act, in order to strengthen the case for the collection of royalties for Irish performers abroad. In 1998, the Music Industry Group of IBEC made a submission¹⁶⁶ to government, in which copyright law reform was identified as an important factor in developing the Irish music industry. The submission noted that Ireland was not "the worst affected region" for piracy, but argued that the "menace of piracy may be increasing in Ireland" (1998, 23). The submission claimed that, despite the changes which the 1998 legislation and adoption of the EU Duration Directive had made, Irish copyright law was still "very out of date," with legislation being "in arrears of its formal international obligations, not to mention lagging behind the commercial and technical realities." (1998, 25).

The FORTE Report, *Access All Areas*,¹⁶⁷ argued that the existing high level of Irish musical creativity could not be guaranteed to continue, unless stronger copyright protection was provided. It recommended that government and the Irish music industry should "work together at all levels to ensure the highest level of protection possible for this creativity" and

¹⁶¹ Ireland was one of four states which opposed a Commission proposal for a levy on home taping in 1992,

¹⁶² This was accomplished by Statutory Instrument, and not by primary legislation.

¹⁶³ Ken Stewart, Ireland extends c'right protection, *Billboard*, 23 September 1995, 107(38), p 57.

¹⁶⁴ Senator David Norris criticised the re-imposition of copyright, which might be "damaging to the Irish academic and cultural establishment" by preventing critics from quoting works by writers like James Joyce. Senator highlights 'danger' of EU copyright law, *Irish Times*, 30 October 1995, p 18. This is certainly one lesser-known cultural effect of copyright law.

¹⁶⁵ *Irish Times*, 19 November 1994; Letter to the Editor from Eamon Donovan, Information Officer of MusicBase..

¹⁶⁶ *Raising the volume: policies to expand the Irish Music Industry*: a Submission to Government by the Music Industry Group of the Irish Business and Employers Confederation. Dublin: 1998.

¹⁶⁷ *Access All Areas: Irish Music and International Context*. Report to the Minister for Arts, Culture and the Gaeltacht, Dublin: Stationery Office, nd, but issued in 1996.

argued that “there must be a comprehensive underpinning of the concepts of copyright by the Government to copperfasten the future success of the Irish music industry” (1996, 41).

The foreword to a 1998 report issued by IBEC claimed that the FORTE report had been precluded from considering copyright in depth. IBEC, in addition to its generalised call for increased protection, specifically called for a home taping levy.¹⁶⁸ The Simpson Xavier Horwath report,¹⁶⁹ commissioned by the rights organisations and some composers’ and musicians’ organisations, argued that “copyright reform is an essential pre-requisite to the development of the Irish music industry to its full potential” (1994, 32). In addition to the necessity of Ireland complying with EU Directives, the report argued that Ireland’s laws should be updated as “a matter of justice, fairness and national interest.” The Report argued also that stronger Irish copyright legislation would have industrial beneficial consequences, since it could be used as “one basis on which to attract international investment in the Irish music industry” (1994, 33).

7.6 Conclusion

The enactment of the Copyright Act 1963, which opened this period, marked the last occasion when Ireland availed of a substantial measure of autonomy of action in the field of copyright. The period ended with Ireland becoming incorporated into an international copyright system in which significant national autonomy was no longer available. Indeed, autonomy was no longer a practical proposition for smaller states, and indeed, as the international information and cultural economy converged, the advantages of autonomy for even major states declined. It is paradoxical that, as Ireland relinquished the capacity to construct a copyright system to the particular advantage of its own cultural producers, Irish cultural activity was achieving substantial commercial success, and an enhanced international reputation for cultural production.

¹⁶⁸ The 1994 Simpson Xavier Horwath report also called for the adoption of the levy. Ireland had recently voted against the adoption of the levy at the EU (Dempsey, 1999)3.

¹⁶⁹ The Simpson Xavier Horwath report, *A Strategic Vision for the Irish Music Industry*: a submission to government, Dublin, nd (1994).

The preponderant importance within Irish cultural life of a small number of institutions was reflected in the actions of government over this period. While the Arts Council and Aosdana have been important for the development and sustenance of cultural producers, the special position of the state broadcasting service in Irish cultural life is mirrored in its special position in Irish copyright law in this period. The close fit of the interests of RTE with the provisions of the Performers' Protection Act was not merely a measure of the success of RTE in winning internal administrative battles. It was also indicative of official recognition of the importance of this dominant cultural institution in Irish cultural life. As a result, broadcasting by the state broadcaster was the major beneficiary of the IPR regulatory system which was constructed in the years between 1960 and 1990.

In the latter part of this period, an internal debate on copyright began in earnest, and various formal and informal alliances and pressure groups came into existence to seek to influence government decisions on copyright. This represented a maturation of the cultural economy, where the economic and financial importance of cultural activity and the protection of the fruits of that activity became a normal aspect of commercial life. Nevertheless, the pattern remained of external influence being important in the debates. Even the domestic actors were in some cases aligned to, if not actually being facades for, international actors in the debates.

The failure to keep the law in step with technological and economic developments continued, however. The combination of relentless pressure from the US, coupled with less insistent pressure from the European Commission and from internal forces, forced the government undertake to recast the copyright law. The foot-dragging which was apparent throughout the 1990's, is difficult to explain. The scarcity of expert personnel within the administration would appear to have been the proximate cause. Even if this was so, it is indicative that copyright was a low political priority, unless a serious threat of economic sanctions loomed.

Ireland's integration into the European Union gave it the potential to influence the initiatives of the European Union from within, rather than simply acting as a minor state in international conferences. On the basis of the history of the development of Irish copyright law, it is likely that Ireland was not at this time a seedbed for radical initiatives in the formulation European copyright policy.

The aims which might in previous decades have been achieved through the use of the then-available mechanisms of the copyright law, have now been achieved by other means. A note of realism about the practical capacities which a small state like Ireland can have in the globalised cultural and information industrial and trading structures is now widespread among cultural producers in Ireland.

In conclusion, it must be recognised that in the latter part of this period, there was a conspicuous rise in the quantity of Irish cultural production which was also being reproduced in Ireland, by publishers, record producers and film makers. The fact that this occurred without the aid of a discriminatingly supportive copyright law is not just testimony to the quality of the output. It also indicates a matching of the output of producers to the demands of consumers. This is an achievement which would have been welcomed by many of the cultural critics who wrote about the state of the Irish cultural industries earlier in the century. It also represents an improvement in the retention within the Irish cultural industries of those industries' raw material. By so doing, the act of selection of material for reproduction, which is one of the prerogatives of the controllers of these industries, takes place within Irish culture to a greater extent than hitherto. This can be assumed to have enhanced the authenticity of cultural production, and to have contributed to its domestic cultural acceptability.

I would argue that this is one of the most important benefits to Ireland of the development of a secure linkage of cultural production and reproduction. It has emerged in the context of a diffuse project of using cultural production and reproduction as tools in the enhancement of a distinctive cultural identity for Ireland. This has been verbally encouraged at official level, but it has also been adopted by opinion leaders in Irish society. It appears to have permeated Irish society, and to be expressed in an enhanced sense of national cultural confidence and autonomy.

Chapter 8: Conclusions and Implications

Introduction

In this final chapter, I set out a summary of the main research findings of this study, I present some key conclusions and lessons that emerge from the research and I draw some implications for current and future policy-making, in the context of the findings. Ireland is recently engaged in a process of amendment of its copyright law, and this is likely to be merely the first phase in a continuing process of amendment, driven by two interacting forces, technological advances and the impetus to forge new international agreements. The chapter concludes with an indication of a number of issues which merit future research.

8.1 Summary of Main Research Findings

At one level, the history of the formulation of Irish copyright regulation and of its effects is simple and schematic. Over the course of the long period examined, two historical turning points conveniently divide the long span, and mark off three distinct phases in which copyright law or its absence had certain clear effects on the cultural economy and on society. Even in the case of the post-1922 period, when copyright was intermittently an issue of some political importance, certain enduring attitudes to copyright in administrative circles continually confront the investigator, and present simple explanations for actions taken. The belief at official level that copyright regulation was impenetrable to all except legal experts was a strong influence on the debates within the Irish administration. The belief that copyright could have little effect on Irish culture was pervasive. A normative belief that copyright was a ground on which cultural activity took place, rather than a legislative artefact created in response to conditions and expectations, dominated much of the thinking of the Department of Industry and Commerce. This led to a belief in the inevitability and immutability of copyright regulation as it was imported from abroad.

In tension with the simple explanations for the historical experience and for the policy decisions taken at various times, certain complexities which colour the situation must be taken into account in coming to a more sophisticated interpretation of the various issues. In

the following sub-sections, I summarise briefly the findings under four headings derived from the research questions posed in the opening chapter.

8.1.1 What was the relationship of copyright to the political project of nation-building and state-building after independence? How was copyright regulation used for political and diplomatic purposes?

The nation-building project

Copyright law was not a major factor in the nation-building or state-building project after 1922. However, it was mobilised in the project of the attempted restoration of the Irish language, which was one of the primary policy aims of the new state. An attempt was made to sustain the Irish language through the use of a derogation from the full demands of the Berne Convention, by allowing the publication of translations in certain circumstances without making a payment to the copyright owner.

The State also took advantage of the provisions of the Berne Convention to support educational publishing between 1927 and 1958, in a similar manner to the translations reservation. It would be wrong to consider this to have been an adjunct to a state-building ideological effort, however. It is more correctly understood to have been primarily a subsidy to the printing industry, and consequently an aspect of the government's industrial policy. To the extent that it had any social purpose, it was enacted to ensure that schoolbooks would be available at the reduced cost appropriate to a low-income society.

In more recent decades, copyright law was mobilised in favour of the state broadcasting service, to the detriment of the interests of the owners of copyright works. This might conceivably be considered to be an indirect aspect of a nationalist project of nation-building, if the activity of the broadcasting service as a shaper of national consciousness was to be considered in this light. However, this is a far-fetched interpretation which should be discounted.

The political and diplomatic use of copyright

Copyright law was used in the 1920's in several ways to assert in various public forums the independence of the new Irish State. It had previously figured as a minor component in the struggle between the Irish Parliament and the London government in the late eighteenth century, where it became entangled in larger political questions. It would be untrue to assert that the refusal to adopt a copyright law in 1785, at the time of the British - Irish negotiations on the Commercial Propositions, was of the same character as the attitudes of the 1920's. Nevertheless, the refusal of the Irish Parliament to enact a Copyright Act then or again at the very end of the eighteenth century was indicative of its political importance as a signifier of legislative autonomy.

In the 1920's the Irish government insisted in adhering to the Berne Union independently of Britain, and refused to be drawn into an 'Empire' position on copyright. Ireland enacted a Copyright Act in 1927, with provisions which were opposed by the British government. The government enacted an amended Copyright Act in 1929, to nullify a decision by the Privy Council, as part of its constitutional strategy of asserting the primacy of the Irish courts. Copyright and performing rights became clearly enmeshed with the question of sovereignty in the Bray UDC case, in which the government again displayed great energy, politically and legislatively, in elevating this case to a point of principle, while simultaneously contriving to retain the status quo in relation to the substance of copyright law. It is therefore clear that political capital was expended in a dispute over copyright for symbolic purposes which were logically unrelated to the substance of the dispute.

Even the decisions to take advantage of the derogations permissible under the Berne Convention in respect of translations and anthologies were in part calculated to demonstrate that the Irish state was entitled to legislate contrary to the wishes of the British government. The minor deviation from British practice which this involved was commensurate with the level of real interest at official level in using copyright law for policy purposes intrinsically concerned with copyright.

Taken all in all, however, the use of copyright for political purposes, though leading to a greater awareness of the political implications inherent in international copyright, did not

extend to any wider consideration of the issues. To that extent it represents a lost opportunity for Ireland, since it was in the circumstances of the 1920's that Ireland might have been most open to legislating in a distinctive manner, appropriate to domestic conditions. Copyright was not utilised as a mechanism for developing the cultural industries. Even in the 1950's when the EBU offered Ireland the opportunity to be influential internationally by drafting distinctively advantageous copyright legislation, the opportunity was rejected.

8.1.2 What were the industrial effects of copyright regulation in Ireland - on publishing, on printing and on other industries? What cultural consequences flowed from this? What was the nature of the debates that took place on the influence of copyright regulation on cultural production? How was the balance between consumption of indigenous and imported cultural goods influenced by the copyright system?

In this section, I briefly outline the development of the copyright regulatory system in Ireland in order to give a succinct assessment of its effects on specific Irish cultural industries. I also indicate the influence of copyright legislation on the balance between the development of the cultural industries in Ireland and the importation of cultural goods from outside Ireland.

Eighteenth Century Ireland

In the Eighteenth century, Ireland did not legislate for copyright, despite the country being in a close cultural and political relationship with Britain. Neither the Irish Parliament nor the Dublin Castle government made serious efforts to enact a copyright law, in the face of considerable political pressure from Britain to do so. Publishing in Ireland developed into a considerable industry in these circumstances, and the bulk of its production was exported to Britain and America, in defiance of the legal prohibitions in British law. The local sale of books in Ireland was significant, but the availability of an export market, albeit one legally

closed to Ireland, provided considerable rewards to Irish publishers. The fact that no payments had to be made to writers or to copyright owners meant that Irish printers and publishers were in a position to undercut the 'legitimate' British producers of the competing editions.

Certain cultural consequences flowed from this circumstance. Since the publishing industry in Ireland was driven by the demands of an export trade, and since it was competing directly with the British publishing trade, the output of the Irish presses was similar in nature to that of the British. In effect this meant that Irish publishing, an Irish cultural industry, was additional source of British-originated cultural material. Works by British writers were published in Ireland, at lower cost, and were sold by Irish publishers both in Ireland and abroad. There was little concentration by the Irish publishing industry on publishing the works of Irish writers, leading to a cleavage between Irish writing and Irish publishing.

The aberrant character of the situation is pointed up further when it is shown that Irish writers generally shunned the possibilities of publishing in Ireland. This was not just because of the increased social prestige of publishing in London, but also because there was no protection for their work or income in Ireland, due to the absence of a copyright law. Consequently, Irish writers were published in Britain, and their work could then be republished in Dublin without recompense to the writer and without right of recourse to the law. The absence of copyright in Ireland in the eighteenth century therefore assisted the development of a cultural industry, but it acted contrary to the interests of Irish writers, by creating a zone of non-compensating production. Simultaneously it drove a wedge between the creation of cultural works in Ireland and the reproduction of such cultural works in the publishing industry, by forcing the publication of works by Irish writers outside Ireland.

Ireland in eighteenth century was therefore a substantial exporter of books, but was simultaneously a very considerable importer of cultural property, in the form of unprotected or 'pirated' works of intellectual property. Irish creative cultural activity was therefore dissociated from the content industry which reproduced and marketed it in Britain. One very important consequence of this was that the selection of works for publication was therefore handed over to external cultural gatekeepers, in the guise of British publishers. As a result of this, those Irish writers who were successful tended to be those whose cultural

output was best aligned to the taste of the British publishers, and a self-reinforcing pattern emerged which led to British domination of the selection and promotion of Irish cultural producers.

Among the industrial consequences of the co-existence of copyright and non-copyright territories within what amounted to one market in information goods was that a lucrative publishing industry and trade developed in Ireland, but it was one which was inherently very unstable. The imposition of copyright on Ireland was therefore liable to lead to serious difficulties for the publishing industry. Following the failed British attempts in 1785 to have Ireland adopt a copyright law, it was likely that the early imposition of copyright on Ireland would follow the passing of the Act of Union. There is no evidence that Irish publishers and printers made any preparations for this eventuality. The industrial consequence was that publishing in Ireland collapsed soon after the almost simultaneous coming into effect of the Act of Union and of the Copyright Act. A cultural consequence was that the United States benefited from this, as, rather than trying to build up the publishing industry on a new basis in Ireland, many Irish printers and publishers emigrated to America, and made considerable contributions to the development of the US publishing industry (Cole, 1986). It is even the case that the large publishing industry of eighteenth century Ireland contributed to the Anglicisation of the country, by making texts in English available in the local market considerably cheaper than competing editions imported from Britain.

From 1801 to Independence in 1922

The effect of the imposition on Ireland of a copyright law in 1801 was profound. While this occurred in tandem with the political and social changes which followed the Union, the precipitous decline in the scale of the Irish publishing industry and the parallel decline in the quality of the material issuing from Irish presses is explicable in large part by the imposition of copyright law on the country without the benefit of a period of transition and adjustment.

A publishing industry which had depended for its success on access to texts without a legal requirement to make payments to authors, and with access to export markets in Britain and America for its output, now faced the different situation of being legally obliged to pay for

copyright material. It was no longer able to publish the most lucrative material because other publishers in Britain had acquired the copyright. Indeed, it also faced a developing American publishing industry which retained the legal authority to publish works by British and Irish writers without payment of copyright fees.

The industrial effects were clear from an early date. The prestige book-publishing industry was destroyed in a short period. The local market for books in most categories contracted noticeably, as the political and other elites migrated to London, now the undisputed centre of political and social influence. The export trade to America dried up. Illegal export of copyright books to Britain was no longer controlled only by customs seizures: British publishers were now at liberty to pursue Irish publishers on their home ground through the Irish courts. As was shown in Chapter 4, the publishing industry declined rapidly and concentrated on the production of works of local interest, on school texts and on other culturally less significant forms of production. This industrial decline brought in its wake some significant cultural consequences.

There was an increase in the importation of books from Britain from the early years of the union. No compensating cultural centre of gravity existed in Dublin to mitigate the effects on Irish society of the influx of ever larger quantities of cultural works which had been selected by cultural gatekeepers in Britain, to the standards of British taste. This carried beyond the issue of the importation of books in general, but had consequences for the re-importation to Ireland of cultural property originating in Ireland.

British cultural gatekeepers were now emphatically the selectors for publication of Irish cultural property. Irish writers submitted their works to British publishers. The act of selection occurred in Britain, and these selected works were imported into Ireland. Irish literary taste was therefore being formed ever more strongly by the cultural norms of another society.

Over the course of the nineteenth century, an Irish publishing industry did develop, but it never achieved an industrial status commensurate with the demands of the Irish market, or with the output of cultural production by Irish writers. Having been disadvantaged at the beginning of the century, it became trapped in a weak relationship with the British

publishing industry, and there was continual reinforcement of this weakness over the period through social and other forces. Irish publishing became provincialized, and Irish intellectual property fled to the metropolitan centre in London for approval, selection and publication. Indeed, Irish intellectual property was socially validated through its being published in London, and this proved to be a considerable obstacle to efforts in the twentieth century to relocate to Ireland the reproduction of Irish cultural output.

Copyright in Ireland after independence from 1922 to 1949

When Ireland secured independence in 1922, the sphere of cultural production in books was regulated by the mature intellectual property system developed in the Berne Convention in 1886, as translated into the British and Irish regulatory system by the UK 1911 Copyright Act. This framework was seen as normative and as value-neutral by most commentators in Ireland after independence. This was a notable circumstance, given that Irish political independence was founded on the efforts of a culturally nationalistic movement, which aimed at the cultural differentiation of Ireland from Britain. It would therefore have been unremarkable had Ireland at that time radically altered its copyright framework to support the cultural agenda which had been advanced by the cultural nationalist theorists. This was not to be the case.

In fact, industrial concerns predominated in the debates on copyright law, particularly in the 1920's. As the legislators and other members of the establishment debated and then enacted the 1927 copyright law, few cultural initiatives were proposed, and there was little articulation of the possibilities of using copyright law preferentially to advantage Irish cultural production or reproduction. Instead, half-hearted attempts were made to introduce manufacturing requirements to assist Irish printers, and printing interests suggested that Irish writers should receive lesser copyright protection, to assist the printing industry. These failed initiatives were emphatically directed at supporting the printing industry, and there was scarcely any consideration of the possibilities of availing of the copyright law to assist the development of the cultural component of the publishing industry.

Admittedly, at the margins, some cultural intentions underlay minor provisions of the copyright law of the immediately post-independence period. The 1927 Act provided for

special measures to allow the translation of works into Irish without the copyright owner's permission, in limited circumstances. This was done with the aim of supporting the linguistic policy of the new State, at no cost to itself. In the event, the provision had no practical consequences, although both cultural and industrial benefits had been expected to flow from it.

A second distinctive feature of Irish copyright law in this period was the enactment of provisions allowing publishers in Ireland to issue anthologies of texts for use in schools without the necessity to make payments to the holder of the copyright. This measure, intended to give a social benefit by reducing the cost of school textbooks, acted simultaneously as a considerable boost for the publishing industry. Copyright law in this case had a demonstrable positive effect on the financial viability of the publishing industry. However, by sustaining the Irish publishing industry in this way, the copyright law also contributed to the industry's concentration of effort on a small sector of the potential market. Rather than publishing works across the entire range of the market's requirement, the Irish industry settled for issuing works for the captive schools market. It is therefore clear that in this area, the copyright law led to a skewing of the output of the Irish publishing industry, and furthermore that it led to a diminution of the cultural credentials of that industry.

By abandoning the possibility of publishing works across the full spectrum of cultural production, Irish publishers contributed to the continued dependence of the Irish market on the importation of books and other works from Britain. Copyright law was therefore an (unintended) further contributory factor to Ireland's cultural dependence on imported works.

Irish writers continued to have their works published in London, and imported back to Ireland. As was shown in Chapter 5, the censorship of publications apparatus which Ireland established in the 1920's acted as a further barrier to any possible intentions Irish publishers might have had to publish the creative output of Irish writers.

In this period, only the publishing industry was of consequence in Ireland as a cultural industry. Radio broadcasting, introduced in Ireland in 1926, was not even a concern for the

legislators in 1927, and even in the 1930's there was little official interest. Similarly, music recording was almost non-existent as an industry in Ireland, and this remained the case until the 1950's at the earliest. Some Irish folk music was recorded in this early period, but the recording was done in the US and was of minor commercial significance. Consequently, there was little Irish political or administrative engagement with issues of broadcast or recorded music copyright at this time.

Throughout the period Irish copyright material continued to be exported for publication to Britain and elsewhere abroad. Thus, the cultural gatekeepers in the publishing industries of other countries selected material for publication and thereby determined the success of particular writers and classes of writing. The importation to Ireland of these finished cultural goods was therefore a writing-back without input to selection.

There was therefore a profound consequence for Irish culture of the country being a significant importer of cultural goods which had originated in cultural production in Ireland, but where the selection of reproduced works was made outside the country.

This cultural disadvantage was accentuated by another conscious choice made by Ireland's political establishment, the creation and sustenance of an apparatus of literary censorship which particularly addressed itself to the works of Irish writers, and further dissociated Irish cultural production from free circulation of the resulting published work within Irish culture.

1950 to the Copyright Act 1963

In this period, Irish copyright law was forced to change under the impetus of two principal stimuli, technological change and changing international copyright norms. With the development of broadcasting in Ireland, a technologically-enforced requirement was brought to bear on the Irish administration, and consequently, a lengthy debate on the copyright system ensued. This occurred in the context of an accelerating change in international copyright requirements, and this was accentuated for the Irish administration by the adoption by Britain of a new copyright law in 1956 which gave effect to new international obligations.

Book publishing in Ireland was less strongly influenced in this period by changes in the copyright system than were the electronic media. However, certain changes in the law affected publishing. Ireland abolished its special provisions for translations into the Irish language. The commercially more significant school anthologies provisions were also abolished. When Ireland signed the Universal Copyright Convention of 1952, the export of Irish books to the United States could finally be placed on a commercially and legally sound footing, and an important market for books about Ireland was opened up.

The prospect of television broadcasting being introduced to Ireland was a major influence on the development of copyright law in this period. Indeed, the debates on copyright within the Irish administration were centred on this question, almost to the exclusion of the concerns of other cultural industries. Copyright law in Ireland in this period was therefore shaped to the requirements of television broadcasters, and to a considerable extent the interests of other actors in the cultural industries were discounted. As it became clear that television broadcasting would be a major cultural influence on Irish society, the Administration came round to the view that its requirements should generally be paramount.

The success of the Irish television service was seen as a cultural good in itself, and not only for purely cultural reasons. Television was introduced by the State as much for political as for cultural reasons. The Copyright Act 1963 gave the television service rights in ephemeral recordings, in rebroadcast rights, in respect of the use of embedded cultural works in broadcasts, and in a large range of other technical matters, many of which had been disputed by other cultural or commercial actors in the pre-1963 debates. In the face of complaints by musicians, by the Collecting Societies, by writers' and other creators' groups, by some politicians and by others, the State prioritised the interests of one Irish cultural industrial producer. (The fact that broadcasting in Ireland was confined to one state-owned institution makes it illegitimate to claim that the purpose of the government was the unalloyed aim of support for a cultural industry, rather than for a state institution which "happened" to have a state-enforced monopoly in that industrial sector.)

The effects of the copyright regime in the period 1950 - 1963 on the relationship between indigenous cultural production and the importation of cultural products from outside Ireland differ only in degree from the relationships which had been established or reinforced in the

earlier post-independence decades. However, as the period drew on, the output of the Irish cultural industries increased slowly. This was clearly so in the case of book publishing, but a small music recording industry also developed. Many Irish writers continued to be published outside Ireland, with their books being imported to Ireland. However, this was in parallel with the slow development of the publishing industry. When Ireland and the US finally came to a copyright agreement following the conclusion of the formalities of the UCC, a small but culturally important export trade of books to the US grew from the late 1950's onwards. The surrender by Ireland of the rights of publishers to issue schools anthologies without paying copyright owners, and of the right to issue translations into Irish, were indications that some confidence was developing in the capacity of Irish publishers to stand in commercial competition with imports. This occurred at a time when the first steps towards the removal of Irish tariff barriers were being broached in official discourse.

The modernisation of Irish copyright law and Ireland's conclusion of bi-lateral and multilateral copyright agreements led to the publishing industry being in a position to export its products more freely, with the virtuous consequences of that for the domestic cultural industries.

Ireland remained a considerable importer of cultural goods in this period, but in the following period, and for reasons unconnected with the copyright system, the cultural industries developed into significant suppliers of the domestic market and also increased their export activities. Both of these had positive cultural consequences for Ireland.

From the Copyright Act 1963 to the 1990's

In the final period of this study, copyright law was little discussed within policy-making circles as a force for differentially advantaging the Irish cultural industries, yet it was in this period that those industries achieved their greatest successes.

The publishing industry developed considerably from the early 1970's to the end of the century with no direct support from the copyright regime. Indeed, one of the major engines for growth in Irish publishing was the collapse of the Irish University Press in 1974, which

released an experienced publishing workforce onto the market, and led to the founding of several important Irish publishing houses.

While publishing developed without particular support from the state apparatus, cultural production in the sense of writers living and writing in Ireland was sustained through other state interventions and supports. The taxation system was altered to benefit writers and other cultural producers and direct state subsidies of individual writers was introduced. By the 1980's, State bodies were describing publishing as a significant cultural industry in own right, worthy of government financial support. Similar patterns emerged in the cases of other cultural industries, notably in music recording and performance, and in film-making.

In all these cases, the industries developed without preferential support from the copyright system. The ideal of copyright being a neutral ground in which cultural producers from Ireland and abroad met in a marketplace became established. The great change which occurred, relative to all earlier periods since 1800, was that substantial Irish cultural industries were now in existence, capable of taking advantage of the legal framework, and able to market their goods internationally. National prestige was enhanced, and, in a sense, an aspect of the nation-building project of the earlier generations of cultural nationalists was carried into effect, though without support from within the intellectual property system.

Ireland by the end of the period under review had developed mature cultural industries, though these were not uniformly developed in all sectors. However, the internationalisation of these industries through the emergence of transnational content industry corporations diminished the national character of much of the industry. The maturity of the Irish cultural industries is indicated by the emergence of an identity of interest of Irish and international cultural industrial actors in acquiring the highest level of copyright law protection for their works. The conclusion to be drawn is that, having been a weak and ineffectual player in the international market in cultural goods until recent decades, the Irish cultural industries have achieved a measure of success which allows them to compete internationally, while simultaneously being able to supply the domestic market for cultural goods with distinctively indigenous works of cultural production.

The copyright regime by the end of this period ceased to have differential effects on the level of consumption within Ireland of the output of Irish and foreign cultural industries. The domestic demand for cultural material with a distinctively Irish character acted as a greater industry support than could any rigid country-of-origin quota requirement that could be devised in any copyright law. The crucial factors at this stage were the availability within Ireland of cultural producers, the demand by Irish audiences for Irish material, the commercial stability of the cultural industries in Ireland, the existence of appropriate linkages between domestic and international content and circulation industries and the existence of common copyright responsibilities, rights and entitlements throughout the international system of trading states.

8.1.3 The relationship of copyright regulation to the wider regulatory framework of media and cultural production in Ireland.

In the century leading up to the enactment of the 1801 Copyright Act, Ireland and Britain were the two elements of a complex two-state system, in which Britain had a copyright law, and Ireland refused to legislate in the area. The output of Irish publishers in this system was formally regulated by British prohibitions on its importation into Britain, and on the export of Irish books to the British colonies. The Irish industry, deprived of export markets, was forced into book piracy, and thus became financially reliant on the avoidance of copyright charges to undercut London publishers. At the same time, the absence of copyright protection for works published in Ireland contributed to the dissociation of the output of Irish writers from the domestic publishing industry.

The press in Dublin was regulated in the eighteenth century by the official mechanisms of politically-motivated censorship, and by prohibitions on the publication of blasphemous works. In this period, censorship was a major concern for the newspaper industry, rather than for the book publishing industry. Among other regulatory inputs at the time were the tariffs on paper and on ink, which adversely affected the industry.

After 1922, copyright law was formulated in an atmosphere of censorship of publications and of films. The market and cultural effects of copyright on book publishing from the

1920's onwards were less important ultimately than was the effect of censorship. This again separated the output of many Irish writers from that of Irish publishers.

State intervention in the cultural industries, motivated by a linguistic policy to restore the spoken Irish language, led in the 1920's to the establishment of a State publishing house, An Gum. While this was one of the major initiatives of the State in the traded cultural sphere in the early decades after independence, its cultural, social and linguistic effects were limited. It had become a declining force as early as the 1930's, although it continues in existence to the present. A later initiative in the 1950's, when Bord na Leabhar Gaeilge was established, was again of minor importance culturally.

In the 1960's, the State chose to support some cultural workers directly, outside the public bargain of the copyright law. Qualifying artists and writers were entitled to special treatment under the Income Tax Acts. This led to the domiciling in Ireland of many writers and others, but the impact on the cultural life of the country appears to have been minimal. In the 1980's, a further direct method of assistance was introduced, with the establishment of Aosdana, a form of cultural academy, with powers to make financial grants of authors and other artists.

The belated development of the Irish publishing industry in the 1970's, and of the Irish music industry more recently, appears to have come about without any positive influence from the copyright environment. Some state initiatives and supports for these industries outside the copyright field assisted in their development, and this situation contrasts with the use by other countries of copyright law itself as an industry support. It is striking that the norms of international copyright regulation were implemented in Ireland to an extent which appears to have been unrelated to the state of development of the Irish publishing or other productive cultural industries. It suggests that either there was a trade-off internationally for other benefits in other sectors, or Ireland was simply endeavouring to demonstrate its credentials as an upstanding member of international society.

Certain forms of state intervention in the cultural sphere were effective in Ireland. This was notably the case of broadcasting, and indeed it had downstream positive consequences in classical music. RTE maintained two orchestras and other musical groups, adding to the

critical mass in Irish cultural life, as well as providing some opportunities for the performance of original music by Irish composers.

It is apparent that the state, had it been concerned with the development of publishing as an aspect of the cultural life of the country, should have become involved in the publishing industry in English. The country was in a position to export books to Britain, and already successful writers might have been encouraged to consider publishing in Ireland for the export market. This might also have placed in Irish hands some of the power for the selection of literary works and the identification of new literary figures, rather than having the dominant literary figures of Ireland being selected mainly by British and American publishers and critics.

Throughout the post-1922 period, copyright law was largely detached from other cultural regulatory legislation and was treated differently by the government. Irish governments were prepared to diverge from international practice in legislating in the areas of literary and film censorship, in broadcasting law and in the legally-enforced linguistic employment requirements for workers in state cultural institutions. Copyright law, in contrast, was treated as a normative aspect of the regulatory framework. With the exception of government intentions to support Irish language publishing and educational publishing, copyright regulation was not shaped to achieve larger cultural or domestic policy ends.

8.1.4 - The effects of the internationalisation and globalisation of copyright on policy-making and on cultural production.

In a sense, Irish copyright law was internationalised very early. Considered as a separate country, Ireland was exposed to external competition within a regulated copyright environment from 1801. After independence, as a result of choices to continue to give domestic effect to high standards of protection in line with the Berne Convention, and later a willingness to adhere to additional conventions, Ireland was an early participant in the internationalisation of copyright protection. In critical cases, such as at Stockholm in 1967, Ireland allied itself with the interests of the developed world, against those of the developing countries.

Ireland largely acquiesced in the internationalisation of copyright law, by accepting almost unquestioningly the pre-1922 enactments and agreements which had been entered into by the United Kingdom. It was open to Ireland after independence to repudiate these agreements, and to embark on a process of international negotiation of copyright law *ab initio*. While some exceptions to Ireland's acceptance of international norms have been identified, such as its delays in ratifying later international agreements, the tendency was always to conform, albeit belatedly. Britain and the external world more generally performed the analyses on the cultural and economic situation, and provided the models for Irish regulation. There is no evidence of Ireland advancing any initiative internationally on copyright reform.

Ireland was in the 1950's and 1960's buffeted by international pressure on copyright, from Britain and from the new EBU, which identified Ireland as a potentially influential state internationally. The EBU, in seeking to have Ireland adopt copyright regulations advantageous to broadcasting and distinct from the British model, recognised that there was open to Ireland at the time the possibility of inventiveness in national copyright law. However, there was the counterweight of an administrative devotion to British practice, and to the retention of effectively identical regulatory systems with Britain. This calls into question the *raison d'être* of Irish independence of action in this field, and suggests that the Irish debate on copyright had an almost entirely pre-determined outcome throughout.

Ireland, which had been indolent about investigating modernisation of its copyright law, and perhaps not entirely conscious of the change in heart deep within corporate and political America, failed initially to notice the signs of change in the 1980's. The growth in Ireland of a piracy industry in cassette tapes, videos and computer software in the 1980's and 1990's, led to bilateral initiatives by the US, in which Ireland was forced to enact short Intellectual Property Acts in 1987 and 1998, to enhance powers to control counterfeit goods. Ireland also engaged in a sustained police action against pirates, ostensibly on the grounds of the involvement of politically subversive groups in the practice. A pressure group - INFAC - came into existence, to investigate illicit reproduction, and to pressure the Irish government to enforce the law, and to strengthen it. There is no direct evidence of US involvement in the financing of this organisation, but it has been difficult to obtain any

information on the background of the organisation. The alleged damage done to the recording industry in Ireland by piracy was widely trumpeted, though the external location of that industry, and the foreign ownership of that intellectual property was rarely hinted at. The presumption was allowed to grow that, if the performers were of Irish nationality, that Irish performers were themselves suffering the economic disadvantage. This recruited a nationalistic sympathy to the cause of the suppression of piracy. By this time, much of the retail industry for music and videos in Ireland was in foreign or multinational hands. Broadcasters also became involved in the denunciation of piracy, and in effect a scare was fomented on the basis, apparently, of some street sales of videos and tapes. The invocation of the politically subversive threat was the brilliant factor in this argument, since it mobilised the enforcement organs of the state.

Piracy of software, rendered so easy by the developing technologies, and made so attractive by the high prices and frequent updating and revision of software, was another weak point. As Ireland sought to establish herself industrially as a Silicon suburb of the US, the country was susceptible to pressure on the IP front, since the pressure groups seeking changes in Irish law were arms of the same pressure groups in the US itself. Ireland, for long a low-level assembler of computer parts, or a reproducing and packaging site for software, was incorporated into the US project of enforcement of IP rights, as though it were the originator of the intellectual property. It is likely that it was only Irish membership of the EU that preserved it from acquiescing completely in US demands on the IP front.

8.2 Discussion of the findings

I present the conclusions under three broad headings. The conclusions derive from the findings presented in earlier chapters, and summarised briefly in the previous section.

Because the research was concerned primarily with the debates, the conclusions are dominated by observations drawn from the conduct of the debates and the influences on those debates. The negative factors in the Irish debates are of particular importance, since I argue that one of the most significant issues to emerge from this research is the poor quality

of the debates themselves. Several of the negative factors indicated below shaped the regulatory system which emerged, and many were in themselves indicative of presumptions which permeated Irish official thinking over the post-independence period.

8.2.1 Demonstrable effects of the imposition of copyright law on the cultural industries of weaker states

The imposition of copyright law on Ireland in 1801 evidently had a detrimental effect on the existing publishing industry. In the ensuing decades, Irish publishers remained at a disadvantage, because their stock of copyright material was inadequate to sustain a legal, commercially-viable industry. As a consequence, the Irish publishing industry was placed at a disadvantage in the early nineteenth century, and in its weakened state, it was unable to compete strongly with the British publishing industry as the century went on.

Irish historical experience shows that the imposition of inappropriately stringent copyright obligations on states can have disastrous results for the cultural industries. It is likely that similar effects will be seen in the future, as strong protection regimes are imposed on less developed states.

There is a particular problem in incorporating a non-copyright territory into an existing copyright territory with a major production centre at its core. Unless special transitional measures are agreed, the territory over which copyright is newly extended is likely to suffer. The interests of the incorporated territory need to be protected when subjected to the competitive environment of the new territory. The great problem for the Irish publishing industry in terms of copyright was not in fact that copyright was introduced to Ireland, but that it was not imposed on Ireland as a distinct territory, where new, distinct Irish copyrights would be created and sold to publishers. Consequently, Ireland endured the unfairness of the economic consequences of copyright, with next to none of the advantages. If further demanding obligations are imposed in the future on states ill-equipped to accommodate themselves to them, similar destructive forces may be unleashed on their cultural industries.

The historical moment when Ireland became incorporated into the United Kingdom copyright territory has been echoed repeatedly in history, and this continues to the present. The intensification of international copyright obligations on states, as information and communication industries become relatively more important economically, means that states are repeatedly passing over new thresholds, which in practice are equivalent to being incorporated into new and more demanding copyright unions.

When a state joins an international copyright union, or takes on additional copyright obligations, it can be exposed to intense competition from more powerful cultural industries in other states. In the 1990's, the new copyright obligations imposed by the international copyright agreements typically suited the requirements of the major producing countries. Weaker states, which have effectively no free choice to remain outside these agreements, find themselves exposed to competition which their cultural and information industries may not be able to withstand. Similarly, increases in revenue outflows for the use of imported intellectual property in these circumstances can present problems for such states. It is therefore clear that the absence of phased implementation of international copyright obligations, to take account of the different stages of development of countries' cultural economies, tend to have deleterious effects on those states.

8.2.2 Critical influences on the nature of the debates on Copyright in Ireland

The dominance of political considerations over cultural and industrial questions

The reason for the urgency in enacting a copyright law so soon after independence remains a mystery. Since the ultimate result amounted to little more than the re-enactment of the previous law, the urgency displayed is puzzling. Given the amount of parliamentary and administrative time and effort which was expended on what became the 1927 Act, the results were surprisingly poor. Not alone had there been no radical departure from British practice, in a country which had emerged from a culturally-informed revolutionary process, but no serious examination of the purpose or effects of copyright law was conducted (with the minor exception of the Joint Committee which examined the 1925 Copyright Bill).

Although it is perhaps a trivial point, it is indicative of some incompetence that the 1927 Act was found faulty so soon, and required amending legislation by 1929.¹

The absence of systematic data-gathering and of analysis of the cultural industries undermined the efficacy of policy formulation for much of the post-1922 period. Copyright laws were enacted without the administration undertaking any real research on the state of the publishing or cultural industries. This was exacerbated by the failure to engage in any exercise of public consultation. The result was that certain privileged forces in society, such as the printing firms and the printing workers, had an excessive influence on policy formulation. This influence was exerted in private, and so the opportunities for public debate were diminished. With the administration less than fully informed, it is unsurprising that it was unaware of the possibilities which were inherent in the Irish cultural industries, and of how the copyright law might be shaped and mobilised with the aim of developing these industries.

Certain political objectives overrode issues which were intrinsic to copyright. Prime among these in the early years after independence was the use of copyright law to express sovereignty internationally. While it was arguably a laudable objective in itself, I argue that copyright policy was perverted by this symbolic use. Political energy was diverted from consideration of copyright and its effects. Indeed, it is likely that its misuse was indicative of a view that copyright policy in itself was of little importance.

The political and diplomatic use of copyright law and treaties by the Irish state, while consuming considerable energies, diverted attention from what would have been more practical policies, responsive to actually existing domestic conditions. While the reasons for the mobilisation by the new state of all possible means of advertising its sovereignty can be understood, it is inescapable that rhetoric was adopted as a substitute for action in these debates.

The delusional image of Ireland as a developed country held by the political class is evident even in copyright policy. From the early 1920's, Ireland played the part of being a

¹ There was a similar problem in 1957, when the short Act then enacted had to be amended within a year, due to drafting flaws.

developed country, in terms of its media and cultural industries. The positioning of the country among the developed states, which was evident in the adoption and retention of unnecessarily demanding copyright laws, was clearly contrary to its interests as a developing country for much of the twentieth century. While the country achieved independence in advance of the elaboration of a philosophy of developmental theory, it might nonetheless have drawn on the examples of Canada and the United States as guides to alternative routes to cultural and media development.

The political project of the restoration of the Irish language was influential in shaping copyright policy. Between the 1920's and the late 1950's, Irish copyright law gave special treatment to translations into the Irish language. I would argue that copyright law was used by the government in this way, to give the impression of treating seriously the issue of publishing books in the Irish language. This apparent commitment was undermined by the lack of interest demonstrated from the 1930's in the activities of An Gum, the government Irish language publishing house, notably in the parsimony in funding the publisher, and in the reduction in the quality and quantity of output.

It is clear from the research that the use of the translations reservation by Ireland for thirty years was merely the advertisement of linguistic policy good intentions. It was one of the few provisions in Irish copyright law which could be considered to have had even the possibility of having a cultural consequence. However, the policy had no practical positive consequences, and in fact it was never necessary to invoke the privileges granted to publishers by the Act. Indeed, one of the main virtues of the provision for the Irish government in the 1920's almost certainly was that they were able to represent themselves both domestically and internationally as taking action to support the Irish language. This in itself was an adequate return on the political investment made by introducing the amendment of the law.

While propitiating the Irish language interest through the use of the translations reservation, government policy after independence was largely antipathetic to the cultural industries in the English language. Not alone was English the majority language of the people, but works in English were potentially an exportable cultural commodity in a more direct way than works in Irish could be.

The independent Irish state was not disposed to support English-language cultural production on the scale which the prevalence of the language merited. This meant that the trend continued for Irish writers in the English language to publish their work outside Ireland. As a consequence, the selection of works for publication took place within other cultures, and this exacerbated the sense of dissociation between Irish writers and Irish culture. The strongly expressed antipathy for many writers which was frequently expressed in the debates is indicative that there was support for this a dissociation. Such antipathy in Irish society to writers publishing outside Ireland, coupled with an official policy of encouraging the restoration of the Irish language, underscored the state's failure to use its resources to support and encourage cultural production in the English language on a scale proportionate to the importance of the English language in Ireland.

The rigidly enforced censorship of publications, which diminished even further the publishing opportunities for Irish writers from the 1920's onwards, was an additional factor in suppressing cultural production in English. It had the further consequence of leading to the export of Irish cultural production to foreign publishers, and of denying the domestic market to many of those writers.

Cultural production in Ireland was in tension with demands for censorship for much of the period under review. The majority opinion was so strongly in favour of literary and other censorship that the sense of using literature and other creative work for the sustenance of a sense of nationalist and cultural identity seems to have been weak over much of the post-independence period. The sense of a distinctive cultural identity was evidently grounded in other areas of social and cultural life. It is, however, clear that high cultural activity was not a significant component of general cultural identity until relatively recently in Ireland. The change in public appreciation of the importance of cultural production can be mapped onto the development of a form of self-conscious national pride in Irish writers, which emerged forcefully in recent decades.

Despite the fact that the Irish independence movement of the early 20th century was grounded in a sense of a distinctive cultural identity, this philosophical foundation was to a considerable extent ignored in official circles after 1922. A more utilitarian approach to

government was adopted than might have been predicted, and cultural enthusiasm appears to have waned. While this is evident in the treatment of English-language cultural production, an even more striking failure to understand the importance of cultural production to society was evident in the official attitude to Irish traditional music in the 1920's and 1930's.

I argue that there was for several decades after independence a surprising lack of awareness in society, and particularly in official and in industrial circles, of the cultural importance and commercial prospects of Irish traditional music. The research helps to draw out the lack of concern among some elites and among administrators for traditional Irish music, where it impinges on the copyright debates. It is discernible in particular in the lack of care among regulators for the protection of what was a national cultural asset.² Copyright law, as formulated legally, was not equipped to protect or encourage works of traditional origin. Ireland, where a strong folk tradition was potentially commercially as well as culturally valuable, should have sought to modify the IPR system to recognise the special claims of this form of cultural activity.

The low status in Irish society which was accorded to Irish traditional music, which contrasted with its early take-up in the US by commercial and cultural forces, meant that Ireland was not active in seeking to shape international copyright law in favour of the protection of traditional or folk music works. There is evidence that a new appreciation of traditional music did not arise in Ireland until the 1950's. By contrast, the American recording industry recognised the economic value and the potential market for Irish traditional music very early.

Slow response to technological developments

There was a notable unwillingness to engage with the impact of new technologies on copyright both in the 1920's and in the 1950's, and a relative absence of official interest in many aspects of the new communications technologies is evident in the debates. As a result, much of the Irish legislation was a mere snapshot in time of the contemporary technological

² A contempt among some elite groups for other aspects of the musical cultural production of the country such as the work of dancehall musicians also impacted negatively on the debates on copyright.

possibilities, leading to progressive dating of the legislation. The continuing capacity of the regulatory environment to function became dependent on the inventiveness of the judiciary, rather than of the legislature. The Irish tendency to adopt technologies belatedly (though this was economically enforced) also provided a refuge for administrators who were not forced to provide legislative protection for new technologies.

Within the Irish administration there was a pronounced lack of interest in the likely effects of new technologies on the cultural landscape, even when an opportunity to be inventive and influential was presented through the EBU initiative in the 1950's. With the exception of some individuals in the P&T, the new mass communications technologies were generally considered an unaffordable extravagance, and their introduction to Ireland was delayed as a result of this attitude. Ireland therefore became belatedly involved in the debates on the impact of copyright on new technological forms. The absence of any indigenous recording industry worthy of the name for most of the century also had a particularly detrimental effect. It led to a reluctance at official level to consider the needs of a future recording industry, and its effects were compounded because the forms of regulation appropriate to foreign industries were imported into Irish law, through the indiscriminate copying of British law.

Few government cultural initiatives

Ireland failed to develop distinctive policies in relation to copyright or to pursue initiatives internationally in pursuit of cultural aims. For a State which emerged from a political process grounded in an ethos of cultural distinctiveness, it is surprising that so few cultural initiatives were taken after independence to give substance to the rhetoric of cultural distinctiveness.

There was an aversion at official level even to considering pioneering changes in copyright law, even if there might have been a significant cultural benefit. The sole occasion when it appeared that Ireland was likely to adopt a self-interested stance on any copyright issue on cultural grounds emerged due to the chance presence in the Department of P&T of Leon O Broin, who sought to develop Irish policy in the light of a cultural validation of regulatory

choices. Indeed, it was only the coincidence of the introduction of television, the uninvited activism of the EBU and the presence of officials alert to a cultural agenda in the Post Office which led to the protracted examination of the law which occurred in the 1950's and 1960's. Even so, as a result of the immovable conservatism of I&C, this did not lead to any notable distinctiveness in the regulatory system.

Disjunction between Irish writing and Irish publishing

With a few un-influential exceptions, there was a lack of realisation that it is appropriate for there to be an organic link between cultural production and commercial reproduction of cultural works in a society. While there were some suggestions in the 1920's that a special domestic copyright might be created for Irish writers who published in Ireland, and a concomitant refusal to protect the works of Irish writers who published abroad, this was introduced into the debates simply as a mechanism to support the printing industry.

The result of the dissociation of writing and publishing was that even after independence, Ireland continued to be in a dependent cultural relationship with Britain. This can be characterised as being the continuation of the pattern of a colonial cultural relationship. In effect, a post-colonial cultural relationship succeeded an institutionalised metropolitan (almost colonial) relationship.

Prioritising of printing over cultural production

There was clearly a widespread attitude that cultural production in Ireland was of importance to the extent that it provided industrial employment or financial returns to the proprietors of the printing industry. This is clearly shown in the debates of the 1920's, but, surprisingly, attitudes of this kind were found within government circles even in the 1960's.

The school anthologies provision of the 1927 Act, which was one of two marginally distinctive provisions of the Irish copyright legislation, was enacted for pragmatic purposes only. The policy had two objectives, to reduce the cost of school textbooks to a level appropriate to income levels in Ireland, and to support the schoolbook publishing industry. It has not been possible to ascertain which was the prime motivation for the amendment to the law, but it appears likely that the support for the industry was the primary objective. The

interests of education appear to have been secondary, if not in fact being merely a cloak for the financial interests of the printers. Nevertheless, it demonstrates that the Irish government had the capacity and will to enact a copyright law for the achievement of larger purposes in society. It can only be regretted that its ambitions were so limited.

8.2.3 General Conclusions on the nature of the Irish debates

A number of related issues have become apparent as a result of this research, notably, the restricted nature of the debates on legislation and regulation, the absence of openness in the debates and the negative consequences for Ireland through not having a single government department charged with responsibility for cultural matters.

The failure to conduct official quantitative investigations into the extent of the Irish cultural industries and to measure Ireland's legislative and regulatory situation against those of comparable countries, was a substantial administrative and policy failure.

The relationship between the scale of the cultural industries and the conduct of the debates

The Irish publishing industry was weak for most of the period of this study. Publishing was a considerable industry in Ireland only in the pre-1800 period and in the most recent decades. The industry which existed in 1922 had been formed in the context of the United Kingdom copyright regime of the nineteenth century and early twentieth century. For reasons which are summarised in Chapter 4, high-prestige book publishing was a minor industry in Ireland, and was not capable of supplying domestic market demand. In addition, it had a minor presence in export markets.

The music recording industry was negligible for most of the period, while the film industry was very small. Only broadcasting was a substantial commercial actor, and its more vigorous contribution to the debates was sustained by its status as an arm of the administration and not, I would argue, for reasons of any recognition of its intrinsic cultural and social importance. It is notable, however, that the broadcasting service was not

mobilised as the agent of development of a commercial recording industry, when this would have been an appropriate synergy.

The fact that the publishing industry in Ireland was so weak meant that it was not an influential actor in the debates. Its contributions amounted to little more than causing consideration of a manufacturing requirement in the 1920's and pressing for a copyright agreement with the US in the 1950's. A negative feedback situation developed, where the weakness of the industry contributed to a lack of official interest in the potential of the industry to assist in the achievement of cultural goals.

The record of the debates makes it clear that some actors were aware of the incomplete and underdeveloped nature of the Irish media landscape in the first fifty years after independence, in comparison to the level of development in other states. However, the regulatory response tended to be to seek to omit protection for classes of works where no Irish industry existed. This was evident in the failure in the 1930's to take account of the needs of the music recording industry, and the fact that the copyright system was updated to take account of the introduction of television broadcasting only when the plans for the broadcasting station were well advanced.

Lack of entrepreneurship in the Irish cultural industries

There was also a notable lack of entrepreneurship among most Irish publishers for much of the twentieth century, and in particular at the periods when amendment of the copyright law was being debated. The export potential for Irish books was not realised, and in the main Irish publishers contented themselves with supplying a fraction of the domestic demand. The concentration by publishers on supplying schoolbooks, partly protected by advantageous copyright terms, further exacerbated the unadventurous approach of the sector.

The post-independence Irish publishing trade concentrated on the uncompetitive markets of school textbook production, religious works, and practical manuals. (Those Irish printers who printed vast quantities of books in the 1930's for British publishers were dissociated

from Irish cultural production.) The failure of the publishing sector to address the commercial possibilities of supplying Irish cultural works to an export market, including the large émigré market in the United States, is surprising. An export trade for this market was developed only in the 1950's, and to a relatively limited extent.

Such entrepreneurship as existed in the book sector was largely concentrated in the printing industry. This was recognised implicitly by government, where the interests of printers and print workers were sedulously guarded by politicians and officials, while writers and publishers were simultaneously sidelined in the official mind. Behind tariff barriers, the publishers concentrated on issuing poor quality schoolbooks for a captive market. Their only animation in the copyright debates seemed to centre on the possibility of imposing further non-tariff barriers to foreign imports.

Absence of openness in the debates

The continuing absence in Ireland of openness in government, and the failure to use consultative processes in the formulation of legislation formed an invisible barrier to the development of copyright regulation directly suitable to Irish conditions. The failure to engage in a process of consultation was exacerbated by the failure to examine critically the effects of existing legislation. The fortuitous availability of Britain to do Ireland's policy formulation for her, and to take all initiatives in copyright law, seems to be at odds with any concept of an independent state seeking to shape its legislation in its domestic interests, still less a state whose independence was informed so explicitly by a sense of cultural distinctiveness.

The Irish failure to engage in a public debate or even in a fact-finding exercise in relation to copyright or cultural affairs contrasts with Britain's approach, where there have been four major public investigations of copyright in the past century and a quarter. Irish regulation has been so derivative, that it is plain that it was considered as purely an economic right, and that its cultural dimensions were downplayed, if considered at all. Many influential officials considered British forms of regulation to be normative, and only when an official

of a strongly culturally nationalistic cast of mind became involved in the debate in the 1950's, was there any strong consideration of cultural issues.

Until very recently there was an extraordinary absence of openness in the consideration of what were relatively uncontroversial issues. This led to an absence of public debate on the issues, which had the further consequence of limiting the number of groups or individuals who were competent or interested in contributing. Few domestic pressure groups emerged, and there was a tendency for cranks to dominate such discussions as there were. This was notable in the concentration on the legal deposit obligations of publishers, and in particular on the obligations to supply books to British libraries. A desiccated nationalism underlay these interventions, and meant that culturally nationalistic energies which might have fruitfully been employed on matters of moment were dissipated. The debates on copyright regulation were extraordinarily restricted, not just in terms of the actors who contributed, but even in terms of the extent and quality of the positions advanced.

Few local interested parties, so enhanced influence for external actors

Ireland's lack of formalised pressure groups and organised economic actors in the relevant industrial sectors presented obstacles to sustaining a real debate on copyright. Other than statutory bodies and commercial firms, most of the participants in the debates were individuals, small weak associations or *ad hoc* groups which coalesced to seek to further a particular temporary cause. For example, one of the prime movers in the Irish debates in the 1920's, the Irish Playwrights' Union, was a shadowy organisation, which appears to have left little trace in the historical or archival record. This is in complete contrast to the British case, where the various commissions on copyright heard evidence from vocational and sectional interest groups which were articulating policy objectives which were evidently the result of some extended consideration of the issues.

The continued influence in Ireland of British institutions, publishers, record companies and collecting societies contributed to the somewhat illusory nature of Irish independence of action in the copyright debates. While there was periodic indignation at the exportation of funds to the PRS, for example, to pay for the use of intellectual property, this did not

develop into a serious examination of the propriety of the collecting agency for performances in Ireland being externally based. While a court action in the 1920's, in which the PRS set out clearly to demonstrate its continuing rights in the newly independent state, was a matter of considerable public and political controversy and irritation, it did not result in any requirement that an Irish agency should be established. In the 1950's and 1960's, irritation at the actions of the PRS continued to be expressed, and, though the EBU sought to accentuate official Irish dissatisfaction with the arrangements, no legislative or regulatory action was taken. A crucial issue to be understood is that the location of the PRS in London is in itself evidence that the bulk of the material for which it collected fees was foreign music. The establishment in the 1990's of an autonomous, though reciprocating, collecting society in Ireland, suggests that this is justified by the existence of an Irish base of financially successful performers.

Absence of unambiguous responsibility for cultural issues at official level

Conclusions in relation to the administration of the Irish state emerge clearly from this research. The absence in Ireland of a single Cultural Ministry hampered debate on the cultural aspects of copyright. Because copyright fell within the remit of an Economic Ministry, the economic, legal and diplomatic consequences were accorded much greater prominence in the debates. The avocation of members of the Department of P&T and of RE as protectors of the wider cultural interests of Ireland was fortuitous, but was also clearly indicative of the existence of a gap in the Irish administrative structure. Strong personalities, frequently operating outside their official functions, were sometimes the most influential in the debates.

In the absence of a cultural ministry, cultural questions were measured by the economic orthodoxies of the Departments of Finance and I&C. The cultural functions and responsibilities of government were dissipated throughout the administrative structure. Some entities, such as the Arts Council, which were not charged with the development of high-level policy, concentrated on the disbursement of grants. In addition, for many years the Arts Council ignored publishing as an element in cultural development. The Department of Education was negative about suggestions that copyright law might have a cultural component in the 1950's and 1960's. The educational possibilities of the developing

technology of television in particular were also discounted, as a result of a failure by the competent authorities to perceive the potential of the new medium

In the absence of a cultural ministry, a utilitarian, educationalist approach to cultural issues became the norm. Cultural questions, though the object of ritual obeisance in official discourse, were relegated by the official mind to a minor status. Indeed, as previously argued, the greatest expenditure of official energy on cultural questions appears to have been confined to the limitation of cultural reproduction through the censorship apparatus, and to a weak effort at the restoration of the Irish language.

I suggest that the fact that no official entity was charged with responsibility for cultural development, coupled with the fact that the Copyright Bills were drafted in an economic affairs department, in itself had an impact on the nature of the debate and on the eventual form of the regulations. In particular, the legalism of the contributions of I&C and of the Patent Office to the debates, and the insistence on the exclusively proprietary nature of the rights being regulated, constantly anchored the debates in the sphere of economic rather than of cultural rights. The debate was skewed in favour of normative understandings of the purpose of copyright law. This extended into a belief that the British model of copyright law was the appropriate one for Ireland, both on logical grounds, and as a matter of judicial and interpretative convenience.

Irish passivity in the international copyright debates

Because Ireland in the 1920's accepted the obligations which had been entered into internationally on its behalf by the UK, its scope for developing a distinctive copyright regulatory system was circumscribed. Over the latter periods examined in this study, Ireland in practical terms adopted a stance of high-level compliance with the demands of the international copyright system, and appears to have done so with little awareness of the cultural consequences of doing so. By the end of the period, Ireland had become effectively locked into a rigid copyright network, dominated by the terms of membership of the Berne Union, the Council of Europe, the World Trade Organisation and the European Union, which emerged in the 1990's as a most important shaper of Irish copyright regulatory

policy.³ The transformation of the United States in the 1980's into an international enforcer of good copyright practice, originally directing its coercive attentions to LDCs, led eventually to Ireland's coming to American attention. The result of Ireland's capitulation before American cultural and economic power was the enactment of legislation in the 1980's and 1990's in conformity with American demands. Having done so, Ireland found itself at the end of the 1990's still under US pressure, and finding this supported by recent indications from the OECD of the necessity to 'reform' its copyright law.

The pattern which developed was of a state buffeted by international events and by technological considerations, and eventually by newly emerging international actors. The weakness of Ireland's interest in copyright was discerned at an early stage by the EBU, for example, which endeavoured to use Ireland as a tool to achieve greater international goals. This was resisted by the government only on the grounds of inertia (not wishing to move away from Britain's position) and a resentment on the part of some Irish officials to being, as they saw it, dictated to by a continental organisation. Ireland could have achieved influence internationally, according to the EBU, particularly on other ex-British territories, if it had introduced legislation which diverged from Britain's. Irish anxiety to continue to demonstrate full membership of the international community, and to maintain uniformity of regulation in substantive issues with Britain, undermined this effort. As in previous cases, this calls into question the purpose of Irish administrative and political independence, at least in this sector.

8.3 Implications and Future Research

8.3.1 Implications for policy-making

Since copyright policy is in future to be developed within the EU, or with the EU acting as the international actor in relation to Berne and the TRIPS, it is in Ireland's interests to have a voice in these forums. While the country will no longer have the freedom to develop copyright policy in its domestic interest, it will be a participant in EU-wide policy

³ Despite Ireland's membership of the EU, there is little indication that Irish initiatives have been influential in the development of EU copyright policy. Indeed, there has been some commentary that Ireland proposes to adopt

formulation and implementation. Since Ireland has become a considerable cultural producer with an international export market, this is likely to be to her overall advantage. Membership of the EU, which has already placed demands on its legislative apparatus to enact a new copyright law, gives the country a voice in one of the most important regional policy-setting forums. While the country has effectively surrendered its largely unexercised copyright sovereignty to the Union, it now has the potential to have a more influential voice internationally through this forum. Given the strengthened Irish belief in the importance of its cultural industries, and the value placed on cultural identity by some other EU states, there exists the possibility that Ireland will in future be able to influence the shaping of international copyright law in the interests of its cultural industries and of its society. It is, however, regrettable that, though much of its copyright and cultural policy flows from EU initiatives, Ireland was not in a position to avail of protection from the EU in the face of the non-commensurate response by the US to the Irish piracy problem and to the belated Irish legislative response.

The major legislative challenge for Ireland in the 1990's was to adapt its law to the requirements of the digital age, and in particular to new media. International developments in the WTO, the EU and WIPO have placed challenging demands on Ireland for legislative reform. The EU process of harmonisation of law has removed scope for deviation from European norms. This, coupled with US unwillingness to accept any derogation from the new high standards it has now adopted, in effect removes copyright legislation from the armoury available to a country like Ireland in furtherance of its cultural development. However, as a member of the developed world, as a member of influential clubs such as the EU, and given the extent of Irish cultural production and of the cultural industries in Ireland, the proper response for Ireland now is to seek to couple its available native talent with indigenous industrial exploitation.

Quota regimes in the cultural sectors, and the insistence on a quantity of indigenous production and exhibition in the film and music industries, are in some senses the functional modern equivalents of the manufacturing requirements and national publishing requirements of previous periods. It would appear, however, that they are likely to be considerably more effective, in the Irish case, and in the general European situation. States

even more stringent copyright regulation than is required by international law or international pressure.

will in future preserve and support their cultural production through culturally appropriate, well-directed production, through the encouragement of artistic production by non-copyright means, through the use of protectionism and through the insistence that 'culture is different' and that its commodification must be limited.

Membership of the EU, and a sense of the value of developing a European identity, with the ensuing energising of cultural activity with could flow from this, might permit the development in Ireland of cultural works and cultural sectors which compete with, outsell, or out-value the dominant American products. An awareness of its cultural heritage, in music and literature, (and perhaps of the possibilities of harnessing its linguistic potential), offer additional scope for development in the sector. The development of a distinct and self-confident Irish national identity within Europe, where the cultural relationship with Britain is placed in a more appropriate perspective, should also have undoubted positive consequences for Ireland.

In recent decades there has been for Ireland a gradual closing down of domestic legislative options for the encouragement of domestic industry. There is now an evident necessity for Ireland to adopt a high profile within the EC on copyright issues, both in formulating policy proposals, and in the identification of common interests with other states. The forging of alliances with other smaller states, and with states such as France which prioritise the protection of culture, are desirable political objectives. Ireland should investigate the use of non-copyright forms of protection, in furtherance of cultural aims, since copyright is only a tool and not a good in its own right. There should be an awareness of the importance of linguistic issues in the copyright field and an awareness of the potential for the development of a cultural industry based on a translated literature from and to the Irish language.

The necessity of distinguishing between the economic and cultural attributes of copyright law should be prioritised internationally, so that IP rights in film production, for example, which does not yet have deep roots in the Irish cultural industry, are not excessively prioritised over the established forms of cultural output in Ireland. This is not, however, to suggest that the protection of film rights is not also in Ireland's cultural and industrial interest, but simply to recognise the relative importance at present of film and other forms of cultural expression.

Tendency towards excessively stringent interpretation of international obligations

The tendency which persists in Ireland that it must adopt the most stringent interpretation of the international conventions in relation to IP Rights should be countered. International Conventions on IPRs are the reflection of the best possible compromise between sovereign states. However, the dominance of the US in particular in the negotiation of these conventions, and the divergence of Irish and US interests, make it incumbent on Ireland to seek to apply the conventions in a manner appropriate to Irish cultural and industrial interests.

While there have been considerable delays since 1963 in amending Irish copyright law in the light of technological changes and international agreements, Irish administrators have remained to a surprising degree at the disposal of US interests, and have clearly been influenced by a maximalist interpretation of the requirements of international agreements. It is imperative for the benefit of Irish society and culture in the future that well-informed citizens and groups of interested parties should challenge this reflex of a normative view of strongly expressed international opinion.

Desirability of Ireland taking a lead internationally

The contemporary cultural debates in Ireland centre on issues which are of concern to most states. Ireland should now seek to influence and modify international normative regulation in the interests of its culture, its population and its industry. There is a necessity for Ireland to take action internationally to prevent the appropriation of its folk heritage and of other public domain and anonymous works by commercial interests. The difference between the modes of ownership of traditional music works and the economic rights which are recognised in copyright should be reconciled. The pre-existing rights of Irish musicians to the use and modification of works within the cultural context in which they find themselves should be sustained by legislation in future. In pursuit of this objective, means should be sought to find common cause with other states with persisting strong folk art cultures to establish internationally accepted norms in this area.

It would be desirable if Ireland took a position within the European Union and internationally in defence of the interests of small states in the face of the globalised communications and information industries. As a participant in the internal EU debates, Ireland has a privileged position. Simultaneously it retains a strong link with the US, and in particular with the information and communications industries. It would be to the benefit of other small states if Ireland were to adopt negotiating positions genuinely based on their interests.

To adopt such a position, it would be necessary to provoke a debate in Ireland about the policy issues which surround copyright. Such a debate might necessarily be confined to a small group in society. However, in the context of the development in Ireland of a practice of more open debates on policy issues, democratic structures for the elaboration of options and proposals in the field should be developed.

It is notable that in the past Ireland did not seek to make common cause with other developing countries, seeing itself instead as a member of the developed world, even in relation to a sector as underdeveloped as the Irish cultural industry sector. This was demonstrated both in its attitude to the potential to use copyright law for developmental purposes, and also in its refusal to apply the 1967 Stockholm Protocol in Irish law. There was an evident desire to be recognised as part of the developed world, and as a compliant member of the international community. Even today, it would be appropriate for Ireland to seek to lead developing countries in the copyright debates, given its own history, and also to act as a voice within the EU, where the debates on copyright are more open to input on cultural grounds than would be the case in the WTO, for example.

As appropriate, Ireland should adopt an openness to initiating policy proposals in relation to copyright. I suggest that mechanisms for protecting folk and traditional cultural works, and encouraging the continued production of such works, are the most evident areas in which Ireland might consider advancing policy proposals.

Necessity for public debate

There is a clear necessity to debate policy proposals in an official forum, in advance of the publication of legislation. The State should support widespread, open debate on the consequences of legislation, rather than doing so after legislation is introduced into the Oireachtas. There is a place for official examinations of the issue, and for the use of the Green Papers on policy proposals, and for the use of open consultative forums.

The fact that the 1999 Copyright and Related Rights Bill was drafted without any public examination of the issues is indicative that there has not been a change of administrative or political attitude in relation to the formulation of copyright legislation. It contrasts with the efforts which have been made in recent years to engage in debate on other aspects of the media and communications legislative landscape of the country. The view that the issue is purely technical and that it is not part of the cultural regulatory framework still needs to be countered. By concentrating on the legal and economic aspects of the legislation, to the detriment of the cultural implications, the insights of the non-economic cultural sector have been less strongly influential in the drafting of the Bill than their importance would warrant. Producing the Bill in a finished form and seeking to expedite its parliamentary passage has led to the inversion of what I would argue to be the ideal situation. The policy debates which should have preceded the drafting the Bill, most suitably through the use of a Green Paper, have instead taken place while the Bill was before the Oireachtas. The result is that the government has been forced by the opposition and by the demands of interest groups to amend the Bill repeatedly. Policy debates have taken place, inappropriately, during the Dail Committee Stage. While the Bill will eventually be passed, and US anger assuaged, it is important that future Copyright legislative proposals should emanate from considered public debate, rather than being the point of origin of such debates.

The civil interest / the consumer interest must be recognised

With the professionalism of the collecting societies and the activism of the US and EU in the Irish debates, the interests of the citizen and consumer have become endangered. The view among Irish administrators and legislators that copyright is an issue of law which can

be understood only by lawyers is pernicious but prevalent, and this conspires to exclude the public interest. As the issues at stake in international debates become both more important and become genuinely more complex, it is essential that a strong public interest argument should be available in all the important domestic debates. It is necessary to distinguish between the purely legal issues involved in copyright, which in any case tend to be confined to litigation, and the policy issues, which are properly the concern of a wider group in society. Ideally, policy discussion in relation to the regulation of the communications and information industries should be a general political concern of the population.

Necessity to break the link between copyright and legal deposit

The concept and justification for legal deposit should be clearly addressed in future legislation. The concept should be entirely separated from copyright law, particularly since it is exercised between Britain and Ireland, and brings the concept of copyright law into confusion and controversy. The cultural benefits of legal deposit should be articulated, and provided for through separate legislation. The government should be open to the possibility of compensating publishers. It is difficult to defend this legally-enforced subsidy of libraries by publishers; the preservation of the country's cultural heritage would be easier to defend if this issue of justice were addressed.

The need for continual review of the legislation

In the past, Irish copyright law tended to remain unamended for decades at a time. It would be a mistake to imagine that this is still the situation. Irish legislators, regulators, administrators, economic actors and citizens are now likely to face frequent amendment of the legislation, as the law struggles to keep pace with new technological developments, with new economic arrangements and with new social and cultural practices. In the light of this, the value of the creation of structures for the continual review and debate of the regulatory framework is clear.

Now that Ireland has become a developed country, the law is perhaps at last largely appropriate to its circumstances. However, this must be kept always under review, as it is

crucial that the law should continue to be appropriate to prevailing cultural and economic conditions. Copyright, which was used previously as a label of sovereignty, now carries with it a genuine meaning, since in the communications world of today, a measure of cultural self-sufficiency and an industry capable of sustaining this are themselves a necessary component of cultural sovereignty.

9.3.2 Future Research

In this section I outline some suggestions for further research which could be carried out on copyright, both in relation to the specific Irish case, and in relation to issues which impact on Ireland but which are of wider concern internationally. Historical research and policy research are the two important fields for further enquiry.

Historical research

Publishing history and what is frequently termed the “history of the book” are developing fields of research internationally. A body of valuable work has been produced in this field in relation to Ireland, but the study of copyright regulation as it has been experienced and constituted has been relatively neglected. While the eighteenth century history of copyright has been investigated in some detail, the historiography of copyright in Ireland for later periods is generally treated only in legal texts.

Policy formulation would benefit from detailed historical work on copyright in Ireland in the past thirty years. Archival material for this period will be released in the coming years, both as a result of further releases under the National Archives Act 1986, and as a result of the hoped-for further extension of the Freedom of Information Act 1997. This was a period in which the Irish publishing industry revived, and in which it achieved a solid status as an essential component of the Irish cultural landscape. The effects of copyright regulation on the development of the industry, while likely to have been minimal, should be researched as material becomes available. The forces which shaped Irish policy in that time, and in particular the international forces, should be revealed in future research. This is likely to be a richer field.

Historical research on Irish publishing in the nineteenth century would be likely to allow for a deeper understanding of the decline of the industry. A more sophisticated picture of the complex nature of the decline, and the relegation of Irish publishing to certain non-prestige sectors, would emerge from such work. Sources for this work in Britain might prove most fruitful in this regard, given the relative lack of material in Ireland. It is likely that with the growth of interest in publishing history, this will become one of the most important fields of research in the short term. The historical turning point of 1801 and its immediate aftermath will remain a major focus for research in publishing history. If documentary or statistical sources can be traced, the immediately preceding five years, leading up to the Act of Union, is a second period which should be further investigated. It is likely that important debates within the publishing trade, and within government, took place in this period. The reasons for the immediate imposition of copyright on Ireland, the negotiations leading up to this event, and the social, cultural and economic aftermath remain intriguing topics for research.

More comparative work is also needed. As national studies on other countries become available, the data should be analysed to provide a better understanding of the Irish case in a cross-national context.

Research should be carried out on the history and the effects of the legal deposit requirements of copyright law in Ireland. An abundance of twentieth century archival material on the subject came to light during the present research. I have argued that the issue is largely irrelevant to this discussion of the effects of copyright law. However, the issue bears examination on its own merits. Indeed, it is one of the few aspects of Irish copyright regulation for which contemporary nineteenth century sources of any consequence are readily available.⁴

⁴ Important work has been published on one aspect of this issue by Kinane (2000).

Policy research

Research to assist in the development of future copyright policy is clearly needed. In particular, there is a need for quantitative data collection and research.

There is considerable scope for research on copyright outside the parameters of the national state or the regional bloc. Such fundamental research, should be carried out on developing alternative modalities for the encouragement of works of the imagination and of creativity. Such research would not necessarily be linked to the Irish experience, but would have more universal practical application. There is also a need to understand better the level of public acceptability of copyright, and to seek either to develop mechanisms to enhance the social legitimacy of copyright, or to present alternatives which would continue to achieve the economic and social goals towards which copyright policy is presently directed. In the light of the large-scale international piracy of copyright works, there would be a commercial justification for such work.

Research on copyright in Ireland might be most fruitfully directed at an examination of how Irish cultural production might be protected and encouraged in the context of developing media technologies. In parallel with technological development, the increasing globalisation of copyright regulation and the globalisation of the commercial cultural industry, there would be value in researching mechanisms for protecting a “national cultural patrimony” in the collective interests of Irish society. This would be legitimated by being in the interests of maintaining a distinctive Irish cultural identity, which I would argue to be a valid goal in its own right. The ownership of rights in their own cultural production and reproduction will become one of the most powerful tools for societies to express their distinctiveness in a culturally globalised future.

It is important for policy makers to have a clear picture of the society for which they are creating policy. Ireland needs to move beyond an automatic acquiescence in any international consensus in which it does not exert rationally-based influence or appropriate compensation. Research on contemporary issues should be directed at detecting changes in social and economic attitudes to copyright. As the cultural and information industries

develop in Ireland, the likelihood is that Ireland will acquire greater economic justification for being a proponent of strong protection, following the US path.

Because most political and administrative apparatuses are impressed by economic rather than cultural arguments, and because copyright has both an economic and a cultural face, there is a pressing need for quantitative work on the actual value of cultural production in societies. This need is particularly acute in Ireland, where such quantitative data is sparse, both for more distant historical periods and for the immediate past. The formulation of appropriate policies depends on the availability of solid data, rather than impressionistic arguments, and so this strand of empirical research is of the highest importance.

It would be of particular interest in Ireland if work were done on formulating new forms of protection of traditional and anonymous works and for new works created within traditional cultural frameworks. Such work would also have a wider relevance, since many other societies are considerable producers of works of this nature, but are at present at the mercy of major international commercial interests. It would be valuable to pursue research on the question of whether it is appropriate for commercial entities to achieve and maintain control over the cultural heritage of states. Case studies on any such appropriation should be carried out, and the cultural and social consequences charted. Policy options which might flow from this would include forming alliances of common interest with states with similar stocks of traditional cultural capital. Research in this area would also incorporate some of the insights from the emerging field of the human rights aspects of copyright regulation.

9.4 Conclusion

Ireland's self-conscious decoupling from Britain in cultural matters since independence has been a half-hearted affair. Nevertheless, the national preference for Irish traditional music and the appetite for books about Ireland or by Irish writers have contributed to an increase in the social prestige of the art forms associated with these cultural products. In the twentieth century a concentration on the role of the artist purely in cultural terms, derived from an ideologically-constructed historical understanding of the artist in Gaelic Ireland, led to the relegation of proper consideration of the economic possibilities of developing a cultural industry as an industry.

Domestic cultural industries drawing from and in return supplying a society comprise, in my view, an essential feature of a culturally distinctive society. Among these cultural industries, book publishing, the music recording industries and broadcasting are at present the most critical for the establishment and sustenance of such a distinctive cultural identity. Ireland was merely fortunate that a viable book publishing industry survived into the 1980's. The potential inherent in a large cultural sector for giving effect to political and cultural aspirations of independence and distinctiveness went largely unrealised in independent Ireland. Culture was, except for rhetorical purposes, an insignificant influence on public policy-making in Ireland until many decades after independence.

Despite fitful supports from government, in a non-coherent manner, over the decades since 1963, it would be impossible to sustain an argument that government or regulatory action encouraged or sustained the Irish publishing industry. Serendipitous events and apparent catastrophes were ultimately the engines of the emergence of the industry in its present state. Even so, the pattern of many Irish writers publishing in London and in New York continues virtually unabated. Irish publishers, with the exception of those which have concluded partnership agreements and which issue dual editions, do not generally have the capacity to penetrate the distribution chain or to exert the advertising force in the export markets to the extent that their foreign competitors can.

The administration's indolence and its failure to consider the cultural production of the country as an economic as well as a cultural resource, though corrected in more recent years, remains a telling indictment of successive governments. This must, of course, be balanced against a realistic appraisal of the actual scale which a publishing industry can attain in a small society. Book publishing in Ireland would always have remained a comparatively small-scale industry. However, this solace cannot be relied upon with regard to the music industry. Once Irish musicians began to make a major impact internationally, it would have been appropriate for the government to have intervened decisively in the marketplace to harness this production for industrial development purposes, if not for cultural reasons.

Ireland should have been more active in international forums in developing policy proposals in relation to the regulation of the trade in cultural goods. The consistent passivity of the Irish government, which might be excusable if the country were not a producer of commercially exploitable cultural goods, was a culpable political failure. Ireland's attitudes of submitting to US pressure and of acceptance of the structures of copyright regulation devised internationally were inappropriate when the country was not seeking actively to shape the international regulatory framework. On these issues the initiative was surrendered to other countries, particularly the US, which were highly conscious of the value of cultural production, both economically and in terms of the projection of national prestige internationally. There was a legalistic perception that copyright and neighbouring rights were exclusively instrumental legal rights. This meant that the proper consideration of the policy precursors to regulatory choices and the policy implications of acquiescence in international agreements were ignored or downgraded from their proper importance.

Copyright regulation in Ireland clearly had consequences for the cultural industries of the country. Copyright was imposed on Ireland before 1922 when it did not have the capacity to reject it. Once independence was achieved, the imposition of international norms continued with the support of the political and cultural establishment. At the present time the country is entering a phase in which copyright law is attracting increased political and economic attention. There is now no longer a realistic potential to mould a domestic copyright regime in the specific internal interests of Ireland. In these circumstances, it is incumbent on the country to make all efforts to influence the shaping of the future international Intellectual Property system to reflect the needs of smaller states, in the face of immense international political and economic pressure. In these circumstances, Ireland should prioritise its conception of the cultural consequences of copyright over the economic demands of transnational industry.

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