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Revisiting the Royal Commission on Copyright

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We have a commission, appointed by a Conservative Government and presided over by a Conservative peer, recommending a form of legislation with regard to literary property which is denounced as the most pernicious communism when applied to land; and, while the measure of our earlier history, concerning “forestallers and regraters,” and fixing the price of bread and other material necessaries, are considered as monuments of the obsolete errors of our less enlightened ancestors, we find the same commission in effect advising that the price of literary commodities should be fixed by the state.¹

The novelist Anthony Trollope’s autobiography, written in 1875, though published posthumously in 1883, warned: ‘Take away from English authors their copyrights, and you would very soon take away from England her authors’.² In hindsight, one might find his concern about the survival of English copyright misplaced. Statutory copyright had existed in England since 1710; the concept of literary property was of an even older vintage. The scope and duration of the copyright regime had increased during the intervening years rather than otherwise. In fact, as intellectual property scholars regularly observe, the reach of statutory copyright has tended to increase since its inception. In the middle of what we view from our contemporary position as the steady, inexorable growth of a copyright regime over the course of several hundred years, why was Trollope worried about copyright abolition? So worried that he included a posthumous plea for the existence of copyright law in his autobiography?

The simple answer is that Trollope was worried because he believed that the greatness of the English literature of his day was dependent on the law of copyright, and he was aware from having served on the Royal Commission on Copyright that in the 1870s there existed a

¹ Thomas Edward Scrutton, *The Law of Copyright* (John Murray 1883) 1-2.

² Anthony Trollope, *An Autobiography* (1884, Oxford World Classics 2008) 107.

concerted effort, largely from within the Civil Service, to alter the face of British copyright law as it was known.

The Government appointed the Royal Commission in 1876 to inquire into the British law of copyright.³ It was composed of prominent men from varied backgrounds; its membership included politician Lord John Manners, civil servant Sir Louis Mallet, composer Sir Julius Benedict, jurist, philosopher, and journalist James Fitzjames Stephen, and historian and biographer James Anthony Froude. Thomas Henry Farrer, Permanent Secretary to the Board of Trade had long been the Board of Trade's copyright expert; he was appointed to the first Commission, withdrawing from participation in the second due to pressures of work.⁴ Nevertheless, he too made a substantial contribution, appearing eight times as a witness.

The Commission conducted forty-eight hearings and spent months on deliberations before producing an 1878 report, which bluntly observed that the existing law was 'wholly destitute of any sort of arrangement, incomplete, often obscure'.⁵ Having determined that the copyright law was in a mess, the Commission was in the position of having to recommend domestic reforms and provide guidance for the Government's international and colonial policy on copyright. In its attempt to do so, it found the task impossible to accomplish without addressing broader philosophical and political problems regarding the purpose and nature of copyright. There were proposals from high-ranking members of the Board of Trade, which then had responsibility for intellectual property matters, and others to replace copyright as a proprietary right—colonially and perhaps domestically—with a mandatory system of royalties. It was the debate over this proposal that forced many of the more

³ A Royal Commission on Copyright was originally appointed in 1875 but was dissolved. For further background on the political institution of royal commissions and their assessment see B Lauriat, 'The Examination of Everything': Royal Commissions in British Legal History" 31 *Statute Law Review* 24 (2010).

⁴ Farrer served as permanent secretary to the Board of Trade from 1865 to 1886.

⁵ Royal Commission on Copyright, 'Royal Commission on the Laws and Regulations Relating to Home, Colonial and Foreign Copyrights; Report, Minutes of Evidence' c2036 (1878) (hereinafter 'RCC Report', 'RCC Minutes').

theoretical issues to the forefront of the debates. Difficult fundamental questions were raised about whether copyright was a natural right of authors or a mere state-granted privilege to incentivise creation and dissemination of works for the benefit of the public.

Reactions to the Royal Commission on Copyright have been mixed. Book historian John Feather described the Royal Commission as a failure,⁶ but another book historian Simon Eliot, writes:

It has been said that history is always written by the victors, but here we have a chance to use a source that did not leave its triumphal mark in history. Due to the traditionally contentious legal and moral issues surrounding copyright, the Commission suffered from internal conflicts and dissenting voices, and concluded in a rash of minority reports. Nevertheless, it was an honest and, in many ways, an heroic effort to engage with matters that had remained unresolved by the Act of 1842.⁷

Was the Royal Commission on Copyright ‘heroic’, as Eliot suggests; and could that in itself make it a success? Or was it a failure, as Feather claims? After two years, the Royal Commission produced a Report, which only five of its fifteen members signed without reservation. One refused to sign at all. The Press and Parliament took immediate notice of the Royal Commission’s Report; its recommendations for rapid reform and codification were acted upon but were not immediately successful. Some of the recommended domestic reforms were enacted, but subsequent attempts at large-scale legislative action on copyright during the next decades also failed.

Whether a failure or success, the Commission was forgotten for many decades. But with the increasing prevalence of research on book history and the history of copyright, scholarship has turned to the Commission as valuable resource. This is not altogether a recent

⁶ John Feather, *Publishing, Piracy, and Politics: An Historical Study of Copyright in Britain* (Mansell 1994) 185.

⁷ Simon Eliot, “‘Mr Greenhill, whom you cannot get rid of’; Copyright, Legal Deposit and the Stationers’ Company in the 19th Century,” R Myers and M Harris, eds, *Libraries and the Book Trade* (St Paul’s Bibliographies 2000) 65.

phenomenon; seminal works on copyright like Arnold Plant's 'The Economic Aspects of Copyright in Books',⁸ Benjamin Kaplan's *An Unhurried View of Copyright* and Stephen Breyer's 'The Uneasy Case for Copyright' made good use of the Commission's materials.⁹ Having appeared online several years ago as part of the *Primary Sources on Copyright* project, the Commission has begun to receive more attention than it had previously. Isabella Alexander notes that while 'little academic attention has been paid to the Commission [though she notes the work of Saint-Amour] it is significant, as the site of considerable discursive activity regarding the justifications for copyright law, and the first real attack on their philosophic plausibility at the governmental level'.¹⁰ Literary critic Paul Saint-Amour has studied the Commission in detail and also called for further attention to be paid to its contribution.¹¹

This essay addresses some modern accounts of the Commission in the academic literature on copyright and publishing history. Recent work on the Commission has tended to praise the minority/dissenting views on the Commission, particularly the dissent of Sir Louis Mallet, which challenged the extension, and even existence, of copyright. The majority Report, however, is often dismissed as simplistic, inconsistent or ill-reasoned. This essay aims to analyse further Mallet's contribution, placing it in the context of his broader economic views and free trade ideology in order to consider critically the use that modern accounts have made of his work and the Commission Report.

⁸ 1 *Economica* (May 1934) 167.

⁹ 84 *Harvard Law Rev* 281 (1970) 283.

¹⁰ *ibid* 128.

¹¹ Paul K Saint-Amour, *The Copywrights: Intellectual Property and the Literary Imagination* (Cornell University Press 2003). The Commission has also been considered in other works, including: Augustine Birrell, *Seven Lectures on the Law and History of Copyright in Books* (Cassell 1899) 206-208; David Saunders, *Authorship and Copyright* (Routledge 1992); Sherman & Bently *The Making of Modern Intellectual Property Law: The British Experience, 1760-1911*, Cambridge Studies in Intellectual Property Rights. (CUP 1999) 135; Benedict Atkinson, *The True History of Copyright: The Australian Experience 1905-2005* (Sydney University Press 2007).

The Report and Dissent

The Royal Commission's majority Report, published in 1878, came out clearly in favour of copyright as a property right, albeit a limited one.¹² Based on their understanding of the current law, and grounded in the legal history, they expressed:

no doubt that the interest of authors and of the public alike requires that some specific protection should be afforded by legislation to owners of copyright; and we have arrived at the conclusion that copyright should continue to be treated by law as a proprietary right, and that it is not expedient to substitute a right to a royalty defined by statute, or any other right of a similar kind.¹³

It was not only the rhetoric of author's rights among some witnesses that led to the royalty proposal's defeat, but also concerns over the practicalities of implementation. The idea of an author having to chase royalties collected all over the world was deemed impracticable by many. The Report stated its intention to limit its analysis of the merits of copyright versus royalty to a brief discussion, but it did include an outline of the essential arguments for and against the royalty system.¹⁴

Beyond this brief outline of arguments for and against the royalty proposal, the Report deliberately omitted any lengthy justifications for copyright as a proprietary right—not believing a royal commission report to be an appropriate forum for discourse on property theory, even if they could have reached a consensus. Agreement would have been unlikely, as those who agreed on one particular shape and character of copyright did not all necessarily agree on a theoretical basis for rights of property. Instead, the Report focussed on setting out its practical recommendations for codification and reform to the law. As a result, the extent to which the justification for copyright was a subject of discussion at the meetings becomes evident only when one reads the Minutes, the 'Separate Report by Sir Louis Mallet, C.B.',

¹² RCC Report viii-ix.

¹³ RCC Report viii.

¹⁴ RCC Report viii-ix.

who refused to sign the majority Report, or later essays by Froude, TH Farrer, and Matthew Arnold.¹⁵ Even though the others did sign the majority Report, Mallet's approach to copyright duration was not without support from members Drummond Wolff, John Rose and Edward Jenkins.¹⁶

Modern scholarship has often identified as a failure the fact that the Commission Report did not provide a coherent justification for copyright. Catherine Seville observes that the Report does not (and acknowledges that perhaps it could not) deal with matters of principle.¹⁷ Alexander observes that the Commission's Report did not address the controversial questions about the intent and foundation of copyright but 'smoothed over the fundamental questions that had been raised over copyright's purpose and justification'.¹⁸ Feather is particularly critical. The Commission was, in his view, 'the most thorough and the least conclusive' of the inquiries into copyright from the 1870s to the 1970s.¹⁹ Feather asserts that the Commission's focus was on the 'mundane practical problems' of copyright rather than the 'great issues of the nature of copyright, its philosophical justification and its economic consequences'.²⁰ He finds the Commission doomed by the complexity and breadth of its subject, and 'ultimately unsatisfactory' in attempting to achieve pragmatic compromise, as conceptual agreement seemed impossible.²¹

Feather also criticized the Commission for failing to define in its Report what it meant when it deemed copyright 'proprietary'.²² But while it did not define 'proprietary' in the Report, it is clear from the discussions in the Minutes that the Commission did understand

¹⁵ RCC Report xlvi; TH Farrer, 'The Principle of Copyright', 24 *Fortnightly Review* (1878); JA Froude, 'The Copyright Commission', 304 *The Edinburgh Review* (October 1878); Matthew Arnold, 'Copyright', 27 *Fortnightly Review* 319 (1880).

¹⁶ RCC Report lvii, lviii.

¹⁷ *ibid* 273-4.

¹⁸ See Isabella Alexander, *Copyright Law and the Public Interest in the Nineteenth Century* (Hart 2010) 127.

¹⁹ Feather, *Publishing, Piracy, and Politics* 185.

²⁰ *ibid* 189.

²¹ *ibid* 194.

²² Feather, *Publishing, Piracy, and Politics* 187.

what they meant by the word.²³ While in the utilitarian nineteenth century, the Members balked at the idea of natural property rights, the consensus favoured a pragmatic acceptance that property rights arose from the combined force of utility, desert arising from labour, and maintenance of a status quo—all this meant that copyright should be treated as property, albeit a limited property. The majority decision to treat copyright as a proprietary right can perhaps be appreciated in negative terms; whatever it means to say that copyright is a proprietary right, it is clearly *not* something that the State ought to appropriate and replace with an even-more-limited privilege administered by a government department. One may take the view that copyright exists only to provide incentives and therefore agree with the position taken by Mallet and Farrer. But the Commission materials indicate that many of the members of the Commission disagreed with this conclusion after having given it years of thorough consideration.

Mallet was unable to concur, either with the practical recommendations of the majority Report or the implicit foundations upon which they rested. Instead, he submitted a ten-page dissent, in which, he was compelled to articulate what he believed were ‘the abstract principles upon which the law of copyright ultimately rests.’²⁴ To Mallet, copyright had arisen only because of the development of printing and the market failure that resulted from ease of copying. He thought it was nonsensical for a law to be created essentially in order to give authors the share of the value of the printing press—‘a mechanical invention to which they have contributed nothing’.²⁵ Moreover, in his view, the value in works came from the ideas, facts, and opinions, which copyright did *not* protect. The mere form of a work (i.e., the expression) might simply be protected by contract law, he suggested.²⁶

²³ See, e.g., RCC Minutes 272-74, 287-88, 304-3-5.

²⁴ RCC Report xlvi.

²⁵ RCC Report xlviii.

²⁶ RCC Report xlviii.

Mallet argued that copyright could not be justified in the same way as property more generally and therefore did not and should not share its legal characteristics. He rebutted claims that authors have a complete property interest requiring perpetual copyright. Copyright, he pointed out, relied on the artificial limitation of supply. Published works, he said, are not analogous to houses and pieces of cloth, but are akin to water in the ocean, air, sunlight—naturally unlimited and in the gratuitous possession of mankind. As indefinite numbers of copies can be made, to limit the number of copies made in order to create value is to create artificial scarcity and monopoly.²⁷

Having dismissed the notion of natural property rights of authors, Mallet concluded that ‘the policy, then, of copyright laws must be sought in another order of ideas and be made to rest on some other ground than that which is the foundation of rights of property in whatever is subject to a natural limitation of supply.’²⁸ Logically progressing from this basis, ‘the question becomes purely a practical one, viz., whether any special interference by law is required to ensure for a community the best possible literature at the cheapest possible price.’²⁹ Using the empirical evidence submitted to the Commission, Mallet argued that copyright law could not be justified on this basis. He agreed that it would be desirable to allow for some kind of remuneration to flow to authors of literary works, but he thought the royalty proposal’s terms would easily allow for such remuneration. He admitted some concern arising from philosopher Herbert Spencer’s testimony, appearing before the Commission twice as a witness, that the plan would discourage publishers from undertaking the first publication of an expensive but highly valuable work. In response, he cited an example of an expensive British series that managed to pay twenty per cent of the retail price to its authors without being undersold

²⁷ RCC Report xlvi.

²⁸ RCC Report xlix.

²⁹ *ibid.*

by rival editions in the American market as evidence that publishers would not, in fact, be deterred.³⁰

Ultimately, Mallet concurred with the Commission majority's conclusion that it should not recommend the royalty proposal because he did not believe that such a profound legal change could be effected in the face of contrary public opinion, but he thought it so advantageous that it ought to be remembered for future reform.³¹ He then methodically presented his objections to nearly all of the majority Report's recommendations in the areas of Home, Colonial, and International Copyright.³²

The *Times* praised Mallet for his independence in rejecting the force of the majority:

Royal Commissioners are never revolutionary in their recommendations, and rarely paradoxical. Some clever member may dissent from his colleagues and give a rein to his thoughts, but the majority abide by the old paths. We believe Sir Louis Mallet has been the independent man of the Copyright Commission, questioning everything that others take for granted.³³

Even Froude, who had been strongly opposed to Farrer's proposals, acknowledged that it would 'be a mistake to treat such views disrespectfully. Something real must admit of being said for them when they command the assent of a man of such unquestionable ability as Sir Louis Mallet.'³⁴

Current Analysis of the Commission

Recent scholarship in the areas of copyright and publishing history has not ignored the valuable historical resource that is the Royal Commission on Copyright. Works by Deazley and Saint-Amour use the Commission to demonstrate that the underlying justifications of

³⁰ RCC Report li.

³¹ RCC Report l.

³² RCC Report liv.

³³ *The Times* (1 June 1878) 11.

³⁴ JA Froude, 'The Copyright Commission' 156.

copyright law were subject to significant controversy and that alternatives were seriously considered, drawing on its debates to contradict the view that copyright is an essential facet of Anglo-American law or that its growth is inevitable, inexorable, or desirable.³⁵ To varying degrees, discussions of the Commission by Alexander, Deazley, Saint-Amour, Seville, and Feather have all identified the relevance of utilitarian philosophy and free trade doctrine to an understanding of the Royal Commission on Copyright.

In his ‘Commentary’ provided for the *Primary Sources on Copyright (1450-1900)* project, Deazley emphasizes both the disagreement in descriptions of the Commission’s work and the disagreement between the various members of the Commission with regard to the underlying purpose of copyright law.³⁶ He notes that ‘Perhaps the most profound point of disagreement that lies at the heart of the Report concerned the very nature and function of copyright itself, set against a backdrop of arguments about free trade and commercial protectionism.’³⁷ He presents the positions of Farrer and Mallet in the context of free trade ideology, but he does not acknowledge the extent to which strains of thought that can also be labelled free trade ideology informed some of those who came to opposite conclusions on the question of the nature and function of copyright law. Deazley observes that the recommendations in the Report appear to lack unanimity in terms of a cohesive ideological basis, but his, admittedly brief, commentary on the Royal Commission does not delve into the reasons for the inconsistencies beyond noting that some of the recommendations in the Report appear to focus on protecting the economic rights of authors.³⁸

³⁵ Deazley (2008) ‘Commentary on the Royal Commission’s Report on Copyright (1878)’ 2. Saint-Amour, *The Copyrights* 54-55.

³⁶ Deazley (2008) ‘Commentary on the Royal Commission’s Report on Copyright (1878)’ 2. See also Deazley, *Rethinking Copyright*, 78-9, fn 100 implicitly criticizing the Royal Commission on Copyright and Stephen’s Digest for avoiding a conclusive answer on the question of whether any common law remained after the Statute of Anne.

³⁷ *ibid* 5.

³⁸ *ibid* 6.

Saint-Amour addresses the Royal Commission on Copyright in a chapter of his book *The Copywrights: Intellectual Property and the Literary Imagination*.³⁹ His analysis of the Commission focuses primarily on the response of its members to the royalty alternatives to copyright proposed by several witnesses and the free trade-based challenge to the majority Report's copyright reforms seen in Sir Louis Mallet's lengthy dissent. Saint-Amour praises Mallet's dissent, which, he says, 'distinguishes itself as one of the Commission's few extended meditations on the underlying principles of copyright'.⁴⁰ More directly than other current scholarship dealing with the Commission, his work engages with the free trade arguments, which could be used both to support copyright as a property right *and* attack it as a monopolistic practice.⁴¹ His chapter goes into great and useful detail on Mallet, placing his views on copyright in the context of Mallet's background and understanding of economic theory.⁴² He considers Farrer's views to some extent—particularly as expressed in Farrer's subsequently article on copyright in *The Fortnightly Review*—criticising Farrer for moderating his more radical ideas and thus weakening the case for the royalty proponents.⁴³ But there is little in Saint-Amour's analysis to explain the positions of the other participants on the Commission, and those in favour of a property-based conception of copyright, regardless of how justified, are treated dismissively as 'the "divine right of authordom" faction of the Copyright Commission'.⁴⁴

It is the seeming 'dead ends' of the Commission's Report, that interest Saint-Amour, and which he suggests could provide a necessary counterbalance to a self-legitimizing teleological model of copyright history.⁴⁵ He compares Mallet's views to those of modern day copyright sceptic James Boyle. Acknowledging that Boyle might disapprove of Mallet's

³⁹ Saint-Amour, *The Copywrights* 53-89.

⁴⁰ *ibid* 76.

⁴¹ *ibid* 87.

⁴² *ibid* 74-76.

⁴³ *ibid* 79.

⁴⁴ *ibid* 76.

⁴⁵ *ibid* 55, 82-9.

reliance in neoclassical economics, he nevertheless argues that ‘Boyle shares with Mallet not only a critique of the “natural rights vision of property” but an interest in redefining economic value itself—with an eye toward redistributing intellectual property, and thus wealth generally, to the excluded and exploited orders of human society.’⁴⁶

While a work of publishing history more than copyright history, the brief discussion of the Commission in N. N. Feltes’s Marxist-structuralist analysis of late nineteenth-century book production provides a striking contrast to Deazley and Saint-Amour’s treatment. As a Marxist, Feltes is, unsurprisingly, much more hostile to what he describes as ‘the insular, outmoded free trade discourse of Sir Louis Mallett [sic] and T.H. Farrer’ than Saint-Amour.⁴⁷ Without acknowledging the close connection of the two men and their positions, Feltes describes Mallet’s contribution as so obscurely doctrinaire as to be incomprehensible, while he finds Farrer explanations of political economy ‘more subtle’.⁴⁸ Feltes also dismisses the arguments of Mallet and Farrer as hopelessly misguided when trying to assess the value of books; their position was ‘founded only on abstract political economic opinions about what might be “good” or “very rubbishy” in literature, based on the production of simple commodities’.⁴⁹ In Feltes’s view, the explanation of the idiosyncrasies of the nineteenth-century book trade can be found in the shift from production as a petty commodity to a fully capitalist mode of production.

Unsurprisingly, a fairer assessment of the value of Mallet’s analysis probably falls somewhere in between Saint-Amour’s enthusiastic approval and Feltes’s dismissal. While much of the secondary literature groups the positions of Farrer and Mallet together, none of them fully indicate the extent to which the two men were allied. Mallet and Farrer were close

⁴⁶ *ibid* 87.

⁴⁷ NN Feltes, *Literary Capital and the Late Victorian Novel* (University of Wisconsin Press 1993) 63.

⁴⁸ *ibid* 61-62.

⁴⁹ *ibid* 62.

friends and had worked together in the Board of Trade for several years, when Mallet was serving as Private Secretary to the President. Their correspondence in the ensuing decades was frequent and voluminous, and ranged from brief personal notes to extensive essays on economic questions of the time.⁵⁰ (From what remains of their correspondence, it would seem that it was more often the latter.) Their views on economics were remarkably closely aligned and permitted no deviation from free trade orthodoxy—but Farrer’s convictions were perhaps somewhat more realistic and pragmatic. As he mused to Mallet:

economists ordered the foundations of property deep in absolute Justice “Labour is the just foundation of value” and they did not see that an exception to their rule would be a very dangerous thing. The more humble doctrine that on the whole the community gets most out a thing by letting a single person have and use it—is more true and more safe.⁵¹

We see that Farrer, like Mallet, was sceptical of labour theories of value. And unlike many of the free traders, Farrer viewed it as a practical, guiding principle rather than a sacred doctrine to be taken to far-distant extremes. Yet, it is a few simple words Farrer included in another letter to Mallet which summarize best their joint attitude on free trade: ‘Always capitalize “Free Trade”’.⁵²

It is clear that Mallet’s perspective on copyright was that of a free trade ideologue. But ‘free trade’ encompassed a wide variety of positions. The very popularization of political economy and free trade doctrine in the nineteenth century, however, had led to an oversimplification of many of its tenets and a glossing over of the profound disagreements of many of its supposed adherents.⁵³ As Saint-Amour writes, ‘if the 1876-1878 Commission

⁵⁰ Balliol College, Oxford, Mallet Family Papers, III, 38.

⁵¹ *ibid* 38, Letter from Farrer to Mallet, 12 December 1879.

⁵² *ibid*, Letter from Farrer to Mallet, Paris, 31 May 1879.

⁵³ GR Searle, *Morality and the Market in Victorian Britain* (Clarendon 1998) 38-39.

debates teach us anything, it is that the rubric of free trade could shelter completely adverse viewpoints.’⁵⁴

In common with the utilitarian view of property, Mallet held that ‘the only proper meaning of the term “right of property” is the right to whatever it is in the interest of society to recognize as property’.⁵⁵ But Mallet’s brand of free trade was heavily influenced by neoclassical economic thought. In analysing the nature of property in his writings on political economy, he rejected the labour theory of value favoured by many political economists, such as Ricardo and J.S Mill, and advocated a theory of value based on the demand of the consumer.⁵⁶ His adoption of neoclassical notions of value (he was particularly influenced by Jevons and Bastiat) and his rejection of Ricardo and Mill, if anything, became more pronounced towards the end of his career.⁵⁷ Consumer demand creates value, he asserted, and therefore, when framing legislation or ‘social arrangements’ it is only the consumer that should be considered.⁵⁸ ‘The interest of the producer is always opposed to that of society; that of the consumer is always identical with the interests of society’, wrote Mallet⁵⁹ According to his theory, the interests of the community could only mean that books, and other cultural artefacts, should be as cheap as possible, and he was not readily willing to admit any other factors into the analysis.

The modern copyright critic, James Boyle, to whom Saint-Amour compared Mallet,⁶⁰ provides a memorable example of one of the arguable flaws in this economic model :

The market measures the value of a good by whether people have the ability and willingness to pay for it, so the whims of the rich may be more “valuable” than the needs of the destitute. We may spend more on pet psychiatry for the

⁵⁴ Saint-Amour, *The Copywrights* 87.

⁵⁵ Mallet, *Free Exchange* 281.

⁵⁶ *ibid* 280.

⁵⁷ Louis Mallet & Bernard Mallet, ‘Introduction’ *Free Exchange* (Kegan Paul 1891) XIV.

⁵⁸ Mallet, *Free Exchange* 280-81.

⁵⁹ *ibid* 333.

⁶⁰ Saint-Amour, *The Copywrights* 84-87.

traumatized poodles on East 71st Street than on developing a cure for sleeping sickness, because the emotional wellbeing of the pets of the wealthy is “worth more” than the lives of the tropical world’s poor.⁶¹

Bently and Sherman have described how pre-modern conceptions of copyright used the language of classical jurisprudence, while in the nineteenth century, modern conceptions of copyright began to apply ‘the language and concepts of political economy and utilitarianism’.⁶² This led, they suggest, to the law focussing on the value of the physical object within which the work is embodied rather than considering the creativity, or even the labour, that went into the creation of the work.⁶³ While this is accurate in the case of Mallet and Farrer, his kindred intellect, it was not true for all who approached the problem of copyright as utilitarians or political economists. Influential nineteenth-century economic thinkers of varied political stripes, such as Ricardo, Mill, and certainly Marx, all essentially rejected a theory of value based on consumer demand. Mallet’s concept of value was not adopted by Robert Andrew Macfie, who called for some of the most radical reforms to intellectual property in the nineteenth century. Macfie promoted his royalty-based alternative to copyright as a way to compensate authors for the labour they expended, even if that compensation took a form more directly connected to the value of the physical object than the extent of the labour.⁶⁴

Mallet’s economic theory had its limitations, and he recognized only two possible ways to regulate the equilibrium between demand and supply: ‘The first is by the institution of private property and free exchange applied to all values; the second by collective property and regulated exchange. The first rests on the principle of personal freedom; the second on

⁶¹ James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (Yale University Press 2008) 2.

⁶² Bently & Sherman, *The Making of Modern Intellectual Property Law* 174.

⁶³ *ibid.*

⁶⁴ RCC Appendix IX to the Minutes, 356; RA Macfie, *Copyright and Patents for Inventions* (T&T Clark 1879) 35.

that of constraint.’⁶⁵ Mallet naturally rejected the socialistic elements that had crept into Mill’s later economic thought, which had ‘brought into an unnatural and sinister alliance the teachings of the English universities, and of Proudhon and Karl Marx’.⁶⁶ He argued that the experiences of human nature and nation, ‘make it clear that the one thing needful in the interest of labour is the greatest possible increase of capital. If this is once admitted, all the socialistic schemes with which we are afflicted must suffer an ignominious collapse.’⁶⁷

Mallet was essentially trying to fit copyright law into his black-and-white view of the necessity of government by pure capitalism or pure socialism—it was a poor fit in either model and therefore he viewed it as an artificial and suspect legal construction. Years later, legal scholar T.E. Scrutton identified what he saw as the “communitistic” character of the Law of Copyright’, in granting a limited privilege for the good of the community.⁶⁸ In fact, in some respects, his view of the purpose and procedure by which an optimal copyright system should be framed is remarkably similar to that of Mallet, even if their conclusions were poles apart. Scrutton too found property, and copyright, to be a creation of the state, which it could limit as it saw fit.⁶⁹ Mallet would, of course, have strongly objected to any depiction of his position as ‘communitistic’. Froude described the royalty-based alternative to copyright as ‘socialistic’, knowing his targets would take the description as an insult.⁷⁰

Mallet’s dissenting report relied heavily on a paper by Farrer on the principles of copyright which had been distributed to the Commission members.⁷¹ The paper commented on some of the evidence of other witnesses, particularly on those who had advocated the absolute and perpetual rights of authors. Farrer later published it as an article in the

⁶⁵ Mallet, *Free Exchange*, Appendix B, 394.

⁶⁶ *ibid* 351.

⁶⁷ *ibid* 355-56.

⁶⁸ Scrutton, *The Laws of Copyright* (1883) 290. See also the prefatory quotation.

⁶⁹ *ibid* 291.

⁷⁰ Froude, ‘The Copyright Commission’ 153.

⁷¹ RCC Report xlvi, xlix, li.

Fortnightly.⁷² It is tempting to speculate how the Commission's Report might have been framed differently had Farrer been a member of the Commission, as he was originally appointed in 1875. While he certainly gave thorough evidence as a witness, it is likely that he could have been more persuasive without the limitations placed on a witness at formal, interrogatory hearings. Moreover, the consistency and agreement between the views of Farrer and Mallet would have made them a formidable coalition. Deazley claims:

At its most basic, the efforts of both Farrer and Mallet amounted to an attempt to encourage the legislature to approach and develop copyright policy and law primarily through the lens of the public interest, as opposed to that of the 'natural' rights of the author. In addition, in proselytising the virtues of the royalty system, they also sought to distinguish and disentangle the interests of the author and the publisher within the context of the copyright ideology and doctrine.⁷³

Deazley appears to define 'the public' solely as users, and their 'interest' solely as cheap access to books and other creative commodities. This is certainly the position of Mallet, who believed that 'it is the demand (the consumer) who causes the value, and in all social arrangements, in all legislation, it is to the consumer that exclusive regard should be had.'⁷⁴ But, as Jane Ginsburg and Isabella Alexander have written, this is not the only way to define the scope of the public interest.⁷⁵ 'The public' is an elusive concept, and its definition may vary depending on the context—limiting only to a notion of 'users' may be too narrow. Creators themselves are not necessarily omitted from an understanding of 'the public'.⁷⁶ For example, an originating principle of the Association for the Protection of the Rights of Authors—an interest group that had an influence on the formation of the Commission⁷⁷—was that a belief that the interests of authors and the public were essentially aligned: 'it would be

⁷² Farrer, 'The Principle of Copyright' 836.

⁷³ Deazley, 'Report of the Royal Commission on Copyright' 7.

⁷⁴ Mallet, *Free Exchange* 280.

⁷⁵ Jane Ginsburg, 'Authors and Users in Copyright' (1997) 45 *Journal of the Copyright Society of the US*, 1, 4. Alexander, *Copyright Law and the Public Interest* 4, 5, 80.

⁷⁶ Ginsburg, 'Authors and Users in Copyright' 1; Alexander *Copyright Law and the Public Interest* 2, 4.

⁷⁷ See B Lauriat, 'Charles Reade's Roles in the Drama of Victorian Dramatic Copyright', 33 *Columbia Journal of Law and the Arts* 1 (2009).

idle to pretend that the public can safely allow literature to be ‘its own reward’.⁷⁸ Moreover, even if the public interest is regarded as divergent from, or opposed to, the interest of creators, identifying the best interests of users can itself be controversial. The Commission members themselves differed on whether vast quantities of cheap, popular literature were, in fact, in the public’s best interest.⁷⁹

As noted above, the accounts by Deazley and Saint-Amour of those members of the Commission who supported the majority position may be oversimplified. For example, Deazley suggests that Jenkins was an oddity in arguing in favour of stronger, longer, and broader copyright protection and yet not believing in copyright as a natural right.

That Jenkins, as one of the founding members of the Association for the Protection of the Rights of Authors, on the one hand passionately argued for the need for greater, and indeed universal, protection for all authors irrespective of nationality, while at the same time rejecting the concept of copyright as natural property, was certainly unusual.⁸⁰

This was perhaps less unusual than Deazley suggests. In 1876, Moy Thomas had vehemently protested that the Association for the Protection of the Rights of Authors, which included Trollope, Jenkins, and Froude, did not advocate a natural property rights approach. The Commission members who viewed copyright as a property right and thought it should be stronger—Saint Amour called them the ‘divine right of authorship’⁸¹ faction of the Copyright Commission—did not necessarily recognize property as a natural right.⁸² James Fitzjames Stephen viewed copyright as the creation of statute.⁸³ Indeed, free traders were just as likely, or perhaps more likely, to believe they were upholding a divine natural order, though political economy, as distinct from free trade doctrine, had largely detached from ideas of Christian

⁷⁸ Moy Thomas, ‘Correspondence: The Association to Protect the Rights of Authors’ *The Academy* (15 May 1875) 506.

⁷⁹ For example, James Fitzjames Stephen indicated concern at the effects of the royalty proposal and the kind of literature that would be produced. RCC Minutes 261-63.

⁸⁰ Deazley, ‘Commentary on Royal Commission on Copyright Report’ 6

⁸¹ *ibid* 76.

⁸² ‘The Fortnightly Review and The Copyright Commission’ (15 January 1876) 89.

⁸³ RCC Minutes 264.

morality by this time.⁸⁴ Scrutton too observed some time later that when one has acknowledged copyright as a creation of the State, the State may then ‘impose conditions and limitations, even though the acknowledgement is used as the basis for a suggestion that no book should obtain copyright unless it has a good index, but let us remember that the position is applicable to all kinds of property.’⁸⁵

It is therefore unfair to suggest that the members who disagreed with the royalty proponents did so because they failed to comprehend their arguments or that the majority did not understand what it meant by treating copyright as a proprietary right or did not consider the public interest to be of primary importance. The disagreement on the Royal Commission was a disagreement on the purpose and goal of copyright law—not simply a debate about what term and breadth of protection would provide the greatest incentive for authors to create while making the associated products as inexpensive for the public as possible. And this disagreement implicated further disagreements about the nature of property and what the public interest truly entailed—such issues were unlikely to be resolved in the finite time of even a major Victorian public inquiry.

The Commission’s Influence

Formed in 1884, the Society of Authors, with Tennyson as its first president, became a powerful interest group for copyright codification and reform.⁸⁶ It continued to lobby for legislation as well as supporting international copyright agreements.⁸⁷ Authors and publishers alike wished to see the Commission’s recommendations implemented. American publisher RR Bowker observed of the Commission’s suggested alterations to the copyright law that it

⁸⁴ As originally conceived, Cobdenite free trade doctrine was closely tied to principles of Christian morality. GR Searle, *Morality and the Market in Victorian Britain* (Clarendon 1998) 15.

⁸⁵ Scrutton (1883) 291. The index point refers to Macfie’s slightly eccentric suggestion following question 2777 of the Minutes that adequate indexing be a requirement for registration of copyrights.

⁸⁶ *About the Society of Authors*, available at: <http://www.societyofauthors.net/about_the_society/index.html>

⁸⁷ See Seville, *The Internationalisation of Copyright* 278-289.

was ‘much to be regretted that their work failed to reach the expected result of an Act of Parliament. The evidence taken by the Commission forms a second Blue Book, also of great value.’⁸⁸

In 1886, the Copyright Committee of the Society of Authors drafted a proposed act based on the Commission’s recommendations. Several years later it was finally brought forward in Parliament as a private bill by Lord Monkswell.⁸⁹ Author JM Lely was a member of the Copyright Committee⁹⁰ and he published the proposed Bill along with the ‘all-important Report of the Commission of 1878’, upon which the Bill had been modelled. Saint-Amour and Deazley have suggested that soon after the publication of the Commission’s Report the dissenting voices were ignored and a gloss of unanimity was applied to the proceedings,⁹¹ but it is interesting to note here that this official re-publication included Sir Louis Mallet’s dissent. Lely’s publication also ‘briefly touched on the “Manners Bill” and other measures which were submitted to Parliament though not discussed by it, between 1878 and the present time.’⁹² Despite such efforts, the Bill did not make it to the Commons and was not successful in subsequent reintroductions in 1898 and 1900. The *Speaker* reported on the unsatisfactory state of affairs in 1898:

The history of Copyright in Parliament is a history of exasperating delays. In 1878 there was Royal Commission on Copyright, as a result of which a Bill was introduced by Lord John Manners. This measure never advanced beyond the preliminary stages, but in 1881 Lord Monkswell again endeavoured to legislate upon the Commission’s report. His Bill was read a second time and then dropped. Last year the measure advanced a further stage, and Lord Monkswell’s Copyright

⁸⁸ RR Bowker, *Copyright, Its Laws and Its Literature, Being a Summary of the Principles and Law of Copyright, with Especial Reference to Books* (1886) 7.

⁸⁹ GH Thring, ‘Recent Attempts at Copyright Legislation’ 63 *Fortnightly Review* 461 (1898). See also Alexander, *Copyright and the Public Interest in the Nineteenth Century* 238-41.

⁹⁰ J M Lely, *Copyright Law Reform: An Exposition of Lord Monkswell’s Copyright Bill (with Extracts from the Report of the Commission of 1878)* (Eyre and Spottiswoode 1891) (‘As one of the members of the Copyright Committee of the Author’s Society, I had some little share in directing the progress of the present Bill before it was entrusted to Lord Monkswell.’)

⁹¹ Deazley, ‘Commentary: Royal Commissioner’s Report’, Saint-Amour *The Copyrights* 54.

⁹² Lely, *Copyright Law Reform* 2.

Amendment Bill was introduced. At length, after twenty years we have Lord Herschell's Bill, which was been read twice in the House of Lords, and is at present before the committee. That some new legislation is badly needed is self evident.⁹³

Legislation in 1886 had brought British copyright law into compliance with the Berne Convention, but the thorough codification recommended and sought by the Royal Commission on Copyright was not to be achieved until 1911. Even then, the Commission had not been forgotten. Evan James MacGillivray said in his annotated edition of the Copyright Act 1911, 'such a code has long been desired by all those interested in the legal rights of authors, artists and publishers. So long ago as 1878 a consolidation of the law was recommended by a Royal Commission, which carefully considered the whole subject'.⁹⁴

It has been argued that the mid to late nineteenth-century battles over copyright may not have achieved the desired reforms, but they did have the effect of heavily publicizing the position of authors in a way that raised the profile of professional authorship.⁹⁵ Alexander has also observed that the Commission revealed, and brought together, authors and publishers who put forward forceful expansionist arguments in favour of stronger copyright—these individuals would not be without influence in the subsequent years.⁹⁶ The Society of Authors, which was to be more powerful than the earlier interest groups, included many men who had been instrumental in the Commission or its creation, including Matthew Arnold, TH Huxley, Edward Dicey, Froude, WS Gilbert, Sala, and Reade.⁹⁷ The Royal Commission on Copyright was a catalyst for much of the publicity for copyright activism and so played a role in its future social development.

⁹³ 'Literary Copyright', 17 *The Speaker* (7 May 1898) 573.

⁹⁴ EJ Macgillivray, *The Copyright Act, 1911, Annotated* (Stevens and Sons, 1912) iii.

⁹⁵ Robert Colby, 'Authorship and the Book Trade' in *Victorian Periodicals and Victorian Society* (Toronto: University of Toronto Press 1994) 143-161.

⁹⁶ Alexander, *Copyright and the Public Interest* 147.

⁹⁷ Seville, *The Internationalisation of Copyright* 278.

In the face of debates that writer Edward Dicey (brother of Albert Venn) had, not unreasonably, called ‘irresolvable’, the status quo undoubtedly had compelling force, or daunting inertia, depending on one’s perspective.⁹⁸ The careful consideration given to alternative proposals, even fairly radical ones, demonstrates that the Commission’s majority conclusions were not simply the inevitable result of entrenched interests. Nevertheless, in the face of disagreement as to the fundamental roots of the law and inconclusive evidence about the likely effects of many proposed alterations, the Commission generally chose to maintain the status quo in the absence of persuasive evidence that change was needed—even if this meant that some of its recommendations were theoretically inconsistent upon closer examination. It has been suggested that one of the reasons copyright reform did not occur for so long after the Commission’s Report was because of the complications of the colonies.⁹⁹ There were undoubtedly theoretical differences if one compares the treatment of colonial copyright and domestic, but the resulting compromise was not unsatisfactory.¹⁰⁰ Given the scope and magnitude of its task, the Commission’s pragmatic approach was ultimately a reasonable, if practically unsuccessful, one.

Conclusion

Froude and Arnold in the nineteenth century, and Saint-Amour and Deazley in the twenty-first century, have identified the great question before the Royal Commission on Copyright as whether copyright law was justified on moral, economic, and legal grounds.¹⁰¹ Given the significance of the question, and the distance between extreme positions, it is no surprise that the Commission was not unanimous, but the majority did, nonetheless, conclude that copyright was justified and that it took effect as a property right. And it is partly due to

⁹⁸ Edward Dicey, ‘The Copyright Question’ (January 1876) 19 *Fortnightly Review* 126.

⁹⁹ Bently & Sherman, *The Making of Modern Intellectual Property Law* 136.

¹⁰⁰ Scrutton, *The Laws of Copyright* (1883) 266-67.

¹⁰¹ Arnold, ‘Copyright’ 319; Froude, ‘The Copyright Commission’ 161; Saint-Amour, *The Copywrights* 6, 53; Deazley (2008) ‘Commentary on the Royal Commission’s Report on Copyright (1878) 5.

their conclusions that copyright as they knew it is not wildly dissimilar from copyright as we know it. The Report itself is flawed, inconsistent and compromised, as one might expect from the controversial product of a committee. It is considered a failure for its conclusions resulting from compromise, or perhaps not compromising enough. Given the size, complexity, and scope of the Commission, this is unsurprising. As Scrutton observed, any attempt to ‘reduce to principle the laws dealing with Copyright...would naturally commence with an investigation of the nature of property,’ inevitably leading to the ‘realm of legal metaphysics’.¹⁰² On its face, Mallet’s dissent, as the work of an intelligent sole author, appears to be more consistent and deeply reasoned. In fact, the dissent rests on a shaky ground of economic theories unpalatable to many of those who praise his conclusions and which could be equally applied to reach opposite conclusions.

Is the copyright regime ‘communistic’, as Scrutton believed? Was the royalty proposal socialistic, as Froude suggested? The Commission demonstrates the way in which arguments about copyright law can be conducted at cross-purposes due to fundamental disagreements about the nature and purpose of property. This newer area of law highlighted these different conceptions of property existing amongst educated laypeople that did not arise when discussing more venerable and less controversial forms of property. Similarly, lawmakers today may differ in their views of the nature and purpose of property. It may seem absurd to consider jurisprudential questions about property theory in mainstream debates about copyright law, but not to do so can lead to profound misunderstandings about where disagreements about copyright law actually lie. Modern academics could read the Minutes and Report with a critical eye and suggested that they are merely the result of unsophisticated classical economics meets unsophisticated natural law theory, but when one considers the

¹⁰² Scrutton, *The Laws of Copyright* (1883) 2.

limitations of scope and depth in current governmental discussions of intellectual property legislation, the remarkable thing is that such modes of analysis were applied at all.

The Royal Commission on Copyright could, in fact, serve as a model for future discussions of copyright policy in terms of thoroughness, quality and range of analysis, and the wide variety of interests represented. Its independence from government and the wide-ranging experiences of its members contributed to a Commission that resulted in a theoretically uneasy compromise, but one built on a solid foundation of thorough consideration and analysis. Decisions had to be reached and functional compromises made, despite profound disagreements as to the nature of the law. A group of interested, unpaid individuals with a range of expertise spent several years examining an area of law to a level which included questioning its very existence, and went on to produce a majority Report and a workable proposal as to how the law might be shaped in future—a remarkable feat in any age. The Commission is a lesson to policy-makers about the challenges of reaching any conclusions on copyright policy, without implicating deeper questions about the nature of property, the value of aesthetic creations, and the purpose of education. If all that seems daunting and improbable, then the outcome of the Royal Commission on Copyright becomes the more explicable, and in its Victorian determination and thoroughness, instructive.