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COPYRIGHT AND THE VICTORIAN INTERNET: TELEGRAPHIC PROPERTY LAWS IN COLONIAL AUSTRALIA

*Lionel Bently**

This article concerns the relationship between law, technology, and society. More specifically, this article is about legal responses to the establishment of global telecommunications networks and how those networks prompted a reevaluation of the legal protection of data, and in particular, requests that information be treated as property. This article explains how these requests were met with the criticism that granting property rights in data would restrict freedom of expression and reinforce monopolies. Subsequently, the laws came to be adopted in some territories but were rejected in others.

Does all this sound too familiar? Then it may be a surprise to discover that this article is not about the relationship between copyright and digital communications technologies, the Internet, the

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This Article draws largely from primary historical documents located in various parts of Australia. Citations containing sources that the *Loyola of Los Angeles Law Review* was unable to collect are indicated by the symbol “†”.

World Intellectual Property Organization (W.I.P.O.) digital agenda,¹ or the European Community's *sui generis* database right.² Rather, it is about legal proposals for property rights in news stories that circulated in the Australian colonies in the 1870s. The particular Acts discussed are the Victorian Telegraphic Messages Act of 1871 and the Telegraphic Copyright Acts of Western and South Australia, both passed in 1872.³

These Acts conferred a limited property right or copyright in "news."⁴ They differed in a number of respects, but they shared certain features. First, they all provided for a short term property right in "messages published in newspapers."⁵ In all cases, the right arose from the date of publication, and lapsed if publication did not occur within a short time after the message was received.⁶ Second, the right was only provided for "messages" that came from outside

1. More specifically, this "digital agenda" refers to the W.I.P.O. Copyright Treaty of 1996 and the W.I.P.O. Performers and Phonograms Treaty of 1996. See generally JÖRG REINBOHE & SILKE VON LEWINSKI, *THE WIPO COPYRIGHT TREATIES 1996*, at 104–11 (2002) (defining right of communication to the public via the right of "making available" works online).

2. Council Directive 96/9 of 11 March 1996 on the Legal Protection of Databases, 1996 O.J. (L 077) 20–28. For commentary on the *sui generis* right, see LIONEL BENTLY & BRAD SHERMAN, *INTELLECTUAL PROPERTY LAW* 297–304 (2d ed. 2004).

3. The Telegraphic Messages Copyright Act, 1871, 35 Vict., no. 414 (Vict.); The Telegram Copyright Act, 1872, 35 & 36 Vict., no. 10 (S. Austl.); The Telegram Copyright Act, 1872, 36 Vict., no. 7 (W. Austl.). For a more general comparison of the Internet with electrical telegraphy, particularly in terms of social history, see TOM STANDAGE, *THE VICTORIAN INTERNET: THE REMARKABLE STORY OF THE TELEGRAPH AND THE NINETEENTH CENTURY'S ONLINE PIONEERS* (1998).

4. Lucy Brown has argued, "[t]he news' as we understand it, is a nineteenth-century creation," and that one of the contexts for the emergence of the concept was telegraphy. LUCY BROWN, *VICTORIAN NEWS AND NEWSPAPERS* 1 (1985); see also *Proposing to Copyright News*, N.Y. TIMES, Feb. 18, 1884, at 2 ("That which we call "news" is a modern invention, as much as gutta percha or the reaping-machine." (quoting Henry Watterson)).

5. 35 Vict., no. 414, § 1 (Vict.) (twenty-four hours); 35 & 36 Vict., no. 10, § 1 (S. Austl.) (twenty-four hours); 36 Vict., no. 7, § 1 (W. Austl.) (seventy-two hours).

6. 35 Vict., no. 414, § 1 (Vict.) ("thirty-six hours from receipt"); 35 & 36 Vict., no. 10, § 1 (S. Austl.) ("thirty-six hours from the time of receipt"); 36 Vict., no. 7, § 1 (W. Austl.) ("eighty hours from receipt").

the particular colony.⁷ Third, the right was always conditioned upon the publishers' specification of the date and time of the message's receipt, and indication that it was protected by the use of a phrase such as "By Submarine Telegraph," or "By Electric Telegraph."⁸ Fourth, the right arose in favor of the "publisher."⁹ Fifth, the right extended in all cases beyond replication of the words to the reuse of the "substance" of the intelligence, to "the whole or any part of any such message . . . or . . . of the intelligence therein contained"—even prohibiting "any comment upon or any reference to such intelligence, which will in effect be a publication of the same."¹⁰ Sixth, in many cases, the right also extended to the transmission of the intelligence to others, usually to those outside the state.¹¹ Seventh, there were generally no exceptions allowing, for example, a reproduction that was necessary in the "public interest." A person who obtained the news from outside the relevant colony, however, did not infringe upon the right.¹² Eighth, and finally, all the Acts gave rise to criminal liability, such as fines and imprisonment, rather than to civil action.¹³

7. 35 Vict., no. 414, § 1 (Vict.) (protecting "any message sent by electric telegraph from any place outside the Australian colonies"); 35 & 36 Vict., no. 10, § 1 (S. Austl.) (same as in Victoria, but also requiring that the message be "lawfully received"); 36 Vict., no. 7, § 1 (W. Austl.) (protecting "any message by electric telegraph containing intelligence from any place outside the said Colony;" thus the right covered inter-colonial messages as well).

8. 35 Vict., no. 414, § 3 (Vict.) ("By Submarine Telegraph"); 35 & 36 Vict., no. 10, § 3 (S. Austl.) ("By Submarine Telegraph"); 36 Vict., no. 7, § 3 (W. Austl.) ("by electric telegraph").

9. 35 Vict., no. 414, § 1 (Vict.) ("Where any person . . . publishes."); 35 & 36 Vict., no. 10, § 1 (S. Austl.) ("When any person . . . publishes.").

10. 35 Vict., no. 414, § 1 (Vict.); 35 & 36 Vict., no. 10, § 1 (S. Austl.); 36 Vict., no. 7, para. 1 (W. Austl.).

11. *See* 35 Vict., no. 414, § 4 (Vict.) ("[N]o intelligence protected by this Act shall be transmitted by electric telegraph to any person outside Victoria."); 35 & 36 Vict., no. 10, § 4 (S. Austl.).

12. 35 Vict., no. 414, § 1 (Vict.); 35 & 36 Vict., no. 10, § 1 (S. Austl.); 36 Vict., no. 7, § 1 (W. Austl.).

13. 35 Vict., no. 414, § 2 (Vict.) (imposing a fine of £10 to £100 for the first offense and £50 to £200 for the second); 35 & 36 Vict., no. 10, § 2 (S. Austl.) (same); 36 Vict., no. 7 (W. Austl.) (imposing a fine of £5 to £50 for the first offense and £50 to £100 for the second). Enforcement was simplified through use of certain presumptions: first, that a document purporting to be a telegraphic message from outside colonies delivered by a proper officer of the electric telegraph department is a message within the Act; second, that an

The existence of these Acts raises a number of questions. Why were they passed? How did they operate? What were their effects? What, if anything, do these Acts tell us about modern intellectual property? This paper focuses on the first and last of these questions. Part I describes the origins of the Acts, and explains that they were based in the perception that there was a gap in the coverage of existing "copyright" laws. The absence of protection for news stories took on particular commercial significance in the light of impending technological change, namely international telegraphy. Part I also rehearses the arguments in favor of extending protection to cover news sent by telegraphy, and those articulated against such an extension. Part II describes the claim's progress in the six Australian colonies, and identifies its success or failure in terms of a diversity of factors including the newspaper industry's commercial structure peculiar to each of the colonies. Part III briefly speculates on the impact of the Telegraphic Property laws in the countries where they were and were not adopted, as well as their influence outside Australia. Part IV considers how this history is relevant to understanding some of the copyright issues facing policy makers, lawyers, and commentators today.

I. ORIGINS OF THE ACTS

The inquiry into why the Acts were passed can be unpacked into a number of interrelated questions. The most obvious matters are who petitioned for the laws, and what were their interests and consciously articulated aims? There are also related questions. For example, who opposed the passing of the law, how was that opposition expressed, and why, in the case of Western Australia, South Australia and Victoria, did the legislature prefer the petitioners over the opponents? Implicit in both of these elements are further questions of a comparative nature. Why were the laws passed in those states, but rejected in New South Wales and Tasmania? Why were such laws not even sought in Queensland? This section attempts to answer these questions.

editor or manager "wilfully" publishes. 35 Vict., no. 414, § 5 (Vict.); 35 & 36 Vict., no. 10, § 5 (S. Austl.); 36 Vict., no. 7, § 4 (W. Austl.).

A. The Petitioners

The answer to the first question—who petitioned for the laws and what were their interests and consciously articulated aims?—is relatively straightforward. The Acts were petitioned for by newspaper proprietors—typically those with the highest circulation in each state, and in some cases, still the leading state-based newspapers today: in Victoria, the *Argus*; in Tasmania, the *Mercury*; in New South Wales, the *Herald*; in South Australia, the *Advertiser* and the *Register*.¹⁴ The proprietors wanted a limited property right in the news stories that they produced so that they could prevent other newspapers from copying and publishing them.¹⁵ In particular, they were concerned about news from overseas transmitted by telegraph.¹⁶ This was because newspaper proprietors anticipated, rightly as it turned out, that such news would prove very costly to receive.¹⁷ They worried that, in the absence of protection, competitors would “free-ride” by copying the news, and that the recipients’ “lead-time” advantage alone would be insufficient to justify incurring the cost of obtaining news, or at least sufficient amounts of it.¹⁸ More importantly, the proprietors of the leading newspapers hoped such a right would facilitate the development of a syndication or licensing system, so that the participants in the arrangement would pay to publish the news and thus fund its acquisition.¹⁹

This relatively straightforward explanation, of course, was dependent upon the existence of certain conditions that require further elaboration. The most important was the existence of a number of highly competitive, but very much state-based, newspapers and a virtually insatiable appetite for news from

14. See ARGUS (Melbourne), Nov. 3, 1871; ARGUS (Melbourne), Nov. 8, 1871; ARGUS (Melbourne), Nov. 14, 1871; ARGUS (Melbourne), Nov. 21, 1871; MERCURY (Hobart), Oct. 17, 1871; ADVERTISER (Adelaide), April 11, 1872; REG. (Adelaide), April 11, 1872.

15. See sources cited *supra* note 14.

16. See *id.*

17. ARGUS (Melbourne), Nov. 3, 1871; ARGUS (Melbourne), Nov. 14, 1871; ARGUS (Melbourne), Nov. 21, 1871; MERCURY (Hobart), Oct. 17, 1871; MERCURY (Hobart), Dec. 12, 1871.

18. See sources cited *supra* note 17.

19. ARGUS (Melbourne), Nov. 4, 1871.

overseas.²⁰ According to one paper, newspapers were “almost as necessary to [a Victorian’s] existence as his daily bread.”²¹ Newspapers were regarded as purveyors of information, truth, and as offering “intellectual improvement.”²² Take Victoria for example, Australia’s most heavily populated state, with a population of approximately 700,000 in 1871.²³ There were fourteen dailies, twelve tri-weeklies, twenty-three bi-weeklies, and forty-seven weeklies in operation.²⁴ That amounts to approximately 100 papers. In Melbourne, population 55,798,²⁵ there were four dailies. There were three in the morning, the *Argus*, the *Age*, and the *Daily Telegraph*. There was also one in the evening, the *Herald*.²⁶ The *Argus* sold for 3 pence (“d”) in 1871, was usually eight pages, and

20. See *infra* notes 44–46; DENIS CRYLE, *THE PRESS IN COLONIAL QUEENSLAND: A SOCIAL AND POLITICAL HISTORY 1845-1875* (1989); HENRY MAYER, *THE PRESS IN AUSTRALIA* (reprint 1968) (1964). See generally R.B. WALKER, *THE NEWSPAPER PRESS IN NEW SOUTH WALES, 1803–1920* (1976) (presenting studies on this issue).

21. On its reopening on July 6, 1872, the *Sandridge Reporter* observed that “[t]o every community of moderate proportions a newspaper is an essential adjunct which cannot be set aside. Whatever a Victorian may learn to do without, he cannot dispense with his newspaper, especially his local newspaper. It speaks to him with the voice of home, and is almost as necessary to his existence as his daily bread.” SANDRIDGE REP. (Victoria), July 6, 1872.

22. YASS COURIER (New South Wales), Feb. 7, 1871 (explaining the importance of the press in the context of a call for the removal of postage on newspapers); MARYBOROUGH & DUNOLLY ADVERTISER, Dec. 20, 1871 (stating that the first function of a newspaper is to collect and disseminate information with respect to public events); DAILY TELEGRAPH (Melbourne), July 6, 1872 (“[I]f we want to educate the masses, to diffuse knowledge, and to render the community as one in intelligence and information, the one practical way is to facilitate the circulation of the newspaper.”).

23. 4 C.M.H. CLARK, *A HISTORY OF AUSTRALIA* 221 (1978) (noting the population of Victoria was 729,654 in April 1871).

24. HAMILTON SPECTATOR, Dec. 2, 1871.

25. Victoria, *Census of Victoria*, 3 Parl Paper No 37 (1871) (noting the population of Melbourne in 1871 to be 55,798). †

26. Melbourne had populous satellites including Collingwood (population 18,550) and Fitzroy (population 15,558), which would also have formed part of the market. The *Argus* claimed to have sales as far away as Geelong and Gippsland. See *Wilson v. Rowcroft* (1873) 4 A.J.R. 57, 58 (Vict.); *Wilson v. Luke* (1875) 1 V.L.R. 127 (Vict.).

had a circulation of 10,000 to 12,000.²⁷ At that time, its chief rival was the *Age*, which sold for 1d, with a circulation of 16,000.²⁸ The *Herald* also sold for 1d, published Monday through Saturday, and enjoyed the largest circulation of any evening paper in Victoria.²⁹ In 1875, New South Wales boasted three Sydney dailies and sixty-nine country newspapers.³⁰ In the well-populated Australian states, newspapers were clearly regarded as important and competition among them was stiff.

B. *The Anticipation of the Cable*

The timing of the petitions reflected the anticipated laying of a submarine cable between Java and Darwin, on South Australia's then northern coast, and the building of an overland line from Darwin to Adelaide (from there to be connected to the existing overland telegraphic system).³¹ An overland line had been gradually extended

27. The number of pages and the price of the *Argus* in 1871 are evident from a visual inspection of the paper. For circulations figures, see *infra* note 29.

28. C.E. SAYERS, DAVID SYMES, *A LIFE* 111 (Cheshire ed., 1965).

29. EVENING POST (Ballarat), Mar. 17, 1871 (criticizing the *Evening Mail's* claim that it had the largest circulation of an evening paper in the colonies and asserting that the *Herald* had a greater circulation than all the other evening papers had collectively). The *Evening Mail* claimed a circulation of 3,200 on November 16, 1871. *Notice to Advertisers*, EVENING MAIL (Ballarat), Nov. 16, 1871.

30. WALKER, *supra* note 20, at 176.

31. The first line between Melbourne and Williamstown opened in January 1854. See FRANK CLUNE, *OVERLAND TELEGRAPH: THE STORY OF A GREAT AUSTRALIAN ACHIEVEMENT AND THE LINK BETWEEN ADELAIDE AND PORT DARWIN* (1955). Adelaide was linked to Melbourne in July 1858, and in October, Sydney was linked to Melbourne and Adelaide. K.T. LIVINGSTON, *THE WIRED NATION CONTINENT: THE COMMUNICATION REVOLUTION AND FEDERATING AUSTRALIA* 44–46, 48, 54 (1996); ANN MOYAL, *CLEAR ACROSS AUSTRALIA: A HISTORY OF TELECOMMUNICATIONS* 23 (1984). A Sydney to Brisbane link was opened in 1861, LIVINGSTON, *supra*, at 48, and a direct line between Sydney and Adelaide was opened in 1867, MOYAL, *supra*, at 31. A cable from Melbourne to Hobart had been laid in 1859, but proved unreliable until replaced by a better one in 1869. LIVINGSTON, *supra*, at 48. Of the five Australian colonies, only Western Australia was not party to the network by 1870. *Id.* On the history of telegraphy and the over ground link in Australia, see generally *id.* at 44–71; MOYAL, *supra*, at 15–34; K.S. Inglis, *The Imperial Connection: Telegraphic Communication between England and Australia, 1872–1902*, in *AUSTRALIA AND BRITAIN: STUDIES IN A CHANGING RELATIONSHIP* 21 (A.F. Madden & W.H. Morris-Jones eds., 1980).

from Europe to Alexandria, then to India, and, in the late 1860s, towards China, Japan, and Indonesia.³² Linkage from Java to the Australian states was the obvious next step. In 1870, the Anglo-Australian Telegraph Company had undertaken to establish a submarine link to Darwin by the end of 1871, and the South Australian government had contracted to build the overland line by the same date.³³ The link from Java to Port Darwin was completed on November 21, 1871,³⁴ but the overland project was delayed until the end of 1872.³⁵ Although some international news was dispatched on June 1872,³⁶ the link was not fully established until November 15, 1872.³⁷ Prior to that, news had become twenty days old by the time it reached Eastern Australia. Thereafter, it was between fifteen and twenty hours old!³⁸

The telegraph was widely regarded as "one of the triumphs of the age."³⁹ Of all the anticipated benefits of the telegraphic connection—and there were many political, commercial, and social benefits⁴⁰—perhaps the most obvious was the potential to bring news

32. See, e.g., Inglis, *supra* note 31, at 23–26.

33. DAILY TELEGRAPH (Melbourne), Dec. 23, 1871.

34. *Id.*

35. LIVINGSTON, *supra* note 31, at 77–79.

36. The first overland cable was sent by Todd on May 22, 1872, and reached Adelaide on June 22, 1872. *First Message From England Direct by the Java Cable*, EMPIRE (Sydney), July 3, 1872. The first submarine message reached Sydney on July 3, 1872, but took ten days and had been carried sixty miles on horseback. *Id.*

37. SYDNEY MORNING HERALD, Nov. 16, 1872; BORDER WATCH (Mount Gambier), Nov. 20, 1872 (describing celebrations).

38. BORDER WATCH (Mount Gambier), Nov. 20, 1872.

39. *Id.*

40. DAILY TELEGRAPH (Melbourne), Dec. 20, 1871 (asserting that "the acutest and most far-reaching mind among us is completely dazzled at the thought of the multitudinous consequences which may be anticipated to follow from the accomplishment of a fact so heavily charged with so many subtle influences upon the lives, habits, and history of so many different communities"). The BALLARAT MAIL (Victoria), Dec. 30, 1871, noted the "vast consequences to their commerce, political institutions and society." The *Daylesford Mercury and Express* noted its "great naval and military value, since, in case of danger, we should not only be early warned to prepare for defense, but ships of war might be concentrated on any portion of the Australian coast likely to be attacked," but added:

the line has even higher political importance, calculated as the work is to abridge the time and distance that separate us from the mother country to a mere point. Indeed it is impossible to overrate the

from overseas, particularly from Great Britain, which many still referred to as “home.” This was wholly unsurprising. The telegraph had already proved an important conduit for news in Europe. It had been a key factor in the emergence of the Reuters news agency in the 1850s⁴¹ and indeed had been utilized for some years to speed up the process of transmission of news from Great Britain to Australia.⁴² By the late 1860s, news dispatches were sent from London to Point de Galle (Ceylon). There they were picked up by boat. When they arrived at Glenelg in Adelaide, they were telegraphed to the newspapers at the major population centers, particularly Melbourne and Sydney.⁴³ Indeed, the rush to transmit the news that landed at

usefulness of this line in removing any cause of difficulty that may arise between these colonies and the parent state.

DAYLESFORD MERCURY & EXPRESS (Victoria), June 27, 1872. Moreover, SYDNEY MORNING HERALD, Dec. 1, 1871, noted Australia will feel the throb of a new life when it is bound to the old country by the electric chain and remote though it is, will come more than ever to recognise itself as an integral part of the *Empire*. The *Mercury* acknowledged its potential to cement and maintain friendships. It predicted that “by the next 14th of February, a ROSLIND in the streets of London, and a CELIA in the forest of Tasmania will be able to exchange valentines by telegraph as early as if the tract of land and water that separates them was no broader than a forest path.” MERCURY (Hobart), July 6, 1871. † The *Maryborough & Dunolly Advertiser* noted that,

[t]here is in such an undertaking an element that may be pronounced to be divine since it tends to fulfill the purposes of Providence and to knit together the whole human family. If we could imagine the human body destitute of a nervous system we should then have something analogous to the globe unprovided with a nerve-like network of telegraphic wires. For as in that beautiful mechanism by which sensation is transmitted from the remotest extremities to the brain, and the mandates of the brain are conveyed to the hands and feet, as well as to every portion of our organism, is as the electric telegraph to that greater and grander unity, the human race.

MARYBOROUGH & DUNOLLY ADVERTISER (Victoria), July 1, 1872. Carrying the analogy further, the paper identified London as the brain: “It is the virtual abrogation of the sentence of isolation pronounced upon us by our geographical position. Melbourne has been transformed into a suburb of London.” *Id.*

41. See generally DONALD READ, *THE POWER OF NEWS: THE HISTORY OF REUTERS* 1–39 (1992).

42. WALKER, *supra* note 20, at 201.

43. *Id.* at 200–02. This news was typically three weeks old. See Letter (Dec. 5, 1870) (located at Wilson M.S.S. at the National Library of Australia, Canberra) (reporting that the last mail arrived on November 23, 1870—bringing telegraphic news from Galle up to November 2—“which I believe is

Glenelg sparked controversy, to which we will return, and raised questions about how the telegraphic offices were to prioritize each user.⁴⁴ The experience had given the newspaper proprietors a sense of anticipation for the international link. They knew that it would become one of the most important sources of news. As Hobart's *Mercury* remarked, "News only an hour or two old, though it comes from the other side of the world, will be as exciting as sparkling wine"⁴⁵

C. *The Costs of Telegraphic News*

The newspaper proprietors were not only excited about the telegraphic link, but also somewhat nervous. Lachlan Mackinnon, owner of the Melbourne *Argus*, appreciated that the paper would need to publish cables on a daily basis.⁴⁶ It was clear this would be a costly enterprise. The costs were of two major sorts. First, there was the cost of collecting the news in Europe and the decision of exactly what to convey. Second, there was the cost of paying for the transmission of the news. These costs would be considerable. It was

the shortest time in which news has been transmitted from England to Melbourne"); WARRNAMBOOL EXAMINER & W. DIST. ADVERTISER, Nov. 3, 1871. †

44. The principle of first come, first served was tempered by a maximum word limit of 1500 words. See HERALD (Melbourne), June 27, 1872. The accusations of giving preference in the sending of messages prompted a Select Committee investigation in New South Wales, which concluded that the accusations were based on a misunderstanding. New South Wales, *Report from the Select Committee on Telegraphic Communication*; Together with the Proceedings of the Committee, Minutes of Evidence and Appendix, 41 Parl Paper 67, 79-92 (1872-3) † (evidence of E.C. Cracknell, Superintendent of Electric Telegraphs) (explaining that the 1500 word limit is one set by the South Australian office).

45. MERCURY (Hobart), Oct. 16, 1871.

46. Letter from Lachlan MacKinnon to James Johnston (Mar. 24, 1870) [hereinafter Letter from Lachlan MacKinnon (Mar. 24, 1870)] (located at University of Melbourne Archive, James Johnston Collection, Accession No. 64-6, Group 2) ("[I]n two years we shall have to publish daily telegrams from all parts of the world. This is the great fact for which we have to be prepared."). In another letter from Lachlan MacKinnon to Johnston, he stated that "the success of modern journalism must depend in a very great measure on enterprise in the direction of a free expenditure on telegrams. . . . No economy can be more unwise than a reduction in expenditure on telegrams." Letter from Lachlan MacKinnon to James Johnston (July 2, 1879) (located at University of Melbourne Archive, James Johnston Collection, Accession No. 64-6).

thought these would be well over £10,000 per year, a sum that represented virtually one third of the sales income of one of the leading papers.⁴⁷ As Hobart's the *Mercury* explained, even before the submarine link had been completed, "[t]he journals [felt] by anticipation the pinch of the shoe."⁴⁸

As to the costs of collecting the news, there was the question of whether the Australian papers should have their own London offices, or use the services of one of the existing news agencies, and Reuters in particular.⁴⁹ Reuters had been established in 1851, and by the 1860s it and two other international news agencies, Wolff and Havas, had come to dominate the process of global news collection and distribution, with Reuters' market corresponding largely with the territories of the British Empire.⁵⁰ Some Australian papers were using Reuters' services even before the direct link was established,⁵¹ with Edward Greville in Sydney describing himself as "Reuter's

47. Letter from Lachlan MacKinnon to James Johnston, (Jan. 29, 1871) (located at University of Melbourne Archive, James Johnston Collection, Accession No. 64-6, Group 1). Of course, another important source of revenue was advertising. See WALKER, *supra* note 20, at 51–52, on the importance of advertising to papers in New South Wales. More generally, see SIMON J. POTTER, *NEWS AND THE BRITISH WORLD: THE EMERGENCE OF AN IMPERIAL PRESS SYSTEM 1876–1922*, at 60 (2003).

48. *MERCURY* (Hobart), Oct. 17, 1871. The proprietors of the *Argus*, especially MacKinnon, had long been concerned about the impact of the telegraph. Indeed, MacKinnon had toured the United States in 1869 on a fact-finding mission, and this experience lay at the basis of his approach to the issue. See Letter from Lachlan MacKinnon to James Johnston (June 17, 1869) (located at University of Melbourne Archive, James Johnston Collection, Accession No. 64-6, Group 2).

49. READ, *supra* note 41, at 58–63; see Alex Nalbach, "The Software of Empire": *Telegraphic News Agencies and Imperial Publicity, 1865–1914*, in *IMPERIAL CO-HISTORIES: NATIONAL IDENTITIES AND THE BRITISH AND COLONIAL PRESS* 68 (Julie F. Codell ed., 2003) (describing relations between Reuters and government); POTTER, *supra* note 47, at 89–91 (describing Reuters's relationship with Australian papers); see also GRAHAM STOREY, *REUTERS' CENTURY: 1851–1951* (1951) (describing Reuters's news-gathering between 1851 and 1951).

50. READ, *supra* note 41, at 53–55 (stating that agreements between the agencies were made in 1856 and 1859, but the key arrangement was that of January 17, 1870, which formed the basis of the cartel until the 1930s); see also BROWN, *supra* note 4, at ch. 6.

51. Ross Harvey, *Bringing the News to New Zealand: The Supply and Control of Overseas News in the Nineteenth Century*, 8 *MEDIA HIST.* 21, 25–26 (2002).

Agent.”⁵² The proprietors of some of the leading Australian papers, particularly the *Argus*, were keen not to use Reuters, hoping to preserve some independence and fearing that Reuters would otherwise control what was sent and be able to charge whatever he liked. This was both a threat to the integrity of their news and a financial threat to the individual subscribers who would be effectively under Reuters’ control. “Dependence on him would be humiliating as well as dangerous,” Mackinnon remarked.⁵³ “Come what may . . . we must be independent of Reuter The leading papers will never be safe till they can do something of the kind”⁵⁴ He was aware of how dissatisfied some parts of the Indian press were with Reuters’ power, and he was intent on doing all he could to prevent Reuters from taking control in Australia.⁵⁵

As to the cost of transmission, it was obvious that this would be large. When the tariffs were published in 1872, the price for cabling twenty words from Java to Darwin was set at £3, 15 shillings (“s”), and 2d. The total price for such a message from London to Hobart was £15 to £16.⁵⁶ The effect was that for an Australian newspaper to receive a forty-word telegram on a daily basis, it would cost well in excess of £10,000 per annum. The cost of these telegraphic

52. The *Age* was using Greville’s service as “Reuters’ Agent,” see AGE (Melbourne), Nov. 17, 1871, as were many of the minor papers, such as the *Hill End and Tambaroora Times* and *Miners Advocate*. For a description of Greville’s operation as Reuter’s agent between 1861 and 1871, see Peter Putnis, *Reuters in Australia: The Supply and Exchange of News, 1859–1877*, 10 MEDIA HIST. 67, 70–72 (2004). Greville also operated in New Zealand. See Harvey, *supra* note 53, at 25–26.

53. Letter from Lachlan MacKinnon (Mar. 24, 1870), *supra* note 46 (“If he had a monopoly he could at pleasure shut up any paper in the colony by refusing to give it telegraphic news.”).

54. Letter from Lachlan MacKinnon to James Johnston (Apr. 22, 1870) (located at University of Melbourne Archive, James Johnston Collection, Accession No. 64-6, Group 1). For further vitriol against Reuter, describing him as the “grossest of modern liars,” see FREEMAN’S J., June 29, 1872.

55. Letter from Lachlan MacKinnon to James Johnston (Apr. 22, 1870) (located at University of Melbourne Archive, James Johnston Collection, Accession No. 64-6, Group 1).

56. New South Wales, *Report from the Select Committee on Telegraphic Communication*, *supra* note 44, at 92 (evidence of S. Bennett on cable charges).

messages was readily perceived to be a problem. As Mackinnon said as early as 1870, “we must leave no stone unturned to lessen it.”⁵⁷

How could newspapers, in a highly competitive market, afford to pay? The price of advertising could be increased, as could the subscription rate, but this might simply reduce the number of advertisers or subscribers. Mackinnon developed an ambitious plan to meet both the problem of collecting the news and the costs of its dissemination. MacKinnon’s plan was to imitate the ‘Associated Press’ of the United States,⁵⁸ And thereby to reduce the costs of collection and spread the costs of distribution amongst a group of subscribing newspapers.⁵⁹ More specifically, Mackinnon hoped to unite the Chinese, Indian, and Australasian newspapers in a single association to collect and distribute news.⁶⁰ However, after several

57. Letter from Lachlan MacKinnon to James Johnston (May 19, 1870) (located at University of Melbourne Archive, James Johnston Collection, Accession No. 64-6, Group 1).

58. *Id.* (stating there is “no better model” than the U.S. Associated Press). By the 1860s, the A.P. of New York was an arrangement between six daily papers (*New York Times*, *New York Tribune*, *New York Herald*, *New York Sun*, *New York Express*, and *Journal of Commerce*) primarily for the collection and sharing of news and the labors and expense involved. The A.P. made news available to other newspapers across the United States on “proper terms.” See, e.g., *Telegraphic News and the Associated Press*, N.Y. TIMES, Dec. 28, 1866, at 4; *The Associated Press—Its Relations with the Press of Other Cities*, N.Y. TIMES, Nov. 23, 1866, at 4. The A.P.’s history and operation is described by W.F.G. Shanks, *How We Get Our News*, 34 HARPER’S NEW MONTHLY MAG. 511 (1867). For recent accounts, see ALFRED MCCLUNG LEE, *THE DAILY NEWSPAPER IN AMERICA* (2000) (1937); RICHARD SCHWARZLOSE, *THE NATION’S NEWSBROKERS* (1989-1990); and OLIVER GRAMLING, *AP: THE STORY OF NEWS* (1940).

59. Letter from Lachlan MacKinnon to James Johnston (July 15, 1869) (located at University of Melbourne Archive, James Johnston Collection, Accession No. 64-6, Group 2.); Letter from Lachlan MacKinnon (Mar. 24, 1870), *supra* note 46 (“My idea . . . is that an organization embracing every paper now in the Colonies should be formed so as to ignore Reutterism altogether.”); Letter from Lachlan MacKinnon, *supra* note 57 (stating there is “no better model” than the U.S. Associated Press).

60. Letter from Lachlan MacKinnon, *supra* note 57. For later advocacy of an imperial press organization, see generally POTTER, *supra* note 47, discussing a meticulous survey of press connections between Britain and its colonies and emphasizing in particular the commercial motives that prompted imperial press co-operation—and also worked against the emergence of an official imperial press system.

meetings, it became apparent that various jealousies and local rivalries would make that the multi-national plan impossible.⁶¹

Nevertheless, MacKinnon ordered his staff in Australia, in particular Hugh George, to attempt to establish an Australian association, including not only the *Sydney Morning Herald*, but also *Argus*' Melbourne competitors such as the *Age* and the *Telegraph*.⁶² He warned that if Johnston and George failed "to unite the whole of the Australian press in a common league, Reutter [sic] [would] conquer."⁶³ Mackinnon figured that an Australian association would have two benefits. First, it could bargain more effectively with Reuters and thereby keep down the costs of obtaining the news.⁶⁴ Second, it could operate to spread the cost of news transmission to Australia.⁶⁵ George was therefore sent to London to negotiate with Reuter.⁶⁶ The negotiations resulted in a deal for the supply of news

61. Letter from Lachlan MacKinnon to James Johnston (Sept. 8, 1870) [hereinafter Letter from Lachlan MacKinnon (Sept. 8, 1870)] (located at University of Melbourne Archive, James Johnston Collection, Accession No. 64-6, Group 1); Letter from Lachlan MacKinnon to James Johnston, (Apr. 21, 1871) [hereinafter Letter from Lachlan MacKinnon (Apr. 21, 1871)] (located at University of Melbourne Archive, James Johnston Collection, Accession No. 64-6) (reporting a telegram from Hugh George stating "that the idea of an Indian combination is not to be acted on").

62. See ARGUS (Melbourne), Nov. 14, 1871 ("[E]very newspaper in the whole of these colonies has been invited to join the association.") For an account of Hugh George's life, see ARGUS (Melbourne), May 15, 1886, at 9.

63. Letter from Lachlan MacKinnon to James Johnston (Nov. 28, 1870) (located at University of Melbourne Archive, James Johnston Collection, Accession No. 64-6, Group 1).

64. Letter from Lachlan MacKinnon (Sept. 8, 1870), *supra* note 61 ("Reutter [sic] will of course be very unwilling to allow an Association in Australia to reap fruits that he himself would like to gather."). It was feared that Reuter would operate an agency in Australia. In fact, Reuter had informed Wilson of the *Argus* in April 1871 that once the line was opened, Reuter would have an office in Melbourne. Letter from Lachlan MacKinnon (Apr. 21, 1871), *supra* note 61. However, problems in India delayed the opening of the proposed office. See New South Wales, *Report of the Select Committee on Telegraphic Communication*, *supra* note 44, at 154 (including a copy of the letter, dated May 10, 1871, sent from Collins in Bombay to Bennett of the *Empire*).

65. ARGUS, Nov. 14, 1871 ("The greater the number of associated journals, the smaller will be the cost to each.").

66. Letter from Lachlan MacKinnon to James Johnston (Jan. 25, 1871) (located at University of Melbourne Archive, James Johnston Collection, Accession No. 64-6, Group 1); ARGUS (Melbourne), Mar. 27, 1871; ARGUS (Melbourne), Mar. 28, 1871; ARGUS (Melbourne), Mar. 29, 1871;

for £4000 per annum.⁶⁷ Mackinnon's plans for an Associated Press

AUSTRALASIAN (Melbourne), Apr. 1, 1871. † George was specially qualified for this task because he had previously worked as an agent for Reuters.

67. Putnis, *supra* note 52. The story of the negotiations is a fascinating one. Although MacKinnon had done nothing to secure the agreement of the Australian press (maybe other than the *Sydney Morning Herald*) in advance, he sent Hugh George to meet with Reuter to obtain Reuters' services. See *supra* note 66 and accompanying text. MacKinnon was despondent to discover that David Syme, the proprietor of the *Age*, the *Argus*' major Melbourne rival, boarded the same ship to London as George in March 1871 and was determined to make a separate deal with Reuter. AGE, Mar. 29, 1871. MacKinnon wrote to Johnston on April 21, 1871, that "our game is up and . . . we shall have to surrender at discretion. Had Syme been taken into combination he need not of course have come home. As it is the House of the Press in Australia is divided against itself and must fall. Nothing could have suited Reuter better." Letter from Lachlan MacKinnon (Apr. 21, 1871), *supra* note 61. However, Reuter preferred to contract with George rather than Syme.

There is no single authoritative account of what happened in the negotiations. The KYNETON OBSERVER, Nov. 23, 1871, states that "[t]he one either outbid or outwitted the other." According to W.E. Langley, who in 1873 gave evidence to the New South Wales Select Committee as a representative of "the Sydney Branch of the Associated Press Agency," it was simply a matter of price. New South Wales, Parl Paper No 79 (1872-1873) 67, 145 †. David Syme rejected Reuters' terms as "absurd" and George, for the press, accepted them. *Id.* In contrast, Bennett, the owner of the *Sydney Empire*, recounted that George won the deal by misrepresenting to Reuters that the A.P. represented the whole of the Australian press. *Id.* at 19, 97. On discovering the "transparent sham," the *Empire* protested to Reuters. *Id.* MacKinnon's account is that Syme got to meet with Reuter first. Letter from Lachlan MacKinnon to James Johnston (June 16, 1871) (located at University of Melbourne Archive, James Johnston Collection, Accession No. 64-6). Rather startlingly, however, Syme lost any advantage he might have gained by depicting the *Argus* and *Herald* combination as a financially robust outfit. According to MacKinnon, Syme's comments did the *Argus/Herald* combination a huge favor because Reuter was motivated primarily by money. *Id.*

George returned upon the RMSS *Rangoon* on Saturday, August 26, 1871, and the *Australasian* reported that "[a]s the agent of the *Argus* and the *Sydney Morning Herald*, Mr. George has succeeded in making an arrangement with Reuter's Telegraph Company which will enable him to supply the newspapers composing the Australian Associated Press Association with telegrams from Europe, on the completion of the through line, upon terms which it is believed will be found highly satisfactory by the colonial press." *Town News*, AUSTRALASIAN (Melbourne), Sept. 2, 1871; ARGUS (Melbourne), Aug. 28, 1871. The *Home News* reported that Hugh George "ha[d] been in London for the last two months, and on behalf of the proprietors of the Melbourne *Argus* and the *Morning Herald* of Sydney, made arrangements for receiving and supplying all the European and American intelligence considered

to reduce the cost of collecting the news was only a partial success.⁶⁸ In place of an agency that would collect and distribute news, Mackinnon had to settle for the Australian Associated Press "A.A.P." to serve as Reuters' exclusive distributor in Australia.⁶⁹ However, in that capacity, the A.A.P. could help spread the burdensome costs of transmission.⁷⁰

In the meantime, the *Argus* and the *Herald* worked at getting the subscription service established. George operated as the Melbourne arm and toured Tasmania to drum up business.⁷¹ In Sydney, the Fairfaxes appointed Langley as the representative of the New South Wales part of the Association.⁷² How the A.A.P. settled on the

worth telegraphing." N. ARGUS (Rockhampton), Sept. 23, 1871; PORT DENISON TIMES (Queensl.), Sept. 29, 1871. †

68. Some Australian news was distributed under the rubric "Australian Associated Press" (A.A.P.) from May 1871. WALKER, *supra* note 20, at 205. These A.A.P. telegrams typically came from within Australia. On December 30, 1871, for example, the *Sydney Morning Herald* had telegrams from Mudgee, Melbourne, and Hobart. SYDNEY MORNING HERALD, Dec. 30, 1871. On September 12, 1871, the *Argus* had telegrams from Sydney, Hobart, and Adelaide. ARGUS, Sept. 12, 1871. Long before the international connection was established, a number of papers were using the A.A.P. designation on their intercolonial news, for example, the *Bendigo Independent*, the *Castlemaine Representative* (in November 1871), the *Hamilton Spectator*, and the *Newcastle Chronicle* (for intercolonial news dating from August 12, 1871 and international news dating from the end of 1872). *Later News From America and Europe*, BENDIGO INDEP., Nov. 14, 1871; *Telegraphic Despatches*, CASTLEMAINE REPRESENTATIVE, Dec. 19, 1871; *By Electric Telegraph*, HAMILTON SPECTATOR, Dec. 2, 1871; NEWCASTLE CHRON., Aug. 13, 1871. †

69. *See supra* note 68.

70. The A.A.P. may have had other functions as well. The HERALD (Melbourne), June 27, 1872, stated that the A.A.P. was formed to enable papers to be sent more than the maximum 1500 words permitted from Adelaide on arrival of the boats from Europe.

71. MERCURY (Hobart), Oct. 16, 1871 ("[A] total change will take place in the manner in which the news of the world will reach the press of Australia; and the presence of Mr. George in Tasmania now brings us face to face with the new order of things.").

72. New South Wales, *Report of the Select Committee on Telegraphic Communication*, *supra* note 44, at 145. Nevertheless, in December 1871 in Victoria, there were complaints from the press that there had only been "desultory steps . . . taken to induce the various papers to share the outlay." *By Electric Telegraph*, *supra* note 68; *see also* KYNETON GUARDIAN, Nov. 15, 1871 ("We believe very few of the country journals have been invited to join the Association . . ."). The *Kyneton Observer* stated:

subscription fee is unclear. The going rate in Victoria was approximately £500 per annum for a fifty word daily message in morning papers outside Melbourne, and £750 for messages in Melbourne papers.⁷³ It was alleged that for an evening paper to receive the latest news, that is, news that was not printed in the morning editions, it would have to pay “several thousands a year for the fresh intelligence.”⁷⁴ In contrast, country papers operating on a bi-weekly basis were offered the telegrams at £50 per annum.⁷⁵ Similar figures seem to have been sought by subscribers in other key states.⁷⁶ However, in New South Wales, as we will see, the evening

[C]an anyone tell us on what terms we may be permitted to join the ‘Association?’ How much shall we have to pay? May we regulate the length of our own messages or will it be regulated for us? Will the expenses be shared proportionately, or will the persons who manipulate the whole matter dictate terms in a high-handed manner? Is there a committee or board of directors who manage the affairs of this association? Who is the secretary? None of this information is at our command.

KYNETON OBSERVER, Nov. 23, 1871.

73. William Bayles said that a Melbourne paper paid £750 a year and a country paper was asked to pay £500 per year. Victoria, *Parliamentary Debates*, Legislative Assembly, 1871, 1878 [hereinafter 1871 *Vict. Parliamentary Debates*]. † The £500 per annum figure is confirmed in the case of *Wilson v. Rowcroft* (1873) 4 A.J.R. 57, 58 (Vict.), where it is recounted that the *Age* and the *Daily Telegraph* paid £500 per year “for the right of publishing the same in their respective newspapers, which right is confined to such publication.”

74. EVENING MAIL (Ballarat), Dec. 13, 1871 (explaining because of the high price it would be unable to provide the latest news, but describing the cost of republishing the information from the *Argus* as “by no means exorbitant”); see also EVENING POST (Ballarat), July 10, 1875 (“[W]e should have our chance of first publication of news as well as the morning press, but under present circumstances it would be withheld from us until after it had become stale, and therefore worthless . . .”); HERALD (Melbourne), July 1, 1872 (describing A.A.P.’s refusal to supply evening papers with new news and charging £78 per annum for news already published in the morning editions).

75. *Wilson v. Luke* (1875) 1 V.L.R. 127, 132 (Vict.). The *Hamilton Spectator*, a bi-weekly newspaper, was delighted with the terms it had been offered: “[W]e have been met in what we consider to be a most fair and liberal spirit, and have obtained a promise of the accommodation required, on terms which are quite as reasonable as we could expect.” The charge was probably the £50 per annum that was asked for three years later. *Id.*

76. In Tasmania, for example, it seems George sought a return of about £1000 per annum. TASMANIAN, Oct. 21, 1871 (“The modest figure demanded from Tasmania for this service was £1000 per annum divided among the three newspapers; an amount which we feel perfectly certain the newspaper readers

papers were not offered news *at any price* other than the news which had already been made available to the morning editions.

The papers' "need" to control the copying of news became apparent during the process of negotiating with potential subscribers. The A.A.P. offered to supply papers with news, but the papers asked why they should not just copy the news when it was published in the *Argus* and the *Herald*.⁷⁷ Alternatively, if the papers would not admit to copying the news, they asked why they should pay (and thus put themselves at a competitive disadvantage) when their rivals and competitors could simply appropriate the news. As the *Bendigo Advertiser*, an earlier subscriber to the A.A.P. and a supporter of the Telegraphic Property laws, explained, "there is a danger of their [sic] being losers instead of gainers, as unless they are protected by law, their telegrams may be pirated by papers which do not choose, or cannot afford, to join the association."⁷⁸ The *Mount Alexander Mail* agreed. "[I]f neither the *Argus* nor those who join this kind of association are protected from the wholesale appropriation of telegrams there would be no advantage in joining the association."⁷⁹

D. The Legal Context

If it was clear that some kind of legal protection was needed for the scheme to operate successfully, it was completely unclear whether news telegrams were protected, and if so, by what legal mechanism and to what extent.⁸⁰ The most obvious source of

of the colonies would never pay for daily English news."). As for New South Wales, there is evidence that the Sydney paper, the *Empire*, paid £600 to the A.A.P. service. GAVIN SOUTER, *COMPANY OF HERALDS: A CENTURY AND A HALF OF AUSTRALIAN PUBLISHING BY JOHN FAIRFAX LTD. AND ITS PREDECESSORS, 1831-1981*, at 69 (1981).

77. LAUNCESTON EXAMINER, Dec. 12, 1871 (explaining that because the papers seemed reluctant to pay £10 per week, the *Argus* appealed to Parliament to protect its monopoly, and soon after an Act was passed in Victoria).

78. *Telegraphic Communication with Europe*, BENDIGO ADVERTISER, Nov. 7, 1871.

79. MOUNT ALEXANDER MAIL, Nov. 11, 1871.

80. Contemporary expressions of opinion varied accordingly. For the view that there was copyright protection for news telegrams, see *1871 Vict. Parliamentary Debates*, *supra* note 73, at 1873 (James Wilberforce Stephen). For the view that there was protection, but that its scope might not cover any more than "the exact words of the message," see AGE (Victoria), Nov. 21, 1871. For the view that there was protection but that it only operated in the most egregious of cases, see SYDNEY MORNING HERALD, Dec. 29, 1871 and

protection could come from copyright law. In 1871, there were at least three “varieties” of copyright law in Australia. First, there was imperial copyright law contained in the British Copyright Act of 1842, specifically an imperial act.⁸¹ Second, in 1869 statutory copyright was enacted in Victoria, but not in any of the other Australian colonies.⁸² Third, there was common law copyright in unpublished works that was recognized in a series of eighteenth century cases.⁸³ Moreover, there were associated common law doctrines, those of “property” and “unfair competition” laws, to the extent that they extended to this material.⁸⁴ As we will see, these laws were complex, lacking in clarity, and inconclusive. This lack of clarity was further exacerbated by the lack of legal expertise in Australia and the unavailability of copyright works in the libraries.

1. Imperial Law

With regard to imperial copyright, it was clear that books published in Great Britain gained protection throughout the dominions, including in the various Australian states, for the longer of the life of the author plus seven years, or forty-two years.⁸⁵ Could

Telegrams Copyright Bill, SYDNEY MORNING HERALD, June 22, 1872, which reported the claims of George Wigram Allen when moving for a second reading of the New South Wales Bill. For the view that there was “no check upon the operator with scissors and paste except a moral one,” see MERCURY (Hobart), Oct. 17, 1871. Perhaps the best indication of the confusion in the law was demonstrated by Langley’s responses to the question of whether there was copyright in news. New South Wales, *Report of the Select Committee on Telegraphic Communication*, *supra* note 44, at 69–70, 147–8. Langley first claimed that “the best lawyers in England” had suggested there was copyright in New South Wales, but when further pressed he admitted that he did not know of such a copyright in New South Wales. *Id.* He then repeated his earlier assertion that “newspaper matter is copyright—that you have no more right to use it than a book of which I am the author.” *Id.*

81. Literary Copyright Act, 1842, 5 & 6 Vict., c. 45 (Great Britain & Empire). See generally CATHERINE SEVILLE, LITERARY COPYRIGHT REFORM IN EARLY VICTORIAN ENGLAND: THE FRAMING OF THE 1842 COPYRIGHT ACT (1999) (describing the background to the Act).

82. Copyright Act, 1869, 33 Vict., no. 350 (Vict.).

83. See *infra* text accompanying notes 166–174.

84. See *infra* text accompanying notes 428–460.

85. Literary Copyright Act, 1842, 5 & 6 Vict., c. 45, § 15 (Great Britain & Empire) (defining infringement as when a person “print[s] or cause[s] to be printed . . . any Book in which there [is a] Copyright”); *id.* § 2 (defining the British dominions as, *inter alia*, “all the Colonies, Settlements, and Possessions

this provide protection for the news telegrams received by the A.A.P.? Could it provide practical protection? There were at least six problems with relying on the Literary Copyright Act of 1842.⁸⁶

a. The problem of subject matter

The first problem was to determine whether the Act could be interpreted to cover news sent by telegram. The claim that it could, could have been made in one of two ways. The Act could have protected telegrams per se, or it could have protected telegrams as parts of protected newspapers. Copyright subsisted in "books," which were defined in section 2 as covering "every Volume, Part or Division of a Volume, Pamphlet, Sheet of Letter-press, sheet of Music, Map, Chart, or Plan separately published."⁸⁷ Case law established that there was no requirement of literary quality. As with modern British copyright law, it covered mathematical tables and directories.⁸⁸ This was so despite the preamble's reference to the statute's aim of encouraging the production of "literary [w]orks of

of the Crown which now are or hereafter may be acquired"); *id.* §§ 3-4 (defining length of copyright for works published during the life of the author, and after the author's death).

86. Similar questions eventually came to be of significant interest to the Reuters news agency. Papers in the Reuters archives indicate that it sought advice about telegram copyright and received eight different opinions (from Seward Brice, Sturt, T.E. Scrutton, Lord Davey, John Cutler, R.S. Wright, G.C. Paul, and E.F. Mitchell). Papers from the Reuters Archive (on file with author).

87. Literary Copyright Act, 1842, 5 & 6 Vict., c. 45, § 2 (Great Britain & Empire).

88. See *Kelly v. Morris*, (1866) 1 L.R.-Eq. 697, 701 (Eng.) (granting an injunction to restrain copying of sections from the claimant's two and a half thousand page *Post-office London Directory*); *cf.* *Chilton v. Progress Printing & Publ'g Co.*, [1895] 2 Ch. 29 (Eng.) (holding that mere selection of probable winners of a horse race was not a literary composition, even if the newspaper itself was protected). Lord Justice Lindley opined that the notion of literary composition could not be extended wider than Vice Chancellor Wood had done in deciding *Kelly v. Morris*. *Id.* at 34. A list of 400 deeds of arrangement and bills of sale (compiled from official records and with payment made for access to those records) was treated as protected in *Trade Auxiliary Co. v. Middlesborough & Dist. Tradesmen's Prot. Ass'n*, (1889) 40 Ch. D. 425, 430 (Eng.) (Chitty, J.) (emphasizing payment); *id.* at 435 (Lindley, L.J.) (emphasizing "brainwork" that had been bestowed and that these were not "mere collections," rather "abridgment and mental work and an amount of labour" entitled the author to copyright).

lasting [b]enefit to the [w]orld.”⁸⁹ Moreover, courts indicated that, as to quantity, a single page could be protected.⁹⁰ However, as of 1870, it was by no means clear that a forty-word telegram would be protected.⁹¹

The alternative—establishing that telegrams were protected as a component of a protected newspaper—was even more problematic. Although section 2 of the Literary Copyright Act defined “books” as encompassing sheets of letterpress,⁹² and section 18, dealing with the allocation of rights between authors and proprietors, referred to the protection of “any Encyclopedia, Review, Magazine, Periodical Work, or Work published in a series of Books or Parts,”⁹³ doubts existed as to whether the Act covered newspapers. In *Cox v. Land & Water Journal Co.*,⁹⁴ Vice Chancellor Malins inferred from the specific references to magazines and periodical works that the Act was drawn to exclude newspapers from its scope.⁹⁵ *Cox* concerned a

89. Literary Copyright Act, 1842, 5 & 6 Vict., c. 45 (Great Britain & Empire).

90. *White v. Geroch*, 106 Eng. Rep. 376, 376 (K.B. 1819) (Abbot, C.J.) (holding that a one page composition published in a collection was a book because “any composition, whether large or small, is a book within the meaning of this act of parliament”).

91. Another potential problem was “originality,” although the 1842 Act had no express requirement of originality. See Literary Copyright Act, 1842, 5 & 6 Vict., c. 45 (Great Britain & Empire). T.E. Scrutton discussed the question of originality given the low level of labor, skill and judgment involved in formulating the wording of the telegrams in relation to newspapers, especially “mere announcements of fact.” SIR THOMAS EDWARD SCRUTTON, *THE LAW OF COPYRIGHT* 28–29 (1883). He noted that “the enterprise of papers who provide early graphic and accurate news seems to need more encouragement than the appreciation of the buying public and the barren flattery of rival journals who copy often without acknowledgment of source,” but that “undoubtedly . . . there is great difficulty in drawing the line between the facts and the literary articles, and no very precise principles can be laid down.” *Id.* Furthermore, Copinger asserted that “[t]here can of course be copyright in newspaper telegrams.” WALTER COPINGER, *THE LAW OF COPYRIGHT IN WORKS OF LITERATURE AND ART* 100–01 (2d ed. 1881).

92. Literary Copyright Act, 1842, 5 & 6, Vict., c. 45, § 2 (Great Britain & Empire)

93. *Id.* § 18.

94. (1869) 9 L.R.-Eq. 324 (Eng.).

95. *Id.* at 328–29; see also *Platt v. Walter*, (1867) 1 L.T.R. 471 (Eng.); *Ex parte Foss*, 44 Eng. Rep. 977 (Ch. 1858) (discussing rights of mortgagee of newspapers and the entire copyrights thereof). Lord Justice Knight Bruce described this as “a right to publish newspapers bearing particular names,” *id.*

publication called the *Field*, which the court treated as a newspaper and thus outside the scope of the Act.⁹⁶ Given this holding, in 1878 the Royal Commission on Copyright remarked that “[m]uch doubt appears to exist . . . as to whether there is copyright in newspapers.”⁹⁷ Not long after that, in 1881, doubts were resolved when Master of the Rolls Jessel held in *Walter v. Howe*⁹⁸ that a newspaper was a sheet of letterpress and hence a book within the meaning of section 2, and a periodical within the meaning of section 18 of the Act.⁹⁹ Nevertheless, in the period when the Telegraphic Copyright Acts were being considered, the orthodox view must have been that newspapers were *not* within the scope of imperial copyright.

b. *The problem of first publication*

Even if *Cox v. Land & Water Journal Co.* had been wrongly decided—so that newspapers did fall within the scope of the Imperial Copyright Act—the A.A.P. faced a second problem. The A.A.P. had to argue that its news telegrams, once published through the various newspapers in the “syndicate,” were protected by imperial copyright. To do so, the A.A.P. would have to show that the material was

at 980, and Lord Justice Turner observed that copyright of a newspaper “undoubtedly exists,” *id.* at 980. In *Kelly v. Hutton*, Lord Justice Page-Wood considered a purported assignment of a person’s share in a “newspaper, and the copyright and right of publication thereof, and all profits arising therefrom,” which was followed by entry of the assignee in the registry at Stationers Hall. *Kelly v. Hutton*, (1868) 3 L.R.-Ch. 703, 704–05 (Eng.). In the Court of Appeal in Chancery, the Lord Justice stated that “there is nothing analogous to copyright in the name of a newspaper” and the entry “was clearly futile,” but held there was an assignment of the “chattel interest” in the name. *Id.* at 708–09.

96. *Cox*, 9 L.R.-Eq. at 330.

97. Great Britain, *Report of the Commissioners Appointed to Make Inquiry with Regard to the Laws and Regulations Relating to Home, Colonial and International Copyright*, Parl Paper No 163, 1878, para. 88 [hereinafter *Royal Commission Report on Copyright*]; COPINGER, *supra* note 91, at 459 (calling the decision in *Cox* “somewhat remarkable”).

98. (1881) 17 Ch. D. 708 (Eng.).

99. *Id.* at 710. *Walter v. Howe* was approved by the Court of Appeal in *Trade Auxiliary Co. v. Middlesborough & Dist. Tradesmen’s Prot. Ass’n*, (1889) 40 Ch. D. 425, 434 (Eng.) (Cotton, L.J.), and *Cate v. Devon & Exeter Constitutional Newspaper Co.*, (1889) 40 Ch. D. 500 (Eng.) (North, J.). In *Cate*, Mister Justice North said that *Howe* was “universally accepted from that time to this as being a correct exposition of the law on the subject.” *Id.* at 503.

published in Great Britain. This was because in 1868, in *Routledge v. Low*,¹⁰⁰ the House of Lords ruled that first publication in one of the colonies or dominions, rather than in the United Kingdom itself, would result in the loss of any copyright that could exist under the 1842 Act.¹⁰¹ While a British newspaper published in Britain would have copyright throughout the British empire, a colonial newspaper published locally would not enjoy the benefit of imperial copyright. Rather, it would only benefit from copyright locally if the particular state provided for it.¹⁰² To obtain protection for telegram publication, the A.A.P. would have to arrange for publication of the matter in London. Theoretically, this arrangement was possible. Reuters later adopted such a practice.¹⁰³ For the A.A.P. in 1870, however, the process was far too bureaucratic to be practical.

c. *The problem of ownership*

A third problem with relying on the 1842 Literary Copyright Act to protect telegrams related to regulating the ownership of existing copyright. Under the 1842 Act, copyright did not constitute a right accorded to a publisher, but rather a right initially accorded to an author.¹⁰⁴ To this general principle, the Act admitted two exceptions.

100. (1868) 3 L.R.-E & I App. 100 (H.L.).

101. *Id.* at 105–06. The case concerned a book published in London, but composed by a lady domiciled in the United States who temporarily resided in Montreal. The House of Lords held that she was entitled to copyright because the book was published in London. The need for first publication in the United Kingdom stood until 1886. International Copyright Act, 1886, 49 & 50 Vict., c. 33, § 8.

102. *Royal Commission Report on Copyright*, *supra* note 104, para. 182. The position was generally regarded as unjust. *See id.* para. 227, at xxxv; *see also* COPINGER, *supra* note 91, at 505 (“This opinion has caused great and general dissatisfaction in the colonies and India; it has either destroyed all copyright property in the numerous works since 1842, which have been first published there, or rendered such property comparatively worthless.”); J. Finnamore, *Imperial Copyright Law As Affecting the Colonies*, (1881) VICTORIAN REV. 712. †

103. In 1890, Reuters launched *Reuters’ Journal*, a daily news-sheet that secured copyright protection for a collection of the day’s most important telegrams by publishing and selling them in London. *See* READ, *supra* note 41, at 92.

104. Literary Copyright Act, 1842, 5 & 6 Vict., c. 45, § 3. However, a defendant, who wished to rely on the fact that a plaintiff was not the author or copyright owner, had to specify by way of notice who he alleged was the author or copyright owner. *Id.* § 16.

First, it permitted assignment.¹⁰⁵ Second, according to section 18, if the proprietor employed and paid persons to compose particular parts of a work, the “[t]erms [were] that the [c]opyright . . . [would] belong to such Proprietor.”¹⁰⁶ This exception applied to multi-part works, more specifically, “any Encyclopaedia, Review, Magazine, Periodical Works, or Work published in a series of Books or Parts.”¹⁰⁷ Therefore, for the A.A.P. to have any copyright, it needed to show that it was the author of the telegrams or an assignee of that copyright, or that the telegrams were provided for publication in a multi-part work. The problem for the A.A.P. was that the author of each element of the telegrams was a Reuters agent, stationed at the news source.¹⁰⁸ Under these circumstances, the A.A.P. was clearly not the author of the materials supplied by Reuters, nor was the A.A.P. an assignee. However, Reuters might have been persuaded to assign copyright in the individual messages. For this to have had the appropriate effect, it would have also been necessary for Reuters itself to have taken assignments from its own agents.

Whether the A.A.P. could have argued that it owned copyrights under section 18 was even more doubtful. *Cox v. Land & Water Journal Co.* held that the provision would not apply to newspapers.¹⁰⁹ It would have required a bold tribunal, moreover, to treat the telegram authors as A.A.P. employees, as opposed to Reuters’ employees, or to conclude that the authors expressly or impliedly agreed that the A.A.P. was the copyright owner,¹¹⁰

105. *Id.* § 13.

106. *Id.* § 18.

107. *Id.*

108. See *supra* note 86 and accompanying text.

109. (1869) 9 L.R.-Eq. 324.

110. In *Sweet v. Benning*, 139 Eng. Rep. 838 (C.P. 1855), the Court of Common Pleas held that such an agreement could be inferred from the nature and character of the employment. There barristers were employed to produce reports of cases, including head notes, for the *Jurist*, and the court held that copyright vested in the publisher. *Id.* at 848. Although decided after the period under consideration, the cases of *Walter v. Howe*, (1881) 17 Ch. D. 708 (Eng.), and *Johnson v. Newnes*, (1894) 3 Ch. 663 (Eng.) illustrate some of these problems. The courts held that a relevant agreement could be made with a number of proprietors. See *Trade Auxiliary Co. v. Middlesborough & Dist. Tradesmen’s Prot. Ass’n*, (1889) 40 Ch. D. 425 (Eng.) (explaining that where three journals employed two persons to compile lists, all three benefited from copyright under section 18).

or that they were paid by the A.A.P.¹¹¹

d. The problem of registration before action

Even if the A.A.P. had been able to show that the messages benefited from imperial copyright and that it had some standing to rely on that copyright against copyists, further difficulties stood in its way.¹¹⁵ One practical problem was the “registration” requirement. Under section 24, registration was a prerequisite to bringing an infringement action.¹¹⁶ The issue was whether it was necessary that every set of telegrams be entered in the register of the Stationer’s Company, or that every newspaper be registered there, or whether registration was possible in some more general way. With regard to “multi-part” works, section 19 provided that the proprietor was entitled to all of the benefits of registration at Stationers’ Hall upon entry in the “said Book of Registry the Title of such Encyclopedia, Review, Periodical Work, or other Work published in a series of Books or Parts, the Time of the first Publication of the First Volume, Number or, Part thereof . . .”¹¹⁷ If this applied, registering the

111. See *Richardson v. Gilbert*, (1846) 61 Eng. Rep. 130 (Ch.) (considering actual payment of the author a condition precedent to vesting of a right). Whether payment was a condition precedent to the vesting of copyright or merely the right to sue was subsequently ventilated in *Tuck & Sons v. Priester*, 19 Q.B.D. 629 (1887) (Eng.), when the court suggested that a proprietor may bring an action for infringements which occur after payment. In *Trade Auxiliary Co.*, Mister Justice Chitty suggested that, like registration, only payment was only required before an action could be brought. *Trade Auxiliary Co.*, 40 Ch. D. at 430. The point was not pursued on appeal. *Id.* at 432–33.

115. Perhaps the A.A.P. could have sued as a licensee of Reuters. See *Trade Auxiliary Co.*, 40 Ch. D. at 434 (Cotton, L.J.) (suggesting that a licensee could sue).

116. Literary Copyright Act, 1842, 5 & 6 Vict., c. 45, § 24 (Great Britain & Empire).

117. *Id.* § 19.

newspaper itself would allow for the protection of articles or telegrams published in its later issues.¹¹⁸ Alternatively, under *Cox v. Land & Water Journal Co.*, every set of news telegrams might need to be registered before an action could be brought under the Act.¹¹⁹ This would be a most cumbersome requirement. It would delay proceedings when expeditious remedies were required.

e. The problem of establishing infringement

Another problem was whether the appropriation of telegrams from a newspaper itself amounted to copyright infringement. In this respect, it is useful to review an example taken from the *Argus* in late 1872:

EUROPEAN TELEGRAMS.

(By Submarine Telegraph)

(AUSTRALIAN ASSOCIATED PRESS TELEGRAMS)

LONDON, Nov. 26, 4 p.m.

The ship *Royal Adelaide*, bound for Sydney, has been wrecked at Portland. All on board were saved with the exception of three.

The ship *Calcutta* has twice returned to Plymouth.

The Australian October mails via Suez and via California have both arrived.

At the wool sales prices have slightly given way. Combing fleeces are eagerly competed for; but clothing greasy sorts attract but little attention. Cape of Good

118. See (1876) *Henderson v. Maxwell*, 4 Ch. D. 163 (Great Britain and Empire) (Jessel, M.R.) (rejecting the argument that it was necessary to register not just the journal name, but also the title of any story serialized in the journal).

119. *Cox v. Land & Water Journal Co.*, (1869) 9 L.R.-Eq. 324, 329 (Eng.). Vice Chancellor Malins explained that the requirement of registration was aimed at allowing the public to know when a copyright expired and when third parties would be at liberty to publish the work. *Id.* at 328. He said that this requirement made no sense in relation to newspapers, and that in his view newspapers and matters published therein were not within the scope of the Act. *Id.* at 328-29.

Hope descriptions are lower. The number of foreign buyers is increasing.

PERSIA, Nov. 26

The Sebah of Persia has granted to Baron Reuter an exclusive concession for the construction of railways, tramways, and waterworks; also for working mines throughout Persia.¹²⁰

Would merely reprinting the following constitute to infringement? “The ship Royal Adelaide bound for Sydney has been wrecked at Portland. All on board were saved with the exception of three.” Section 15 of the 1842 Act referred only to an action on the case being brought against any person who should “print or cause to be printed . . . any [b]ook in which there [should] be subsisting Copyright . . .”¹²¹ The courts had determined that there could be infringement where copying was not total,¹²² but they had not made clear how far the Act would extend in cases of copying of parts of works. In *Kelly v. Morris*,¹²³ a directory case, Vice Chancellor Sir William Page Wood said that the defendant would infringe if he took “a single line of the Plaintiff’s Directory for the purpose of saving himself labour and trouble in getting his information.”¹²⁴ In *Morris v. Wright*,¹²⁵ however, Lord Justice Giffard in the Court of Appeal in Chancery suggested that the statement in *Kelly v. Morris* went “beyond what the law authorises.”¹²⁶ The same judge had also

120. *European Telegrams*, ARGUS, Nov. 26, 1872.

121. Literary Copyright Act, 1842, 5 & 6 Vict., c. 50, § 15 (Eng.).

122. *Sweet v. Benning*, (1855) 24 LJ CP 175. Jervis CJ stated that “[I]t is . . . difficult . . . to lay down any . . . rule upon the subject. It would be difficult to say that the printing of any portion of a work, however small, would furnish ground for an action. The question is one of degree, which may vary according to the circumstances. . .”; Maule J, at 180, said “it is not every verbatim extract that will support an action for piracy. It will depend on the proportion which the extract bears to the whole work. . . .” *Id.* at 849.

123. (1866) 1 L.R.-Eq. 697. In that case, it seems there was allegedly wholesale copying of parts of the plaintiff’s directory, which the defendant merely verified and updated. *Id.* This was an infringement. *Id.* at 702–03.

124. *Id.* at 702.

125. (1869-70) LR 5 Ch App 279, at 285-86.

126. *Id.* at 81. Lord Justice Giffard was specifically concerned with statements in *Kelly v. Morris* that suggested that a person could only use an

indicated in *Pike v. Nicholas*¹²⁷ that there was no infringement of a book on the history of the English people where a person copied "one or two passages." It was thus far from clear whether appropriating one or two telegrams from an eight page paper would infringe copyright in the paper.¹²⁸

Apart from the small size of the telegrams, the question arose as to whether imperial copyright would enable the A.A.P. to prevent one paper from appropriating the content of an article based on a telegram in another by changing the form. For example, another paper might state:

Three people have died in a shipwreck in the English Channel. It is probable that appalling weather conditions were responsible for the demise of the Royal Adelaide, which foundered not long after departure off Portland in Dorset. Its destination was Sydney. Thankfully, all the remaining passengers survived.

or

Another ship journeying from Britain to Australia has met its fate. The Royal Adelaide had not long left

existing work to verify their own efforts. *Id.* at 81–82. He was of the view that the information in an existing copyright work could also be used as a starting point for the user's research (for example, directing him where to call). *Id.*

127. (1869-70) LR 5 Ch App 251, 268.

128. Decisions twenty years later, in 1889, suggest that the courts would have held small appropriations to be infringing. For example, Mister Justice Chitty held that weekly copying of four entries from the claimants lists was not *de minimis non curat lex*, in part because it was for the same purpose and thus competing with the claimant. *Trade Auxiliary Co. v. Middlesborough & Dist. Tradesmen's Prot. Ass'n*, (1889) 40 Ch. D. 425, 428–29 (Eng.). Mister Justice North came to the same conclusion with regards to the same lists, but a different defendant, who had merely reproduced a single entry. *Cate v. Devon & Exeter Constitutional Newspaper Co.*, (1889) 40 Ch. D. 500, 507 (Eng.) (emphasizing that the defendant's takings were entire, regular, for the same purpose, and claimed to be "as of right"). *See also* *Walter v. Steinkopf*, (1892) 3 Ch. 489, 489 (Eng.) (finding infringement in a case of copying of newspaper articles). Mister Justice North noted that the whole of each item was taken, for the same purposes, and observed that "[i]t is not a case of the selection of a part, or quotation of an extract." *Id.* at 496.

England on its lengthy journey to Sydney when it was wrecked in the Channel, off Portland. Remarkably, there are believed to have been only three fatalities.

or even

Three passengers leaving for Australia lost their lives when the Royal Adelaide was wrecked off Portland.

The courts had, albeit in different contexts, held that there was “piracy” where there was “a mere borrowing with alterations and departures merely colourable.”¹²⁹ The question of the appropriation of information contained in these telegrams raised the problem of to what extent copyright was confined to “expression,” as opposed to “ideas” or “facts.” The so-called “directory cases” seemed to indicate that where labor was expended collecting factual information, reproducing that factual information constituted copyright infringement.¹³⁰ Liability could only be avoided where a defendant had himself gone through the same laborious process of collection as the author.¹³¹ In those cases, however, significant amounts of labor were invested and the product itself was substantial.¹³² In the case of the A.A.P.’s telegrams, while the investment in them was substantial, much of it was in the transmission of the information, rather than in the “brainwork” of the author, as Lord Justice Lindley would later describe it.¹³³ The telegrams were only forty or fifty words in total.

Moreover, in other cases the courts had started to elaborate upon the “idea-expression” distinction. For example, in 1869 in *Pike v. Nicholas*, Vice Chancellor James stated, in a passage expressly referred to with approval on appeal by Lord Justice Giffard, that

129. (1844) *Dickens v. Lee*, 8 Jur. 183 (Eng.).

130. See (1866) *Kelly v. Morris*, 1 L.R.-Eq. 697 (V.C.) (Eng.); *Morris v. Ashbee*, (1868) 7 L.R.-Eq. 34 (V.C.) (Eng.); *Morris v. Wright*, (1870) 22 L.T.R. 78 (Ch. App.) (Eng.).

131. See *Kelly*, 1 L.R.-Eq. at 701; *Ashbee*, 7 L.R.-Eq. at 40–41; *Wright*, 22 L.T.R. at 81–82.

132. See *Kelly*, 1 L.R.-Eq. at 697; *Ashbee*, 7 L.R.-Eq. at 34–37; *Wright*, 22 L.T.R. at 79.

133. *Trade Auxiliary Co. v. Middlesborough & Dist. Tradesmen’s Prot. Ass’n*, (1889) 40 Ch. D. 425, 435 (Eng.).

“there is no monopoly in the main theory of the plaintiff, nor in the theories and speculations by which he has supported it, nor even in the use of the published results of his own observations.”¹³⁴ Facts, then, could be appropriated without infringing copyrights in the telegrams. In due course, in *Walter v. Steinkopf*,¹³⁵ Mister Justice North would elaborate more clearly the proposition that there was no copyright in the news itself, but there may have been copyright in its mode of expression.¹³⁶ In 1871, in Australia, the reach of any imperial copyright in the A.A.P. telegrams was simply impossible to predict.¹³⁷

f. The problem of remedies

The sixth and final difficulty with relying on imperial copyright law was that it envisaged enforcement by way of action on the case, or in the Courts of Chancery, for an injunction. Both methods were expensive and problematic.¹³⁸ Proving damages would be exceedingly difficult. Injunctions were discretionary in nature and would be refused because the past infringements were unlikely to be repeated.¹³⁹ What the A.A.P. wanted was a quick and simple action

134. *Pike v. Nicholas*, (1869) LR 5 Ch 251, 268).

135. (1892) 3 Ch. 489 (Eng.).

136. *Id.* at 495 (“It is said that there is no copyright in news. But there is or may be copyright in the particular forms of language or modes of expression by which information is conveyed, and not the less so because the information may be with respect to the current events of the day.”).

137. If copying was from a subscriber of the A.A.P., rather than directly, a further question would have been whether there was infringement. This point was unsuccessfully taken twenty years later in *Cate v. Devon & Exeter Constitutional Newspaper Co.*, where Mister Justice North clarified that infringement could be indirect as well as direct. *Cate v. Devon & Exeter Constitutional Newspaper Co.*, (1889) 40 Ch. D. 500, 505–06 (Eng.).

138. *See infra* note 145.

139. *Steinkopf*, 3 Ch. at 500–01. The *Times* brought suit alleging, among other things, that another newspaper had substantially copied twenty-two articles or paragraphs from one of its papers. The *Times* sought injunctive relief extending to copying “any other article or communication, or [to] any letter, telegram, cablegram, or other matter which appeared in the *Times* newspaper of the said 13th of April, 1892, and of which the copyright is vested in the Plaintiffs, or any substantial portion thereof or extract therefrom.” *Id.* at 491. Mister Justice North refused to continue the order for these potential infringements because “[t]heir interest has passed away, and they will not be repeated. It has not been shewn that any damages resulted to the *Times* from the illegal appropriation of these articles, and I do not think it necessary to

to bring those copying telegrams into line.¹⁴⁰ The A.A.P. did not want to have to prove damages or reveal circulation figures.¹⁴¹

2. Australian Copyright

The second possible avenue available to the A.A.P. was to rely on local copyright laws. The main problem with this was that in 1871 such laws existed in only one of the Australian dominions, namely Victoria.¹⁴² Later in the decade, New South Wales and South Australia would adopt their own copyright laws,¹⁴³ but it was not until the 1880s and 1890s that Queensland, Western Australia and Tasmania adopted local copyright laws.¹⁴⁴

The law in Victoria certainly offered advantages to the A.A.P. over the imperial law.¹⁴⁵ First, it was clear from its terms that

observe the form of giving nominal damages.” *Id.* at 500. Moreover, Mister Justice North refused to give costs:

of [the] part of this action which [did] not relate to the *Rudyard Kipling* article. [He thought] that the Defendants were very summarily dealt with by being pulled up all at once without notice for doing what they had done precisely in the same way and on the same scale without any objection or complaint for twelve years past.

Id. These cases other than Kipling were “trivial in themselves.” *Id.* at 501.

140. See *infra* note 194.

141. See *infra* text accompanying notes 454–455.

142. See Victorian Copyright Act 1869, 33 Vict., no. 350. †

143. Copyright Act, 1878, 41 & 42 Vict., no. 95 (S. Austl.); Copyright Act, 1879, 42 Vict., no. 20 (N.S.W.). Both Acts were modeled after and are similar in coverage to the Victorian Act 1869, 33 Vict., no. 350 though the New South Wales law placed “literary, dramatic and musical productions” in Part I, whereas the Victorian and South Australian acts placed them in Part II, after “Copyright of Designs.” See Victorian Copyright Act 1869, 33 Vict., no. 350 †; 41 & 42 Vict., no. 95 (S. Austl.); 42 Vict., no. 20 (N.S.W.).

144. Copyright Register Act, 1887, 51 Vict., no. 3 (W. Austl.); Copyright Act, 1895, 59 Vict., no. 24 (Tas.); Registration of Copyright Act, 1887, 51 Vict., no. 2 (Queensl.). The Victorian Act of 1869 was replaced by Copyright Act, 1890, 54 Vict., no. 1076.

145. Introducing the bill to the Victorian Legislative Assembly on June 8, 1869, Paton Smith observed that “[t]he English copyright laws have no force here, owing to the machinery for carrying them into effect being most expensive and unsatisfactory.” Victoria, *Parliamentary Debates*, Legislative Assembly, June 8, 1869, 1005. He described the bill as “merely a transcript of the English Acts, with the addition of such provisions as will give speedy and inexpensive remedies to persons whose rights are infringed upon.” *Id.* at 1005, 1837 (second reading). The primary motivation for introducing the law was protection of designers and photographers. Part I of the Act, based on the British Copyright of Designs Acts of 1842 and 1843, protected registered

copyright existed in Victoria for the benefit of newspapers. The law defined books as "every volume, part, or division of a volume, *newspaper pamphlet*, sheet of letter press, sheet of music, map, chart or plan separately published."¹⁴⁶ Thus, some of the problems raised by *Cox v. Land & Water Journal Co.* in relation to imperial law did not exist. Second, the Victorian Act was based on publication in Victoria and thus avoided the problems raised by *Routledge v. Low*, under which imperial copyright did not extend to publication outside Great Britain.¹⁴⁷ Third, the Victorian Act explicitly provided that a newspaper could enforce its copyright based only on registration of the title of the newspaper, the time of first publication of the first volume number, and the name of the proprietor and publisher at the "book of registry" in Victoria, rather than at the Stationers Company in London.¹⁴⁸ Fourth, Victorian law simplified the issue of ownership by extending the rules on publisher ownership of multi-

designs, "any new and original design for any article or work of manufacture or art, whether such article or work be for purposes of utility ornament or otherwise" for two or three years. See Victorian Copyright Act 1869, 33. Vict. No. 350 §§ 3-13 †; British Copyright of Designs Act, 1842, 5 & 6 Vict., c. 100; British Copyright of Designs Act, 1843, 6 & 7 Vict., c. 67. Part II, based on the 1842 Copyright Act, protected literary, musical and dramatic productions that were first published in Victoria. See Victorian Copyright Act 1869, 33. Vict. No. 350 §§ 14-30 †; Literary Copyright Act, 1842, 5 & 6 Vict., c. 45. It also incorporated the 1835 Lectures Copyright Act, though modifying the requirement of prior notification of justices of the peace with prior announcement that copyright was retained through the newspaper press. See Victorian Copyright Act 1869, 33. Vict. No. 350 §§ 31-34 †; Lectures Copyright Act, 1835, 5 & 6 Will. 4, c. 65 (Eng.). Part III adopted the provisions of the British Fine Art Copyright Act of 1862, consolidating them with the provisions in the Sculpture Acts and the Engravings Acts, and thus subjecting the latter to registration requirements as a pre-requisite to commencing legal action. See Victorian Copyright Act 1869, 33. Vict. No. 350 §§ 36-44 †; British Fine Art Copyright Act, 1862, 25 & 26 Vict., c. 68; Sculpture Copyright Act, 1798, 38 Geo. 3, c. 71 (Eng.); Engravers' Act, 1735, 8 Geo. 2, c. 13 (Eng.). However, the duration of copyright in paintings and drawings was set at fourteen years, and that of photographs at three years (as opposed to seven years after the death of the author in the British version). See Victorian Copyright Act 1869, 33. Vict. No. 350 § 36 †; British Fine Art Copyright Act, 1862, 25 & 26 Vict., c. 68; 38 Geo. 3, c. 71; 8 Geo. 2, c. 13.

146. Victorian Copyright Act 1869, 33. Vict. No. 350 § 2 (emphasis added). †

147. *Id.*; see *Routledge v. Low*, (1868) 3 L.R.-E. & I. App. 100 (H.L.) (Eng.).

148. Victorian Copyright Act 1869, 33. Vict. No. 350 § 25. †

part works to cover newspapers.¹⁴⁹ Yet the position of the A.A.P. was only marginally improved because the other complications in the imperial provision—those requiring employment, intention, and payment—were retained.¹⁵⁰

While the legal position of the A.A.P. was clearer under the 1869 Victorian Act in important respects, there still remained the problem of the scope of protection, and specifically whether reprinting telegrams or the information contained in them would constitute an infringement. The provision on infringement in section 21 of the Victorian Act used identical terms to those of section 15 of the Imperial law.¹⁵¹ Consequently, the law could be assumed to be identical to that operating under the Imperial Act. In due course, the *Argus* would test this position in *Wilson v. Luke*¹⁵² and learn that telegrams were protected.¹⁵³ But in 1871 the position was as uncertain under the Victorian Act as under the Imperial Act.

3. Common Law Copyright, Common Law Property and Unfair Competition

A third avenue of redress for the A.A.P. might have been based on the development of the common law. The famous House of Lords case of *Donaldson v. Becket*,¹⁵⁴ which brought to an end the

149. *Id.* § 24.

150. Compare Victorian Copyright Act 1869 § 24 † (incorporating the employment, intention, and payment requirements of the imperial provision), with Literary Copyright Act, 1842, 5 & 6 Vict., c. 45 (Great Britain & Empire) (describing employment, intention, and payment requirements).

[W]hen any publisher or other person in the colony of Victoria shall, before or at the time of the passing of this Act, have projected, conducted and carried on, or shall hereafter project, conduct or carry on, and be the proprietor of any encyclopaedia, review, magazine, periodical, work, *newspaper* or work published in the said colony, in a series of books or parts . . . the copyright in every such . . . work published in a series of books or parts . . . shall be the property of such proprietor, projector, publisher or conductor, who shall enjoy the same rights as if he was the actual author thereof, and shall have such term of copyright therein as is given to the authors of books by this part of the Act.

151. Compare Victorian Copyright Act 1869 § 21 † (describing infringement provisions), with Literary Copyright Act, 1842, 5 & 6 Vict., c. 45, § 15 (using the same infringement terms as the Victorian Act).

152. (1875) 1 V.L.R. 127 (Vict.).

153. *Id.* at 135.

154. 98 Eng. Rep. 257 (H.L. 1774).

eighteenth century “battle of the booksellers,” was widely regarded as having settled the position that once a book was published the only sort of protection available to it was protection under the Statute of Anne and its replacement, the 1842 Act.¹⁵⁵ This left unclear, however, at least to contemporaries, the position prior to publication or the position of works outside the remit of statutory protection.¹⁵⁶ It also left unclear the relationship between the Imperial Act and other new common law property rights recognized by the courts. As of 1871 there were authorities that suggested that some sort of common law rights, unaffected by the Copyright Act, might give the A.A.P. the protection it desired.

The key case appeared to be, once again, *Cox v. Land & Water Journal Co.* In that case, as already noted, the Vice Chancellor held that newspapers were not within the scope of the 1842 Copyright Act.¹⁵⁷ This case concerned the defendant’s publication in its *Land and Water Journal* of lists of hunts, their time and location, and details of their participants (such as masters, huntsmen, and kennels) taken from the claimant’s newspaper, the *Field*.¹⁵⁸ While the Vice Chancellor held the *Field* and its lists fell outside the 1842 Act,¹⁵⁹ he also held if the law provided no protection, “it is a monstrous state of

155. See generally RONAN DEAZLEY, ON THE ORIGIN OF THE RIGHT TO COPY: CHARTING THE MOVEMENT OF COPYRIGHT LAW IN EIGHTEENTH CENTURY BRITAIN (1695–1775) (2004); MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT (1995).

156. Was there a common law copyright, which protected the work, or just personal property rights in the manuscript? *Jefferys v. Boosey*, 10 Eng. Rep. 681 (H.L. 1854), held that a foreign author resident abroad gained no copyright under the Statute of Anne from first publication in Great Britain. Ronan Deazley argues that *Jefferys* established that there were only personal property rights, but that commentators, such as Copinger, deliberately ignored that holding in favor of the position of common law copyright. Ronan Deazley, Paper, prepared for ESRC Research Seminar Series, Intellectual Property Rights, Economic Development and Social Welfare: What Does History Tell Us? (Edinburgh Univ. July 9, 2004) *Jefferys* does, of course, indicate divergences among the judges and the Law Lords on the issue of “common law” copyright, but it is not clear that the decision resolved the issue. The Lord Chancellor, for example, reached his conclusion wholly without reference to the issue of common law rights prior to publication. See *Jefferys v. Boosey*, 10 Eng. Rep. 681 (H.L. 1854).

157. (1869) 9 L.R.-Eq. 324 (Eng.).

158. *Id.*

159. *Id.* at 328.

law, repugnant to common sense and common honesty”¹⁶⁰ Consequently, he took the view that there was “property” in all the articles for which the proprietor had paid “as will entitle him, if he thinks it worth while, to prohibit any other person from publishing the same thing in any other newspaper, or in any other form.”¹⁶¹ The Vice Chancellor referred to the right not “as copyright, but as property.”¹⁶²

The doctrinal basis of the decision in *Cox* was left unclear in Vice Chancellor Malins’ judgment. It is unclear whether the basis of the property was common law copyright in published works falling outside the 1842 Act, statutory copyright under the 1842 Act in works where registration was not required, or some other sort of common law property. In 1871 in *Buzacott v. Bourcicault*,¹⁶³ *Cox* was interpreted by counsel for the claimant, the *Rockhampton Bulletin*, as distinct from common law copyright, and supported by reference to Puffendorf’s observations to the effect that property was either acquired by labor applied or by money expended.¹⁶⁴ Judge Hirst accepted the authority, though with some diffidence.¹⁶⁵ In 1873, in *Wilson v. Rowcroft*,¹⁶⁶ Mister Justice Molesworth, in the Victorian Supreme Court, granted the *Argus* an injunction against the *Geelong Evening Times*, restraining the publication of telegrams on the basis of *Cox*.¹⁶⁷ Mister Justice Molesworth observed that the *Argus* had paid for the intelligence,¹⁶⁸ and stated:

This is a kind of property which a peculiar state of society has brought into existence for the first time. The plaintiffs have a clear property in that for which they give a price, and from which they obtain a profit, and the defendant appears to have been habitually interfering with that property by

160. *Id.* at 327.

161. *Id.* at 331.

162. *Id.*

163. This case is discussed in *Buzacott v. Bourcicault—Piracy of Telegrams*, N. ARGUS (Rockhampton), Dec. 2, 1871.

164. *Id.*

165. *Northern District Court: Civil Sittings*, ROCKHAMPTON BULLETIN (Queensland), Dec. 2, 1871; *Buzacott v. Bourcicault—Piracy of Telegrams*, *supra* note 163.

166. (1873) 4 A.J.R. 114 (Vict.).

167. *Id.* at 116, 121.

168. *Id.* at 122.

publishing, without paying for it, that which they have procured by a large outlay.... Habitual injury of property... is a good ground for the interference of a court of equity to protect it.¹⁶⁹

Two years later, however, in *Wilson v. Luke*, the same judge noted that the decision of Vice Chancellor Malins in *Cox* appeared to have been based upon a common law copyright.¹⁷⁰ In his view, "[t]he existence of common-law right of copyright is questionable."¹⁷¹ Giving the claimant a remedy under the Victorian Copyright Act, the judge said he preferred not to rely on *Cox* and the supposed common law right.¹⁷²

Ultimately, then, the claim to some common law property in news telegrams was to the founder. British law would come to accept that news telegrams could be protected prior to publication, either under a common law copyright or by way of implied contract, but not after publication.¹⁷³ In 1871, however, such claims to common law rights might have succeeded, and indeed did succeed.¹⁷⁴ Nevertheless, the case law was limited, decided by lower courts, and dubious given the broader holdings of the higher courts.¹⁷⁵ Common law rights would not have provided the *Argus* and the *Sydney Morning Herald* with much confidence that their annual investment of £14,000 per annum would be protected.¹⁷⁶ Faced with these uncertainties, it is not surprising that the A.A.P. preferred the idea of a statutory right.

169. *Id.*

170. *Wilson v. Luke*, (1875) 1 V.L.R. 127, 140 (Vict.).

171. *Id.*

172. *Id.* at 140-41.

173. *Id.*

174. *Buzacott v. Bourcicault—Piracy of Telegrams*, *supra* note 163; *Wilson v. Rowcroft* (1873) 4 A.J.R. 57, 58 (Vict.).

175. *Donaldson v. Becket*, 98 Eng. Rep. 257 (H.L. 1774); *Jefferys v. Boosey*, 10 Eng. Rep. 681 (H.L. 1854).

176. *See supra* text accompanying notes 56-57 (cost of transmission) and note 67 (cost of Reuters service).

E. The Solution: Telegraphic Property Laws

Despite opponents' suggestions to the contrary,¹⁷⁷ there is no evidence that the idea of copyright in newspaper telegrams was part of Mackinnon's grand scheme. Indeed, there is no mention of copyright in his letters to Johnston.¹⁷⁸ This is not surprising, given that Mackinnon's model for the A.A.P. was New York's Associated Press, and no such specially tailored copyright in news had been crafted in the United States.¹⁷⁹ The idea was probably a reaction to the problem of persuading other papers to subscribe to the news service.

Whatever the source of the idea of copyright in newspaper telegrams may have been, it is clear that, once the idea was conceived, the A.A.P. worked with speed to coordinate its adoption of copyright into the various Australian colonies.¹⁸⁰ In October 1871, the Tasmanian paper the *Mercury* reported that approaches were to be made to the legislatures of South Australia and New South Wales, and in due course to those of Queensland and Victoria, for property rights in the news sent by telegraph from overseas for forty-eight hours.¹⁸¹ As it transpired, the paper was wrong. The first approach occurred in Victoria, and it was soon followed by an attempt at legislation in Tasmania.¹⁸² Action would also occur in New South Wales, South Australia and Western Australia in 1872, but no approach would be made in Queensland.¹⁸³ There would be partial success in Victoria in 1871, more fruitful outcomes in South

177. There is a suggestion by Vale, in the Victorian Legislative Assembly, that this idea was conjured up around March or April of 1871. *1871 Vict. Parliamentary Debates*, *supra* note 73, at 1875. As far as I have been able to ascertain, the earliest reference to such a copyright-style protection was in the *Rockhampton Bulletin* on September 21, 1871. On October 21, 1871, the *Tasmanian* accused the *Mercury*, its rival, of responsibility for the scheme: the idea "has its origin in Hobart Town, and probably may be traced to our contemporary himself." *Press Monopoly*, TASMANIAN, Oct. 21, 1871. The *Tasmanian* drew this inference from the fact that Hugh George had not mentioned the idea when seeking to persuade it to join the A.A.P. *Id.*

178. *See supra* note 46.

179. ARGUS (Melbourne), Nov. 14, 1871 ("Reference has been made to the absence of a similar copyright bill in the United States . . .").

180. MERCURY (Hobart), Oct. 16, 1871 ("[I]t has been found necessary to form a body which is already known as the Associated Press of Australia.").

181. MERCURY (Hobart), Oct. 17, 1871.

182. *See infra* text accompanying notes 275-341.

183. *See infra* text accompanying notes 342-471.

Australia and Western Australia in 1872, and failure in Tasmania and New South Wales.¹⁸⁴

As it turned out, the desirability of a statutory right over newspaper telegrams proved extremely controversial. Before examining how and why these laws were adopted in some states but rejected in others, we will examine the arguments both for and against the protection of these information products. These arguments were articulated fiercely in the press itself and in the legislative arena, particularly during the first two approaches in Victoria and Tasmania.¹⁸⁵

1. The Arguments for Protection

The arguments for protection of the newspaper telegrams are remarkably familiar to anybody interested in twenty-first century intellectual property law. The arguments rehearsed in the early 1870s were the time-honored “justifications” for intellectual property protection—those marshalled in support of every aspirant to a new or extended form of intellectual property. Arguments were based upon justice, the public interest, and consistency.

The justice argument was simply that it was right, proper, or fair that the A.A.P. and the subscribers to its service, who invested time and effort in collecting and obtaining the newspaper telegrams from overseas, should be granted some protection in that investment.¹⁸⁶

184. See *infra* text accompanying notes 275–471.

185. See *infra* text accompanying notes 275–341.

186. In Victoria, the MOUNT ALEXANDER MAIL, Nov. 11, 1871, stated that “in undertaking a task of such great magnitude it is only a fair and reasonable request to ask that those who bear the burden shall have their common property protected from the unscrupulous.” During the legislative debate in the Assembly, Angus Mackay stated that “[h]e had not heard a single argument which militated against the fairness, honesty, and justice of the demand made in their behalf.” 1871 *Vict. Parliamentary Debates*, *supra* note 73, at 1875. On December 12, 1871, during the Tasmanian debates, the *Mercury* argued:

Newspapers are the caterers of the information the public require; and they spend not a little money, and a very great deal of ingenuity and activity, in thus catering . . . [A]nd it is only right, therefore, that they should have, in turn, freely granted by the representatives of the people, such a measure of protection for the information procured by them at great cost as will give them the exclusive right to furnish it for a sufficient number of hours to protect them from those who would be unscrupulous enough to rob them openly of the fruits of their enterprise and expenditure.

Conversely, the argument went, it would be unjust if other newspapers, which had not contributed to that expenditure, could appropriate the information, taking a free ride on the A.A.P.'s investment and thus reaping without sowing.¹⁸⁷

The second argument was not based upon ideas of what was right and just, but what was in the public interest. According to this justification, the public interest lay in obtaining the overseas news.¹⁸⁸ The A.A.P. and its subscribers should be granted a property right as a means of providing the newspapers with sufficient incentive to obtain and publish that news.¹⁸⁹ Absent a property right, there was a real danger that the papers would not invest in obtaining the news because, once published, competitors would readily copy it at a negligible cost.¹⁹⁰ Moreover, lead time would be insufficient to provide the necessary incentives.¹⁹¹ This is the classic argument economists now call "market failure."¹⁹²

MERCURY (Hobart), Dec. 12, 1871.

187. ARGUS (Melbourne), Nov. 3, 1871 ("A proposition of this kind is so obviously in accordance with reason and justice that it seems almost an act of supererogation to argue or to illustrate it. . . . [Copying would be] a flagitious wrong."); AGE (Victoria), Nov. 3, 1871 ("[T]hose who hold aloof should be debarred from reaping advantages for which they do not pay."); SYDNEY MORNING HERALD, Dec. 29, 1871 (referring to the "the palpable injustice of this piracy").

188. See ARGUS (Melbourne), Nov. 3, 1871 ("[A]nd it is only by associated effort that [the principal Australian journals] will be enabled to supply the public with the latest intelligence from every capital in Europe and North America, as well as from Egypt, India, China, and Java.").

189. *Id.* ("If [a copyright] were denied, and if messages . . . were liable to be reproduced by some unscrupulous printer . . . there would be every inducement to curtail the messages and lessen the expenditure.").

190. Some asked,

Who would continue to lavish money upon the acquisition of intelligence which was liable to be seized upon and made marketable by any person owning a hand-press and a few reams of paper? We should simply save our money, and the public would have to wait for its news until it arrived by the ordinary channels

ARGUS (Melbourne), Nov. 3, 1871.

191. See *id.* ("[I]f messages . . . from London were liable to be reproduced . . . within an hour or two of their appearance in our columns . . . there would be every inducement to curtail the messages and lessen the expenditure.").

Where every word has to be purchased for a gold coin, and where the purchasers of such messages cannot hope to reimburse themselves for the additional outlay thus imposed upon them by any increase in the

The third argument for property protection in news was the need for “consistency.” This took at least three guises and was the least intellectually robust of the justifications. According to this argument, it was right to give a special copyright over newspaper telegrams to ensure that protection was consistent either with the general law of copyright or with principles of private property.¹⁹³ Sometimes it was argued that newspaper telegrams were already protected, and that laws were merely needed to make them “effective” by providing appropriate remedies, i.e., penalties.¹⁹⁴ On other occasions, it was argued that investment in obtaining such news telegrams was no different from the creation of literary works or inventions, which were both given protection.¹⁹⁵ It was thus necessary or right, for consistency’s sake, to adopt special protection for newspaper telegrams. In a number of such assertions, it was said

selling price of the newspaper, or by any material addition to its circulation, they are bound to ask for protection to this costly description of property.

ARGUS (Melbourne), Nov. 14, 1871.

192. See 3 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 326–29 (John Eatwell et al. eds., 1987).

193. *Press Telegrams*, SYDNEY MAIL, June 29, 1872 (“[The Legislature] is simply asked to recognize long-established principles and apply them to a new state of things.”).

194. AGE (Victoria), Nov. 3, 1871 (placing this claim in the context of existing copyright laws). AGE (Victoria), Nov. 21, 1871, countered the suggestion that the law was a dangerous experiment by reference to the relationship between the bill and existing copyright protection. It observed that many commentators believed these telegrams were already protected, not for forty-eight hours, but “for seven years or more,” and all that was necessary was registration at a fee of one shilling. *Id.* Protection, then, was not unprecedented. This fact “should satisfy the objectors that no great harm can result from making the experiment of protecting telegrams in a straightforward way instead of by implication.” *Id.* However, the *Age*’s editorial said it was uncertain whether existing copyright law would only protect the “exact words of the message,” and not the “special nature” of the property. *Id.* Thus, the bill was required to protect the “special nature” of the property. *Id.* “To throw out the bill would be to refuse to make the law consistent . . .” *Id.*

195. ARGUS (Melbourne), Nov. 14, 1871 (claiming that the arguments that justified copyright protection for authors, composers and artists, applied “with equal force to press messages from Europe, collected and compiled by men possessing special aptitude, intelligence, and sources of information, and transmitted at an enormous cost half round the globe”); SYDNEY MAIL, June 29, 1872 (denying that proposed laws were novel, as they were merely application of established principle to a particular situation).

that if the law failed to protect labor and investment in obtaining the news, then it was only a matter of time before all private property rights, traditionally seen as rights protecting expended labor or things purchased, would be under threat.¹⁹⁶ Appealing to fears of banditry and communism, it was argued that the failure to afford legal protection to news sent by telegram would set in motion an unstoppable drift toward anarchy.¹⁹⁷

2. The Arguments Against Protection

The arguments against protection mirrored those made in favor. To counter the argument that protection was just, the opponents asserted that such laws were unjust.¹⁹⁸ To counter the argument that

196. See *infra* note 197.

197. For example,

To deny them the very brief copyright asked for would be precisely equivalent to the withdrawal of the protection of the law to any other form of property. It would be tantamount to a declaration that any man should be free to walk into his neighbour's house and make use of his furniture, to enter his stables and borrow his saddle-horse, or to trespass upon his garden and carry away his fruit and flowers without let or hindrance.

ARGUS (Melbourne), Nov. 14, 1871; see also *id.* (denying that publication rendered the information public property); *The Monopoly*, FREEMAN'S J. (Queensl.), June 29, 1872 (reporting that the *Sydney Morning Herald* called the *Empire* "communists" for its opposition to telegraphic copyright). The assertion that failure to grant news copyright would bring into question the totality of the system of protection of private property, however implausible today, needs to be understood in the particular historical context. Property ownership, particularly in relation to land, was one of the key political issues of the day. See GEOFFREY SERLE, *THE GOLDEN AGE: A HISTORY OF THE COLONY OF VICTORIA, 1851-1861*, at 130-36 (1963) (regarding the land question). One manifestation of this was the political divisions between the aristocratic "squatters," whose titles were based on possession (and an expectation that they would be granted a right of pre-emption) of Crown lands rather than a legal right, and migrant gold-diggers who were keen to purchase this land from the government. The squatters traded their titles as if they were valid, and thus were particularly anxious about the existence and extent of their rights. *Id.* at 130-31. Another reason why the proponents of telegraphic property were so ready to relate the issue to potential revolution may be found in the legacy of the Eureka stockade, an uprising of miners of Ballarat in 1854. *Id.* at 161-87 (regarding the Eureka stockade and its significance). While the exact significance of the rebellion has been hotly debated, it was viewed by some contemporaries, including Karl Marx, as an example of a workers' revolutionary movement. *Id.* at 182-83.

198. See *infra* text accompanying notes 201-207.

protection was necessary in the public interest, the opponents asserted that protection was neither necessary nor desirable.¹⁹⁹ To counter the need for consistency argument, opponents argued that property in news was different in character from other subjects for which the proponents claimed consistency of treatment.²⁰⁰

The argument that it was just or right to protect the A.A.P.'s investment was met with a simple counter-argument: the A.A.P.'s claim to ownership was unjust because the A.A.P. was claiming ownership of matter it had not created and, in some cases, simply appropriated.²⁰¹ The opponents said telegraph news was taken from material created by others and published in Europe.²⁰² If it was to be owned, the owners should be European journals rather than Australian ones.²⁰³ According to one opponent, the *Kyneton Guardian*, the A.A.P. and the petitioners were seeking the exclusive right "to sell stolen property, for no better reason than that they have gone to the expense of conveying it to these colonies."²⁰⁴ Certainly, as noted, there would have been difficulties if the A.A.P.'s claim were based on its own authorship of the telegrams.²⁰⁵ Given the arrangement A.A.P. had entered with Reuters, however, the criticism that the information was "stolen" was easily refuted, while the argument based on investment was left standing.²⁰⁶ Perhaps a more telling critique of the argument for telegraphic property came from those who questioned why the appropriation of international news should be regarded as unjust, and thus requiring legal prohibition, when there should be no such special prohibition of the appropriation of local news.²⁰⁷ In other words, some asked why the law should protect investment only in some cases but not in others.

The argument that the laws were in the public interest because without such property newspapers would not obtain news from

199. See *infra* text accompanying notes 208–246.

200. The *Miner* concluded: "[T]he measure, in our opinion, is unwise, uncalled for and unnecessary. . . . [T]here is no analogy whatever." *The Telegraph Messages Copyright Bill*, N. ARGUS (Rockhampton), Dec. 13, 1871.

201. See BENDIGO ADVERTISER, Nov. 7, 1871.

202. See *id.*

203. See KYNETON GUARDIAN, Nov. 15, 1871.

204. *Id.*

205. See *supra* text accompanying notes 104–114.

206. ARGUS (Melbourne), Nov. 14, 1871.

207. See *id.*

overseas was met with an obvious response: past practice suggested that newspapers *would* still acquire news.²⁰⁸ Indeed, at the time the legislatures were being petitioned, the *Argus* and the *Herald* had already bound themselves contractually to take fifty words a day of Reuters' news without seriously believing that the existing law afforded them protection.²⁰⁹ Opponents said that there was a simple explanation for this, namely that first publication provided ample incentive to obtain such news or subscribe to the A.A.P.'s service.²¹⁰ There was no need to provide an artificial, legal incentive.²¹¹

Proponents, however, responded that property was needed not merely to ensure that some news was transmitted, but to ensure that the *right amount* of news was sent. While proponents acknowledged their obligation to acquire some news even if they received no legal protection, they said this would be a minimal amount. The *Argus* asserted that if the Bill was rejected, it was the public that would lose, not the *Argus* itself.²¹² This was because A.A.P. would "restrict its expenditure upon it within the narrowest limits practicable."²¹³ They claimed that what the public needed was "copious" amounts of news, and to achieve this, a form of legal protection was required.²¹⁴ In fact, with a limited property right, papers would, in principle, be able to spend as much or as little as they desired on telegraphic news. Consequently, the public could indicate its desire for such

208. *Id.*

209. *The Press and "The Associated Press,"* HERALD (Melbourne), Dec. 1, 1871.

210. *See 1871 Vict. Parliamentary Debates, supra* note 73, at 1877 (Jones's comments); *Press Monopoly, supra* note 177, at 9 ("The first right is embraced in the power of first publication and requires no Act of Parliament to secure it [E]very legitimate advantage is secured in the right of first publication."); *The Monopoly, supra* note 197 ("[I]n literature, in newspaper enterprise, as in nature . . . the early bird catches the worm.")

211. *See supra* note 210.

212. ARGUS (Melbourne), Nov. 21, 1871.

213. *Id.* (asserting that if the public wanted "copious messages day by day from three quarters of the globe . . . it must be prepared to give the short-lived protection asked for to the costly property which the Associated Press will have to purchase on its behalf"). "The more security given, the more journals will subscribe, and the longer will be the cable message." *Id.*

214. SYDNEY MORNING HERALD, Dec. 29, 1871 ("[I]t is for the good of all parties that information should be conveyed copiously. . . . It is, however, clear that no persons will supply anything like constant and copious news if exposed to have it purloined within half-an-hour after its arrival").

telegraphic news by purchasing papers carrying it even though they might be more expensive, or not doing so, where the public considered the additional news not worth the expense. As a result, the public would enable papers to continue to invest their resources in this manner.²¹⁵ Faced with the imponderable of what exactly the right amount of overseas news would be, the strategy of enabling the public to decide had some persuasive force.²¹⁶

Nevertheless, opponents went on to argue that such a proposed property right was not only unnecessary, but also contrary to the public interest.²¹⁷ First, the opponents argued, such property rights would limit the free dissemination of important and valuable information.²¹⁸ This would involve "a loss to the public that [could] scarcely be estimated."²¹⁹ Defenders of the free dissemination of information objected both to the general idea of property in the news,

215. *See id.*

216. John Alexander MacPherson, of Dundas, Victoria, supporting the proposal, said it avoided unfairness and would be in the public interest because it would ensure "the most ample news [would] be brought here" *1871 Vict. Parliamentary Debates*, *supra* note 73, at 1878.

217. *Press Monopoly*, *supra* note 177.

218. *Id.* To attempt to secure control of more than just first publication "would be to stop the free circulation of information, which is certainly contrary to all recognized public policy;" it therefore opposed legislation as "contrary to public policy and opposed to the progressive spirit of the age." *Id.*

219. LAUNCESTON EXAMINER, Dec. 12, 1871 ("It must be patent even to very obtuse individuals, that if every newspaper had its own news protected against republication, the dissemination of intelligence throughout the world would be seriously impeded, if not almost prevented, and this would be a loss to the public that can scarcely be estimated. . . ."). The *Cornwall Chronicle* took pleasure in the failure of the law to pass through the Tasmanian Parliament. The *Cornwall Chronicle* explained:

The attempt to create private property in public news is undoubtedly a mistake. . . . [Such a restriction] would tend more than anything else to limit the spread of knowledge, and to trammel the press. . . . It is for the interest of the public at large that the circulation of news should be thoroughly free and untrammelled, and for this reason we are glad the Legislature has rejected the proposed Telegram Protection Bill.

CORNWALL CHRON. (Launceston), Dec. 22, 1871; *The Telegraph Copyright Question*, EMPIRE (Sydney), June 27, 1872 (describing dangers of newspaper proprietors suppressing information temporarily to their own commercial advantage); EMPIRE (Sydney), June 28, 1872 ("The material interests, the honour and even the lives of a whole community might be placed at the disposal of a handful of people."). The GUNDAGAI TIMES, July 20, 1872, reprinted similar criticism from the *Cooma Gazette*.

but also, and with greater vehemence, to the provisions in the proposed legislation that would have prohibited any comment on the protected news or mention of its existence.²²⁰ As a result of the cost of transmission, cabled news was in a pithy and highly abbreviated form.²²¹ Proponents feared that, if not supplemented by a prohibition on commenting on the news, the right to control its reproduction would be worthless.²²² The problem was that the valuable commodity—the information itself—would be implicit in any commentary about events.²²³ To the opponents, however, this seemed scandalous.²²⁴ Freedom of expression was regarded as a fundamental element of the (British) tradition which bound the colonizers together.²²⁵

Opponents also argued the laws would curtail freedom of the press.²²⁶ Freedom of the press was valued as a bulwark against misgovernment, with a key role in ensuring accountability and underpinning democracy. For example, James Aikenhead, a member of the Tasmanian Legislative Council, urged his colleagues to oppose the measure because it would “interfere with the liberty of the press—the palladium of their liberty—which had been purchased at

220. See *supra* note 10 and accompanying text.

221. See *supra* text accompanying notes 120 (providing an example).

222. See LAUNCESTON EXAMINER, Dec. 12, 1871.

223. *Id.*

224. *Launceston Examiner* stated that “[t]here is something monstrous in thus seeking to interfere with the liberty accorded to the Press in every other part of the British dominions. It is an attempt to gag the press, to establish a sort of censorship.” *Id.* In a similar vein, the EVENING MAIL (Ballarat), Nov. 13, 1871, referred to “the scandalous method by which freedom of speech is destroyed and a tyrannous censorship of the Press established.” “If this freedom of comment is allowed—and we contend it must be, for no law will be allowed in a free country to stop it—it is useless to talk of a Copyright Act.” EVENING MAIL (Ballarat), Nov. 8, 1871; TASMANIAN, Oct. 21, 1871; *The Monopoly*, *supra* note 197 (“[T]he press would be gagged—comment or reference is denied, much more contradiction to the worst falsehood . . . Reuter would force us to swallow!”); S. ARGUS (N.S.W.), *reprinted in* DENLIQUIN CHRON. & RIVERINE GAZETTE, June 27, 1872 (“[N]o such power of dictatorial control over the free circulation of information must be permitted to be entrusted to private parties.”).

225. *1871 Vict. Parliamentary Debates*, *supra* note 73, at 1876 (Edward Langton) (“[F]reedom of comment . . . has been the characteristic of the English press and the English people for such a long period.”).

226. See, e.g., *The Monopoly*, *supra* note 197.

the cost of much blood and suffering."²²⁷ He believed that "when a press was free a people could not be enslaved."²²⁸ The proposed laws would enable one newspaper to act as a censor of others. Thus the laws were "subversive of the principles on which modern journalism is conducted."²²⁹

The opponents of property rights in news telegrams were particularly concerned about the impact of the property rights on the newspaper trade. They predicted granting the rights would lead to the closure of papers that were deprived of the freedom to print the latest news.²³⁰ This concern seems to have been predicated upon the potential abuse of the laws to enforce the power of the newspaper combination, the A.A.P. They expressed the fear that if the A.A.P. controlled access to all news it could decide not to supply certain

227. *Telegraphic Messages Property Bill*, MERCURY (Hobart), Dec. 20, 1871 (reporting the comments of James Aikenhead, Tasmanian Legislative Council). On the liberal theory of the press as the "fourth estate," see H. Reeve, *Essay VII*, 102 EDINBURGH REV. 470-98 (1855); George Boyce, *The Fourth Estate: The Reappraisal of a Concept*, in NEWSPAPER HISTORY FROM THE SEVENTEENTH CENTURY TO THE PRESENT DAY 19 (George Boyce et al. eds., 1978) (describing the historical origins of the idea). For a review of emerging criticisms of the idea in the late nineteenth century, see POTTER, *supra* note 47, at 38-45, 58-62, 160-62.

228. MERCURY (Hobart), Dec. 20, 1871.

229. *The Telegraph Message Copyright Bill*, reprinted in N. ARGUS (Rockhampton), Dec. 13, 1871. The *Miner* criticized the measure as being "subversive of the principles on which modern journalism is conducted A selfish attempt on the part of a few journals to gain a temporary and unnecessary advantage at the expense of the true and permanent interests of journalism." *Id.* Also, the *Northern Argus* referred approvingly to the words of a Ballarat contemporary:

The true principle of modern journalism is, that news once published shall be free as air, the only restriction being, that in the act of republication the newspaper from which the news may be taken shall be quoted. For our own part, we fully and unreservedly recognize this principle of action [To] talk of 'thieving' in connection with the republication of news of the day, however expensively obtained, when the journal which republishes it quotes its authority, seems to us a total misuse of words In conclusion, we may say that we regard this Telegraphic Messages Copyright Bill as a gross blunder, and as a selfish attempt on the part of a few journals to gain a temporary and unnecessary advantage, at the expense of the true and permanent interests of journalism.

N. ARGUS (Rockhampton), Dec. 13, 1871.

230. KYNETON OBSERVER, Nov. 23, 1872. †

papers, either out of commercial self-interest—the chief competitors of the *Argus* and the *Herald*, perhaps—or for political reasons, such as to undermine the commercial viability of papers propagated a different political or religious position.²³¹ The proposed laws would empower the A.A.P. as the sole conduit of overseas news, to decide who could print that news. Because subscribers and purchasers were attracted to this part of the papers, it was feared that the A.A.P. would indirectly control all other aspects of the Australian press.²³²

As these fears of a press monopoly spread and intensified, the A.A.P. attempted to explain that, in its view, the concerns were misplaced because they were based on a misunderstanding that the A.A.P. was a “monopoly.”²³³ It was wrong, the A.A.P. argued, to see it as a monopoly for two reasons. The first, and most important, was that anyone could join the organization as long as it was willing to pay for the news on fair terms.²³⁴ In fact, this was one of the terms

231. See *infra* text accompanying notes 380–397 (describing commercial self-interest motive). GUNDAGAI TIMES (N.S.W.), July 20, 1872 (criticizing the measure as “one step towards controlling and gagging freedom of expression with regard to political sentiments” (quoting the *Southern Argus*)).

232. *The Telegram Copyright Bill*, KYNETON GUARDIAN, Nov. 15, 1871 (criticizing the bill).

With the Bill passed in its present form, the other journals would be entirely at the mercy of the two wealthy proprietaries . . . the Bill would place in the hands of a few individuals the power of depriving the country newspapers of giving their readers the most interesting portion of each day’s intelligence by fixing the rate so high that it could not be paid.

Id. James Wilberforce Stephen added, “There was a great deal of force in the statement of the Chief Secretary, that there was a danger of such a Bill as this giving to a powerful journal, with a large capital, the monopoly of the newspaper business of the country . . .” 1871 *Vict. Parliamentary Debates*, *supra* note 73, at 1873. Jones urged the Assembly to wait by saying, “[a] number of newspapers objected to the Bill, and very naturally so, on the ground that it placed them entirely at the mercy of two newspapers.” *Id.* at 1888.

233. See *supra* note 232.

234. The *Argus* denied the charge of monopoly:

[E]very newspaper in the whole of these colonies has been invited to join the association upon terms so equitable as to commend themselves to general approbation. The greater the number of associated journals, the smaller will be the cost to each; and the two journals which have taken the initiative in this matter—*The Argus* and the *Sydney Morning Herald*—enjoy no special advantages, and have

of the deal between Hugh George and Reuters, and also one of the fundamental principles under which Mackinnon, owner of the *Argus*, had urged his managers to operate.²³⁵ As John Henry Barrow explained to the South Australian legislative assembly, “[m]onopoly was not only not intended, but positively excluded.”²³⁶ The A.A.P. argued that the second reason the concerns were misplaced was that other newspapers could, if they wished, form an organization of their own to obtain and distribute the news.²³⁷ Indeed, for a while in Victoria there was a proposal for such an arrangement.²³⁸ The practicality of such an enterprise, however, would have been severely prejudiced by the fact that the A.A.P.’s deal with Reuters was exclusive, so Reuters could not supply a competing organization.²³⁹ Furthermore, the four world press agencies, Reuters,

reserved to themselves no privileges other than those participated in by the most obscure country paper in Australia.

ARGUS (Melbourne), Nov. 14, 1871. In the Victorian Assembly, Angus Mackay, proprietor of the *Bendigo Advertiser*, reiterated that “[a]ll the papers would be invited to join the common enterprise.” *1871 Vict. Parliamentary Debates*, *supra* note 73, at 1876. On December 12, the *Mercury* made the same point to its Tasmanian readers: “[E]very journal which is willing to bear its proportion of the expense, less or more, of maintaining the necessary agency, is at liberty to join it.” *MERCURY*, Dec. 12, 1871.

235. *See supra* note 46.

236. South Australia, *Parliamentary Debates*, Legislative Assembly, 1872, 458. †

237. In the Victorian Assembly, Angus Mackay, asserted that “if a monopoly were attempted on the part of any one or more journals, it would be open to the others to band themselves together and form another associated press.” *1871 Vict. Parliamentary Debates*, *supra* note 73, at 1876.

238. *See infra* note 241.

239. *See supra* note 50. There were accusations that Reuters controlled the Java to Darwin link. For example, the *Empire* stated: “Messrs Reuter and Co. . . . have entire control over the transmission of all messages by the Java cable. They can, therefore, shut out any messages they please.” *EMPIRE* (Sydney), July 3, 1872 (emphasis omitted). While these accusations were probably unfounded, the belief seems to have been genuine. *See New South Wales, Report from the Select Committee on Telegraphic Communication*, *supra* note 44, at 92, 95, 96 (evidence of S. Bennett). While some of this was probably fantasy, Cracknell doubted that Reuters had influence over the Anglo-Australian Company. *Id.* Q. 104, at 6. Todd explained the “exceedingly high” charges by reference to the high costs, the need for a return, and shortage of business. *Id.* Q. 1390, at 61, 139; *see also* N.S.W. SELECT COMMITTEE INQUIRY INTO TELEGRAPHIC COMMUNICATION, *supra* note 80, QQ. 1569–76, at 70, 148 (Langley) (explaining Reuters’s charges). However, Bennett was right to be suspicious, given Reuters’s history: he had a

Wolff, Havas and the American Associated Press, had themselves come to a cozy agreement to the effect that Reuters would be the exclusive supplier in the British Empire.²⁴⁰ It would not have been particularly easy for an Australian association that hoped to compete with the A.A.P. to obtain the latest European news.²⁴¹

The claims by the *Argus* and the *Herald* that they gained no advantage from the arrangement were also questionable. Although any other paper could join the association and obtain the cabled news on "fair" terms, it was the A.A.P. that decided what was "fair." For a good while, the papers outside the A.A.P. opposed the passage of the Telegraphic Property laws simply because they did not know what the terms of the arrangements were likely to be.²⁴² Moreover, when the terms did become clear, some papers discovered that what was "fair" for the *Argus* and the *Herald* was not "fair" for them.²⁴³ In particular, given that the two founding members of the association were daily morning papers and had struggled to launch successful evening versions, it was not surprising that the terms offered to evening papers were less than generous.²⁴⁴ The two founding members also benefited from two other advantages. First, they controlled the content of the forty or fifty words that would be sent daily from London.²⁴⁵ Second, if the number of subscribers turned out to be large, it was quite possible that the *Argus* and the *Herald*

deal with the Atlantic Telegraph Company in 1858 to receive cable messages at half price. See READ, *supra* note 41, at 20–21.

240. See READ, *supra* note 41, at 57; Putnis, *supra* note 52, at 80–83.

241. In Victoria, the EVENING MAIL (Ballarat), Nov. 8, 1871, suggested that all the evening papers (seven in Victoria and one in New South Wales) form an organization to obtain their own news. Towards the end of 1871, there was talk of formation of a competitor association, to be called "The United Press." HAMILTON SPECTATOR, Dec. 9, 1871. The *Hamilton Spectator* reported that Mr. George Collins Levey, former member of the legislative assembly for Normandy, was to manage the new association and that twelve papers had already pledged their support. *Id.* However, this seems to have failed, and in mid-1872 the only competitor was Greville's agency.

242. See *supra* note 72 and *infra* note 290.

243. See *infra* text accompanying notes 388–390.

244. The evening papers were offered the same news that the morning papers had published on the same terms as the morning papers, but were not to be given any news which arrived between compilation of the morning paper and that of the evening. See *infra* text accompanying notes 388–390.

245. See SOUTER, *supra* note 76, at 80. The *Argus* sent an agent to London to control the content. *Id.*

would obtain the news for nothing. On the other hand, these two papers had taken a big risk in contracting with Reuters in advance of any commitment from other Australian papers and without any legal protection against copying,²⁴⁶ so it was also possible that they would end up considerably out of pocket.

The opponents of the telegraphic property laws had two rhetorical strategies by which to counter the argument of those proposing that the laws were needed for consistency. The first strategy was to deny that telegrams had the same characteristics as works of literature or patentable inventions. The *Tasmanian*, for example, humorously contrasted the subject matter of press messages with that of patents, inventions, authors' rights, and original compositions.²⁴⁷ Press messages, it said, "stand upon quite a different footing . . . [T]hey are not original compositions, and we hope they are not often 'inventions,' although instances of this even have happened."²⁴⁸ A more serious-minded analysis pointed to the basis for copyright protection—the need for a lengthy period of exclusivity so that the author could reap a reward—and contrasted this with press messages for which the compiler obtained a reward from first publication.²⁴⁹ Indeed, echoing arguments against the

246. See *supra* text accompanying notes 80–176.

247. *Press Monopoly*, *supra* note 177.

248. TASMANIAN, Oct. 21, 1871. This argument was repeated by the *Empire* during the debates in New South Wales: "In no circumstances . . . can the claim be made to a copyright, for those who obtain telegraphic intelligence, be regarded as similar in kind to that of an author or inventor to the fruit of his own intellectual labour." *EMPIRE* (Sydney), June 24, 1872; see also BENDIGO INDEP., Nov. 15, 1871 ("[I]t is quite preposterous to draw a parallel between the rights of original genius and the claims of common merchandise."); DENILQUIN CHRON. & RIVERINE GAZETTE (N.S.W.), June 27, 1872 (located at State Library of New South Wales) ("[T]he word 'copyright' is misapplied when conjoined with actual transactions of life which arise out of no originality of thought, and therefore cannot be subject to the protective laws which we conceive ought always to be enforced as against those who pirate the emanations from another man's brain.") (quoting the *Southern Argus*).

249. LAUNCESTON EXAMINER, Dec. 12, 1871. The *Miner* criticized the measure, stating that "[a] poem, a history, or even a photograph, requires time for its owner to get the value of it, but it is not so with news. . . . [T]he first publisher of news, however important, or however expensively obtained, practically gets the full value of the article without any further protection." *The Telegraph Messages Copyright Act*, N. ARGUS (Rockhampton), Dec. 13, 1871 (referring to a report in the *Miner*).

protection of new designs in mid-century Great Britain,²⁵⁰ it was said that “[a]n importer of toys or fancy articles could make out a better case for protection.”²⁵¹ The argument here was that press messages, in contrast to genuine literature or technology, produced nothing of lasting benefit to mankind. They were of fleeting interest and their value lying only in their temporary novelty.

The second strategy was to highlight further inconsistencies that giving protection over telegrams would create.²⁵² We have already noted that the legislation was limited to press telegrams from outside the colony, rendering it problematic to argue that the laws were based on universally-applicable principles of justice or fairness.²⁵³ The protection of telegrams, however, would highlight a more serious inconsistency than this. This was because it was common practice for newspapers, including Melbourne’s *Argus* or the *Sydney Morning Herald*, to extract paragraphs from other papers and publish them with attribution, but without obtaining consent or making payment.²⁵⁴ Given the brevity of the telegrams that were to receive protection under the proposed telegraphic property laws, how could these practices continue to be acceptable? In response, the *Argus* found itself arguing that such practices were also morally unacceptable.²⁵⁵ Such a position, though consistent, could not have helped its case. As the *Kyneton Guardian*, an opponent, observed, “supposing the moral rule thus laid down by our contemporary were

250. BRAD SHERMAN & LIONEL BENTLY, *THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW* 196 (1999).

251. *Telegraphic Messages Property Bill*, LAUNCESTON EXAMINER, Dec. 23, 1871 (reporting on the comments of James Aikenhead, made before the Parliament of Tasmania, Legislative Council, on December 20, 1871).

252. See *infra* note 255.

253. See *The Telegram Copyright Bill*, *supra* note 232.

254. Evidence of the *Argus* and the *Sydney Morning Herald*’s practice of referring to other newspapers with attribution can be found in most editions. See, e.g., SYDNEY MORNING HERALD, Feb. 3, 1872 (abridging from the *Newcastle Chronicle*).

255. Regarding the arguments based on consistency, the *Argus* asserted that “morally, if not legally, the copyright of the leading articles, the criticisms, and intelligence procured at the cost of the proprietors of any journal, is vested in them, and although such articles and items are copied or extracted from it, sometimes with and sometimes without acknowledgement, the act of appropriation thus permitted is not the less dishonest and inequitable.” *The Telegram Copyright Bill*, *supra* note 232 (quoting the *Argus*).

strictly adhered to, its own columns would frequently be very barren of interest."²⁵⁶

In addition to refuting the proponents' arguments for protection, the opponents of telegraphic property laws offered some of their own objections and some alternative ways to alleviate the problem of the costs of telegraphic transmission without resorting to private property rights. One objection was that the proposals were premature. When the Bills were introduced in Victoria and Tasmania in November and December 1871, the submarine telegraph was almost complete and the overland route was a year away from opening.²⁵⁷ Another objection was that the laws would produce interminable litigation, or alternatively, prove impossible to enforce.²⁵⁸ A more significant objection was that the laws were novel in the sense that they appeared nowhere else in the world. Certainly there were no such laws in either Great Britain or the United States.²⁵⁹ This was startling, given that the United States, like Australia, would have had to obtain European news by way of submarine telegraph and with similar expense.²⁶⁰ What, they speculated nervously, could be so different about Australia to justify this reaction?²⁶¹ The colonists wondered whether it could be right

256. *Id.*

257. See 1871 *Parliamentary Debates*, *supra* note 73, at 1888 (Jones) (urging the legislature to wait because the line was not yet running).

258. James Wilberforce Stephen said the proposals would lead to "speculative actions." *Id.* at 1874. Edward Langton stated that they would either be of "no avail" or produce "perpetual litigation." *Id.* at 1877. One problem he anticipated, given the widespread belief in "spiritism," was proving that the information was taken from A.A.P. sources rather than being "independently" gathered. *Id.* at 1877. James Aikenhead, a member of the Tasmanian Legislative Council, argued that "they might as well try to mop up the Atlantic as to stop intelligence from other colonies coming to Tasmania. The idea was preposterous." LAUNCESTON EXAMINER, Dec. 23, 1871; MERCURY (Hobart), Dec. 20, 1871.

259. See 1871 *Vict. Parliamentary Debates*, *supra* note 73, at 1874 (Vale) ("In dealing with this Bill, it should be recollected that the principle was an entirely novel one. There was no such Act in any part of the world . . ."). James Aikenhead, a member of Tasmanian Legislative Council stated: The bill was "opposed to every principle of legislation. At home in England there was no complaint of piracy. The paper to which the telegram came first achieved its object by being the first to publish it." MERCURY, Dec. 21, 1871.

260. See *infra* text accompanying notes 502-506.

261. 1871 *Vict. Parliamentary Debates*, *supra* note 73, at 1876 (Edward Langton) ("[I]t certainly seemed a novel proposal to forbid freedom of

that they have laws that had not been thought necessary elsewhere, and certainly considered it risky to try an experiment that had not been tried before.²⁶²

Supporters of the telegraphic laws responded by stating that the situation in Australia differed significantly from those of other nations, and that those differences explained the need for a novel approach.²⁶³ Supporters also argued that in these circumstances the Australian colonies should have the self-confidence to break new ground and do unprecedented things.²⁶⁴ The differences between Australia and the United States lay in the costs of the telegrams, the sizes of the populations, and the Associated Press arrangements that were already in place.²⁶⁵ In terms of cost, whereas the telegraphic

comment upon telegraphic intelligence . . . What was there, in the circumstances of this colony which rendered it necessary to take a course here which had not been taken in England or in America . . . ?”) Joseph “Coffee” Jones urged the Victorian Legislative Assembly to wait, saying “[t]here must be something very peculiar in the circumstances of the case if such a measure was necessary in this country when no Act of the kind existed in America . . .” *Id.* at 1877. One of the supporters of the Bill in Victoria, Mackay, argued that the U.S. law did give such protection. *Id.* at 1877 (stating that “the presumption was that the American law afforded the same protection to newspapers in America that this Bill was intended to give the associated press in this country”). But Jones rightly denied that this was so, stating that “it was a fact that no such measure as this had been passed by the American legislature or had ever been submitted to it.” *Id.*

262. *The Telegram Copyright Bill*, *supra* note 232, reported: “The general question as to whether newspaper copyright law is advisable or practicable, is a wide one. The fact that it has never before been attempted may be taken as tolerably conclusive: that such a law is not desirable.” *See also 1871 Vict. Parliamentary Debates*, *supra* note 73, at 1874 (James Wilberforce Stephen) (describing proposals as “novel and hazardous”).

263. *See, e.g., Telegraphic Copyright*, AUSTRALASIAN (Melbourne), Nov. 18, 1871 (explaining that the differences of the cost of transmission and size of population between the U.S. and Australia justified the Bill’s passage).

264. *AGE* (Victoria), Nov. 3, 1871, stated: “It is therefore peculiarly appropriate that the experiment of protecting press telegrams should be originated in the Australian colonies.” The *Age* also argued that if the law proved problematic, it could be repealed. *Id.*; *see 1871 Vict. Parliamentary Debates*, *supra* note 73, at 1878 (John Alexander MacPherson) (“In some matters there was no occasion to search the world or look to other countries for precedents, but all that was requisite was to be guided by common sense . . .”); *Id.* (regretting “that honourable members were so fond of comparing other countries with this, and of arguing that, because certain things were not done elsewhere, they should not be done here”).

265. *See Telegraphic Copyright*, *supra* note 263.

communication between Great Britain and the United States involved a simple and relatively cheap operation, the cables from Europe to Australia would “travel three times the distance, [would] traverse two continents and several seas, and [would] have to be repeated by a dozen instruments, at a dozen intermediate stations, each operation increasing the cost of transmission”²⁶⁶ A second important difference lay in the size of the newspaper market in the United States. Australia had a population of approximately 1.75 million in the 1870s, while the United States had a population of approximately 45 million.²⁶⁷ Reflecting this difference in population, the United States had ten times the number of dailies, approximately 230.²⁶⁸ As the *Australasian* explained, the prosperity of the U.S. newspapers meant proprietors could afford to purchase the telegrams and “wink at the kind of robbery which the Legislature appears to be not indisposed to legalise.”²⁶⁹ A third difference lay in the fact that the Associated Press of New York had established an organization for the collection and distribution of news in the United States.²⁷⁰ This enabled it to enter into a good deal with Reuters to obtain and spread the cost of the European news widely amongst its subscribers, so that “the cost of cable messages [was] reduced to a minimum for each associated newspaper.”²⁷¹

The opponents of information property rights contained in news telegrams sometimes proffered their own suggestions for resolving the fundamental problem of the cost of telegraphed European news.²⁷² Chief amongst these was the idea that the government should take some action either to reduce the costs of the cables or to arrange for news to be transmitted to Australia and made it available

266. *Id.*

267. *Id.* A Melbourne paper explained that “while the charges are unparalleled in world’s history, the Australian population is absurdly small.” DAILY TELEGRAPH, Nov. 11, 1871.

268. *Telegraphic Copyright*, *supra* note 263.

269. *Id.*

270. ARGUS (Melbourne), Nov. 14, 1871.

271. *Id.*

272. *See, e.g.*, EVENING MAIL (Ballarat), Nov. 13, 1871 (stating that all that is appropriate is that newspapers attribute the source). “[H]onest fairness as between editor and editor subsists amongst all journals of respectability and influence.” *Id.*

to all papers.²⁷³ The latter approach was met with skepticism by those who were inclined to distrust the government, since it appeared to present opportunities for governmental control of news content.²⁷⁴

II. THE PROGRESS OF THE BILLS IN THE DIFFERENT AUSTRALIAN STATES

Given the consistent and repeated use of arguments for and against the proposed property rights, it may be surprising that the Bills were successful in some states, but not others. In some cases, it may be that the arguments of one side or the other seemed to carry more intellectual force in one state rather than another. However, statute law is rarely, if ever, merely the consequence of the legislature carefully weighing (or “delicately balancing”) the intellectual arguments placed in front of it. Members of a legislature often act, or fail to act, out of self-interest, ambition, loyalty, or for reasons upon which intellectual rhetoric has little impact. Such rhetoric itself is often merely the outward expression of that interest. In the Australian colonies of the early 1870s, the configurations of interest and ideology are as difficult to decipher as they ever are. This section adds to the previous account of the rhetoric by describing how the Bills progressed in each state, and attempts to offer some explanation of the petitioners’ success and failures.

A. *Victoria*

The first Bill was introduced into the Victorian legislature, with the support of its government, headed by Gavan Duffy.²⁷⁵ The Bill,

273. The idea seems to have been first floated in the *Ballarat Courier*. See BALLARAT COURIER, Nov. 7, 1871. Supporters in the Victorian Legislative Assembly were James Wilberforce Stephen and William Vale. 1871 *Vict. Parliamentary Debates*, *supra* note 73, at 1873.

274. Angus Mackay rejected the government’s idea as “utterly absurd.” 1871 *Vict. Parliamentary Debates*, *supra* note 73, at 1876. “Work done in such a way would be open to the gravest suspicion no matter what Government was in office.” *Id.* Some members had suggested that the Government should obtain the information and “should retail it like new milk in matutinal sixpennyworths.” *Telegraphic Copyright*, *supra* note 263. Echoing Mackay’s criticisms, one commentator in the *Australasian* observed the difficulties with trusting “the genuineness of the article sold” in ensuring that no insider trading took place. *Id.* The commentator added that “as a general rule, Governments make a mess of everything they undertake to perform outside of their own province.” *Id.*

as initially framed, proposed a period of forty-eight hours of protection,²⁷⁶ but was in most other respects in the form described in the introduction to this article. Initially, it seemed as if there would be few problems with obtaining smooth passage of the law, even though Parliament was due for prorogation within a short time.²⁷⁷ Introducing the second reading,²⁷⁸ Duffy said he believed there would be “a universal feeling that they should protect those who were at great expense to furnish the public with the information that would come by telegram.”²⁷⁹ This did not prove to be the case, however. After a few papers made initial objections,²⁸⁰ momentum rapidly built up against the Bill, so that it had to be amended at the

275. SIR CHARLES GAVAN DUFFY, *MY LIFE IN TWO HEMISPHERES* (1898). Duffy was a democrat, liberal, free trader and, in relation to one of the most contentious issues of the day, the distribution of land, a “selector.” These characteristics made him an unlikely supporter of conservative papers, so we can only assume that he acted out of a sense of justice. *EVENING MAIL* (Ballarat), Nov. 13, 1871, described Duffy’s act in taking on the bill as indicative of “a rash stupidity that does him no credit.”

276. *Telegram Copyright Law*, *EVENING MAIL* (Ballarat), Nov. 13, 1871.

277. For approving sentiments and predictions, see *Telegraphic Communication with Europe*, *supra* note 78. “We presume there will be no difficulty about obtaining a protective law of the character proposed. The Government and the Legislature cannot fail to be convinced of the reasonableness and even necessity of giving the associated press the security required.” *Id.* (proposing a longer period of protection); *The Anglo-Australian Telegram*, *HERALD* (Melbourne), Nov. 8, 1871 (“If ever there was a subject which commended itself to the prompt attention of Parliament, it is this one . . .”); *ARGUS* (Melbourne), Nov. 8, 1871 (“It will probably pass through its remaining stages today.”); *MOUNT ALEXANDER MAIL*, Nov. 11, 1871; *DAILY TELEGRAPH* (Melbourne), Nov. 11, 1871; *SYDNEY MORNING HERALD*, Nov. 13, 1871 (“Such a measure will be doubtless readily carried.”).

278. *1871 Vict. Parliamentary Debates*, *supra* note 73, at 1765 (First and Second Reading).

279. *Id.*

280. *BALLARAT COURIER*, Nov. 7, 1871 (preferring “not a Copyright Act, but a state subsidy to the companies whose lines would be connected with Australia, so that all papers be they rich or poor, small or great, can be placed on the same footing in supplying their readers with English news”); *BENDIGO INDEP.*, Nov. 8, 1871 (suggesting that a copyright would be unenforceable and proposing subsidy); *BENDIGO INDEP.*, Nov. 15, 1871. The *KYNETON OBSERVER*, Nov. 9, 1871, also signaled conditional approval for the Bill only, calling for “a proviso, to the effect—that no one paper should be able to secure a preference. If a dozen journals join as an association, on the receipt of a telegram, twelve copies should be taken and distributed simultaneously . . .” †

Committee stage.²⁸¹ The forty-eight hour period of exclusivity was reduced to twenty-four, and the Bill was passed as a temporary measure, with a duration of one year.²⁸² The Government apparently regretted ever having touched the Bill.²⁸³

Where did this opposition come from and how did it have such a dramatic effect? Rather surprisingly, given that the Bill was introduced at the behest of the *Argus*,²⁸⁴ the opposition did not come from its Melbourne rivals in the daily market, the *Age* and the *Daily Telegraph*.²⁸⁵ In fact, despite the fact that the *Age* and the *Argus* had clashed directly over the issue of exclusive access to Reuters news earlier in 1871,²⁸⁶ even the *Age* supported the Bill's passage. Opposition came instead from the "country press,"²⁸⁷ particularly the

281. 1871 *Vict. Parliamentary Debates*, *supra* note 73, at 1872–78; *id.* at 1887–90.

282. *Id.* at 1765 (Third Reading and Passed).

283. GIPPSLAND TIMES, Nov. 21, 1871 ("Mr. Duffy admitted that it was all a mistake, every member had something to say against it . . .").

284. ARGUS (Melbourne), Nov. 3, 1871 (putting the case, and suggesting the claims of the press upon the legislature were "undeniable and irresistible").

285. For support from the AGE, Nov. 21, 1871, see the leader: "[W]e cling to the belief that Parliament will take the rational course—make the bill as perfect as possible, pass it into law, and thus initiate an experiment in legislation which gives promise of being a successful one." See also *Telegraphic Messages Copyright Bill*, DAILY TELEGRAPH (Melbourne), Nov. 11, 1871 (citing support from the *Daily Telegraph*). The *Age*'s support for the Bill seems all the more remarkable given its initial desire to compete with the *Argus* and *Sydney Morning Herald* combination described by Putnis, *supra* note 52, at 80.

286. AGE, Mar. 29, 1871.

287. ARGUS (Melbourne), Nov. 21, 1871. The geographical divisions became clear to both proponents and opponents. For example, the ARGUS (Melbourne), Nov. 21, 1871, referred to an objection "from a section of the country press, which appears to be of opinion that it should have the right of free warren, turbarry, fishery, and what not, over the intelligence which appears in the Melbourne newspapers. They mistake a permitted encroachment for a prescriptive right." THE EVENING MAIL (Ballarat), Nov. 20, 1871, referred to the opposition of the "country journals," saying "we have never seen the country press so unanimous." The *Evening Mail* complained about the *Argus*' reply to the complaints of the country press, saying "[t]he country Press does not care to be left entirely to the mercy of one proprietary able to dictate what terms it pleases." *Epitome of News*, EVENING MAIL (Ballarat), Nov. 21, 1871. KYNETON OBSERVER, Nov. 23, 1872 called the Telegraphic Copyright Bill a weapon to destroy the "up country papers." † There were some country papers, however, who expressed support for the Bill. See BACCHUS MARSH EXPRESS, Nov. 11, 1871 (arguing that the fears were exaggerated). "We see

papers situated in the goldfields,²⁸⁸ and the Melbourne evening paper, the *Evening Herald*.²⁸⁹ It seems that the goldfield papers had yet to be invited into the A.A.P., and many were ignorant of its terms and skeptical as to its motives.²⁹⁰

Moreover, the idea of restricting the dissemination of information must have seemed particularly counterintuitive in a

nothing to object to in this, although we do not contemplate being able to join the Associated Press in this matter of telegrams, and therefore this copyright will prevent our extracting the latest telegrams from our Melbourne contemporaries." *Id.* In contrast with the *Ballarat Courier*, however, the *Express* had no objection to this because it thought "provincial newspapers are not expected to do much more than chronicle local events." *Id.* The absence of cablegrams would not "ring their death knell." *Id.* The commentator reasoned that nearly all subscribers to provincial papers also subscribed to some other paper, and therefore did not expect their local paper to compete in the matter of general news. *Id.* Moreover, the *Express* anticipated that, in time, acceptable deals would be made between the Associated Press and the "up-country press." *Id.* For similar sentiments that "these things will right themselves," see WARRNAMBOOL EXAMINER & W. DIST. ADVERTISER, Nov. 3, 1871.

288. See EVENING MAIL (Ballarat), Nov. 8, 1871 (highlighting concerns with the A.A.P. and calling for its operations to be placed in the hands of an independent body); CASTLEMAINE REPRESENTATIVE, Nov. 8, 1871 (pointing to dangers of making the *Argus* "in the position of actual controller of the news market," and suggesting some government control instead); BENDIGO INDEP., Nov. 8, 1871; EVENING MAIL (Ballarat), Nov. 13, 1871 (attributing the Bill to a "mad lawyer" at the *Argus* and describing the proposal as "tyrannous" and intended "to kill the minor journals in the colonies"); BALLARAT STAR, Nov. 13, 1871 (describing the measure as "conspicuous at once for its promoters' greed and the Ministry's folly"); KYNETON GUARDIAN, Nov. 15, 1871 (firmly concluding that "such a law is not desirable"); BENDIGO INDEP., Nov. 15, 1871; GIPPSLAND TIMES, Nov. 21, 1871 (referring to the absurdity of the Bill, which it predicted would cause it to be stillborn). The *Argus* was stunned and responded to the various arguments at some length. ARGUS (Melbourne), Nov. 14, 1871.

289. After initially supporting the Bill, the *Evening Herald* joined the critics. See *The Anglo-Australian Telegram*, EVENING HERALD (Melbourne) Nov. 8, 1871 (suggesting protection should last one week rather than forty-eight hours); *The Associated Press Again*, EVENING HERALD (Melbourne), Dec. 14, 1871.

290. As late as December 2, 1871, the *Hamilton Spectator* complained that the press was "entirely in the dark." HAMILTON SPECTATOR, Dec. 2, 1871. For earlier criticisms of this sort, see BENDIGO INDEPENDENT, Nov. 11, 1871; BENDIGO INDEPENDENT, Nov. 14, 1871; *More About the Copyright Bill*, EVENING MAIL (Ballarat), Nov. 16, 1871 (quoting the *Kyneton Guardian*); KYNETON OBSERVER, Nov. 23, 1871. †

mining environment where commercial decisions were so directly linked to information. For example, decisions as to whether it was worth mining turned on the prices of metals abroad, and decisions on where to mine turned on the latest information about other finds.²⁹¹ Some suggested that it was a matter for government to ensure there was enough information and that it was available to all equally.²⁹² Others thought the A.A.P. should be regulated.²⁹³ Ultimately, louder and stronger, most believed the Bill should be rejected.²⁹⁴

Whatever the reason, the opposition intensified and was soon reflected in the opinions expressed in the legislature, particularly when the Bill went into Committee.²⁹⁵ Two *Ballarat* members, W.C. Smith and Joseph 'Coffee' Jones, expressed the same criticisms as the country press. Smith suggested an alternative way of ensuring the supply of news without establishing a monopoly: a government purchase and supply of news.²⁹⁶ Jones asserted that papers would be sufficiently rewarded through lead time and urged the Assembly to resist adopting this type of law since the United States had not found it necessary when the submarine link was established there.²⁹⁷ Opposition was not confined to representatives from outside Melbourne, however. In fact, it was William Vale, a member of

291. WALKER, *supra* note 20, at 162 (describing the characteristics of New South Wales' "mining district" papers, noting the keenness of the readers for information but also the commercial instability of such operations when population movements could be dramatic).

292. BALLARAT COURIER, Nov. 7, 1871.

293. See HAMILTON SPECTATOR, Dec. 2, 1871; EMPIRE, June 24, 1872.

294. See EMPIRE, July 8, 1872.

295. The Committee stage is reported in *1871 Vict. Parliamentary Debates*, *supra* note 73, at 1872–78; see also AGE (Melbourne), Nov. 17, 1871.

296. *1871 Vict. Parliamentary Debates*, *supra* note 73, at 1872 (W.C. Smith). James Wilberforce Stephen also spoke in favor of government publication of essential telegraphs in a gazette. *Id.* at 1873. Gavan Duffy explained that at the Intercolonial Conference, it was suggested that each colony should make a contribution for messages for the information of its government, but that the suggestion "was not entertained." *Id.* For criticism of this idea, see *id.* at 1876, where Angus Mackay called the proposed government service "utterly absurd." See also *id.* at 1888 (James Patterson) (referring to experiences in New Zealand). For experiences with a limited governmental news service in New Zealand, see Harvey, *supra* note 51.

297. *1871 Vict. Parliamentary Debates*, *supra* note 73, at 1877.

Parliament for Collingwood,²⁹⁸ who seemed to be the most effective opponent.²⁹⁹ Vale was a controversial figure. He was detested by the *Argus* and the *Daily Telegraph*, but adored by the *Herald* and the *Age*.³⁰⁰ He was variously accused of boorishness, rowdiness, and ponderous buffoonery,³⁰¹ but complimented for being a staunch liberal and defender of the people's cause.³⁰² Pointing to the poor drafting of the legislation, Vale argued that the Bill was premature in two key respects. First, it anticipated the establishment of the cable. Surely, he argued, it would be better to wait and see what the consequences of the cable would be rather than to speculate.³⁰³ Secondly, he observed that while these laws were sought to buttress a monopoly in the A.A.P., the goldfield papers had no idea as to what

298. Vale did have strong connections with the Goldfields, having previously been a member of Ballarat West. See AUSTRALIAN DICTIONARY OF BIOGRAPHY (1851-1809) 324-25 (Geoffrey Serle & Russel Ward eds., 1976).

299. See HERALD (Melbourne), June 26, 1872.

300. Vale attended Syme's leaving lunch before his departure in March 1871 to negotiate with Reuters in London. AGE (Melbourne), Mar. 29, 1871.

301. In its pre-election assessments, the *Argus* had described him as "an unmitigated nuisance," whom it hoped would be at the bottom of the poll. ARGUS (Melbourne), Mar. 13, 1872. See also DAILY TELEGRAPH (Melbourne), Mar. 15, 1871 (accusing Vale of "evil-speaking, envy, and rowdiness"); *The Hon. W.M.K. Vale, Commissioner of Customs*, WKLY. TIMES, Dec. 23, 1871 ("As a public man, Mr. Vale has simply been a bore . . ."); GAWLER TIMES, Dec. 15, 1871; COLLINGWOOD ADVERTISER (Victoria), Nov. 30, 1871 (criticizing Vale by referring to him as a "political chameleon" and noting that "the more intelligent and respectable of all shades of political opinion openly repudiate him"); MARYBOROUGH & DUNOLLY ADVERTISER (Victoria), Mar. 22, 1871 (calling Vale an "inflated bore and pretentious windbag," but opining that he would enliven debates with his "ponderous buffoonery").

302. See AGE (Melbourne), Nov. 23, 1871 (referring to Vale as "a staunch and pronounced Liberal"); HERALD (Melbourne), Dec. 11, 1871 (calling him "the consistent friend of the people's cause"); EVENING MAIL (Ballarat), Nov. 24, 1871 (depicting him as "essentially the representative of Democracy"); *The Commissioner of Customs Returned*, PORTLAND GUARDIAN (Victoria), Dec. 11, 1871 (depicting him as "a pronounced and honest, if not the most polished, politician"); GEELONG ADVERTISER, Nov. 25, 1871.

303. 1871 *Vict. Parliamentary Debates*, supra note 73, at 1875. The *Sydney Morning Herald* treated this as having been the telling argument, reporting that "[i]t was suggested in the Assembly that it would be time enough to pass such a measure when the necessity for it had been actually experienced, and this opinion is possibly held by a sufficient number to prevent its surviving another night's discussion." *Our Melbourne Letter*, SYDNEY MORNING HERALD, Nov. 22, 1871.

the terms of the A.A.P.'s arrangements were.³⁰⁴ If a few papers knew the terms, the rest were "entirely in the dark."³⁰⁵

With the Bill left in Committee, the papers continued their battle. The *Australasian*, an offshoot of the *Argus* managed by none other than Hugh George, launched a personal attack on Vale by stating that "[h]e [was] very much in the dark, and to screech, under such circumstances, is one of the characteristics of the bird from which he [had] probably descended."³⁰⁶ The *Age* and the *Argus*, in particular, also sought to answer some of the criticisms,³⁰⁷ suggesting that the legislation be amended to meet some of the objections.³⁰⁸ The country papers, however, continued to express opposition.³⁰⁹ When the Committee resumed, the Assembly was keen to reach a compromise. Duffy proposed to reduce the period of protection from forty-eight to twenty-four hours, and successfully resisted an attempt to reduce it to a mere six hours.³¹⁰ This was a skillful way to change the impact of the Bill. It could prevent another paper from republishing the news on the same evening, but not the next day. This maneuver had the capacity to divide the Bill's opponents. It meant the proposed law would not affect the goldfield dailies, which would republish the A.A.P. news from the Melbourne press the following morning. This would leave the evening papers as the

304. 1871 *Vict. Parliamentary Debates*, *supra* note 73, at 1875.

305. *Id.*

306. *Telegraphic Copyright*, *supra* note 263.

307. The *Argus* addressed the "misapprehension" that the honorable members were under—that this was an attempt to establish a monopoly in English telegrams. ARGUS (Melbourne), Nov. 17, 1871. The *Argus* attempted to refute the criticism that no such measure had been found necessary, or at least had been passed, in England or America by pointing to the "exceptional position" in which the Australian colonies were. *Id.*; see also ARGUS (Melbourne), Nov. 21, 1871.

308. AGE (Melbourne), Nov. 21, 1871. The *Age* argued that the Bill should be amended to take account of the criticisms, but urged that the measure not be postponed. *Id.* Interestingly, it countered the suggestion that the law was a dangerous experiment by referencing the relationship between the Bill and existing copyright protection. *Id.*

309. See *id.*

310. 1871 *Vict. Parliamentary Debates*, *supra* note 73, at 1887, 1890. Duffy also proposed adding a clause clarifying that there was no infringement if a person obtained information independently from outside the colony in a similar way. This clause was, in fact, adopted. *Id.* at 1887 (Charles Gavan Duffy).

primary target of the Bill, and particularly Melbourne's *Evening Herald*.³¹¹

At Vale's suggestion, another amendment was added limiting the operation of the Act until December 31, 1872.³¹² The argument was that this would give the House the opportunity to judge the workings of the Bill. This seemed plausible since it was anticipated that the line would open early in 1872.³¹³ Because the Bill was being rushed through before the close of session, such a condition was met with general approval.³¹⁴ With these amendments, the Bill passed through the Assembly and the Council without any further debate.³¹⁵ In fact, since the Act was not renewed and the cable did not fully open until the middle of November 1872, the Victorian legislature had little opportunity—only six weeks—to judge its operation.³¹⁶

311. See *The Associated Press Again*, EVENING HERALD (Melbourne), Dec. 14, 1871. Despite the maneuver, the country papers continued to criticize the bill; see, e.g., KYNETON OBSERVER, Nov. 23, 1871. †

312. Vale also suggested an amendment, which was adopted, requiring that the messages only gain protection if published within thirty-six hours of their receipt. 1871 *Vict. Parliamentary Debates*, *supra* note 73, at 1889.

313. See MERCURY (Hobart), Dec. 20, 1871.

314. 1871 *Vict. Parliamentary Debates*, *supra* note 73, at 1889–90 (John Crews). Even Angus Mackay, owner of the *Bendigo Advertiser*, who was closely associated with the A.A.P., accepted that the temporary nature of the Act was justified, though he indicated he was not speaking for the A.A.P. *Id.* at 1887 (Angus Mackay).

315. *Id.* at 1886. The Governor's assent was granted two days later. *Id.* at 1906.

316. The Act was not renewed and so lapsed on December 31, 1872. See EMPIRE (Sydney), July 3, 1872. There is a suggestion in the debates that followed in New South Wales that Duffy had changed his mind about the appropriateness of the legislation. See *The Telegram Monopoly*, DENLIQUIN CHRON. & RIVERINE GAZETTE, July 18, 1872 (reprinting a column from the *Dubbo Dispatch* which claimed that Duffy would have rather suffered his right arm to be cut off than support the Bill); *The Telegram Monopoly*, EMPIRE (Sydney), July 3, 1872 (reprinting a column from June 26, 1872, of the *Evening Herald* in which it claimed that the *Argus* had decided to exclude the *Evening Herald* from the A.A.P. because it was not profitable for the *Argus* to have intercolonial telegrams published in the *Evening Herald* before they were published in the *Argus*); EMPIRE (Sydney), June 26, 1872 (stating that the Victorian Act would not be revived because “[a] general feeling [was] established that it [was] an unjust monopoly”); EMPIRE (Sydney), June 24, 1872 (claiming that Duffy said he would rather have lost his right hand than consent to the measure); *Telegrams Copyright Bill*, SYDNEY MORNING HERALD, June 22, 1872.

The real impact of the Victorian Act was to set a precedent that petitioners elsewhere could use in support of their claims.

B. Tasmania

Soon after the matter was debated in Victoria, a bill was introduced into the Tasmanian legislature, in much the same form as the Victoria Bill, proposing a forty-eight hour property.³¹⁷ The justification for such a copyright had already been ventilated in the Tasmanian press, even prior to the discussions in Victoria, and had generated quite a lot of heat.³¹⁸ This was essentially a consequence of the commercial rivalry between Tasmania's two leading newspapers, the *Mercury* and the *Launceston Examiner*. Each was based in one of the two population centers of Tasmania, Hobart in the South and Launceston in the North, respectively.³¹⁹ The *Mercury* readily agreed to subscribe to the A.A.P. service and argued in support of legislative protection in October 1871.³²⁰ It explained the importance of international news, its expense, and the threat of copying, and consequently the need for some protection.³²¹

The Launceston papers, the *Tasmanian* and the *Cornwall Chronicle*, which had declined the A.A.P.'s offer, joined the *Launceston Examiner* in opposition.³²² The newspaper debates soon came to be reflected in the parliamentary arena. The owner of the *Mercury*, John Davies,³²³ was himself a member of the Legislative Assembly, and in October he met with the Tasmanian government to

317. LAUNCESTON EXAMINER, Dec. 12, 1871.

318. *See id.*

319. Morris Miller said that between the 1860s and the 1880s the *Mercury* had "practically no opposition." E. Morris Miller, *A Historical Summary of Tasmanian Newspapers*, 2 TAS. HIST. RES. ASS'N: PAPERS & PROC. 17, 36 (1952) (located at State Library of Tasmania).

320. *See* MERCURY (Hobart), Oct. 16, 1871. The *Mercury* said it took on itself "the serious burden . . . [of] the interests of the colony as well as the reputation of *The Mercury* leave us no option." *Id.*

321. *See* MERCURY (Hobart), Oct. 17, 1871.

322. CORNWALL CHRON. (Launceston), Dec. 22, 1871; LAUNCESTON EXAMINER, Dec. 16, 1871; LAUNCESTON EXAMINER, Dec. 12, 1871; TASMANIAN, Oct. 21, 1871.

323. John Davies was Member of the House of Assembly (M.H.A.) for Franklin. *See* G.F.J. Bergman, *John Davies 1813-1872: A Jewish Convict, Journalist, Actor, Policeman, Publican, Parliamentarian*, 26 TAS. HIST. RES. ASS'N: PAPERS & PROC. 85 (1979) (relating a remarkable individual biography on Davies' life).

persuade it to support the proposal.³²⁴ Indeed, it was reported that the Tasmanian government took upon itself the task of persuading the governments of the other Australian colonies to follow suit.³²⁵ To avoid any apparent conflict of interest, ownership of the paper was transferred from Davies to his two sons, John George and Charles Ellis.³²⁶ Davies himself introduced the Bill in December 1871, which received general support from his colleagues in the Assembly.³²⁷ Emphasis was placed on the inherent justice of the proposal, the need for the news, and the importance of uniform action with the other states. Indeed, the *Mercury* reported the passage of the Victorian Act, describing it as having been done “with very little hesitation.”³²⁸ Although the *Launceston Examiner* had published the arguments against such a press monopoly (which were picked up by a couple of objectors)³²⁹ prior to the second reading, the Bill was read a second time and, following a few amendments at the committee stage, was passed by the Assembly.

Despite the support of the Colonial Secretary, the Bill was rejected by the upper house, the Legislative Council.³³⁰ There, the proprietor of the *Launceston Examiner*, James Aikenhead, spearheaded the opposition. The arguments against the Bill were articulated in the issue of the *Launceston Examiner* two days before

324. MERCURY (Hobart), Oct. 17, 1871 (reporting that “[a] deputation waited on the Government yesterday by appointment on the subject of the English telegrams of the Associated Press. . . . The Ministry admitted that a very strong case had been made out.”).

325. *Id.* (“The Government, we understand, ha[s] already taken action in the matter by agreeing yesterday to communicate with the Governments of the other Colonies on the subject, so that the matter may be entered upon simultaneously.”).

326. *See* MERCURY (Hobart), Oct. 2, 1871.

327. SYDNEY MORNING HERALD, Dec. 8, 1871 (quoting an A.A.P. telegram that “Mr. Davis has introduced a Telegrams Copyright Bill into the Assembly . . . [and the] ministers promise to support it”).

328. MERCURY (Hobart), Dec. 12, 1871.

329. In the Assembly, Adolphus Frederick Rooke and Abye Douglas spoke against such protection. Douglas said that as far as he could learn, the newspapers in Launceston were not desirous that such a Bill should pass because it was a Bill seeking protection for a single newspaper. *Telegraphic Messages Bill*, LAUNCESTON EXAMINER, Dec. 16, 1871.

330. The Legislative Council at this time was described as “the lair of the predatory monied, pastoral, and propertied classes.” Stefan Petrow, *The Bully of Tasmanian Politics: John Donnellan Balfe 1850–80*, 46 TAS. HIST. RES. ASS’N: PAPERS & PROC. 117, 132 (1999) (located at University of Tasmania).

the second reading in the Assembly, and a week before the Council considered the Bill.³³¹ In that edition, the *Launceston Examiner* pointed to the dangers of a press monopoly and the threat to the public interest such laws would pose, arguing that the investors in such news gained adequate rewards by virtue of first publication.³³² It also pointed out that the Victorian Bill was “rushed through, though not without some strong opposition, just before the prorogation.”³³³

The Tasmanian Council debate was intense.³³⁴ Aikenhead set out the arguments against “any such exceptional and dangerous legislation,” characterizing the laws as impositions on the liberty of the press and pointing out that no such laws had been found desirable in Great Britain or the United States.³³⁵ He said “he believed it would be a disgrace to the colony if such a bill were allowed to pass.”³³⁶ Others responded positively, including the Colonial Secretary who asked whether “intercolonial messages” should also be included.³³⁷ Aikenhead seemed astonished, saying he “did not think he was ever in such a fog in his life—to hear [Honorary] members speak in the way they did.”³³⁸ The Council was divided and ultimately decided to defer further consideration of the Bill, which in effect defeated it, by seven votes to six.³³⁹

It is impossible to say whether a careful weighing of the arguments for and against the Act persuaded the Council to defer consideration, or whether other allegiances or interests were the motivation. Aikenhead’s presence in the Council certainly enabled the arguments against the Bill to be fully articulated. Moreover, the dispute may have appeared to many members of the Council as an argument between north and south, a division with well-established loyalties. Looking at the voting in the Legislative Council, the

331. See LAUNCESTON EXAMINER, Dec. 12. 1871.

332. See *id.*

333. *Id.*

334. See *Telegraphic Messages Property Bill*, MERCURY (Hobart), Dec. 20, 1871.

335. See *id.*

336. *Id.*

337. *Telegraphic Messages Property Bill*, MERCURY (Hobart), Dec. 21, 1871.

338. *Id.*

339. *Id.*

majority in favor of the Bill were from Hobart,³⁴⁰ while the majority of those opposed were from the North.³⁴¹

C. South Australia

The first real success for telegraphic property laws was in South Australia, for here—in contrast with Victoria—the law was adopted on a permanent basis. Unlike the vitriolic debates that had occurred in Victoria and Tasmania, and which followed in New South Wales, the matter raised little comment or opposition when it was introduced in South Australia, and this allowed the Bill to be readily passed.³⁴² Arthur Blyth, a former Premier of the state, introduced the Bill into the Assembly in February 1872.³⁴³ The Bill was not passed until June, but this delay was attributable to problems within the government, not to the Bill itself.³⁴⁴ Although there was a small indication of dissent from one country newspaper, the proposal failed to produce the press reaction that it had produced elsewhere. Within

340. Kennerley, Crowther, and Wilson were from Hobart; Maclanahan was from Jordan in the Southeast; Fysh was from Buckingham; and Whyte was from Pembroke. PHILIP MENNELL, *THE DICTIONARY OF AUSTRALASIAN BIOGRAPHY* 177, 181 (London, Hutchinson & Co. 1892).

341. Aikenhead and Dawson were from Tamar; Keeler was from Mersey; Thomson was from Meander; Cameron was from North Esk, with the exceptions being Gellibrand who was from Derwent, near Hobart, and Dunn from Cambridge, also in the Southeast. *Id.* at 508.

342. The *Mercury* had predicted that the Parliaments of South Australia and New South Wales would immediately be asked to pass Newspaper Copyright Acts. *MERCURY* (Hobart), Oct. 17, 1871. As it happened, nothing could be done in late 1871 because Parliament was dissolved and new elections were held in November.

343. South Australia, *Parliamentary Debates, House Assembly*, 1872, 276 [hereinafter *1872 S. Austl. Parliamentary Debates*]. † The Honorable Arthur Blyth was the M.H.A. for Gumeracha. He had been Premier from November 10, 1871, until January 22, 1872. Just why Blyth took the initiative is unclear. See Index to the Colonial Secretary's Correspondence, GRG 24/8 (located at the South Australian State Records Office) (having no reference to any approach or initiative in 1871 or 1872). Blyth in fact claimed he had "brought this Bill forward only from reading the debate in the Legislature of another colony, and from seeing the general feeling there was in its favour." *Id.*

344. In particular, the fall of the Boucaut ministry, early in March 1872, hindered the Bill. *A Warning*, *GUARDIAN* (Kapunda), Mar. 23, 1872. The new Ministry, led by Ayers, immediately required a recess to prepare and mature its policies. Thus, the Telegram Bill did not have an opportunity to proceed until April. See *GAWLER CHRON. & N. ADVERTISER*, Mar. 2, 1872. †

the South Australian legislature, the proposal gained positive approval.³⁴⁵ Why was this so?

The press reaction, or lack thereof, can probably be attributed to the mutual interests of the owners of the two leading Adelaide papers, the *Register* and the *Advertiser*, who both proposed to join the A.A.P. service.³⁴⁶ In contrast to the situations in New South Wales and Victoria, which were characterised by aggressive competitive behaviour, the leading papers in South Australia operated in parallel commercially.³⁴⁷ In New South Wales, the two leading proprietors competed fiercely but in different markets. The *Empire*, which ran the *Evening News*, competed with the *Sydney Morning Herald*, which had no evening paper. In Victoria, moreover, the dailies did not have evening editions, and thus had divergent interests from those of the Melbourne *Evening Herald*. In Adelaide, conversely, the terms of the A.A.P. deal would apply equally to the two competitors. Even though the two main papers were in competition, they cooperated to obtain the A.A.P. news. By mirroring each other commercially, neither stood to gain an advantage or to lose out by adopting a copyright law. Both had equal reason to support, or oppose, the passage of the laws.³⁴⁸ Thus, the

345. For statements of approval, see 1872 *S. Austl. Parliamentary Debates*, *supra* note 343, at 456–57 (Glyde) † (stating the Bill was in the public interest); *id.* (Conner) (supporting the general principle); *id.* (Erskine West) (believing the measure was fair); *id.* (Hughes) (believing that there was “no question as to the general support of the Bill”). The Bill was also supported by Henry Edward Bright, John Howard Angas, and William Henry Bunday; however, Conner and Judah Moss Solomon expressed worries over the communication clause. *Id.* The bill was further considered on May 9, 1872. *Id.* at 1024. Finally, on June 4, 1872, the Council received the Bill and gave it a first and second reading. *See id.* On June 5, 1872, the Committee of the Legislative Council made some minor amendments. *See id.* at 1096.

346. For discussion of newspaper ownership in South Australia during this period, see Susan Carey, *The Prolific Press: Newspapers in South Australia 1836–90* (1978) (unpublished B.A. honors thesis, Flinders University) (located at Flinders University, S. Austl., SQ 905/19).

347. The *Register* had a sister paper, the *Evening Journal*, that operated from 1869–1923, and a weekly, the *Observer*. Both were both owned by Charles Day and others. The *Advertiser* had an associated evening paper, the *Adelaide Express*, and a weekly, the *Chronicle*, which were owned by J.H. Barrow and Thomas King. For background on Charles Day, see BIOGRAPHICAL INDEX OF SOUTH AUSTRALIANS 1836–1885, at 388 (Jill Statton ed., 1986).

348. In fact, both papers supported it. *See* ADVERTISER (Adelaide), Apr. 11, 1872; ADELAIDE EXPRESS, Feb. 15, 1872 †; ADELAIDE EXPRESS, Apr. 11,

position of the *Advertiser* and the *Register* was most similar to that of the Melbourne dailies—the *Age*, the *Telegraph*, and the *Argus*—all of which supported the proposed Bill.

Moreover, the demographic situation in South Australia was significantly different from that in Victoria and Tasmania. In South Australia, Adelaide was the only substantial city: there was no population centre with its own newspaper interests. There was nothing equivalent to the Goldfields in Victoria, with its host of daily papers, or to Launceston in Tasmania, with its North-South tensions.³⁴⁹ The population of the places outside Adelaide could only sustain weeklies or bi-weeklies, which would hardly be affected by the twenty-four hour proposed copyright.³⁵⁰ In fact, few of them were at that stage of publishing telegraphic news at all.³⁵¹ Not

1872 †; ADELAIDE EXPRESS, May 30, 1872 †; REGISTER (Adelaide), Apr. 11, 1872; *Copyright in Telegrams Bill*, OBSERVER (Adelaide), Feb. 24, 1872; see also Carey et al., *supra* note 363, at 26–27 (remarking that while commercial rivalry was keen, there was no rivalry in the editorial columns, both sharing similarly conventional attitudes).

349. The sizes of the various towns are clear from the census of 1872. See South Australia, Parl Paper No 9 (1872) 259–61 †. At that point, Adelaide's population was estimated to be 27,208. *Id.*

350. In Gawler, the *Gawler Times and Goldfield Reporter*, a weekly that sold for 2d, operated in competition with the *Bunyip*, which was owned by William Barnet and sold for 3d. In Mount Gambier, a similar rivalry existed between the *Mount Gambier Standard* and the *Border Watch and South Eastern District Advocate*; both were bi-weeklies, published in Mount Gambier and sold for 3d. The *Guardian*, a weekly that sold for 3d, was published initially in Gumeracha and then in Clare, but after March 1872, it moved to Kapunda with correspondents in Clare, Koorunga, and Auburn. David and Andrew Fyfe Taylor ran several publications: the *Wallaroo Times and Mining Journal*, a bi-weekly that sold for 3d in Port Wallaroo on the Yorke Peninsula; the *Kapunda Herald and Northern Intelligencer* in Kadina from 1864 to 1951; the *Southern Argus* in Strathalbyn (thirty-five miles from Adelaide) from 1866; and the *Northern Argus* in Clare (ninety miles from Adelaide) from 1869.

351. Of the *Guardian*, the *Border Watch*, the *Gawler Times*, the *Bunyip*, and the *Wallaroo Times*, only the *Wallaroo Times* and the *Border Watch* seemed to carry substantial telegraph columns. The *Wallaroo Times* had Adelaide telegrams "From Our Own Correspondent" and intercolonial ones "From the Daily Papers," suggesting the latter were unpaid for. When the international service was available, the *Wallaroo Times* did not feature such news. In contrast, when the international service started in 1872, the *Border Watch* subscribed to the A.A.P.

surprisingly, while the Adelaide papers had leaders on the Bill, the country papers paid it scant attention.³⁵²

To the extent that opposition to telegraphic copyright was expressed in South Australia, it came from Ebenezer Ward.³⁵³ Ward was the proprietor of a country paper, the *Guardian*, a weekly published in Kapunda.³⁵⁴ Ward referred to the proposals as “absurd”³⁵⁵ and at the time of the Bill’s first reading gave notice that he would oppose the Bill.³⁵⁶ As it turned out, Ward was not present at the second reading,³⁵⁷ and by the time he tried to make his opposition known during the Committee stage, it was too late to influence the Assembly.³⁵⁸

352. The *Gawler Times* did not even note the passage of the measure, while the *Guardian* followed it but referred to it in passing as a “very absurd measure.” The *Bunyip* noted that Blyth intended to introduce the Bill, and the *Wallaroo Times* merely noted by telegram its introduction. WALLAROO TIMES, Feb. 17, 1872; see also KAPUNDA HERALD, Feb. 16, 1872 (noting Ward’s opposition); N. ARGUS (Clare), Feb. 23, 1872. A week later, the *Kapunda Herald* declared that it supported the Bill and would be willing to pay. KAPUNDA HERALD, Feb. 23, 1872; see also KAPUNDA HERALD, Apr. 12, 1872. Those papers, which stood to lose from the legislation, may simply not have known much about it. In April, after the second reading, the *Bunyip* said it could not comment on the legislation Blyth was introducing because it had not seen the bill. BUNYIP (S. Austl.), Apr. 13, 1872 (located at State Library of South Australia).

353. During his lifetime (1837–1917), Ward was the Minister of Agriculture and Education for Gumeracha, as well as a member of the Assembly, representing Gumeracha. See GAWLER TIMES, May 31, 1872 (reporting that Ward was held in high esteem by the southeastern papers, the *Border Watch* and the *Mount Gambier Standard*). For a biographical sketch, see ADVERTISER (S. Austl.), Oct. 9, 1917; OBSERVER (Adelaide), Oct. 13, 1917; AUSTRALIAN DICTIONARY OF BIOGRAPHY, *supra* note 298, at 351–52; HOWARD COXON ET AL., BIOGRAPHICAL REGISTER OF THE SOUTH AUSTRALIAN PARLIAMENT 1857–1957 (1985). †

354. Ward explains the move from Clare because it would be possible for him “to give all requisite attention to the paper there, and also to [his] work in Parliament.” GUARDIAN (Kapunda), Mar. 23, 1872.

355. 1872 S. Austl. Parliamentary Debates, *supra* note 343, at 276 (Feb. 14, 1872); GUARDIAN (S. Austl.), Apr. 13, 1872.

356. *Id.*

357. REGISTER (Adelaide), Apr. 11, 1872 (reporting that “[t]he opposition, of which notice was given when the subject was first brought forward, did not further exhibit itself”).

358. We can speculate as to the reasons for Ward’s failure to express opposition at the second reading. First, he may simply have been occupied with other matters which he considered more important, in particular, issues of

Lack of significant opposition in the papers goes a long way to explain the smooth passage of the Bill through the legislature. Indeed, it is worth noting that, as in Tasmania and Victoria, the A.A.P. interests were well represented in the Assembly by J.H. Barrow.³⁵⁹ Nevertheless, lest it be thought that this was simply some sort of private legislation, it is worth commenting on two of the apparent motives of the legislature in adopting telegraphic copyright.

First, the South Australian legislature expressed a desire to adopt the telegraphic copyright laws for the sake of intercolonial harmony.³⁶⁰ More specifically, South Australia seems to have felt obliged to adopt laws that were similar or identical in character to those adopted elsewhere in Australia.³⁶¹ As Blyth stated, "if it was wise in one place it would be wise [in South Australia]."³⁶² In particular, he did not want the absence of such laws in South Australia to undermine the successful operation of the Acts that were said to have passed in Victoria, New South Wales, and Tasmania.³⁶³

land reform. Ward had been elected "as a radical land reformer," AUSTRALIAN DICTIONARY OF BIOGRAPHY, *supra* note 298, at 351, "with a campaign that persuaded the government to suspend auction sales pending a more liberal credit selection law." J.B. HIRST, *ADELAIDE AND THE COUNTRY 1870-1917*, at 88 (1973) ("Between 1870 and 1874 Ward was commonly regarded as the best representative the farmers had."); REGISTER (Adelaide), Apr. 28, 1880 †; REGISTER (Adelaide), May 6, 1880. † Second, he may have been reluctant to oppose a measure supported by Blyth. The *Bunyip* asserted that Ward "*dare not* oppose any suggestion made by Mr. Blyth." BUNYIP (S. Austl.), Feb. 10, 1872. † Third, Ward may have realized that opposition was futile because of Barrow's presence in the cabinet and the dominance of Adelaide interests over country interests in the legislature. See BUNYIP (S. Austl.), Jan. 27, 1872. †

359. There were three legislative members with newspaper interests: Ward, Barrow, and Derrington. See GUARDIAN (S. Austl.), May 11, 1872 (reporting attempts to get these three excluded from the Assembly); BUNYIP (S. Austl.), May 11, 1872. † For a collection of obituaries for Barrow, see JOHN H. BARROW, M.P.: NOTICES OF HIS LIFE, LABOURS AND DEATH (1874). †

360. See *Telegrams Copyright Bill*, REGISTER (Adelaide), Apr. 11, 1872.

361. John Henry Barrow stated that the measure "was an exact copy of the sort of Bills that were pointed out as models for our own imitation." 1872 S. Austl. Parliamentary Debates, *supra* note 343, at 458 (Apr. 10, 1872).

362. *Id.* at 455.

363. On the first reading, Blyth said that as there was a copyright in the other colonies, if we were to fail to pass a similar law here there would be a sort of smuggling telegrams across the Border, which would be hardly fair. 1872 S. Austl. Parliamentary Debates, *supra* note 343, at 276 (Feb. 14, 1872). On the second reading, he repeated his concern, explaining that

In this sentiment, we encounter one of the most remarkable aspects of the legislative process, namely that it was based on a mistaken belief that such laws had already been passed without controversy in Victoria, Tasmania, and New South Wales.³⁶⁴ The papers supporting the legislation helped to perpetuate this misconception.³⁶⁵

Second, it should not go unnoticed that the South Australian legislature had its own interests in maximizing the use of the telegraph system, a system in which it had invested heavily.³⁶⁶ This interest may not have been explicitly articulated during the passage of the 1872 Act, but it could not have been buried very deep in the legislature's thoughts. The question of the Overland link had been a controversial one for the previous two years, beginning when the South Australian government independently undertook financing of

It seemed to him that unless they passed a similar Bill they should have a considerable amount of complaints from the other colonies of piracy, smuggling, or whatever it might be called of telegrams. [I]t would be very unfair indeed if the telegrams published and circulated by the two principal journals in Adelaide and those in Victoria and New South Wales could be taken by agents in Adelaide and telegraphed to country papers in Victoria.

Id. at 455 (Apr. 10, 1872). In the Council, Honorable W. Morgan said "he had been informed that similar Acts had been passed in [New South Wales] and Victoria . . . [and argued that] the Acts passed in the other colonies would be useless without the passing of this Bill." *Id.* at 1096 (June 5, 1872).

364. Introducing the Bill, Blyth explained that "[i]n New South Wales and Victoria this copyright had been given, if not in a third colony, and he thought it would be unreasonable that in this colony . . . a similar protection should be denied." *Id.* at 276 (Feb. 14, 1872).

365. *Copyright in Telegrams Bill*, OBSERVER (Adelaide), Feb. 24, 1872 (noting that the bill is almost identical to acts passed by the legislatures of three other Australian colonies); REGISTER (Adelaide), Apr. 11, 1872 ("[T]he Bill had been passed in Victoria and New South Wales—it might have been added in Tasmania too, for that colony took the lead in legislating for the protection of enterprising publicists against literary pirates [T]he least we can do . . . is to pay them the compliment of showing our acquiescence in their views."). Many seemed to operate on the assumption that if a Bill had been introduced, it must have been passed. South Australian papers had reported the introduction of the bills in the legislatures of New South Wales and Victoria. *See, e.g.*, BORDER WATCH (Mount Gambier), Nov. 25, 1871 ("Bills have been introduced into the Victorian and New South Wales' Parliaments for the purpose of securing copyright in European telegraph messages sent through the Australian Associated Press.").

366. Introducing the Bill, Blyth noted that South Australia "was perhaps the most interested." 1872 *S. Austl. Parliamentary Debates*, *supra* note 343, at 276 (Feb. 14, 1872).

the construction of the Overland line from Darwin to Adelaide.³⁶⁷ This was a distance of more than 2,000 miles, largely through desert, and a project that required more than 36,000 telegraph poles.³⁶⁸ The actions of the South Australian government in undertaking such a project had not only generated resentment from Queensland,³⁶⁹ which had been considered an alternative route for the link,³⁷⁰ but also caused a degree of consternation within South Australia, whose 188,644 residents had to fund the project.³⁷¹ As delay followed delay, the venture was seen as costly to South Australia's standing and crippling to its finances.³⁷² The *Gawler Times*, for example,

367. In 1869, three possible projects presented themselves: from Western Australia to Ceylon, from Java to Queensland, and from Java to Darwin. The Anglo-Australian Telegraph Company, negotiating through Captain Osbourn, approached the South Australian government in March 1870. The Telegraph Company agreed to terminate the submarine link at Darwin if the South Australian Government would pledge to have the overground cable open by December 31, 1871. For an historical account, see *The Overland Telegraph Historical Sketch*, ADELAIDE EXPRESS, June 25, 1872 †; *The Overland Telegraph*, BORDER WATCH (Mount Gambier), Nov. 20, 1872; IPSWICH OBSERVER, June 4, 1870. †

368. See *The Overland Telegraph*, BORDER WATCH (Mount Gambier), Nov. 20, 1872 (describing the project).

369. ARGUS (Melbourne), June 7, 1871; ARGUS (Melbourne), July 31, 1871 (describing the controversy as a "paper war" being conducted between South Australia and Queensland).

370. The alternative plan, to link the line via Normanton down through Queensland, had many supporters. See ARGUS (Melbourne), May 11, 1871; ARGUS (Melbourne), May 20, 1871; QUEENSLANDER, Oct. 14, 1871; QUEENSLANDER, Oct. 21, 1871 †; SYDNEY MORNING HERALD, Dec. 22, 1871; SYDNEY MORNING HERALD, Dec. 29, 1871.

371. On the population of South Australia at this time, see 4 CLARK, *supra* note 23, at 221. Darwent and Dalwood obtained a contract for the northern section of the line, and they commenced building in August 1870. *The Overland Telegraph Line—Adelaide to Darwin* (Nov. 11, 2004), http://www.wilmap.com.au/alice_springs/as_otl.html. However, in June 1871, they had defaulted on the contract, and the government was forced to take over. *Id.*

372. GUARDIAN (S. Austl.), June 8, 1872 (reflecting that the South Australian government had acted "with such unseemly and disastrous haste"); BUNYIP (S. Austl.), Feb. 3, 1872 † ("This gigantic enterprise has been attended with a series of disasters from first to last, and clearly shows that South Australia is not competent to undertake such large works without neighbourly assistance. The telegraph is essentially an Australian question, and the whole colonies ought to have united in carrying out the great work . . . we find one delay following another, one unforeseen calamity after another."); SYDNEY MORNING HERALD, Mar. 18, 1872. Even after it was completed, the

said it was “ruining our honor and bringing ridicule on the colony” as well as “absorbing more public money than [South Australia could] afford to spare.”³⁷³ The original estimated cost for the South Australian project, £120,000, more than doubled.³⁷⁴

As the opening of the line approached, the need to ensure that it was used to the maximum extent possible was important for South Australia, not only to restore its sense of honor, but, more importantly, to recoup some of the investment. South Australia would charge twenty shillings for a twenty word message.³⁷⁵ Press messages would constitute a significant part of the traffic. Enacting laws to maximize the use of the line was then of particular benefit to South Australia. In effect, it was a mechanism by which the other colonies would come to pay for the construction of the line. Indeed, a cynic looking at South Australia’s desire to cooperate with the other colonies by adopting the Telegraphic Copyright Act might see those expressions of “altruism” as a rhetorical strategy to pressure the other colonies to adopt such laws.

D. New South Wales

After Victoria, New South Wales was the most important place in which the A.A.P. hoped to have Telegraphic Copyright laws

Border Watch observed that “[t]here may still be doubts as to the prudence of South Australia in going single-handed into the scheme.” *The Overland Telegraph*, BORDER WATCH (Mount Gambier), Nov. 20, 1872. The *Walleroo Times* remarked that “as an example of sheer hopeless, stupid, fatuous and obstinate blundering, the attempted connection of Port Augusta and Port Darwin telegraph line is without parallel throughout Australia.” WALLAROO TIMES, May 22, 1872. However, the *Walleroo Times* was more positive once the line was connected describing it as “a great national work.” WALLAROO TIMES, Nov. 20, 1872. The *Maryborough Chronicle* in Queensland gloated that South Australia’s “quixotic attempt to monopolize the avenues of communication . . . ha[d] plunged her people into debt, and . . . [would] be a source of heart-burning and loss for years to come.” MARYBOROUGH CHRON., July 13, 1872.

373. GAWLER TIMES, Apr. 5, 1872.

374. *The Overland Telegraph*, BORDER WATCH (Mount Gambier), Nov. 20, 1872 (estimating that a total of £320,000 was spent to complete the project).

375. Letter from Chief Secretary, South Australia, to Colonial Secretary, New South Wales (Aug. 22, 1871) (located at State Records of South Australia, Indices GRG 24/4 and 24/6), reprinted in *New South Wales, Further Correspondence Respecting Telegraphic Communication with Europe*, 40 NSW Parl. Papers (1872) 1221, at 1222..

adopted. This was not only where the *Sydney Morning Herald* was based, but also a state with a sizeable population of approximately 500,000 people.³⁷⁶ We can be fairly certain that although the *Herald* approached the government in early November 1871,³⁷⁷ the Bill failed to make a second reading before the legislature dissolved for elections early in 1872.³⁷⁸ The new ministry attempted a further effort and got as far as a motion for a second reading. At this point, it became clear that the law would not be passed, and the Bill was subsequently withdrawn in August 1872.³⁷⁹ Of all the attempts to obtain legislation in Australia, the attempts in New South Wales experienced the least success. Why was this so?

376. According to Manning Clark, the population was estimated at 503,981. CLARK, *supra* note 23, at 221.

377. Fairfax approached the Colonial Secretary by letter on November 1, 1871. Letter from John Fairfax, *Sydney Morning Herald*, to Colonial Secretary, New South Wales (Nov. 1, 1871) † (New South Wales State Archive, document Colonial Secretary, Correspondence Received, 71/8489). The letter is no longer in existence; however, the register books record that the letter prompted introduction of the Bill on November 13, 1872, December 5, 1872, and June 19, 1872. It seems that the government decided to support the bill, but had George Alfred Lloyd, a private member, introduce it on November 24, 1871. SYDNEY MORNING HERALD, Nov. 25, 1871 (reporting that George Alfred Lloyd (Member of the Legislative Assembly, Newcastle PMG) had moved for leave to introduce a copyright bill). The Tasmanian *Mercury* reported that the government had undertaken to introduce a bill in the last quarter of 1871. *See infra* note 378. Robertson prepared the bill but advised the government against introducing it. PETER PUTNIS, *NEW MEDIA REGULATION: THE CASE OF COPYRIGHT IN TELEGRAPHIC NEWS IN AUSTRALIA, 1869–1912*, at 9 (2003), <http://www.crf.dcita.gov.au/papers03/newmediaregulation.pdf>.

378. MERCURY (Hobart), Oct. 17, 1871 (“We are glad to learn, therefore, that the Parliaments of South Australia and New South Wales will be immediately asked to pass Newspaper Copyright Acts to protect the publication of at least the English telegrams in these colonies for forty-eight hours.”). The *Australasian* also reported that the Martin cabinet had decided to introduce a Telegrams Copyright Bill into the New South Wales Parliament. AUSTRALASIAN (Melbourne), Nov. 25, 1871. †

379. The bill was introduced into the Assembly by George Wigram Allen and had its first reading on June 12, 1872. *See* SYDNEY MORNING HERALD, June 13, 1872. The motion for the second hearing occurred on June 21, 1872, and was adjourned. *See Telegrams Copyright Bill*, SYDNEY MORNING HERALD, June 22, 1872. A second reading was scheduled first for June 28, 1872, and then for July 3, 1872, but did not take place. The bill was withdrawn on August 9, 1872. EMPIRE (Sydney), Aug. 10, 1872. †

As with the proposals in Victoria and Tasmania, the problems stemmed from commercial antagonisms, but in New South Wales, the problems seem to have been different in both their nature and intensity. In contrast to the debates in both of those states, it is unlikely that any geographical basis for the dispute in New South Wales existed. In fact, there was no great expression of opposition between the Sydney papers and papers elsewhere. Rather, the division was among commercial interests within Sydney.³⁸⁰ With regard to the newspapers, the market was divided between two rivals—John Fairfax, who owned the *Sydney Morning Herald*,³⁸¹ and Samuel Bennett, who ran the *Empire*.³⁸² Their rivalry was fierce, longstanding, and irreconcilable. In addition, there was a further commercial antagonism between the two press agencies—the newly founded A.A.P. and an existing agency run by Ernest Greville. As we will see, the New South Wales legislature readily reflected these antagonisms, to such an extent that it became apparent that Telegraphic Copyright proposals were doomed to fail.

The fact that there was something of a newspaper duopoly in Sydney, the chief population center within New South Wales, may have seemed analogous to South Australia, where the proprietors of the *Register* and the *Advertiser* shared similar interests and favored the passage of the copyright law. Importantly, however, in Sydney the two leading newspaper proprietors stood in different positions.

As of 1871, the Fairfaxes ran two papers—the daily *Herald* and the weekly *Sydney Mail*,³⁸³—but no evening paper. In 1870, Fairfax had launched the *Afternoon Telegram*, but it proved unprofitable and

380. There were no dailies outside of Sydney until the *Newcastle Pilot* began operating in 1874. WALKER, *supra* note 20, at 169. Although a few of the country papers, such as the *Maitland Mercury*, supported the bill, most opposed it. See MAITLAND MERCURY, June 27, 1872.

381. SOUTER, *supra* note 76, at 65; GAVIN SOUTER, HERALDS AND ANGELS: THE HOUSE OF FAIRFAX 34 (1991) [hereinafter SOUTER, HERALDS AND ANGELS].

382. In 1850, Henry Parkes established the *Empire*, but it went out of business in 1858. SOUTER, *supra* note 76, at 66. Bennett started publishing it on May 23, 1859. WALKER, *supra* note 20, at 75.

383. SOUTER, *supra* note 76, at 34 (explaining the foundation of the *Sydney Mail* in 1860 for country readers and indicating that the circulation was 5,000).

only lasted a few months.³⁸⁴ It may have appeared that Bennett and Fairfax held similar commercial interests since Bennett's *Empire* competed with the *Herald*,³⁸⁵ and his weekly, the *Town and Country Journal*, competed with the *Sydney Mail*.³⁸⁶ But in 1867, Bennett started operating an evening paper, the *Evening News*,³⁸⁷ which meant that his commercial interests were different from those of Fairfax, particularly with regards to telegraphic information. Once the cable link was established, the *Empire* would either have to pay to obtain its news from the A.A.P. or some alternative source, or simply try to compete with the *Herald* without such news. Ideally, the *Evening News* preferred to republish both the international telegrams featured in the morning papers and to subscribe to those that arrived in the meantime.³⁸⁸ The needs of Bennett's prospering *Evening News* put Fairfax in what was, for Bennett, an uncomfortably strong bargaining position, because Fairfax controlled the terms under which the A.A.P. would offer news to the evening papers.³⁸⁹ There was no chance of Bennett supporting a proposed law prohibiting the *Evening News* from referring to the morning's telegrams. This additional legal prohibition would enhance what was

384. *Id.* at 67 (describing the *Afternoon Telegram* as "a half-hearted enterprise, marked at the start by portents of failure"). Fairfax tried again in 1875 with the *Echo*. WALKER, *supra* note 20, at 76-77.

385. Bennett had competed with the *Herald* on price, introducing the first penny morning paper in New South Wales in 1868. The *Sydney Morning Herald* sold for 2d in late 1871, and was eight or twelve pages long. "[W]e do not know the effect of these changes on its circulation." WALKER, *supra* note 20, at 74; SOUTER, *supra* note 76, at 66 (stating that from 1865, the *Herald* continued to grow while its main competitor the *Empire* declined and fell). In February 1875 Bennett incorporated the *Empire* in his *Evening News*, leaving the *Herald* in sole occupation of the morning field. *Id.* This remained the case until 1879, when J.M. Lynch established the *Sydney Daily Telegraph*. Assuming that the *Empire* was already struggling in 1871-1872, the proposed telegraphic copyright law and A.A.P. charges would have been all the more unwelcome.

386. In 1871, apparently, the *Journal* had the largest circulation in the colony. WALKER, *supra* note 20, at 77 (citing TOWN & COUNTRY J., Jan. 7, 1871).

387. This paper began operating on July 29, 1867.

388. See WALKER, *supra* note 20, at 76. Because the *Evening News* published the latest telegraphs, it was of interest to subscribers of the morning papers. EMPIRE (Sydney), July 23, 1867. †

389. In 1867, the *Evening News* was selling 8,000 copies and was considered a "very large" circulation. EMPIRE (Sydney), June 28, 1872.

already a strong lead-time position for Fairfax's *Herald* over the *Empire*. In contrast, Fairfax was not likely to be happy with the *Evening News* reprinting the A.A.P. telegrams from the morning papers without subscribing to the service.³⁹⁰

The clash between the *Herald* and the *Empire* over this issue was of little surprise. This was partly because the two papers tended toward different political positions. The *Herald* was conservative,³⁹¹ while the *Empire*, reflecting Bennett's democratic views, was liberal.³⁹² The clash was also predictable given the longstanding rivalry in obtaining telegraphic news when the boats arrived in Adelaide.³⁹³ Because there were few lines, and because telegraphy

390. On December 29, 1871, the *Sydney Morning Herald* urged the adoption of the law in a discussion about the opening of the telegraph to Port Darwin:

The value of a telegram, under some circumstances, would be immense. . . . [I]t is for the good of all parties that information should be conveyed copiously. That this may be the case, it is the duty of the Government to protect those who use the telegraph against a system of piracy which would appropriate messages five minutes after publication in the journals which had paid for them. It is probable, however, that copyright may, in some cases, give power to restrain this appropriation, where it is flagrantly unjust. At all events, a neighbouring colony has passed a law for this purpose. Perhaps it may be that the public conscience is not sufficiently alert to detect the palpable injustice of this piracy, and that, providing the news comes to hand, it may be very indifferent at whose cost. It is, however, clear that no persons will supply anything like constant and copious news if exposed to have it purloined within half-an-hour after its arrival. . . . This consideration would, probably, supplement the force of that natural justice, which, when not warped with strong interests, will approve the Victorian law.

SYDNEY MORNING HERALD, June 27, 1872. "There seems to be still considerable misapprehension about the aim and tendency of the Telegram Copyright Bill." *Id.*

391. The *Sydney Herald* was founded in 1831, and in 1841, Fairfax took it over. WALKER, *supra* note 20, at 35. Fairfax was a staunch upholder of British monarchy, Protestant Christianity, rule of law, capitalism, and private property. See SOUTER, *supra* note 76, at 26–27.

392. SOUTER, *supra* note 76, at 6; WALKER, *supra* note 20, at ch. 7.

393. According to Bennett, the *Herald* and the *Empire* had at one time received a joint message. This, however, was before Fairfax decided to compete by sending the fastest steamer to meet the incoming mail boat and race into port with the news. New South Wales, *Report from the Select Committee on Telegraphic Communication*, *supra* note 44, at 94. † Cracknell's evidence suggested that Fairfax did not begin this practice until 1859 or 1860. *Id.* at 92.

was a relatively slow process, the first message received for transmission at the Adelaide office obtained a lengthy time advantage and might well have arrived at Sydney hours before those destined for rivals. While the various Telegraphy Acts required the offices to send the messages in the order of their receipt, Bennett believed that the offices favored the *Herald* in the transmission of messages.³⁹⁴ In fact, Bennett claimed he "had never had a message from Adelaide on arrival of the mail within seven hours of the *Herald* for the last ten years."³⁹⁵ Regardless of the veracity of Bennett's claims that this discrepancy was a result of corruption,³⁹⁶ it was inevitable that the rivalry and the antipathy it generated would affect the proponent's attitudes toward the A.A.P. and toward claims to Telegraphic Copyright.³⁹⁷

A second difference between the commercial interests in Sydney and those in Adelaide, where the proposed laws had proved uncontroversial, was that Sydney already had an established "news agent," Edward Greville. It is difficult to know exactly what Greville's business entailed, but it seems as though he was the Reuters's agent in the 1860s. He also ran his own operation sending the latest news by electric telegram to New South Wales, Victoria,

394. *Id.* at 93 ("[T]he Telegraph Department here has been conducted as a branch of the *Sydney Morning Herald* Office."); *see id.* at 107 (discussing support of Heaton, a correspondent for the *Town and Country Journal*); *id.* at 135 (discussing support of F.C. Jarrett's, a printer and publisher). *But see id.* at 102 (discussing Cracknell's denials); *id.* at 115 (discussing John Fairfax's denial of such accusations).

395. *Id.* at 94. The *Herald*'s John Fairfax described the competition with Greville & Co. (the agents for the *Empire*) as "warfare" and boasted that in thirteen years the *Herald* had only been beaten three times. *Id.* at 114.

396. By the time of the committee hearings, the issue was relatively moot. The *Herald* relied on daily messages from Europe rather than the less frequent mail, so the lines from Adelaide were freed when the ships arrived. The Committee, however, investigated the issue and took the view that the telegraphic offices in the various states had behaved properly. In fact, the evidence suggested that the *Empire*'s messages arrived at the Adelaide office consistently after the *Herald*'s, and the Committee concluded that Bennett's other grievances were based on a "misunderstanding" of the telegraphic departments.

397. New South Wales, *Report from the Select Committee on Telegraphic Communication*, *supra* note 44, at 108 (evidence of Heaton). † According to Charles Hayes, manager of the Exchange, everyone was "aware of the rivalry between the *Herald* and the *Evening News*." *Id.* at 126.

and New Zealand.³⁹⁸ As a Reuters's agent, he presumably controlled the news Reuters sent to Ceylon when it arrived in Australia.³⁹⁹ For example, we can see from attributions in the press that before the establishment of the international link, when the A.A.P. became the Reuters exclusive agent, papers such as Melbourne's the *Age* were using Mr. Greville's services as a Reuters agent.⁴⁰⁰ Greville must have been disappointed to lose this business when Hugh George completed his deal with Reuters in 1871. Nonetheless, Greville was determined to carry on. In October, he announced he had made arrangements for press messages,⁴⁰¹ and various papers continued to attribute telegrams to his firm throughout 1872.⁴⁰²

The significance of Greville's rivalry with the A.A.P. lay primarily in the fact that Greville was also a member of the Legislative Assembly in New South Wales representing Braidwood. While Fairfax may have had some success in persuading some members of the Assembly that the proposed copyright laws were in the public interest, Greville was able to urge the rejection of the Bill in person, even if he was somewhat inhibited by illness.⁴⁰³ Thus,

398. See FRED JOHNS, AN AUSTRALIAN BIOGRAPHICAL DICTIONARY 147 (1934); MENNELL, *supra* note 340; EVENING NEWS (Sydney), July 11, 1903; *The Late Mr. E. Greville, M.L.C.*, SYDNEY MORNING HERALD, July 13, 1903. Greville had owned the *Sydney Evening Mail* which in 1859 was Sydney's first evening paper. See WALKER, *supra* note 20, at 75. He also produced the *Southern Cross*.

399. WALKER, *supra* note 20, at 202 (referring to the news being conveyed to Alexandria and carried by boat to Albany, where one of Greville's agents would board to prepare a summary to be telegraphed from Adelaide).

400. See, e.g., AGE (Melbourne), Nov. 17, 1871. So were many of the minor papers, such as the *Hill End and Tambaroora Times* and *Miners Advocate*.

401. MERCURY (Hobart), Oct. 2, 1871. The *Manaro Mercury and Cooma and Bombala Advertiser* referred to Greville's circular of the previous September, pointing out the *Herald's* and *Argus's* attempt to monopolize the "Line and Cable." MANARO MERCURY & COOMA & BOMBALA ADVERTISER, June 29, 1872.

402. HERALD (Melbourne), June 27, 1872; BATHURST FREE PRESS & MINING J.; BORDER POST (receiving Greville telegrams from Sydney in 1871 and internationally in 1873); MARENGO GENERAL ADVERTISER (using Greville telegrams in 1873-1874); MANARO MERCURY & COOMA & BAMBALA ADVERTISER (getting Greville telegrams from Sydney). The *Armidale Express* attributed telegrams to Greville in July 1872, and the *New England General Advertiser* attributed telegrams to Greville in July 1872.

403. See *Telegraphic Copyright Bill*, SYDNEY MORNING HERALD, June 22, 1872.

when George Wigram Allen, Assembly member for the Sydney suburb of Glebe and President of the Law Institute of New South Wales, moved for the second reading of the Bill in June 1872, citing the usual ethical and public interest arguments as well as the important precedents of the Victorian and South Australian laws,⁴⁰⁴ Mr. Greville responded that while the Bill appeared simple, it was in fact dangerous. He asked for postponement until more members were present so he could provide the House with more information.⁴⁰⁵ In this proposal, Greville received the support of Sir John Robertson, among others.⁴⁰⁶ The *Evening News* and the *Empire* both expressed support for the legislature's decision to take the time to consider the Bill more carefully.⁴⁰⁷

In the week or so following this postponement, the *Herald*, the *Empire*, and their allies took the opportunity to voice their respective concerns in more detail, making claims and counterclaims, and accusations and counter-accusations in their leader columns.⁴⁰⁸ According to one paper, "all the brain and sinew of the *Herald* have

404. See *id.* William Richman Piddington also supported the bill.

405. *Id.*

406. John Fitzgerald Burns (Member of the Legislative Assembly for the Hunter) also spoke in favor of postponement. *Id.*

407. EVENING NEWS (Sydney), June 25, 1872; EMPIRE (Sydney), June 26, 1872 (stating the delay to the "credit of our legislation" because it showed that the Assembly had taken time to consider the extraordinary measure before it).

408. SYDNEY MORNING HERALD, June 25, 1872; EVENING NEWS (Sydney), June 25, 1872; EMPIRE (Sydney), June 26, 1872; EVENING NEWS (Sydney), June 26, 1872; SYDNEY MORNING HERALD, June 27, 1872; MAITLAND MERCURY, June 27, 1872 (approving the Bill); *The Telegram Copyright Question*, EMPIRE (Sydney), June 27, 1872; EMPIRE (Sydney), June 28, 1872 (describing the Bill as "an attempt to inflict indelible disgrace upon the legislation of the country"); SYDNEY MORNING HERALD, June 29, 1872; SYDNEY MAIL, June 29, 1872 (refuting the misrepresentation that A.A.P. was a monopoly by pointing out that the "lines" were open to all, as was subscription to the A.A.P. service); EMPIRE (Sydney), July 2, 1872; EVENING NEWS (Sydney), July 2, 1872 (claiming that Reuters had control over the Java cable); SYDNEY MORNING HERALD, July 3, 1872; SYDNEY MORNING HERALD, July 3, 1872 (letter from "A Third Party"); EMPIRE (Sydney), July 3, 1872 (referring to the Bill as "a most barefaced attempt to monopolise information"); EMPIRE (Sydney), July 5, 1872; SYDNEY MORNING HERALD, July 6, 1872 ("Besides the fairness of protecting the property in costly telegrams, it is of vital moment that the establishment entrusted with one such great power should be thoroughly responsible . . . There is no contract or agreement which prevents any newspaper from receiving from any other quarters telegrams address to them.").

been strained, and the heavy interests at stake made them . . . fierce for a full week.”⁴⁰⁹ In addition to the arguments based on incentives and justice, the *Herald* emphasized that the A.A.P. would not have a “monopoly,” asserting that the news would be made available to all upon appropriate payment.⁴¹⁰ According to the *Herald*, its act in taking the news was one of social responsibility.⁴¹¹ The *Empire* disputed the sincerity of this claim by publishing correspondence between various parties that indicated the deal between Reuters and the *Herald* was motivated by opportunism rather than generosity.⁴¹²

To counter the *Herald*'s claim that no “monopoly” would be created because all could subscribe to the service for a suitable fee, the *Empire* published evidence that the news would not be available to evening papers in any meaningful sense.⁴¹³ The *Evening News*, it seemed, was not to be offered anything other than the ability to purchase and republish the news that had already been printed in the morning papers!⁴¹⁴ Having presented the evidence to the public, the

409. FREEMAN'S J. (Queensland), June 29, 1872; see also YASS COURIER, July 16, 1872 (stating the *Herald* was “attempting to bludgeon conviction into the public mind by a plentiful system of abuse against all and sundry who dare to differ”). This view was reprinted in the DENILQUIN CHRON. & RIVERINE GAZETTE, July 25, 1872.

410. SYDNEY MAIL, June 29, 1872 (stating “they invite the co-operation of every journal in Australia”).

411. See HERALD (Melbourne), June 26, 1872.

412. EMPIRE (Sydney), June 26, 1872 (referring to “the selfish and mischievous designs of its promoters”); EMPIRE (Sydney), June 2, 1872 † (likening the deal with Reuters to “forestalling” the market—that is, buying up the news that Reuters would otherwise have transmitted to Australia and selling to all on equal terms). The *Yass Courier* also sought to show that the *Herald* had acted in a selfish, rather than public spirited, manner. YASS COURIER, July 16, 1872, discussed in *The Telegram Monopoly*, DENILQUIN CHRON. & RIVERINE GAZETTE, July 25, 1872 (“We are inclined to believe that the convention entered into with Messrs Reuter by the *Sydney Herald* . . . was not so public spirited as the proprietaries . . . would . . . have us all believe.”).

413. EMPIRE (Sydney), July 3, 1872.

414. EVENING NEWS (Sydney), June 26, 1872 (arguing that while the A.A.P. refused to supply the evening papers, it could not in truth and honesty seek public support for this law); see also EMPIRE (Sydney), June 27, 1872, reiterated in EMPIRE (Sydney), June 28, 1872 (asking how refusal to supply the *Evening News* could be squared with claims that the *Herald* “desire[d] to circulate the news in the most rapid and extensive manner practicable”); EVENING NEWS (Sydney), July 2, 1872 (claiming the *Herald* had misrepresented that it was prepared to share the news with all, when it intended to exclude the evening papers); EMPIRE (Sydney), July 3, 1872.

Empire characterized the claim to telegraphic property as, "an insult to the intelligence of the community."⁴¹⁵ Moreover, the *Empire* took advantage of the *Herald's* misreporting of the price of copper on the London market to highlight the dangers of one organization controlling the telegrams.⁴¹⁶ Information of this sort was so valuable that inaccurate reporting would have potentially significant consequences. The *Empire* argued that the best protection against such occurrences was to maximize competition among the papers.⁴¹⁷ Most of the New South Wales provincial press, including Greville's *Southern Argus*, soon echoed the *Empire's* criticisms.⁴¹⁸ By the time Allen moved for discharge of the Bill in August 1872 Sir John

415. EMPIRE (Sydney), June 28, 1872. The issue came to be further complicated when the Postmaster-General revealed the existing expenditures of Fairfax and Bennett on telegraphs; however, the next day, the Treasurer refused to reveal duties paid on imports. EMPIRE (Sydney), July 5, 1872. This led to the Government being accused of having been "grossly partial" because it deliberately revealed information to support the *Herald's* case. *Id.* The *Empire* gleefully reported the spat, including Buchanan's description of the Telegraphic Copyright Bill as "an insult to the House and intended to consummate a most dangerous monopoly." *Id.*

416. EMPIRE (Sydney), July 5, 1872.

417. *Id.*

418. See, e.g., S. ARGUS (N.S.W.), reprinted in DENILQUIN CHRON. & RIVERINE GAZETTE, June 27, 1872; MANARO MERCURY & COOMA & BOMBALA ADVERTISER, June 29, 1872 (stating that the *Herald* was entitled to protection "but not to the disparagement of a large section of the Provincial Press"); GUNDAGAI TIMES, June 29, 1872 (printing that the Bill would be "unwise, dangerous and unprecedented" and that as payment for telegraphic news it was a matter of private speculation and thus an inappropriate subject for legislation); DENILQUIN CHRON. & RIVERINE GAZETTE, July 4, 1872 (republishing the *Empire's* criticism of the Bill on June 27, 1872, and July 18, 1872, along with the *Orange Examiner's* statement calling for the legislature to "scout" the proposal and the *Dubbo Dispatch* statement that "this monopoly bill must not pass"). On July 16, 1872, the leader of the *Yass Courier* opposed the legislation and questioned the enforceability of telegraphic copyright in situations "where the thread of gold can be beaten out indefinitely." SHOALHAVEN NEWS, July 27, 1872; DENILQUIN CHRON. & RIVERINE GAZETTE, July 25, 1872; FREEMAN'S J. (Queensland), July 20, 1872. The *Gundagai Times* referred to the measure as having "aroused almost universal opposition and indignation on the part of the country Press." GUNDAGAI TIMES, July 20, 1872. Further expressions of opinion against the law were printed in the *Southern Argus*, the *Orange Examiner*, the *Dubbo Dispatch*, and the *Cooma Gazette*.

Robertson could remark that there was no “prospect of passing the bill now proposed to be withdrawn.”⁴¹⁹

No further attempts were made during the 1870s to gain copyright for news telegrams. In fact, it was not until 1893, that a further—and again unsuccessful—attempt was made. By then the newspapers and readers had multiplied, the cost of international telegraphy had decreased, and there were two competing combinations offering to supply international news, the A.A.P. and the United Cable Association.

E. Western Australia

Another success in Western Australia followed the failure of the A.A.P. in New South Wales. Of all the states, it was most surprising that the Telegraphic Copyright Laws were adopted here. The conditions in Western Australia in 1872 in no way required or warranted the passage of such a law.⁴²⁰ Most importantly, there were no telegraph links extending beyond the state. In fact, the link to Eucla was only established five years later, on December 8, 1877.⁴²¹

419. SYDNEY MORNING HERALD, Aug. 10, 1872. Although the Bill failed to get close to the statute books of New South Wales, the controversy surrounding it prompted a select committee investigation into various matters relating to telegraphy, including its cost. See READ, *supra* note 41.

420. The Western Australian Act protected “any message by Electric Telegraph containing intelligence from any place outside the said Colony.” 36 Vict., no. 7, para. 1 (W. Austl.). Despite the dreadfully vague wording, the Act can be read as suggesting that it is only the intelligence that must be from outside the colony rather than the telegraph or message. This reading implies that the copyright could have covered news sent by boat to Albany and then transmitted by electric telegraph to Perth. However, in practice, the Act would probably have been read as requiring the message, telegraph, and intelligence all to be from outside the colony which was what was required when a message came from London to Perth through the electric telegraph system via Java, Darwin, Adelaide, and Eucla.

421. See W. AUSTRALIAN TIMES, Dec. 14, 1877. The first telegraph line between Perth and Fremantle had only opened on June 21, 1869. The line was built by Edmund Stirling, owner of the *Inquirer*, and Alexander Cumming, but it was taken over by the government in April 1871. Further lines were built inland to Newcastle and York (January 6, 1872), south to Albany (December 26, 1872), and north to Geraldton (May 13, 1874). On development of telegraphy in Western Australia, see H. Stirling, *The Telegraph in Western Australia*, 1 EARLY DAYS J. & PROC. ROYAL W. AUSTRALIAN HIST. SOC'Y 30-33 (1927); G.P. Stevens, *The East-West Telegraph 1875-77*, 2 EARLY DAYS J. & PROC. ROYAL W. AUSTRALIAN HIST. SOC'Y 16-35 (1933).

The laws seem to have been adopted out of deference to the other Australian states rather than out of necessity. In one of the few available sources referring to the passage of the law, the *Perth Gazette and West Australian Times* in 1871 referred to the Tasmanian government's move to persuade the other colonies to adopt such laws.⁴²² It seems the Western Australian government happily complied, and the reaction of the Western Australian press to the proposal was one of disinterest.⁴²³ Given Western Australia's small population of 25,000, and hence its small readership, few papers were operating there in 1872. In the Perth and Fremantle area, there was the *Herald*, which was sold every Saturday for 6d, the *Perth Gazette and West Australian Times*, published twice a week on Tuesdays and Fridays for 3d, and the *Inquirer*, published every Wednesday. It was not apparent at this stage what impact, if any, these laws would have on the papers or who would stand to gain from them. In the context of this disinterest, it is worth noting that the period of protection was set at seventy-two hours rather than forty-eight or twenty-four. No surviving documents give any indication as to why such a period was chosen. However, given the fact that the most frequently published paper was the bi-weekly *Gazette*, it was probably readily appreciated that when a need for protection finally arose, the laws would fail to induce collective funding of news acquisition unless the term was extended. In addition, it might have been anticipated that given the short distances involved, such a period was necessary to prevent country papers from receiving telegraphed news that would undercut any market for the "metropolitan" papers.

F. Queensland

No Telegraphic Copyright Bill made it into the legislative arena in Queensland. Under the arrangement between the *Argus* and the

422. PERTH GAZETTE & W. AUSTL. TIMES, Nov. 17, 1871. "The [g]overnment of Tasmania has signified its intention of losing no time in introducing a bill for the repression of this sort of piracy, and has placed itself in communication with the Governments of the other colonies, with a view to their taking simultaneous action in the matter. There is little doubt that the necessary measures will be passed by the Legislatures of all the colonies." *Id.*

423. *Id.* ("The South Australian line of telegraph across this continent, is likely to be completed within contract time, although the like anticipation does not prevail with respect to the cable from Java to Port Darwin.").

Sydney Morning Herald, Brisbane's the *Courier* was to be the only recipient of A.A.P. news from Reuters, and it would be able to sell the news on to the provincial papers.⁴²⁴ Presumably, the A.A.P. did not want to license papers in Queensland directly because of the huge distances involved (even to negotiate the deals), the relatively small population, and hence, the value of the rights. It chose the *Courier* because it was the leading paper in Brisbane and was "recognised universally as the chief representative of the Queensland press."⁴²⁵ One would have expected this fact to induce the *Courier* to apply for a Telegrams Copyright Act, however, and such a proposal had been foreshadowed.⁴²⁶ Given that was action was taken in Western Australia, which was not linked to the international network, the absence of any action in Queensland demands some explanation.⁴²⁷

424. New South Wales, *Report of the Select Committee on Telegraphic Communication*, *supra* note 80.

425. ROCKHAMPTON BULL., Nov. 23, 1871. Denis Cryle reveals some interesting aspects of the inter-colonial relations between the *Courier* and the *Sydney Herald*. He states that there had been "a long period of antipathy between Brisbane and Sydney papers" before they found common ground on the issue of Melanesian immigration. DENIS CRYLE, *THE PRESS IN COLONIAL QUEENSLAND: A SOCIAL AND POLITICAL HISTORY* 96–97 (1989). The then still liberal *Courier* and the *Herald* were both opposed, the conservative ownership interests on the *Courier* being in favor. *Id.*

426. ROCKHAMPTON BULL., Sept. 21, 1871 ("[W]e trust the legislature will shortly be induced to pass a bill making the piracy of telegrams a misdemeanour, and imposing severe pains and penalties upon rogues afflicted with literary kleptomania."); *A Newspaper Copyright Act*, COLONIST (Brisbane), Dec. 2, 1871 ("[T]he Parliaments of South Australia and New South Wales will be immediately asked to pass Newspaper Copyright Acts The Parliament of Queensland will be moved to do the same as soon as it is in a position to transact business."); N. ARGUS (Rockhampton), Nov. 27, 1871.

427. Proceedings in Victoria and New South Wales were noted in the Queensland press. *Melbourne*, ROCKHAMPTON BULL., Nov. 9, 1871 (noting the first reading of the Victorian Bill); IPSWICH OBSERVER, Nov. 11, 1871, at 2c (noting the first reading of the Victorian Bill); QUEENSLANDER, Nov. 11, 1871; *The Telegraph Messages Copyright Bill*, N. ARGUS (Rockhampton), Dec. 13, 1871 (reprinting an extract from the *Miner* on the passage of the Victorian Bill through both houses); see IPSWICH OBSERVER, June 26, 1872 (noting introduction of the New South Wales Bill).

One reason for this inaction is that the common law intervened through the case of *Buzacott v. Bourcicault*.⁴²⁸ Before the Parliamentary session opened in November 1871, the owners of the *Rockhampton Bulletin* brought an action against the *Northern Argus*, complaining of the persistent appropriation of its telegrams.⁴²⁹ The *Bulletin* was published on Tuesdays, Thursdays, and Saturdays with a supplement on Friday.⁴³⁰ The *Northern Argus* came out on Mondays, Wednesdays, and Saturdays.⁴³¹ In support of its cause of action, the *Bulletin* cited three dates on which its telegrams had been appropriated: March 16, 1871, March 18, 1871, and September 19, 1871.⁴³² Counsel for the *Bulletin* argued that the news was protected by common law copyright,⁴³³ or, alternatively, on the basis of *Cox v. Land & Water Journal Co.*⁴³⁴

In *Cox*, Malins V-C had acknowledged that a newspaper proprietor had property interest in “the letters of a correspondent abroad, or the publication of a tale, or a treatise, or the review of a book, or [in] whatever else he acquire[d].”⁴³⁵ However, Malins refused to specify the precise nature of the interest, stating, “I will not say as copyright, but as property—such a property in every article for which he pays.”⁴³⁶ Accordingly, counsel for the *Bulletin* asserted that, “by general right of proprietorship [plaintiff] came into court and required protection of the law for what he paid for.”⁴³⁷ The *Bulletin*’s counsel argued that “[i]f the defendant had pirated the telegrams of the plaintiff, and he could show that there had been a

428. For detailed accounts of this case see *Buzacott v. Bourcicault—Piracy of Telegrams*, *supra* note 163 and *Buzacott v. Bourcicault*, ROCKHAMPTON BULL., Dec. 2, 1871.

429. Rockhampton seems, at first, an unlikely place for such a dispute to occur. The river port had been established during the Canoona gold rush of 1858 and in 1871 had a population of six and a half thousand—a third of the size of Brisbane. See Lorna McDonald, *An Overview of Rockhampton’s History* (2003), available at <http://www.library.CQU.edu.au>.

430. *Buzacott v. Bourcicault—Piracy of Telegrams*, *supra* note 163.

431. *Id.*

432. *Buzacott v. Bourcicault*, ROCKHAMPTON BULL., Dec. 2, 1871.

433. “The view that Roscoe took . . . was that it was uncertain whether at common law copyright existed or not. A note to a similar effect was made in Addison on Torts . . .” *Id.*

434. 9 L.R.-Eq. 324 (1869).

435. *Id.* at 331.

436. *Id.*

437. *Buzacott v. Bourcicault*, ROCKHAMPTON BULL., Dec. 2, 1871.

systematic extraction, he was entitled, either in law or in equity, to seek redress.”⁴³⁸ Counsel for the *Bulletin* advanced the theory that the property arose as a result of payment,⁴³⁹ and he quoted Puffendorf to the effect that property was either acquired by labor applied or money expended.⁴⁴⁰ The *Bulletin*’s counsel explained that the claimant paid in three ways: for the transmission, for the content, and for the cost of preparation for publication.⁴⁴¹ Although in print the defendant had asserted that it had not copied the telegrams, but had obtained them independently at twice the cost to the *Bulletin*,⁴⁴³ in court the defendant admitted to copying, but denied that such conduct violated the plaintiff’s substantive rights. The defendant claimed that the news was public property rather than private property, and that it belonged to the world, not to an individual.⁴⁴⁴ The Defendant, criticizing Malins V-C’s decision, or at least arguing that some of the statements it contained were obiter, observed, “[t]he Vice-Chancellor had given his dictum that everything appearing in a newspaper had been acquired and was the private property of the proprietor of the paper. That was merely an opinion outside the case on the record, and could not be taken as of weight with regard to questions that had been argued and decided in cases before the House of Lords.”⁴⁴⁵ He observed that if things were otherwise, a telegram announcing such a thing as a declaration of peace, as he

438. *Id.*

439. *Id.*

440. *Id.*

441. *Id.*

443. *Telegrams*, N. ARGUS (Rockhampton), Sept. 23, 1871. The paper continued to state that “[w]ere we guilty of the conduct so falsely imputed to us, it would be but just retribution for the conduct of our contemporary, who first threw down the gauntlet and opened the campaign by violating his agreement, and following it up by appropriating the whole of our English telegrams, and then coolly intimating to his subscribers that they were unreliable.” *Id.*

444. *Buzacott v. Bourcicault*, ROCKHAMPTON BULL., Dec. 2, 1871.

445. *Id.*

asserted had been published by the *Argus* and copied by the *Bulletin* within two hours of publication, could not be further disseminated.⁴⁴⁶ To allow such a monopoly, he argued, “was monstrous and clearly against sound public policy.”⁴⁴⁷ He also observed that the existence of such a right was incompatible with practices in relation to journals like *Home News* and *European Mail*.⁴⁴⁸ Indeed, such an action “would lie against every paper which adopted from another.”⁴⁴⁹

The judgment in *Buzacott v. Bourcicault* was delivered by Judge Hirst on December 1, 1871.⁴⁵⁰ Judge Hirst said that he gave his opinion “with diffidence.”⁴⁵¹ He felt bound entirely by the Vice-Chancellor’s decision and he could see no distinction between the subject matter in that case and that with which he was faced.⁴⁵² “He found in Phillips, it was laid down that there may be property even in an almanac, though it was simply a compilation of news,” and he said that he “thought that a telegram could also be said to be a compilation of news.”⁴⁵³ In light of the “vast importance” of the issue, he said he hoped it would be appealed to the Supreme Court.⁴⁵⁴

After the judgment, the parties made observations as to the extent of liability. The claimant, Buzacott, had declined to state the circulation of the *Bulletin*, the question being in his view “an unfair one, and one he did not wish to answer.”⁴⁵⁵ Just what prompted this reticence is not made clear, but the effects were significant. Unable to demonstrate failure to sell the 8,000 papers at 3d, the claimant was forced to abandon its estimate of damages at over £100 and instead was forced to quantify damages by reference to the costs it had incurred. The outcome, therefore, was that the judge instructed the

446. *Id.*

447. *Id.*

448. *See id.*

449. *Buzacott v. Bourcicault—Piracy of Telegrams, supra* note 163.

450. The fullest reports are found in the papers themselves. ROCKHAMPTON BULL., Dec. 2, 1871; N. ARGUS (Rockhampton), Dec. 2, 1871. The account in the *Rockhampton Bulletin* is fuller, but that version appears to confuse aspects of argument over liability with the argument concerning assessment of damages. This account is based largely on the structure in the *Northern Argus* and content of the *Bulletin*.

451. ROCKHAMPTON BULL., Dec. 2, 1871.

452. *Id.*

453. *Id.*

454. *Id.*

455. *Id.*

jury that the damages were the costs of the telegraphs to the agents and office in the three instances complained of, amounting to £3 16s and 10d.⁴⁵⁶

Just what was the impact of the case is difficult to say. In principle, it stood for the proposition that Queensland law protected news, whether sent from within the colony or from outside. As such, it was wider than the legislation being considered at the time in Victoria and Tasmania. The protection that the newspaper proprietors received under Queensland case law would therefore be a reasonable explanation for the failure of Queensland to attempt specific legislation.

The *Rockhampton Bulletin*, not surprisingly, welcomed the decision. Placing it in the context of the “enormous” cost of telegrams that would soon arrive from Europe, it observed that “it is of importance to the community that there should be a property in telegrams, and the newspapers proprietors should be encouraged to procure, at whatever cost, the latest and most reliable news from all parts of the world.”⁴⁵⁷ It noted that legislative action was being taken in Victoria and Tasmania, but that “as yet the other colonies appear to have made no sign of an intention to follow their lead.”⁴⁵⁸ The *Bulletin* talked of the “un-looked for good fortune” and “agreeable surprise” that a remedy actually existed and that newspaper proprietors were already protected against piracy, exclaiming, “[f]or once, equity is justice and . . . common law is common sense.”⁴⁵⁹ Given what the paper called the “clear, logical, unanswerable language of the Vice-Chancellor,” the *Bulletin* predicted that the “wealthy newspaper proprietors of the other colonies will but too gladly avail themselves of [the decision in *Cox*].”⁴⁶⁰

There can be no doubt that the decision in *Buzacott* would have offered some reassurance to the proprietors of the *Brisbane Courier* that its expenditure on A.A.P. telegrams was not open to wholesale

456. *Id.*

457. *Id.*

458. *Id.*

459. *Id.*

460. *Id.*

appropriation.⁴⁶¹ There were several reasons, though, for thinking that the decision would not have been regarded as an ideal substitute for a Telegraphic Copyright law. If this is right, then perhaps further explanations need to be found for the failure of the *Courier* even to have a bill initiated.

As far as the *Courier* and the A.A.P. were concerned, there were two sources of dissatisfaction with the decision in *Buzacott*. First, there was the possibility that it was wrongly decided, and would not be followed. Judge Hirst himself noted that he gave his decision "with diffidence" and said he hoped that the *Northern Argus* would appeal.⁴⁶² Although it did not do so, the costs of an appeal potentially amounting to several hundred pounds, the *Northern Argus* continued to maintain that both its case and the Vice Chancellor's decision in *Cox* were incorrectly decided.⁴⁶³ More specifically, the *Northern Argus* criticized the Vice Chancellor for having decided a hard case according to his own views of the merits

461. It is unclear how widely the decision was known or appreciated. Decided by the Northern District Court of Queensland, it was barely mentioned in the other Queensland papers. COLONIST (Brisbane), Dec. 6, 1871 (devoting fifty-nine lines to the case); QUEENSL. TIMES, Dec. 7, 1871 (giving six lines to the case); COURIER (Brisbane), Dec. 2, 1871 (noting just the result); PEAK DOWNS TELEGRAM (Clermont), Dec. 2, 1871 (noting just the result); IPSWICH OBSERVER, Dec. 6, 1871 (noting the outcome); RAVENSWOOD MINER, Dec. 9, 1871 (noting the outcome); PORT DENISON TIMES, Nov. 18, 1871 (reproducing the *Bulletin's* announcement of commencement of the action); WARWICK EXAMINER, Oct. 28, 1871 (noting the commencement of the action, but not its outcome). Rather oddly it was picked up by a Tasmanian paper, the *Cornwall Chronicle*, which was opposing the introduction of a telegraphic property law. The *Cornwall Chronicle* reported that

[T]he Judge held that there was a "property" in news, on the ground that it was "paid for," a fact which he seems to think should give an exclusive right to it. He was not, however, very strong in his opinion, urging that the question being an important one should be taken to the Supreme Court. The jury found for the plaintiff with damages to the extent of £3 odd, being proportion of the cost of the telegram.

CORNWALL CHRON. (Launceston), Dec. 22, 1871; see also BORDER WATCH (Mount Gambier), Nov. 25, 1871 (referring to *Colonist's* report that action was to be commenced).

462. ROCKHAMPTON BULL., Dec. 2, 1871.

463. N. ARGUS (Rockhampton), Dec. 4, 1871 (calling Sir Richard Malins' decision "an expression of opinion . . . delivered in the very teeth of a law").

rather than objectively and according to the law.⁴⁶⁴ The *Courier* and the A.A.P. probably felt that doubts hung over the authority.

Even if the decision was correct, a second source of dissatisfaction for the *Courier* would have been that the damages awarded were so small that they would not have deterred competitor papers from contemplating appropriation. The damages were effectively the cost of the particular news items to the claimants, rather than their "value," and the cost were calculated on a piece by piece basis. This meant that, in light of the real difficulty of proving actual damage, all users could appropriate information from the owners on the same terms as the latter had received it. In fact, the copyists had the advantage that they needed only pay for the news they deemed worth appropriating, whereas, the purchaser of the news was contractually bound to take the news that the A.A.P sent to it.

A telegraphic copyright Act should, then, still have been attractive to the *Courier*. It would have placed the prohibition on a solid, statutory basis, removing the doubts hanging over the common law position and saving the costs that might be necessary to establish that once and for all. A telegraphic property Act would also have rendered the act of piracy a criminal rather than a civil offense,⁴⁶⁵ thus saving claimants the problem of proving damages. Moreover, such a law would have forbidden communication of, and comment on, the information.

In the face of all these considerations, we might want to look for other explanations as to why the *Courier* did not follow the action of the A.A.P. in seeking legislation. The most obvious explanations seem to be provided by the state of the *Courier*, which was in amazing disarray during this period. The proprietors of the *Courier* were not fit to do battle on its behalf because they were hopelessly divided amongst themselves.⁴⁶⁶ Apparently, from 1868 to 1873 the *Courier* was owned by the first Brisbane Newspaper Company.⁴⁶⁷ The Company, in turn, had some shares in the hands of liberals, in particular T.B. Stephens, and some in the hands of conservative

464. *Id.*

465. *See supra* note 13 and accompanying text; The Telegram Copyright Act, 35 & 36 Vict., no. 10 (1872) (S. Austl.) (making the offense a misdemeanor).

466. *See* CRYLE, *supra* note 425, at 88–106.

467. *Id.*

squatters, such as A.H. Palmer and Robert Ramsay. What is more remarkable, however, is that the owners were directly involved in politics. For example, both Palmer and Stephens were members of the legislative assembly.⁴⁶⁸ As Cryle makes clear, ownership interests progressively impacted upon editorial policy, which became increasingly lame, weak, and lacking in direction.⁴⁶⁹ Ultimately, and particularly in the period when agitation for telegraphic property legislation was occurring in South Australia and New South Wales, the paper was not functioning effectively as a business. The conservative shareholders, for instance, failed to attend meetings, rendering them unquorate,⁴⁷⁰ and ultimately the Brisbane Newspaper Company dissolved in April 1873.⁴⁷¹

III. EFFECTS OF THE ACTS

A. *Within Australia*

Encountering these Acts for the first time, a student of the media might imagine that these laws played a critical role in the consolidation of newspaper ownership and, more generally, media ownership, which has been of so much concern in recent years.⁴⁷² Today, Australia has only a few daily papers—the *Australian*, the *Sydney Morning Herald*, the *Brisbane Courier*, the *Age*, the *West Australian*, the *Adelaide Advertiser*, and the *Mercury*. This is a small number compared with the number of those in existence in the 1870s, yet most of them were involved in the story of the Telegraphic Property law. A student might expect that the Telegraphic Property law had an important influence on the transformation. After all, it was passed at the behest of the dominant papers, with a view to limiting the behavior of minor competitors. Therefore, it must have enabled the leading papers to put competitors

468. Stephens acted as Treasurer and Colonial Secretary in the Liberal government from 1868 to 1870, and Palmer acted as Colonial Secretary from May 1870 to January 1874 with Ramsay as his Treasurer from 1870 to 1871. *See id.* at 92–102.

469. *See id.* at 99–106.

470. *See id.* at 105.

471. *Id.*

472. Walker describes the formation of the A.A.P. as “the beginning of the cable combine and restrictive practices that were to characterize this field for many years.” WALKER, *supra* note 20, at 205.

out of business and to consolidate their own commercial position. At the same time, a student of Australian cultural history might readily speculate about the extent to which the Telegraphic Property law limited the development of a specifically Australian culture by privileging the acquisition of foreign news and reinforcing the commercial position of papers that emphasized such news.⁴⁷³

Attractive as either of these speculative theses might be, it is virtually impossible, however, to draw any conclusions as to the impact of these laws. In Victoria, the law had no material impact, because its operation ceased just as the overland link was fully established.⁴⁷⁴ In Western Australia, the law could not have had an impact until the electric cable linking the state to South Australia was finally established in 1877, since protection was limited to news sent by cable from outside the colony.⁴⁷⁵ In South Australia, there were two dailies operating before the law was passed, and both continued. In contrast, in Sydney, where no law was adopted, the *Empire* closed in 1875.⁴⁷⁶

473. For an analysis of how cable transmission of news from London cemented notions of empire, see Alex Nalbach, "*The Software of Empire*": *Telegraphic New Agencies and Imperial Publicity, 1865–1914*, in *IMPERIAL CO-HISTORIES: NATIONAL IDENTITIES AND THE BRITISH AND COLONIAL PRESS* 68 (J.F. Codell ed., 2003). See also POTTER, *supra* note 49, at 28–29 (noting, however, that "the effects of the cable system were not straightforward"). For a discussion of the relationship between urban and country papers in the formation of colonial identity, see P. DOWLING, *Catching up on the News: Local, Colonial and Australia-wide*, 23 *BIBLIOGRAPHICAL SOC'Y AUSTL. & N.Z.* 241 (1999). For analysis of the role of telegraphy in federation, see LIVINGSTON, *supra* note 31.

474. The law would have been in effective operation for six weeks.

475. The cable was extended to Eucla on December 8, 1877, thereby establishing the intercolonial link to Adelaide. At this point, rather interestingly, the three leading papers joined together in the Western Australian Associated Press to obtain telegrams. See *W. AUSTL. TIMES*, Mar. 12, 1878; *INQUIRER* (Perth), Apr. 3, 1878. On March 9, 1878, the *Herald* had telegrams attributed to the "Associated Press." *HERALD* (Fremantle), Mar. 9, 1878. On March 19, 1878, the *Western Australian Times* had telegraphic messages entitled "Western Australia Associated Press Telegrams," and on March 20, 1878, the *Inquirer* had "Associated Press Telegrams," as did the *Western Australian Times* from April 12, 1878. The *Western Australian Times* had previously called for a government subsidy. *W. AUSTL. TIMES*, Dec. 14, 1877.

476. WALKER, *supra* note 20, at 205 ("Whether the discontinuance of the *Empire* in 1875 owed anything to the cable question is not known, but the *Evening News* certainly prospered.").

As for the country papers, it is very difficult to say whether any papers closed because of the telegraphic copyright laws. In all the states during this period, papers started and papers failed.⁴⁷⁷ The costs of joining the A.A.P. would have been one of many expenses the papers had to bear. It could have been a barrier preventing entry into the market for a new paper or any proposal to increase a paper's frequency. It is not impossible to establish any clear cause and effect between the existence of telegraphic copyright and newspaper closures in the 1870's, though. As for the cultural impact, it seems implausible to argue that these laws made Australian culture any more oriented to the outside world than it had previously been. Practices before 1870 clearly demonstrated an intense commercial, political, and cultural demand for information from Europe, and particularly from Great Britain and the United States.⁴⁷⁸ The building of the telegraph and the Acts were as much an expression of the demand for information as a force for change. In the 1870s, though, the effect was to provide approximately forty words a day. It is difficult to say whether this constituted a shift in focus at all, and it is impossible to see it as an era-defining shift.

More interesting, perhaps, is the question of how the failure to pass the laws in Tasmania, New South Wales, and Queensland and the lapse of the law in Victoria affected the A.A.P. itself. Unfortunately, we are again faced with a shortage of information. We can see that many papers after 1872 do attribute the A.A.P.,⁴⁷⁹ but it cannot automatically be inferred from such attribution that the papers were subscribers rather than honest copyists. From the *Wilson v. Rowcroft* and *Wilson v. Luke* decisions,⁴⁸⁰ we learned that

477. See *id.* at 196 (discussing the impact of the removal of free postage in New South Wales between 1864 and 1874). In general, the press continued to expand; by 1886 there were 48 dailies. MAYER, *supra* note 20, at 11.

478. Cf. *Wilson v. Rowcroft*, (1873) 4 A.J.R. 57, 58-59 (Vict.).

479. See, e.g., MARYBOROUGH & DUNOLLY ADVERTISER, Dec. 20, 1871 (discussing intercolonial telegrams); CASTLEMAINE REPRESENTATIVE, Dec. 19, 1871.

480. In *Wilson v. Rowcroft*, the *Argus* sought an injunction against Horace Rowcroft, proprietor of the *Geelong Evening Times*, restraining the publication of telegrams copied or colorably altered from the telegrams from England supplied to and published by the plaintiffs. (1873) 4 A.J.R. 57 (Vict.). The *Argus* prayed in aid of two instances of copying in which telegrams from its May 9th and 10th editions were alleged to have been copied by the defendant in its evening issues the same day. *Id.* at 59. The *Argus* based its claim both

the *Argus* utilized first “common law” protection, and second state law protection under the Victorian Copyright Act of 1869 to protect either itself or its subscribers against copyists. Both protections had some success. Therefore, the absence of telegraphic copyright laws did not mean that there was a complete lack of protection.

With or without copyright, the A.A.P. gained subscribers but did not come close to making a profit. In 1873, Mackinnon indicated that he would happily sell the operation to the government.⁴⁸¹ In one letter, he indicated that the A.A.P. was only receiving £3,500 in

on the Copyright Act of 1869 and independently under the property doctrine recognized in *Cox v. Land & Water Journal Co.* See *id.* Mister Justice Molesworth granted the injunction. *Id.* In *Wilson v. Luke*, the proprietors of the *Argus* sought an injunction against Henry Luke, the proprietor of the *Gippsland Mercury*, a tri-weekly published on Tuesdays, Thursdays, and Saturdays, in Sale, which is within the Gippsland district of Victoria. (1875) 1 V.L.R. 127, 127 (Vict.). (Sale is about 140 miles from Melbourne—then about twenty-four to thirty hours traveling time). Luke had been getting the information published in the *Argus* telegraphed to Sale for publication in the *Mercury* before the *Argus* circulated in Gippsland. *Id.* at 128. Having been caught in August 1874, Luke, from November 1874 to March 1875, was a subscriber to the Associated Press service for £50 per annum. See *id.* at 132. Seemingly disgruntled with the service he was receiving, however, he stopped paying for the telegrams and reverted to his previous practice—this time using a Melbourne agent named Donald Cameron. *Id.* at 132. Instead of publishing the telegrams as A.A.P. telegrams, the *Mercury* published “whatever [information Cameron] heard bruited abroad in the city” under the heading “Our Melbourne Correspondent,” and prefacing the intelligence with phrases such as “The news to-day is . . .” *Id.* at 129, 133–34. The telegrams were not reproduced identically and, according to Luke, tended to come out about twenty-four hours after publication of the information in Melbourne. *Id.* at 131. The *Argus* claimed this infringed its rights under the Copyright Act and, if not under the Act, on the basis that the actions interfered with property for which it had paid. *Id.* at 135. Mister Justice Molesworth granted the injunction restraining the defendant. *Id.* at 141. The GIPPSLAND MERCURY, July 13, 1875, asserted that its actions had been taken openly to test the legal principle. For the reactions of various papers to the decision, see GIPPSLAND MERCURY, July 15, 1875.

481. In the early part of 1873, the Associated Press was in negotiations to sell the benefit of the deal to the government, but these negotiations fell through. Letter from Lachlan MacKinnon to James Johnston (Nov. 1, 1872) (located at University of Melbourne Archive, James Johnston Collection, Accession No. 64-6); Letter from Lachlan MacKinnon to James Johnston, (Jan. 11, 1873) (located at University of Melbourne Archive, James Johnston Collection, Accession No. 64-6); Letter from Lachlan MacKinnon to James Johnston (Feb. 18, 1873) (located at University of Melbourne Archive, James Johnston Collection, Accession No. 64-6).

subscriptions, thus the *Herald* and the *Argus* must have been sharing the great bulk of the burden—perhaps £5,000 each per year.⁴⁸² However, giving evidence to the Select Committee, Langley, representing the Sydney component of the A.A.P., claimed the organization had sixty or seventy subscribers.⁴⁸³ While the two claims may at first seem irreconcilable, if many of the subscribers were not dailies, then the A.A.P. probably only received £50 from each for the service. The A.A.P. endeavoured to reduce its costs by renegotiating its bargain with Reuters, though historians disagree over whether the modified agreement was ever executed.⁴⁸⁴ In 1877, Reuters finally opened its offices in Melbourne and took over the service.⁴⁸⁵

During the same period, South Australia and New South Wales adopted state copyright acts. These would have provided protection for the telegraphic news of the sort acknowledged in Victoria in

482. Nevertheless, MacKinnon estimated in May 1873 that the payments yielded only £3500 per year, so that the cable—which was costing £14,000 per year—represented an increase cost of £4000 each to the *Argus* and *Sydney Morning Herald*. Letter from Lachlan MacKinnon to James Johnston (May 16, 1873) (located at University of Melbourne Archive, James Johnston Collection, Accession No. 64-6). Nonetheless, the *Argus* had annual profits of over £20,000. *Id.* (stating that profits for 1872 were £21,988). On July 9, 1875, the *Argus* claimed that, even with the contributions, it was out of pocket by £2,000–3,000 every year. *Copyright in Telegrams*, ARGUS (Melbourne), July 9, 1875, reprinted in GIPPSLAND MERCURY, July 13, 1875.

483. These included: the *South Australian Register*, the *Advertiser*, the Melbourne *Argus*, the *Age*, the *Daily Telegraph*, the *Herald*, the *Maitland Mercury*, the *Brisbane Courier*, the *New Zealand Press*, and smaller papers in Coolong, Ballarat, Bendigo, Castlemaine, and New South Wales. See New South Wales, *Report of the Select Committee on Telegraphic Communication*, Parl Paper No 79 (1872–1873). † The *Brisbane Courier* had “the whole right for Queensland,” meaning that it had the right to supply other newspapers. *Id.* The New Zealand arrangement had been made with Vogel following a scandal relating to the government’s supply of telegrams to the press. See generally Harvey, *supra* note 51 (examining the development of New Zealand newspapers).

484. Read has assumed that the renegotiated agreement of 1874 was carried into effect, so that in 1875 Reuters was only paid £3000, and in 1876, £2000. READ, *supra* note 41, at 61. However, Putnis has argued that the amended agreement proved not to be to the A.A.P.’s liking, so it continued to rely on the 1871 agreement. Putnis, *supra* note 52, at 80–83.

485. ARGUS (Melbourne), Nov. 2, 1877. The position was the same elsewhere; the *Mercury* refers to “Reuter’s Special Telegrams to the A.A.P.” through to 1877 and then to Reuter’s right through to January 1888.

Wilson v. Luke. By the 1890s, moreover, further claims for telegraphic copyright were made in New South Wales and Tasmania, failing in the former but uncontroversially succeeding in the latter, which was surprising given the events of 1871.⁴⁸⁶ After federation, the question of federal laws was discussed during the passage of the 1905 Act. By this stage the newspaper industry took quite a different shape, however.⁴⁸⁷

B. Outside Australia

We can be more definite about the impact of these laws outside Australia. They became models upon which foreign newspaper copyright acts were based, particularly in other British colonies. Examples include the Cape of Good Hope's Telegraphic Messages Copyright Act of 1880;⁴⁸⁸ New Zealand's Telegrams Act of 1882

486. For New South Wales, see New South Wales, *Parliamentary Debates*, Oct. 24, 1893, 618–25 (located at National Library of Australia); WALKER, *supra* note 20, at 204. For Tasmania, see MERCURY (Hobart), Nov. 4, 1891; DAILY TELEGRAPH (Launceston), Nov. 4, 1891; LAUNCESTON EXAMINER, Nov. 4, 1891; TASMANIAN, Nov. 7, 1891; TASMANIAN NEWS, Nov. 14, 1891; DAILY TELEGRAPH (Launceston), 1891; LAUNCESTON EXAMINER, 1891; TASMANIAN, Nov. 21, 1891; MERCURY (Hobart), Dec. 17, 1891; DAILY TELEGRAPH (Launceston), Dec. 17, 1891; LAUNCESTON EXAMINER, Dec. 17, 1891; TASMANIAN MAIL, Dec. 19, 1891; TASMANIAN, Dec. 19, 1891.

487. The numbers of the newspapers sold had increased tenfold from the numbers in 1872 and the provision of the telegraphic news was monopolized by a differently constituted "Argus Combination." For a brief account of these developments in Australia, see POTTER, *supra* note 47, at 30–31, 45–45, 89–91, 154–56, which describes how Reuter's set up its office in Melbourne in 1877 but its control was challenged in 1886 by the *Argus* and the *Age*. In 1893, Reuter's service became insolvent due to lack of subscriptions, and the agency instead began to supply the *Argus'* office in London. *Id.* In 1895, the *Age* and *Argus* services merged in the 'Argus Combination'—which dominated until, following the critical findings of the Senate Select Committee of 1909, the Independent Cable Association was established in 1911 with the benefit of a government subsidy. *Id.*

488. Act to Secure the Right of Property in Telegraphic Messages, No. 8 (1880) (Cape of Good Hope). On press relation with South Africa, see POTTER, *supra* note 49, at 89, 99–105, 152 (describing Reuter's dominance in the supply of news to South Africa after 1876, and competition with the South African Amalgamated Press Association, and the merger of both in 1910 into "Reuter's South African Press Agency"); D. Read, *Reuters and South Africa: South Africa is a Country of Monopolies*, 11 S. AFR. J. ECON. HIST. 104 (1996).

and Electric Lines Act of 1884;⁴⁸⁹ Natal's Telegraphic Messages Copyright Act of 1895;⁴⁹⁰ the Sri Lankan Copyright Ordinance of 1898; the Straits' Settlements Telegram Copyright Ordinance of 1902;⁴⁹¹ Transvaal's Telegraphic Messages Protection Act of 1902 (No. 48);⁴⁹² various sections of the Orange River Colony's Copyright Ordinance of 1904;⁴⁹³ the Federated Malay States' Telegram Copyright Enactment of 1911;⁴⁹⁴ the Union of South Africa's Telegraphic Messages Protection Act of 1917;⁴⁹⁵ Palestine's Telegraphic Press Messages Ordinance of 1932;⁴⁹⁶ and Kenya's Telegraphic Press Messages Ordinance 1934.⁴⁹⁷

489. An Act to Provide for the Protection of Telegrams from Beyond the Colony of New Zealand, No. 19 (Sept. 13, 1882). On press relations in New Zealand, see Harvey, *supra* note 51. See also POTTER, *supra* note 47, at 31-33, 46-49, 156-57 (describing the formation of the New Zealand Press Association in 1878, its rival the New Zealand Press Agency, and their unification into the United Press Association ("UPA") in December 1879). The combine took Reuter's news until 1886 when it was mixed with news from the *Argus* and *Age*. In the early twentieth century the UPA became dissatisfied with the *Argus* service and began additionally to take news from the Australian ICA and the Sydney *Sun*. *Id.*

490. Act to Secure the Right of Property in Telegraphic and Other Messages, No. 36 § 6 (1895) (Natal, S. Afr.) (extending the laws to messages "transmitted by pigeons and other special dispatches"); see also Orange River Colony, *infra* note 512, at §42. Natal and the Orange River Colony were supplied by Reuters. POTTER, *supra* note 47, at 147.

491. An Ordinance to Secure in Certain Cases the Right of Property in Telegraphic Press Messages, No. 22 (1902) (Sing.). On Canada, see POTTER, *supra* note 47, at 33-35, 49-53, 91-99 (describing the cartel agreement between Reuter's and the Associated Press which gave the Associated Press control over the Canadian market; the tendency of the Canadian press to rely on U.S. sources; Reuter's attempts in the early twentieth century to gain access to the Canadian market, and the simultaneous emergence of the Canadian Associated Press).

492. Transvaal's Telegraphic Messages Protection Act of 1902, No. 48.

493. Ordinance to Protect the Right of Authors in Regard to their Works and to Secure the Right of Property in Telegraphic and other Messages, No. 294 § 37 (1904) (Orange River Colony).

494. An Act to Secure in Certain Cases the Right of Property in Telegraphic Press Messages, No. 5 (1911) (Malay).

495. Act to Confer Temporary Exclusive Rights in Respect of Certain Telegraphic Messages Received in the Union, No. 26 (1917) (S. Afr.).

496. An Ordinance to Confer Temporary Exclusive Rights in Respect of Telegraphic Press Messages, No. 41 (1932) (Palestine), *printed in* PALESTINE GAZETTE, Dec. 29, 1932. This law defined a "telegraph" as "a line, wire, or other apparatus used for the purpose of telegraphic or telephonic communication, and includes a pneumatic tube, submarine or other cable and

Each piece of legislation generated its own stories and its own case law. In some of these environments, the impact of the law may have proved more profound than in Australia in the 1870s. Certainly, the case law in Ceylon depicts the dominant imperially-oriented papers using the laws against the less financially robust indigenous papers.⁴⁹⁸ Full examination of this is beyond the scope of this paper, however. The Acts also formed the basis for claims in the United Kingdom, and possibly in the United States, for protection of news.

Although there is some evidence that a similar law was to be proposed in the United Kingdom as early as 1873,⁴⁹⁹ such protection only received serious parliamentary consideration at the end of the century. A bill was proposed to give newspaper proprietors, who had “specially and independently” obtained news of any fact or event that had taken place outside of the United Kingdom, an exclusive right to publish such news for twelve hours. The *Times* was the strongest advocate for the Bill, its stance reflecting the fact that at the time it invested approximately £50,000 per year in overseas news.⁵⁰⁰ Reliance was placed on Australian laws as precedent, and it was argued that “the mother country [was] rapidly becoming the only part of the *Empire* in which copyright in news [did] not exist.”⁵⁰¹ The country press opposed the proposal for legislation, and organized

any apparatus for transmitting or receiving messages or other communications by means of signals, whether with or without the aid of wires” and excluded broadcasts for public reception from the definition of “telegraphic message.” *Id.*

497. An Ordinance to Confer Temporary Exclusive Rights in Respect of Telegraphic Press Messages, No. 45 (1934) (Kenya).

498. *Capper v. Wayman* [1902] 6 N.L.R. 58 (Ceylon) (describing *Times of Ceylon's* successful suit against *Ceylon Standard*); *Capper v. Silva* [1904] 8 N.L.R. 30 (Ceylon) (describing *Times of Ceylon* success against *Sihala Samaya*).

499. *Copyright in News*, N.Y. TIMES, Nov. 5, 1873 (reporting that a bill to give newspaper proprietors a forty-eight hour copyright in their own special news was to be introduced into the U.K. Parliament in the next session). On the cost of news from the colonies to the United Kingdom and the absence of monopolies, see POTTER, *supra* note 47, at 111–13.

500. See *Copyright in News*, N.Y. TIMES, Nov. 5, 1873.

501. *Letter from “An Old Correspondent,”* TIMES (London), Jul. 11, 1899. The *Times* noted that the proposed law was “in a degree more restricted than that afforded in many of our colonies.” TIMES (London), Jul. 10, 1899.

itself into the Newspaper Society. Ultimately, the legislation was withdrawn.

Attempts were also made in the United States to obtain protection for news, both by appealing to the courts and to the legislature. The courts were happy to recognize a property right in the collection of news, but stated that such property was lost when the news was published.⁵⁰² In the 1880s, the American Associated Press sought a legislative remedy for the failure of the law to protect news after its publication. Henry Watterson introduced a bill that proposed to give newspapers twenty-four hour protection to contributions over one hundred words.⁵⁰³ During the legislative process, the bill was watered down to eight hours, and then finally rejected. Apparently, the country press had filed over forty petitions against the bill.⁵⁰⁴ Ultimately, news agencies were granted some

502. *Kiernan v. Manhattan Quotation Tel. Co.*, 50 How. Pr. 194 (N.Y. 1876) (discussing how the property in news was collected until abandoned by publication); *Law Reports: Property in News*, N.Y. TIMES, Jan. 6, 1876; 13 ALBANY L.J. 33, 34 (1876). On the position in the United States, see E. Easton, *Who Owns the First Rough Draft of History? Reconsidering Copyright in News*, 27 COLUM.-VLA J.L. & ARTS 521 (2004); see also *Clayton v. Stone*, 5 F. Cas. 999 (C.C.S.D.N.Y. 1829) (No. 2872) (suggesting that the subject matter of news, through a product of labor, was too ephemeral to be the subject of copyright, and that such a copyright would not promote "science"). The protection of the newspapers as "books" was only established in 1886 by *Harper v. Shoppell*, 26 F. 519 (C.C.S.D.N.Y. 1886).

503. S. 1728, 48th Cong. (1884). The law would have applied to "all original, special and general matter exceeding 100 words sent by post or wire and embracing the original communication of information of any and every description." See N.Y. TIMES, Feb. 3, 1884; *Proposing to Copyright News*, N.Y. TIMES, Feb. 18, 1884. There was earlier agitation for recognition of copyright in news by John Thrasher, superintendent of the Press Association of the Confederacy in the mid-1860s. See 1 SCHWARZLOSE, *supra* note 58, at 267-68.

504. *Adverse to Newspaper Copyright*, N.Y. TIMES, Apr. 19, 1884. The *New York Times* had described the country papers as "beneath the rule of men with whom the scissors are mightier than the pen." *Copyright in Newspapers*, N.Y. TIMES, Feb. 2, 1884. The same paper predicted, correctly, that if the country papers protested to members of Congress, they "will defeat the bill beyond peradventure." *Proposing to Copyright News*, N.Y. TIMES, Feb. 18, 1884. On these bills, see Barbara Cloud, *News: Public Service or Profitable Property*, 13 AM. JOURNALISM 141, 141 (1996) cited in Easton, *supra* note 521, at 540-42. See also J.F. WALL, HENRY WATTERSON, RECONSTRUCTED REBEL 180-81 (1956) (arguing that the initiative came from Walter Halderman, Watterson's partner on the Louisville Courier-Journal, who was a representative of the Western Branch of the Associated Press). Watterson claimed that the bills

protection by the Supreme Court in the famous case of *International News Service v. Associated Press*.⁵⁰⁵ Interestingly, Justice Brandeis's famous dissent noted the failed bill of 1884, and argued that protection of published news was a matter for the legislature, not the courts.⁵⁰⁶

IV. THE ROLE OF HISTORY IN TODAY'S INTELLECTUAL PROPERTY

So far this article has told a story, albeit one that is not widely known. Its purpose is not to teach any particular lesson. Instead, this article is based on the premise that history rarely, if ever, reveals immutable laws about human behavior, or about the necessary relationships between practices and ideas, or between technology and the law.⁵⁰⁷ Rather, stories from the past, such as this one, are resources which enable us to understand our own condition. Knowledge of these stories from the past can provide us with a sensitivity to, and simultaneously a distance from, the types of developments taking place today. The past provides us with some kind of perspective from which to evaluate the present. We can make this evaluation through careful comparison of past circumstances, including mindsets, actions, events, contingencies, and consequences, with those of the present. Such a comparison enables us to establish similarities and to identify differences between past experiences and current developments or proposals. It is through these processes that historical method affords us a

were abandoned when a number of English decisions recognizing copyright in news were brought to the attention of the Associated Press. 2 H. WATTERSON, MARSE HENRY: AN AUTOBIOGRAPHY 104-05 (1919).

505. 248 U.S. 215 (1918); see also Easton, *supra* note 502, at 521.

506. *Int'l News Serv.*, 248 U.S. at 264-67.

507. If anything, history teaches us about the particularity and contingency of events and actions and enables us to expose the assumptions and ways of thinking we take for granted. By freeing us from such preconceptions, history instills us with the confidence to build social and legal institutions to reflect our own values and aims. For examination of the use of common law in response to new technologies, see Bruce P. Keller, *Condemned to Repeat the Past: The Re-Emergence of Misappropriation and Other Common Law Theories of Protection for Intellectual Property*, 11 HARV. J.L. & TECH. 401 (1998).

particular technique for understanding the seemingly intractable challenges we face today.⁵⁰⁸

I want to conclude by pointing to three similarities and two differences between the story of the Telegraphic Copyright Laws, the interaction of law, society, and technology told within it, and the concerns raised by the Internet and digitization. One similarity between the issues raised by the Internet and the electric telegraph is that both are concerned with getting cars on the "information highway," to use Jane Ginsburg's language.⁵⁰⁹ One of the questions that remains today is how to ensure that people will put effort into the creation and dissemination of information products through new electronic distribution systems. One of the solutions proposed to answer this question, both in the 1870s and again today, is to treat the information as property.

There are important differences, however, between the perceived impediments to using the new communications systems in the two eras. In the case of international telegraphy, the perceived impediments were the cost of collecting and of transmitting the data. In the case of the Internet, the costs of the infrastructure, including computer terminals, servers, ethernet connections, as well as support staff, have been dissociated from the costs of use. The direct costs of using the Internet are negligible. The charges for using the telegraph were substantial. For the Internet, two of the key perceived problems are the duplication of material within the communications system, and how to maintain a secure environment such that there are

508. Having read a draft of this article, Robert Burrell, Associate Professor at the University of Queensland, suggested a number of other "stories" which could be developed or challenged using the material contained in this article. Most of these stories involve problematization of "grand narratives" told by commentators on intellectual property. First, he argues that the history herein reveals inadequacies with any account of copyright law that sees the history of copyright merely as a history of legal responses to new technologies. The story told here, he argues, clearly highlights that technological change does not inevitably produce legal change. Second, he argues that history also shows inadequacies with narratives of intellectual property law as the increasing commodification of information leading to a form of "information feudalism." For Burrell, the story of the telegraphic copyright laws in the 1870s reminds us that such developments are not inevitable, but dependent on particular sets of relations.

509. Jane C. Ginsburg, *Putting Cars on the "Information Superhighway": Authors, Exploiters, and Copyright in Cyberspace*, 95 COLUM. L. REV. 1466 (1995).

incentives to place works and information. With telegraphy, the problem was limiting the duplication of information once it left the communications system.⁵¹⁰ In the telegraph case, the solution to the duplication problem was to give the publisher a property right. In the case of the Internet, it is, *inter alia*, to give the copyright owner a right to put the work or information product into the system.⁵¹¹ This has raised difficult questions about when and where information is put into the system.⁵¹² These are questions that were not regarded as critical in the context of the telegraph.⁵¹³

A second similarity, this time between the telegraph and digitization, is the way in which technological developments prompted reconsideration of the appropriate “units” of protection or “objects” of property. If potential for duplication by the printing press significantly informed the construction of the subject matter of “copyright” protection well into the nineteenth century—“books”, “pages of letter-press,” and so forth—the electronic telegraph prompted debate as to whether “news” or “intelligence” should be protected in its own right, irrespective of its form of expression. Similarly, digitization has raised questions about whether data should

510. Although there were, in fact, similar concerns in relation to telegraphy, they were concerned with secrecy and confidentiality and were resolved by a combination of statutory duties of non-disclosure placed on operatives, and self-help mechanisms of encryption—that is, the use of codes to protect the content of the transmissions. For a general discussion of telegraphy and encryption, see John Robinson Thomas, *Legal Responses to Commercial Transactions Employing Novel Communications Media*, 90 MICH. L. REV. 1145 (1992).

511. The “making available” right: World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, art. 8, 36 I.L.M. 76; World Intellectual Property Organization Performers and Phonograms Treaty, Dec. 20, 1996, art. 14, 36 I.L.M. 76; Information Society Directive 2001/29/EC of May 22, 2001 on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, art. 3, 2001 O.J. (L 167) 10, LEXIS LEXSTAT 1-7 International Copyright Law and Practice 1; Copyright Designs and Patents Act, c. 48, sec. 20 (1988) (U.K.).

512. REINBOTHE & LEWINSKI, *supra* note 1, at 108–11.

513. Though the various laws did contain a “transmission” right, *see, e.g.*, 35 Vict., no. 414, § 4 (Vict.); 35 & 36 Vict., no. 10 § 4 (S. Austl.), in principle, these would have raised questions about whether the transmission took place where the information was first placed in the telegraphic system, or each time it was sent on from one station to another, or where it was received.

be protected *per se*.⁵¹⁴ Technological developments, more accurately particular social and cultural uses of technology, have caused us to rethink how properties are mapped. In the case of telegraphy, the “news” in some countries became a supplementary object of property. In the case of digitization, modern European legislation requires Member States to protect “collections of information, works, data or other materials” by the *sui generis* database right.

A third similarity between recent developments and those of the 1870s is the reaction to claims to property in information. The claims to property in news were controversial, the legislation was highly contested, the lobbying was intense, and the rhetoric was full of bile and vitriol. As we have seen, the claims failed in New South Wales and Tasmania and only succeeded in a limited way in Victoria. Even with over 130 years of history, it remains difficult to differentiate between lobbying that was attributable to vested financial interests and that which was attributable to genuine beliefs as to what was ethically right or in the public interest. In the 1870s, the various interested parties in Australia found it relatively easy to influence the legislature, so there seems to have been little dispassionate “weighing” of arguments by the legislature. The success or failure of the claims seems merely to reflect levels of capture by various interest groups.

Finally, I would like to point out two differences between the responses to the telegraph in the 1870s and to the Internet and digitization in the 1990s and the early 21st century. First, the solution to the problems raised by the telegraph was handled on a national, rather than international level. The laws developed in Victoria, South Australia, and Western Australia were experiments by national legislatures. There were, of course, attempts at coordination—proponents of the laws hoped that all the Australian states would adopt them. It was frequently recognized that the utility of such laws in one Australian state could be undermined by the failure to give similar protection in other states. The laws were adopted or rejected on a national basis, however, in response to national interests, and reflecting the diverse commercial structures

514. *E.g.*, in the context of the EC Database Directive, it has raised the question of whether information itself should be protected by the *sui generis* database right.

operating in each Australian State. In due course, moreover, these laws were copied and spread on a nation-by-nation basis.

In contrast, today's problems of digitization and the Internet are perceived as "global," and solutions are sought and often adopted at that level. The WIPO Treaties are the most obvious example. There are many reasons for this change. Some related to the technologies themselves. Some relate to the widespread adherence to international standardization in business regulation. Some relate to the distribution of political and economic power. The telegraphic property laws, however, are a useful reminder that freedom to legislate at a national level provides opportunities for experimentation in response to newly-perceived "problems." The telegraphic property laws also remind us that the same legislation may look highly undesirable in one place with a particular commercial structure, and with particular traditions, rivalries, or politics, and perfectly acceptable in a neighboring country. Therefore, we should not be surprised today when global "one-size-fits-all" solutions are met with fierce local resistance.

The second dissimilarity between experiences in 1870s Australia and in recent years relates to the form of legislation. In the 1870s, the response to the problem raised by electric telegraphy was considered technologically-specific, and the solution was formulated in equally technologically-specific terms. The rights given were those concerning news sent by "electric telegraph."⁵¹⁵ In contrast, in relation to digitization and digital communication technologies, the tendency has been to promote so-called "technologically neutral" solutions.⁵¹⁶ For example, European "database" laws apply to all "databases" and not just "electronic databases." In the United Kingdom, a technologically specific "broadcasting right" has been replaced with a general "communication" right.

Of course, in many cases, calls for legislation to be "technologically neutral" are sensible for at least two reasons. The first reason is that in many cases the legislature wants to regulate particular modes of behavior, such as the dissemination of

515. See *supra* note 7.

516. See generally Lionel Bently & Robert Burrell, *Copyright and the Information Society in Europe: A Matter of Timing As Well as Content*, 34 COMMON MKT. L. REV. 1197, 1225 (1997) (discussing technology and copyright).

pornography, and the means of communication is *irrelevant*. If pornography is socially objectionable, it is as objectionable on digital TV as on analogue, or in photographs, or engravings. The second reason for promoting “technologically neutral laws” is pragmatic: to minimize, as far as possible, the circumstances in which laws become obsolete or ineffective, or of dubious application, when the technologies of expression or communication change. In an era when all legislatures claim to have little time, it seems more efficient to couch such laws effectively to fit new technological environments.

The experience of the 1870s may, however, remind us that technology-specific laws can be valuable, particularly where the goal is not outright prohibition. As we have seen, the goal of the prohibition on copying news was to facilitate the organization of economic relationships for dissemination and, in turn, to provide a legal mechanism for cost sharing. There was no need to extend the laws beyond news sent by telegraphy, nor necessarily to anticipate that later technologies of transmission would involve the same problems. Moreover, the importance of limiting the telegraphic property laws to news sent by electronic telegraph was to enable existing journalistic practices of appropriation, typically with attribution, to continue unaffected. The telegraphic property laws were formulated narrowly to meet the particular problem with a corresponding solution and to leave others alone.

Today, the drive for “technologically neutral” laws, such as those that would broaden the notion of “reproduction,” comes equally with the danger of bringing perfectly acceptable social practices into the realm of law, unintentionally replacing traditions with negotiations, and unnecessarily juridifying life worlds. A review of the story of the telegraphic property laws reminds us that technological neutrality is not always ideal.