

## ***Dramatic Copyright in Australia to 1912***

***Roslyn Atkinson & Richard Fotheringham***

[This article originally appeared in *Australasian Drama Studies* 11 (1987): 47-63. It has been revised, corrected and updated (11 September 2006); the version below should be cited.]

In 1879 the American lawyer Eaton S. Drone prefaced his *A Treatise on the Law and Property in Intellectual Productions in Great Britain and the United States* with the observation:

Meaningless, inconsistent, and inadequate statutory provisions, ambiguous, erroneous, and conflicting decisions cover the law of copyright with doubt, difficulties and confusion.<sup>1</sup>

Pity then Australian colonial playwrights, for whom the difficulties of protecting their intellectual productions from unauthorised theatrical productions were compounded by additional problems. Unless they were permanent residents of the United States they could not secure copyright in that country, even if they were temporarily resident while performing there;<sup>2</sup> as British citizens living in the colonies their work, if registered in the colony where it was written or first performed, was protected only in that colony, whereas a script registered at Stationers' Hall in London was protected throughout the Empire. The whole question of the legal defence of dramatic creative effort was fraught with uncertainty. Consequently dramatists in colonial Australasia often sold their scripts outright to theatrical managers as quickly as possible, and managers, instead of relying on copyright protection, attempted to restrict the making of copies of original manuscripts by more direct means. A successful play often existed only as a single manuscript prompt script which was guarded like a prized jewel: if it was stolen or destroyed then the work itself was lost. Actors were given 'sides' - part scripts containing only their own lines and the relevant cues. This was customary practice in any case in a period when copies had to be laboriously transcribed by hand, but it also restricted the opportunities for piracy.

In England the system of stage censorship required that a complete copy of a play had to be submitted to the Lord Chamberlain's Office for approval before being performed. When copyright laws were passed in England and the Australasian colonies (and similarly in the USA), it was intended that this too would involve the submission of complete copies of all works for which copyright registration was sought. With *published* works (in the literal sense of the term which still survives in modern copyright legislation; i.e. those printed and distributed in multiple copies as books, etc) this was indeed the case, and those copies submitted now form a major part of the collections of Australiana in the state and national libraries. With the *performance* of unpublished dramas in manuscript it proved impracticable to demand that a complete copy be deposited - at least until typewriters and carbon paper came to be widely used. In any case some dramatists wished to register only the *titles* of their works, since these were the key to their advertising and publicity. Nevertheless in the colony of Victoria some playscripts did finish up in the files of copyright applications, and it is one of the intentions of this paper to draw attention to this source of Australian colonial and early Federation plays (see Appendix).

Obtaining copyright protection for a play in Australia in the nineteenth century was not the automatic consequence of having written it that it is today. Dramatists were expected to

register their work at an appropriate Copyright Office, attached to the Trade Marks and Patents Office in each colony. A copy was submitted to the officer in charge, who read it to see if it contained scurrilous, obscene, defamatory or anti-government material.<sup>3</sup> If approved, the manuscript was stamped and (if it was the only copy) returned to the author or theatre manager who had submitted it. Two distinct rights could be granted: copyright (to prevent unauthorised copies of a published work being made), and performing right (to prevent the unauthorised presentation of a story in acted form on the public stage). Only published books could be granted copyright protection, and similarly for a play the performing right began at the first public performance, for only performed works were covered by the legislation. There was no copyright or performing right in unpublished or unperformed works.

The Registers in which the copyright officer wrote the details of authorship, title, date and place of first performance, and, if relevant, the assignment of rights to a theatrical manager, have survived for each mainland state (Tasmania had no relevant legislation). Together with the Registers of the later Commonwealth Copyright Office, they offer a basic guide to Australian drama between 1870 and 1969.<sup>4</sup> In addition the Registers of Stationers' Hall in London (now held in the Public Record Office at Kew) contain entries relating to the performance of Australian plays between 1877 and 1907; however it is not clear whether a play performed only in Australia could be granted a performing right in Great Britain. Some Australian dramatists did apply to Stationers' Hall; unfortunately the whereabouts of the actual scripts sent to London for registration is, according to the Stationers' Hall's archivist Robin Myers, 'something of a mystery'.<sup>5</sup> For the United States the published two-volume index *Dramatic Compositions Copyrighted in the United States 1870-1916* gives information about the attempted registration of plays in that country by many authors associated with Australia, including W. M. Akhurst, Randolph Bedford, Kyrle Bellew, George Fawcett Rowe, E. Lewis Scott, Toso Taylor, Inigo Tyrell, and J. C. Williamson. It also indicates that scripts of Scott's *The Silence of Dean Maitland* (performed in 1894 in Adelaide, registered in 1900 in the USA) and Bedford's *White Australia* (1909 Melbourne, 1910 USA) were at one time held in the Library of Congress in Washington.<sup>6</sup>

An understanding of the intricacies of dramatic copyright before 1912 is a useful adjunct to the study of both the literature and drama of the period, for the mysteries of the legislation and the popular myths about it affected the authors of novels, stories and poems as well as plays. The copyright legislation, its implementation in England, and a number of significant Australian court cases show something of the dilemmas with which authors had to contend, and these cases are also full of information about the nineteenth- and early twentieth-century theatre in Australasia.

The groundwork was established by the *Dramatic Copyright Act* (1833) of the British Parliament, supplemented by some provisions of the *Literary Copyright Act* (1842) which applied to plays.<sup>7</sup> From 1869 onwards the five mainland Australian colonies also passed copyright acts which were in turn replaced by a Commonwealth *Copyright Act* of 1905 (commencing 1 January 1907),<sup>8</sup> but the 1833 British Act remained the basis of legislation until the 1911 British *Copyright Act*, the adoption of which in Australia on 1 July 1912 marked the beginning of a fundamentally new approach to copyright law and is therefore the logical cut-off point for this commentary.<sup>9</sup>

Nineteenth-century courts in Britain, the United States and Australia were unwilling to allow authors any rights over their work beyond those unequivocally prescribed by statute. In one

famous example, *Stowe v. Thomas* (1853) 2 Wall. Jr. 547; 2 Am. Law Reg. 210, a Circuit Court in the United States held that Harriet Beecher Stowe's copyright in *Uncle Tom's Cabin* had *not* been violated by an unauthorised German translation, even though Stowe had previously caused her novel to be translated into German and had secured copyright for her authorised translation. Strange as such a decision seems now, the reasoning of Mr Justice Grier shows the fear of the courts that extending authors' rights would severely inhibit the dissemination and influence of literary and dramatic narratives, characters and ideas throughout society:

By the publication of her book, the creations of the genius and imagination of the author have become as much public property as those of Homer or Cervantes. Uncle Tom and Topsy are as much *publici juris* as Don Quixote and Sancho Panza. All her conceptions and inventions may be used and abused by imitators, playwrights, and poetasters. They are no longer her own: those who have purchased her book may clothe them in English doggerel, in German or Chinese prose.<sup>10</sup>

The major gap in the British *Dramatic Copyright Act* (1833) was its silence on such questions of translation and adaptation, and in particular on the common practice of making unauthorised *stage* adaptations of *literary* narratives, which the English courts decided did *not* constitute piracy. This anomaly was a source of much frustration throughout the nineteenth century to novelists in particular, who were obliged to write play versions of their own works, and have them performed in public, if they wished to obtain the performing right for their stories. The belief that this gave them some control over dramatic piracy came from *Reade v. Conquest* (1861) 9 C.B. (N.S.) 755 [142 E.R. 297]; (1862) 11 C.B. (N.S.) 479 [142 E.R. 883]. In 1853 Charles Reade had written a play *Gold!* which dealt with the Australian gold rushes and which was performed and also published as a book. Three years later Reade reproduced parts of this play in his novel *It's Never Too Late to Mend*, which was in turn dramatised by the popular playwright George Conquest and staged by Conquest's brother with great commercial success at London's Grecian Theatre. Reade was able to sue successfully for breach of performing right not because Conquest had dramatised his novel, but because Conquest's play was held to have a 'substantial identity' with Reade's original play *Gold!*<sup>11</sup> Novelists therefore assumed that they could protect their works by either dramatising their own narratives or employing a trusted playwright to make an authorised play version. From this belief - and from the fact that in any case it was necessary to perform a play in public before performing right could be granted - came the practice of giving a 'copyright performance.' This involved hiring actors to give a public reading of a new play, sometimes in costume, so that performing right could be claimed before piracy could occur. The practice of giving such readings - both for dramatisations and for original plays - was common in Australia until the 1912 legislation came into effect; special playbills sometimes being printed to give substance to these "performances".<sup>12</sup>

Several of the cases reported in Australian courts confirm the lack of faith which playwrights and managers had in the power of the copyright legislation. One of the earliest, *Coppin v. Solomon* (1868) 2 S.A.L.R. 83, concerned the performance of Dion Boucicault's *Arrah-na-pogue* at the Victoria Theatre in Adelaide. In 1865 the theatrical entrepreneur George Coppin had purchased what he thought were the 'Australasian rights' to this play for three years; Abraham Jacob Solomon had approached Coppin for permission to stage it in Adelaide. Coppin's proposed terms - fifty percent of the gross takings over and above the first one hundred pounds a week - were not acceptable to Solomon, who went ahead with an unauthorised performance. In the South Australian Supreme Court Gwynne J. rejected

Coppin's application for an injunction to prevent Solomon from presenting Boucicault's play. The judge cited English authority (Lord St. Leonards' judgment in *Jefferys v. Boosey* (1854) 4 H.L.C. 815; [10 E.R. 681]) that copyright could be sold outright but not divided up amongst different purchasers in different parts of the British Empire. Thus rights could be *assigned* (that is, sold in their entirety), but a manager who had simply obtained from the author or his assignee a *licence* to give performances in particular colonies or English counties could not sue other managements for breaches of copyright. Boucicault himself could have sued Solomon successfully, but Coppin could not. Probably this difficulty was a relatively minor one in Great Britain where a manager who had obtained a licence to perform an author's play in one area of Britain could quickly communicate with the author (or his assigned copyright holder), and where licence agreements presumably contained clauses which obliged the copyright holder to protect the exclusive rights of a licensee. However it was a major obstacle in the distant colonies of Australasia, where a pirate might well conclude a long and successful season before the author even knew of the breach of performing right, and where in any case legal proceedings by the author would have been greatly hampered by the tyranny of distance. Although some sections of the theatre industry continued to assume that it was possible to purchase from London an exclusive right to perform a play in Australia and New Zealand, but not elsewhere, there seems to have been no legal basis for this assumption for the next twenty-eight years.

However popular understanding of the legal position on this matter was considerably muddled by *Williamson v. Kelly* (1879). This is the first injunction known to have been granted in Australia on behalf of a theatrical manager to prevent an unauthorised performance by another company, and was granted to J. C. Williamson on 9 August 1879 to restrain the Kelly and Leon Minstrels and Burlesque Opera Company from performing Gilbert's and Sullivan's *HMS Pinafore* in Sydney. Williamson and his then wife, Maggie Moore, were Americans who had toured Australia in 1874-75 with a hugely successful play written in part by Williamson himself, *Struck Oil* (a beautiful manuscript of this is held in the Victorian colonial copyright collection; see Appendix, entry 4). They had subsequently played it in England and America, and early in 1879 made plans to again visit the Australasian colonies. On 2 May Williamson came to an agreement with Gilbert and Sullivan which granted him an exclusive right to perform in Australia and New Zealand their extremely successful new comic opera *HMS Pinafore*. This licence, which cost Williamson the large sum of three hundred English pounds for only one year's rights, also specifically empowered Williamson to sue, 'in the name of the authors, for all damages and penalties incurred by others not licensed to represent the said piece'.<sup>13</sup>

While playing in San Francisco in June, Williamson heard to his alarm that 'Pinaforemania' had already reached Australia. Kelly and Leon's company were performing it in Sydney and there were two simultaneous productions in Melbourne; one by the Lingards at the Academy of Music and the other by the Stewarts at St. George's Hall. Williamson instructed his Australian attorney to register *HMS Pinafore* in the Australasian colonies, and arrived in Sydney on the *Zealandia* on 3 August. He immediately commenced legal proceedings against all three companies. The Stewarts' season had already ended; their management later came to a 'satisfactory arrangement' with Williamson.<sup>14</sup> The Lingards, still performing in Melbourne while Williamson was litigating Kelly and Leon in Sydney, ignored his suit. After fifty-six performances to capacity houses they closed their production just before Williamson arrived in Melbourne and shortly afterwards went to New Zealand. Williamson's lawsuits pursued them but no evidence has been sighted to suggest that he was successful in suppressing unauthorised

performances of *HMS Pinafore* by the Lingards, Kelly and Leon, or any other company in any colony other than New South Wales.<sup>15</sup>

However Williamson was successful in obtaining an interim injunction against Kelly and Leon in Sydney; as this was the first action he had commenced it must have given considerable concern to his adversaries, and confirmed their desire not to indulge in expensive and possibly unsuccessful litigation. An 'unusually large attendance of the public' was present on the Saturday morning of the case,<sup>16</sup> and reports of the hearing were widely and prominently reported in the Sydney and Melbourne press.<sup>17</sup> The account given in the *Argus* on 12 August suggests that the matter was decided on the facts, but in spite of the law:

It was the defendants' fault, for they let the case be heard on plaintiffs affidavits only. He had facts on one side only, but arguments on both sides.... His Honour.....said he had some difficulty in granting the injunction in the face of *Jefferys v. Boosey*. He thought there was sufficient ground to grant the injunction especially as plaintiff had gone to great expense in preparing for the piece.

The matter was complicated by the fact that the judge, Sir William Manning, was an acting judge sitting in *locum tenens*, and his duties were to cease at the end of the same Saturday's session. He decided therefore to grant only an interim injunction, effective from the following Monday, until the matter could be heard by the Full Court of the Supreme Court. However Kelly and Leon decided to save themselves further legal expense by withdrawing their production after that Saturday evening's performance. (They had already played a full season of *HMS Pinafore* and had completed several weeks of a return season.)

Williamson's aggressive willingness to litigate his presumed 'rights' appears to have successfully bluffed the pirates into a strategic retreat, but the matter was not mentioned in the law reports for that year, and was not cited as authority in subsequent cases. The incident shows something of the gap between popular myths about copyright law and established case precedent. Many theatre professionals chose to believe that this case had validated copyright licence agreements in the Australasian colonies (a belief which Williamson himself did much to promulgate<sup>18</sup>). Judicially it did not alter the law in any way and quite possibly a permanent injunction would have been refused if the matter had ever gone to the Full Court.

The next reported case, *Weekes v. Williamson* (1886) 12 V.L.R. 483, was interpreted as meaning that a dramatist could not secure the exclusive use of the title of a play. It concerned the dramatisation of Marcus Clarke's *His Natural Life*. George Leitch was the first to stage a version of the novel, in Brisbane on 26 April 1886. He then contracted with the 'Triumvirate' (J. C. Williamson, Arthur Garner and George Musgrove) to perform the play in Adelaide, Melbourne and Sydney. On 14 May, while en route to Adelaide, Leitch called in at the Melbourne Copyright Office and applied to have his script registered in Victoria, submitting a complete copy of the manuscript as evidence; however he did not perform it in Victoria until later. (Curiously, Marcus Clarke's widow Marian herself applied to register a play version ten days earlier, but without leaving a script or giving any evidence that it had been performed. Presumably she was trying to alter her non-existent legal position in the hope of receiving at least some royalty payments to support her and the six Clarke children, but she took no part in the subsequent court action.)<sup>19</sup>

On 14 June, while Leitch was in Adelaide, a minor theatrical manager, Inigo Tyrrell Weekes, staged another version at the Mechanics' Institute in Williamstown. He used the longer title *For the Term of His Natural Life* and applied to register his play the next day, leaving a copy of Act 2 as an exhibit. When the Triumvirate announced that Leitch's version would open in Melbourne at the Theatre Royal on the 26th, Weekes applied for an injunction. He conceded that anyone could dramatise and perform the novel, but claimed that only he could use the title *For the Term of His Natural Life* or any variant of it, including the original shorter title *His Natural Life* which Leitch had used.

Weekes' action illustrates many of the absurdities of the nineteenth-century law on copyright both in general and as it applied in the Australasian colonies. Marcus Clarke had not dramatised his book; it was therefore lawful for anyone to do so, without the permission of Clarke's impoverished widow and without having to pay her either a contract price or a per-performance royalty. At the time of the court hearing, Weekes was the only playwright to have staged Clarke's story in Victoria; as performance had to precede the granting of performing right, only his version could be registered. The fact that Leitch had performed his play in Brisbane (and, by this time, in Adelaide) did not entitle him to protection in other colonies. (Weekes' barrister went further and claimed that authors *could not* claim performing right in more than one colony, though this assertion was not commented on in the judgment.) Leitch had anticipated such difficulties and had sent complete copies of his play both to the Lord Chamberlain's Office and to Stationers' Hall in London, to try to gain the Empire-wide benefits of the British legislation - but, given the slowness of communications between England and Australia, had at the time of the case no way of knowing whether or not his applications had been accepted there, nor any proof that he had even made such applications. Although Weekes had submitted an Act of his play and Leitch an entire script copy to the Victorian Copyright Office, neither appears to have been put in as evidence, since Webb J. in his judgment complained that he could not compare the two plays since 'I have neither the one nor the other before me.' Therefore, as he could not determine if there had been plagiarism of one play by the other playwright, he threw out Weekes' application. He did not specifically decide on the question of whether or not the name of a play could be protected by copyright law, and consequently this important commercial question also remained unanswered for another twenty years.

It was not until 1896 that the actor-manager Bland Holt succeeded, in *Holt v. Woods* 17 N.S.W.R. 36, in establishing in law the practice of issuing a licence granting Australasian rights in a play, and so overrule the judgment in *Coppin v. Solomon*. Holt had gained from the English author Sutton Vane a licence to perform in Australasia Vane's sporting and military melodrama *For England*, and was incensed when an American version of the play under a different title was announced for performance in Sydney.<sup>20</sup> Owen C.J. compared the manuscripts and noted that 'the infringement is of so barefaced a nature that the Court is unable to feel any sympathy for the defendants.' He complained of the difficulty he had in establishing the facts of this and earlier similar cases, since most of the pertinent documents were in London, and made each side pay their own costs because he had 'had to act upon what I have described as more or less imperfect evidence'. Nevertheless Holt got his injunction; although the Chief Justice referred to the same judgment which had been followed in *Coppin v. Solomon*, he pursued a useful distinction between *copyright* and *performance right*:

A dramatic representation is in its nature local; each representation can only take place in one locality; each representation is of a transient nature. It is not

like the reproduction of copies of a book which acquire a tangible form and shape and can be handed on from hand to hand. Lord *St. Leonards*' decision being based on the inconvenience that would arise the right of reproducing copies of a book, and that inconvenience being in my opinion inapplicable to dramatic representations, I am of the opinion that that decision does not apply to the present case.

The consequences of this judgment, as summarised in the headnote, must have made the major actor-managers sleep more soundly the night after judgment was handed down: 'The proprietor in Great Britain of the sole right of representing a dramatic work can ... assign to another that right in the Australian colonies, and the assignee can sue in his own name in those colonies to restrain the infringement of the right'.

Four years earlier a South Australian case *Fishburn Brothers v. Adelaide Cyclorama Company Limited* (1892) L.R. 20, had established new legal guidelines for another vital section of the theatre industry - the work of scene painters - and incidentally provided an opportunity for the testing of the international agreements reached under the Berne Convention of 1886. A 'Professor' Bruno Piglhein of Munich had painted a panoramic picture entitled 'Jerusalem and the Crucifixion of Christ'; because Germany was a signatory to the Berne Convention he was entitled, from 3 May 1886, to the copyright in his painting 'throughout Her Majesty's dominions ... with the same rights as those enjoyed in Germany.' The Glasgow company Fishburn Brothers, which had secured the exhibition rights, consequently moved to prevent the Adelaide Cyclorama Company from exhibiting an alleged copy of the painting 'in Hindley-street.' A major complication in the action was that the British *Fine Arts Copyright Act* of 1862, unlike the other copyright acts of the same parliament, had neglected to make any mention of, or provision for, the colonies, and arguably did not apply in them. In the judgment the Full Court of the Supreme Court of South Australia was obliged to assess the relative merits of different pieces of sometimes conflicting legislation, but ultimately the Berne Convention was held to apply in the British colonies, and 'a painting executed by a German artist in Germany and assigned to a British subject is entitled to copyright in the colonies'.

The right of authors and their assignees to the exclusive use of the title of a play, which *Weekes v. Williamson* had failed to determine, was finally established in the early years of the twentieth century by two cases, the first in New South Wales and the other in Victoria. In *Broadhurst v. Nicholls* (1903) 20 W.N. (N.S.W.) 70, the plaintiffs were the proprietors in NSW of a comedy called *The Wrong Mr. Wright* and the defendant was the proprietor of another play called variously *Jane* and *The Other Mrs. Benson*, but which he had now named *The Wrong Mrs. Wright*. A perpetual injunction against the defendant's use of this name was granted by Simpson C.J. in Equity; however, since his judgment was not based on the exclusive right to a title but rather on the grounds that this retitling was 'calculated to deceive the public,' the law of copyright was not tested on this question.

A less equivocal conclusion was reached in the Victorian case, *Meynell v. Pearce* [1906] V.L.R. 447, which also eliminated another curious anomaly: the fact that those second-rank theatre companies who performed mostly in public halls and other non-licensed theatres were thought to be outside the ambit of the copyright legislation and therefore able to pirate plays at will. (One of the defences in *Weekes v. Williamson* had been that Weekes' performance at the Williamstown Mechanics' Institute Hall was not a performance at a 'theatre' in the meaning of the Copyright Act.)

*Meynell v. Pearce* followed the very successful production at the Melbourne Theatre Royal on 17 March 1906 of *The Fatal Wedding*. After the Meynell Company's season had concluded, a Mrs. Pearce performed another play at the Town Hall, St. Kilda, and the Excelsior Hall, Point Melbourne, using the title *The Fatal Wedding Day* with the word *Day* in smaller type on a separate line. Doubtless this was also calculated to deceive the public, but Mrs. Pearce's defence included the assertions that copyright did not extend to titles - the actual play performed was quite unlike *The Fatal Wedding* - and that in any case she had not performed it in a theatre. Cussen J. rejected both points; he held that Meynell was entitled to exclusive use of the title not only as a trade mark but also because he had been assigned the performing rights to the play in Australasia. His Honour also took a commonsense approach to the definition of a theatre: '... in this context the word "theatres" means places at which the play is performed'. More apparent loopholes in the law of copyright were at last plugged.

The power to legislate in the area of copyright was one of the powers ceded to the Commonwealth by the colonies at Federation, and in 1905 the first Commonwealth *Copyright Act* was enacted, which took effect in 1907. Between 1901 and 1907 however a legal anomaly could still exist in situations where a play was performed and registered in one state, and pirated, performed, and registered in another. This occurred in the New South Wales case of *Denham v. Fuller* (1901) W.N. (N.S.W.) 19, 135, which concerned that most controversial (and, at this time, lucrative) of all local dramatic subjects, the Kelly Gang. Fuller was the lessee and manager of Sydney's Empire Theatre in 1901, and had subcontracted the first half of each evening's variety program to a Mr Coulter, who presented dramatic sketches of about an hour's duration. One of these was a version of the Kelly Gang legend, a story which another actor-manager, Arnold Denham, had also presented with great success in Sydney two years earlier, and for which he had claimed authorship and registered the performing right in New South Wales. Denham applied in the District Court to recover damages he claimed were due to him for the unauthorised performance of his play.

Information about this case comes from a report of a subsequent appeal to the Full Court. This report omits some details of the original trial evidence, so the facts of the matter are difficult to establish with certainty. However it appears that both Denham's and Coulter's plays were plagiarised from an earlier Kelly Gang play written by Reginald Rede and staged by Dan Barry's company in Victoria, but which had not been performed in New South Wales. As proof of this would have led to Denham's claim to authorship of 'his' play being discredited, it is obvious why he did not want this evidence led. Since it would have been damaging to Coulter's and Fuller's reputations as well, counsel for Fuller attempted on other grounds to discredit Denham's claim that he held an exclusive performing right in New South Wales. However when these defences failed Fuller's barrister then attempted to introduce as new evidence the certificate of registration for Rede's play in the state of Victoria, claiming that this showed that Denham was neither the author, nor the assigned copyright holder for the state of New South Wales, of the play he had presented. However no notice had been given of this defence as required under the Act, and the trial judge refused to allow the evidence to be admitted. Denham was awarded damages of £21. Fuller appealed to the Full Court, where the original decision was upheld, but with some expressions of regret from one of the judges (Owen J.) that there was nothing in the original judge's notes on which he could justify overturning his decision. The net result was that Denham, the first pirate in New South Wales of a popular play written and staged in Victoria,<sup>21</sup> gained the same exclusive legal rights as the



original copyright holder, although this is unlikely to have occurred if the defence evidence had been properly led.

The British *Copyright Act* of 1911 (enacted in Australia on 1 July 1912) effectively did away with the residual weaknesses in the earlier legislation: in particular the copyright for a story written in one narrative mode automatically extended to other modes; dramatists could no longer pirate novels and stories at will. It was no longer necessary to perform a play before registering it; copyright and performing right were fused and began at composition rather than at first publication or performance. In England it was no longer necessary to register literary works at all, and this function of Stationers' Hall in London ceased in 1923 when Canada, which had not passed the British legislation, enacted similar laws.<sup>22</sup> But by a curious atavistic oversight the Australian Government, which only five years before adopting the new system had set up a Commonwealth Copyright Office modelled on Stationers' Hall, decided to continue with that office although it had no precise legal purpose nor powers to enforce its functions effectively; it was not closed until 1969. Copyright registration was voluntary, but a work still had to be registered before a court action could be commenced, and early registration was one way of proving the primacy of a narrative. Consequently until the 1950s at least most writers and theatre managers continued to register their works, and some in fact failed to realise that it was no longer necessary to have a work performed before registering it. Furthermore, a new policy of this Commonwealth Copyright Office was to insist that applicants deposit a complete copy of any unpublished play submitted for copyright registration. Between 1907 and 1969 therefore a very large number of Australian playscripts, mostly of performed but unpublished plays, were deposited and are now held in the National Archives of Australia.<sup>23</sup>

It should not be implied from the above study that the indiscriminate and widespread piracy which undoubtedly occurred on the nineteenth-century Australian stage went without other legal impediments. Other injunctions may have been granted, but as reports for these cases have not been located, it is not known on what grounds decisions were made. It is likely that wealthy entrepreneurs like Coppin and Williamson sometimes were able to suppress other managers' productions simply by commencing legal proceedings which the less prosperous could not afford to defend. But even Williamson, the part-author and sole copyright owner of *Struck Oil* (the comedy in which he had made his reputation as the Pennsylvania Dutchman, John Stofel), was unable to prevent his ex-wife Maggie Moore from performing the play after their divorce. According to legend, in 1893 she successfully asked the Chief Justice of the Victorian Supreme Court, Sir John Madden, not to grant Williamson an injunction, as *Struck Oil* was a central part of her repertoire as well, and Lizzie Stofel the role which had made her famous throughout Australia. Being able to perform the play was therefore vital to her financial independence.<sup>24</sup>

Another restraint against dramatic piracy and unauthorised adaptation was the fact that public opinion seems to have been well in advance of legal precedent; consequently there was widespread public pressure on the major theatrical managers to behave honourably, even if they were not legally obliged to do so. Both George Leitch and Alfred Dampier paid Marian Clarke a per-performance royalty for their versions of *For the Term of His Natural Life* after the Sydney *Bulletin* drew attention to her plight, although in Dampier's case at least the actual sum was half what he was obliged to pay for the rights to English plays.<sup>25</sup> Dampier also paid Rolf Boldrewood twenty shillings per performance for *Robbery Under Arms*, but the first Australian playwrights (as distinct from novelists) known to have received a per-performance royalty rather than simply selling a script outright were Bert Bailey and Edmund Duggan,

whose contract with William Anderson for *The Squatter's Daughter* in 1907 has survived in the Bailey Papers in the National Library.<sup>26</sup> Steele Rudd's notoriously poor contract with Bailey for *On Our Selection*, probably drawn up by Bailey, is certainly based on this earlier contract but with many clauses and provisions deleted, and was a very much weaker agreement.<sup>27</sup> It is also probably not coincidental that *On Our Selection* was rushed onto the stage in May 1912 only eight weeks before the new copyright legislation - which would have given Rudd legal rather than simply moral backing for his negotiations - became law. Bailey's real and binding contract for the stage version of *On Our Selection* was not with Rudd at all but with Beaumont Smith, who had staged a copyright reading of his version in 1908, and consequently was able to negotiate with Bert Bailey for a fifty-percent share of the performance right.<sup>28</sup> Steele Rudd was therefore the last as well as the most important Australian playwright to be forced to operate under the old legislation, and to be seriously disadvantaged by it. The imperfect laws covering intellectual property go a long way towards explaining why Rudd has been glibly dismissed as a poor businessman, and why early Australian dramatists in general found their trade to be financially a singularly unrewarding one.

#### NOTES

1. Eaton S. Drone, *A Treatise on the Law of Property in Intellectual Productions in Great Britain and the United States* (Boston: Little, Brown & Co., 1879). p. v.
2. Drone, p.231.
3. For an example of an attempt to use copyright laws as a form of censorship, see Veronica Kelly, 'The Banning of Marcus Clarke's *The Happy Land*: Stage, Press and Parliament,' *Australasian Drama Studies*, 2.1 (1983), pp.78-80.
4. See Marilyn Minell, *A Nation's Imagination: Australia's Copyright Records, 1854-1968*. National Archives Research Guide No 18. Canberra: Commonwealth of Australia, 2003.
5. Letter received from Robin Myers, 14 October 1986.
6. *Dramatic Compositions Copyrighted in the United States 1870 to 1916*, 2 vols (Washington: Government Printing Office, 1918). I subsequently obtained a microfilm of the Lewis Scott play, which I deposited in the Fryer Library at The University of Queensland, Australia. I also obtained a photocopy of the Library of Congress version of *White Australia*, which proved to be a prompt script of the play as staged in Australia by William Anderson's company at the King's Theatre, Melbourne, commencing 26 June 1909. It differed markedly from the only other surviving script, held in the National Archives of Australia (CRS A1336/2 item 931), which is a pre-performance version dating from a copyright reading at the Protestant Hall in Melbourne on 27 February 1909. However, when I went to the Library of Congress in person to check my transcription of that script, the original had been lost. Presumably, it had not been returned to the collection after my inter-library photocopying request had been completed. On a subsequent visit I was told that the Library of Congress copyright collection has now been transferred to microfilm and the originals destroyed; the relevant reel of microfilm does not include *White Australia*. I have deposited a copy of this photocopy, probably now the only remaining witness to this later version of this work, in the Hanger Collection in the Fryer Library.
7. For an explanation of copyright as it applied to dramatic works in England in this period, see the 'Copyrighting a Dramatic Work' entry in Phyllis Hartnoll, ed., *The Oxford Companion to the Theatre* (London: Oxford University Press, 1951), pp. 149-154.
8. See 'Copyright Sources for Australian Drama and Film'; *Copyright Act 1905* (Cth).
9. *Copyright Act 1912* (Cth).
10. Drone, pp.449-50.
11. Drone, p.457. See also *Oxford Companion to the Theatre*, p. 151.
12. See e.g. the playbill printed for the copyright performance on 31 July 1911 of Wilton Welch, *The Wool King*, CRS A1336/1 item 2026, National Archives of Australia (ACT).
13. *Sydney Evening News*, 9 August 1879, reprinted in the *Argus*, 12 August 1879, p.6.
14. *Argus*, 19 August 1879, p.5.
15. See *Melbourne Bulletin*, 20 October 1880.
16. See note 13.
17. See, in addition to the *Sydney Evening News/Argus* account, *Sydney Morning Herald*, 1 August 1879, p.6.

18. Garnet Walch, *The Williamsons, Being A Brief Account of the Careers of Mr and Mrs J C. Williamson. Together with Facts and Figures Relating to the Firm of Williamson, Garner, and Musgrove* (Melbourne: William Marshall, 1885), p.22. I am grateful to Professor Veronica Kelly for drawing my attention to this obscure source.
19. CRS A2389 vol 2 entry nos 2624, 2639, 2673, National Archives of Australia (ACT).
20. In addition to the court report, see Bland Holt Papers, MS2244, items 168, 178, 185, 192, National Library, Canberra.
21. For a more recent and fuller account of this matter, see Richard Fotheringham, *Australian Plays for the Colonial Stage 1834-1899* (Brisbane: University of Queensland Press, 2006), pp.551-70.
22. See Margaret Drabble, ed., *The Oxford Companion to English Literature* (London: Oxford University Press, 1985), p. 1120.
23. See Richard Fotheringham, 'Copyright Sources for Australian Plays and Films', *Archives and Manuscripts* 14.2 (1986): 144-53.
24. For an observation on this matter, see Charles Tait Papers, MS2434, folder 5, p. 14, National Library, Canberra; however the accuracy of this account has not been checked.
25. See Richard Fotheringham, 'Introduction' to Alfred Dampier and Garnet Walch, *Robbery Under Arms* (Sydney & St Lucia: Currency/ADS, 1985), p. li.
26. Bert & Tim Bailey Manuscript Collection, MS6141, folder 102, National Library, Canberra.
27. Bailey Coll, folder 102.
28. For details of Smith's copyright performance, see Hobart *Mercury*, 25 August 1908. (I am grateful to Eric Irvin for drawing my attention to this newspaper reference.) For the copyright agreement between Bailey and Smith, see CRS A1336/1, item 2391, National Archives of Australia (ACT).

#### APPENDIX: Playscripts deposited at the Victorian Copyright Office, 1870-1907

The following scripts were deposited in the Patents Office of the colony of Victoria as copyright exhibits and are now held in the National Archives of Australia, Canberra.

The information is arranged thus: Date of Application; DRAMATIST'S NAME *SHORT TITLE*; script details (MS = manuscript, TS = typescript, P = printed); Archives Commonwealth Record Series number and item number. (Selected additional information, such as the date and place of first performance, where given in the registers or on the script copies, is placed in parentheses)

1. 1 Sep 1871 MARCUS CLARKE *PEACOCK'S FEATHERS*; MS; A1786 140B
2. 7 Dec 1872 MAJOR CHARLES CHATFIELD *DER HAUS GEIST*; MS; A1188 p.49
3. 19 Dec 1872 GARNET WALCH *TRUE BLUE BEARD*; MS & P; A1786 288B (24 Dec, Prince of Wales Opera House, Melbourne)
4. 22 Sep 1874 'A MALGUM' *STRUCK OIL*; MS, A1786 432B (1 Aug, Theatre Royal Melbourne, as revised by J C Williamson)
5. 29 Dec 1874 FRANCIS HOPKINS *CLAY AND PORCELAIN*, P; A1188 p.91
6. 8 Sep 1876 CHARLES SHERARD *FATIMA THE FAIR*; P; A1188 p.135 (21 April, Ballarat)
7. 13 Mar 1877 GARNET WALCH *HEY DIDDLE DIDDLE*; P; A1786 674B (18 Dec [1876])
8. 15 Jul 1878 W.H.WALLACE *UNCLE TOM'S CABIN*; MS; A1786 755B (8 June, Princess's, Melbourne)
9. 3 Sep 1879 MARCUS CLARKE *THE MOONSTONE*; MS; A1786 831B
10. 13 Nov 1879 WILLIAM SOUTH *L'EAU DE MORT*, MS; A1786 858B (performed in Ballarat?)
11. 17 Dec 1879 FRANK TOWERS *DRINKING*; MS; A1786 862B (trans. from Zola, 1st perf South Africa)

12. 15 Oct 1880 JAMES BARNARD *HAYDON'S HOME; OR, LIFE IN OLD BENDIGO IN 1852*; MS; A1786 922B (Prompt script; performed in Bendigo? squatters, bushrangers, gold mining)
13. 17 Oct 1880 GEORGE C EVANS *THE STOLEN WILL*; P; A1786 924B (14 Oct, Bendigo? convicts & gold mining drama)
14. 29 Oct 1880 WILLIAM CARLETON *HMS PIN-A-4*; MS; A1876 929B (?, First performed in Philadelphia; burlesque)
15. 17 Nov 1880 ? *THE TWO OFFUNDS*; MS; A1786 939B (?, American Burlesque)
16. 18 Jun 1884 EDWIN BARNETT *COLONIAL LIFE*; MS; A1786 1826B (?, Victorian gold rush drama by NZ author)
17. 18 Jun 1884 EDWIN BARNETT *THE UNMASKED*; MS; A1786 1827B (?, convict drama by NZ author)
18. 25 Aug 1885 GEORGE LEITCH WALKER *THE PEARL DIVERS*; MS; Act 2 only; A1786 2326B
19. 14 May 1886 GEORGE LEITCH WALKER *HIS NATURAL LIFE*; MS; A1786 2629B
20. 15 Jun 1886 INIGO TYRRELL WEEKES *FOR THE TERM OF HIS NATURAL LIFE*; TS Act 2 only; A1786 2673B (14 June, Mechanics' Institute, Williamstown)
21. 6 Oct 1886 H V H HEINBOCKEL *M'LISS*; MS; A1786 2811B (Adapted from Bret Harte)
22. 23 May 1887 ROBERT C MOLYNENT *RETRIBUTION*, MS; A1786 3074B (Comedy drama in 4 acts, set on Dargo Station in Queensland in 1870)
23. 30 Sep 1889 FRANCIS HAICHEM *UNEARTHED AT LAST*, TS; A1786 4163B ('Original Australian drama' 5 acts & prologue, set in Victoria, murder-mystery; 28 Nov 1889)
24. 4 Sep 1890 KYRLE BELLEW *HERO AND LEANDER*; TS; A1786 4588B (23 Aug 1890, Princess's, Melbourne)
25. 29 Dec 1890 ELEANOR E. MONT *THE SNOW VISION*, MS; A1786 4746B
26. 24 Aug 1891 FRED LESLIE *CINDER ELLEN*; TS; Act 2 only; A1786 5133B (Burlesque; 22 Aug 1891, Princess's Melbourne)
27. 25 May 1894 AUBREY MAITLAND *LIVING MODELS*; MS; A1786 7506B (11 Nov 1893, Theatre Royal Melbourne)
28. 10 Jun 1895 CHAS BROWN *DOCTORS FUN NIGGERS*; MS; A1786 8121B (Clown routines; 1894 at Koondrook Vic)
29. 27 Aug 1897 CHARLES CARTER JNR (CARL RETRAC) *FOR AUSTRALIA; OR, BETWEEN TWO CAPITALS*; MS; A1786 8784B (Set in Melbourne with Jack Browne 'the parliamentary candidate,' 14 Aug 1897 at Yarraville Hall Melbourne)
30. 5 Mar 1898 MADELINE DE ESPINASSE ('THE BARON') *THE ROSE-SCENTED HANDKERCHIEF*; TS; A1786 8903B (1 act comedy 'dedicated to Lady Brassey,' set London?, 4 March 1898, Cambridge Theatre next Theatre Royal, Melbourne)
31. 13 Jun 1898 ARTHUR SEYMOUR *MELBOURNE OLD AND NEW*, TS; A1786 8935B (Pageant, 21 May 1898, Exhibition Building, Melbourne)
32. 8 Jul 1901 GEORGE H FREEMAN ('FERGENHAM') *THE HERMIT'S DAUGHTER*; P; A1786 9681B (Allegorical drama set on a sheep station with 'The Prince of Poverty' 'Spirits' & 'Fairies' as well as human characters)