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# PARTICULARISM VERSUS UNIFORMITY: FACTORS SHAPING THE DEVELOPMENT OF AUSTRALASIAN INTELLECTUAL PROPERTY LAW IN THE NINETEENTH CENTURY

> [Patent law:] This interesting subject, important from its blending science with polity and its bearing on the happiness and progress of mankind.[1]

## INTRODUCTION

The creation of a coherent body of intellectual property law in nineteenth-century Australasia is the result of a series of statutes by the local legislature. These statutes are a patchwork of provisions copied from England with some colonial innovations designed to adapt English law to colonial conditions. That combination is unremarkable in itself, since much colonial statute law displays the same interplay of conservatism and innovation. What is striking about the development of intellectual property law in the Australasian colonies is the degree to which it reflected the tension between centripetal and centrifugal forces, between suggestions of a common body of law for the whole empire and the particularist tendencies of the colonies.

In the intellectual property field, there were two different considerations which did not always point in the same direction. First there was the question of the formation of an appropriate body of law. Here there was an obvious advantage in having essentially similar laws throughout the empire, as this made for simplicity in determining what could be protected and for enforcement of intellectual property rights. On the other hand there were obvious advantages for particular colonies in the law being adapted to colonial circumstances by local legislatures. The cost of a lack of uniformity, it could be argued, might be justified because the colonists

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1 Richard Birnie (Advocate-General of Western Australia) to Kennedy, enclosed with Kennedy to Labouchere, 23 January 1857, CO 18/98.

could exert some control over intellectual property rights in their own colony.

But the decision as to universal or local laws had another quasi-legal and quasi-administrative aspect. Was there to be a simple and nearly universal imperial system in which some form of grant of intellectual property protection in one part of the empire automatically provided for protection in all the empire, or was there to be a requirement that inventors, authors, designers and trade mark users must seek to protect their rights separately in the constituent parts of the empire? Obviously if there were to be a single body of law, and a single imperial system, the centre of gravity would be Great Britain, and equally obviously the colonial legislators and some officials were not prepared to risk British interests overbearing those of the colonies.

It is the thesis of this article that, although the colonial legislators were well aware of the benefits of uniformity of laws protecting intellectual property and were often exhorted to support a single imperial scheme, they made a deliberate choice to insist on local legislative regimes, often largely replicating English law, because they were not prepared to put colonial interests at hazard in a unified imperial system. Thus it is contended that the history of Australasian intellectual property law can only be understood if one takes into account the importance to colonial politicians of retaining control over the operation of the intellectual property systems they created. In this, as in other fields, the colonial legislatures were content to largely re-enact English statutes provided it was clear that this was their choice; few were prepared at any time to hand back to Britain control over any area they saw as important.

The history of intellectual property law is not, it may be said, a part of the mainstream of legal history; readers of either Castles's *Australian Legal History* or Kercher's more recent *An Unruly Child: A History of Law in Australia* will find no index entries for copyright, patents or designs. In part this is because many lawyers, and perhaps many more historians, never learn enough about the area of law to want to research it further. It may also be said that on occasion the historical sources are less full and less accessible than for some other areas of law. Perhaps the least helpful is this 'report' of the discussions on the Victorian Patent Bill 1856:

> The 9th Clause empowers the Law Officers of the Crown to hear applications and objections by inventors, to award costs, and after some unimportant amendments to the verbiage, was passed.[2]

It may therefore be opportune to very briefly indicate the British, and other colonial, law sources on which the Australasian colonists could draw. This article is concerned with three forms[3] of intellectual property: copyright, patents and trade marks. The first two were, it would appear, were the more important in Victorian times. Brief definitions of these different kinds of intellectual property may be offered here to assist with understanding of later events.

Copyright is probably the most familiar form of intellectual property to non-lawyers. Current copyright law covers virtually all forms of reproduction of written works, pictures (still or moving), artworks and sound recordings. However early nineteenth-century copyright law was far less wide-ranging. Copyright law was the first area of intellectual property law to be regulated by statute. The first copyright Act is the 'Act of Anne'—the *Copyright Act 1709*. Eighteen further statutes were passed between that act and the latest falling within our period, the *International Copyright Act 1886*. This series of statutes gradually broadened protection from printed works to include engravings, prints, dramatic performances, musical works performed in public, musical compositions, lectures, photographs, paintings and drawings. The term of protection also increased from 28 years in the 1709 act to the author's life or forty-two

2 Reported at Victoria, *Parliamentary Debates*, 15 January 1857, 284.

3 There was a further form of intellectual property, the registered design. This was also a creature of statute. In essence the principle here is that the visual appearance of a manufactured product may be protected, even if copyright protection would not have attached and if the product's visual features are not novel or related to the manner of manufacture. The first protection of this kind was extended to textiles patterns in the eighteenth century, but the modern broad system follows the *Copyright of Designs Act 1839*, an Act much influenced by French law and practice. There does not appear to have been separate design legislation in the colonies until after 1900, though copyright legislation did on occasion give some protection to designs, as with the Victorian *Copyright Act 1869* (see below).

years, whichever was the longer. (The current life-plus-fifty-years rule did not come in until this century.)[4]

British copyright law generally operated unfavourably to colonial interests. As Ricketson has described,[5] colonial authors were disadvantaged by the British copyright laws which only accorded protection to works first published in Britain, at the same time that colonial consumers were disadvantaged by the British publishers custom of charging very high prices for the first editions of copyright works, the editions most likely to be exported to the colonies. This created a colonial market for US editions of British works (which were not protected by US law); such pirate editions were significantly cheaper for colonial consumers where they were available. Britain did try to stop the trade in such pirate editions. The *Foreign Imprints Act 1847* (Imp) provided that such unauthorised editions could be imported into the colonies subject to the levying of a import duty that would be passed to the copyright holders. It appears that in practice the amounts collected under that scheme were very small.[6]

Patents are a very different from of intellectual property. Patents are directed at the protection of either new industrial products—something of use or value which is manufactured—or of new processes—the means of manufacturing something useful. In Britain patents for invention were, until 1852, granted under the royal prerogative, though the scope of such grants was limited in part by the *Statute of Monopolies 1624*. The procedure was clumsy and expensive, since letters patent for inventions were governed by the same rules as other forms of letters patent and required signatures by a variety of officials whose income was derived from fees paid by the person seeking the issue of the letters patent. These fees, and the official stamps required, meant that patent protection in a

4 See the account in Sam Ricketson, *Intellectual Property: Cases, Materials and Commentary* (1994) 68–76.

5 Sam Ricketson, 'Australia and International Copyright Protection' in M P Ellinghaus, A J Bradbrook and A J Duggan (eds), *The Emergence of Australian Law* (1989) 144–75. For an account of the development of British copyright law in this period see Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Law: The British Experience, 1760–1911* (1999) ch 5.

6 Ibid 148–9.

simple case cost over £100 and on occasion might cost £300 or more (these costs represent those for the separate patents required for England, for Scotland and for Ireland). The technical merits and validity of any invention for which a patent application was made were not subjected to any official scrutiny, though opponents could challenge the grant of the patent.

The *Patents Act 1852* altered the system without solving all its problems. It provided for a system whereby commissioners could issue patents for all of the United Kingdom for a much lower fee than previously—costs fell to perhaps £25—but there was still no proper scrutiny of the merits of the application. It should be noted that the lowering of fees and the simpler system caused a very substantial rise in the number of applications for patent protection. Only in 1883 with the enactment of a new *Patents Act* did something like the modern system emerge, where the inventor had to make full disclosure of his or her invention and have the technical merits and novelty requirements examined prior to grant of the patent. As is discussed below, the passage of the *Patents Acts* of 1852 and 1883 each triggered rounds of discussion as to the appropriate form of law for the empire and for the colonies.[7]

The last form of intellectual property to be considered here is the trade mark. Trade marks were not protected by statute until the latter part of the century. They are an ancient institution; they are essentially no more than marks: words, signs or devices placed on goods to indicate their origin. A trader could protect a mark at common law by an action for the tort of passing off, but this proved increasingly inadequate as the scale of trade increased and the opportunities for abuse grew. The *Merchandise Marks Act 1862* created a criminal offences of the fraudulent use of trade marks; the *Trade Marks Registration Act 1875* moved to a system where traders could register, and obtain exclusive use of, particular trade marks.[8]

7 For the above, see Klaus Boehm, *The British Patent System, Vol 1: Administration* (1967) 14–32, as cited in Ricketson, above n 4, 550–61.

8 See Ricketson, above n 4, 890–91.

## THE PRIOR COLONIAL SETTING: THE NORTH AMERICAN COLONIAL EXPERIENCE

In considering events in Australasia, it is important to remember that many of the issues regarding the protection of intellectual property rights had surfaced in the Canadian colonies years before they did in the antipodes. The North American experience in the first half of the nineteenth century does contain some features which are similar to later events in Australasia, but it also reveals some very striking differences. A total lack of local initiative on copyright law may be contrasted with great activity in dealing with patents. None of the Canadian colonies enacted any copyright statutes at all until well after federation, and then the federal legislation cut across British law by allowing republication of British works in Canada, when published with the author's consent, and conferred on those works a copyright in Canada (which thus thwarted enforcement of any British copyright). The Copyright Bill 1875 (Can) finally became law three years after its passage and only after some complex constitutional manoeuvres.[9]

The first form of patent protection in the North American colonies was the patent conferred by private Act of the local legislature—something to be seen later in the Australasian context too. However such personal patents were not free of difficulty and on occasion the Colonial Office objected.[10] The colonists then moved, well ahead of Britain, to enact general statutes empowering the grant of local patents by the colonial authorities.[11] It

9 H M Clokie, 'Basic Problems of the Canadian Constitution' (1942) 20 *Canadian Bar Review* 395, 414–5. Also see Louvigny de Montigny, 'Copyright in Canada' (1927) 5 *Canadian Bar Review* 27.

10 Eg see Stephen's comment on the *Bragg Patent Act 1820*: Stephen to Bathurst, 14 July 1820, CO 323/41, PRO.

11 The first was in Lower Canada in 1824, and was followed by Upper Canada in 1827, Nova Scotia in 1833, New Brunswick in 1834 and Prince Edward Island in 1837. See Harold Fox, *The Canadian Law and Practice relating to Letters Patent for Inventions* (4th ed, 1969) 5. British Columbia passed a rather exiguous Patent Ordinance in 1867, which the Attorney-General described as 'an interim measure applicable to the early stages of a new country where patent rights would be very rarely sought': Crease to Seymour, 7 May 1867; Crease Papers, British Columbia Archives and Record Service file AM54, box 13, file 67.

seems probable that these general statutes were derived, directly or indirectly, from the passage by the United States Congress of general patent statutes in 1790 and 1793. However the Acts passed by the colonial legislatures were subject to Colonial Office scrutiny, which prevented usurpation of British inventors' rights.[12] Some decades later the Dominion Parliament enacted the *Patent Act 1869* (Can) which drew very heavily on the United States *Patent Act* of 1836, although much of it was also a reproduction of English law.[13]

## AUSTRALASIAN LAW: THE STATUTORY DEVELOPMENTS

### *Patents*

The first aspect of intellectual property law to attract the attention of colonial legislators on any considerable scale was patent law. As with Canada, there were several jurisdictions where the first patent protection was conferred by private Acts of parliament. The number of such patents is hard to determine, but does not appear to have been substantial overall. There were four in South Australia in 1859 alone,[14] yet only two in New Zealand in the two decades to 1860.[15] The procedure for the consideration of such Bills is not clear, but it seems probable it was to some extent akin to the private Bill procedure in the British parliament where the proponents of a Bill had to make their case to a special committee.[16]

12 In 1836 an Upper Canada statute to amend the law relating to inventions by importation was suspended on the grounds that it infringed the rights of British inventors. The matter was referred back to the local legislature but no further legislation appears to have resulted. See Stephen to Glenelg, 21 November 1836, CO 323/52, PRO.

13 Fox, above n 11, 5. Also see G E Maybee, Case and Comment on *Hoffman-La Roche v Commissioner of Patents* (1957) 35 *Canadian Bar Review* 86.

14 The private patents were granted by statute to Abram Longbotham (gas manufacture); Henry William Peryman (spark arresters for locomotives); William Barnett (reaping machine) and William Dinham (railway wheels): Hansen to Governor, nd, in GRG 2/54, South Australian Public Record Office (hereafter SAPRO).

15 *Anderson Pipe Patent Act 1861* and *Purchas and Ninnis Flax Patent Act 1861:* see Grey to Newcastle, 28 November 1861, CO 209/165.

16 See for instance the appointment in New Zealand in 1860 of select committees to examine private patent Bills noted at New Zealand,

Much more important in the long term was the colonial adaptation of the British *Patent Act 1852* to allow the local grant of patents, initially, as in Britain under the 1852 Act, on examination by the Attorney-General and Solicitor-General.[17] It seems clear that the frequency of applications for patents increased markedly once this was possible. In New South Wales there were 64 applications under the *Letters of Registration for Inventions Act 1852* (NSW) up to the end of 1862, of which two were declined, two withdrawn, and three not issued because the fee (£20, though on occasion this was reduced) had not been paid. As against this level of five or six patents per year, in the year 1865 there were sixteen applications, all successful.[18]

What prompted the system of local enactments? There appear to have been two quite different impulses behind the legislation.

The first was simply a pressure to keep costs down. The fees for an application under a general statute were in all cases lower than the costs of a private Bill procedure. In South Australia the Chief Secretary used as an argument for a general statute that the four personal patent Bills introduced that year had cost, on average, £50 each.[19] In New Zealand, too, the introduction of a general patent statute was designed to lower the cost to inventors of obtaining patent protection.[20] It might also be thought

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*Parliamentary Debates*, 30 August 1860, 423 (Anderson Pipe Patent Bill) and New Zealand, *Parliamentary Debates*, 3 September 1860, 434 (Purchas and Ninnis Flax Patent Bill).

17 In Tasmania, it was not until 1893 that the Attorney-General ceased to have responsibility for deciding on patent applications. See the report of the debate on Patents, Trademarks and Designs Bill 1893 in *Hobart Town Monitor*, 11 August 1893.

18 See Colonial Secretary's Documents Concerning Patents, file 4/745.3, Government Archives of New South Wales (hereafter GANSW).

19 South Australia, *Parliamentary Debates*, 17 August 1859, 5210. The figure of four Bills appears to have been a slight increase on prior years; only four were granted in the two years 1857 and 1858: Reports of Attorney-General to Governor on Bills 1857–58, file GRG 2/54, SAPRO.

20 See the speech by Stafford introducing the Patents Bill 1860: New Zealand, *Parliamentary Debates*, 4 September 1860, 434.

that applications under a general statute would be rather more certain of success.

The second impulse is much less obvious yet perhaps more important. It can well be argued that the development of Australasian patent law was shaped to a considerable extent by colonial resistance to suggestions by British officials of some kind of unified *imperial* patent system, one in which the grant of a patent in any one part of the empire would be effective in every part of the empire.

An examination of this aspect of the question may start with a memorandum on patent law circulated to the colonies in 1853 by Herman Merivale, a permanent official in the Colonial Office.[21] After drawing attention to two recent British Acts, the *Patent Law Act 1852* (Imp) and the *Evidence Act 1852* (Imp), he made enquiries as to the local patent law, if any, and as to the mode of proof of a British patent if necessary in any proceedings based on the patent. Merivale went on to suggest that it might be desirable to create a single system of patent law for the empire by extending the British law to cover the colonies as well. The colonies were asked to give their views. This circular may have been influenced by the debate in England as to the proper delineation of the powers of the imperial and colonial parliaments.[22]

By 1853 there was only one general patent statute in force in Australasia: the New South Wales *Letters of Registration for Inventions Act 1852*. In addition, only in Victoria was there a statute that would alleviate, though not solve, the problems of proof of a British patent.[23] In other cases it would appear that enforcement might require a patentee to prove by evidence from appropriate witnesses that the patent in question was valid and had actually been issued, as well as proving that the specifications were valid.[24]

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21 Circular letter, Merivale to governors, 2 January 1853. A copy is in the file 'Correspondence between the Colonial Office and Victoria on Patent Law', file A 2367, Dixson Library (hereafter DL).

22 Paul Knaplund, *The British Empire 1815–1939* (1941) 204–10.

23 The *Evidence Act 1853* (Vic) had largely re-enacted the *Evidence Act 1852* (Imp).

24 Cf Smith to Denison, nd, enclosed with Denison to Newcastle, 5 July 1853, CO 280/308.

What was the response to Merivale's circular?

Firstly, it may have had some effect in promoting legislation in some of the colonies. The Victorian Attorney-General did promise to consider a local Act based on the British *Patent Act* of 1852[25] and legislation did result that year.[26]

However, the more widespread, and more important, response of the colonies was to express opposition to any proposal for an imperial patent system. In some cases, as with Tasmania, the colonial response was a simple statement of opposition to the idea.[27] In Victoria there was more than a simple expression through political channels. The *Victorian Patents Act 1853* (Vic) adumbrated what later became explicit in the *Patents Act 1856* (Vic), that only patents granted under Victorian law—that is, either patents for inventions in Victoria or foreign (including British!) patents registered under the Victorian Act and given force by it—were effective in the colony. The 1856 Act could do this because it permitted patents for inventions by importation where the inventor was not a Victorian resident; the earlier Act had required the patentee to be both the importer and the inventor[28] (a defect that had meant the Victorian legislature had had to provide a special form of patent protection to exhibitors at an International Exhibition in Melbourne in 1854).[29]

25 Stawell to La Trobe, 17 May 1853, enclosed with La Trobe to Newcastle, 19 May 1853, file A 2367, DL.

26 *Patents Act 1853* (Vic).

27 Smith to Denison, nd, enclosed with Denison to Newcastle, 5 July 1853, CO 280/308; cf the similar Victorian response in Stawell to La Trobe, 17 May 1853, enclosed with La Trobe to Newcastle, 19 May 1853, file A 2367, DL.

28 Ibid. For the 1856 Act see Barkly to Labouchere, 12 January 1857, and Barkly to Labouchere, 12 March 1857, Governor's Despatches to Colonial Office, file VPRS.1083/3, Victorian Public Record Office (hereafter VPRO).

29 Hotham to Grey, 13 October 1854, Governor's Despatches to Colonial Office, file VPRS.1084/2, VPRO.

Tasmania soon copied the Victorian statute of 1856 and acted to make it clear that only local patents were effective,[30] as did New Zealand in 1860.[31] In both cases the statute was closely modelled on the Victorian Act. The Victorian statute appears also to have been drawn on when the New South Wales Parliament redrafted its patent law in 1857.[32] The earlier New South Wales Act was the basis for the *Patents Act 1859* (SA), although some divergences appear as a result of members seeking amendments, seemingly derived from the Victorian statute, which some apparently would have preferred as a model.[33]

it is important to note that the choice to follow one style of patent law rather than another seems to have been a reasonably informed one in at least some of the colonies. It is interesting to find that in the debates on the South Australian Patents Bill 1859, one member was urging that the colony adopt the American requirement of complete disclosure of the invention,[34] something which was not part of the British Act until 1883.

Queensland enacted a somewhat different law in 1867, when the *Provisional Registration of Inventions Act 1867* (Qld) gave greater protection to inventors while an application was being examined. Western Australia, though much later, also replicated the Victorian law of 1856 in the *Grant of Patents Act 1872* (WA), which, unusually, passed through the legislature without amendment.[35]

Whether the colony followed the Victorian or the New South Wales law, it is clear that no colony would concede that an imperial system should be set up at the expense of the power of a colony to grant its own patents.

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30 *Letters Patent for Inventions Act 1858* (Tas) and see Smith to Young, enclosed with Young to Bulwer Lytton, 9 December 1858, CO 280/341.

31 *Patents Act 1860* (NZ).

32 *Registration of Inventions Act 1857* (NSW).

33 See South Australia, *Parliamentary Debates*, 17 July 1859, 444; South Australia, *Parliamentary Debates*, 17 August 1859, 520–2. Participants in the debate also referred to the law and practice in England and the United States.

34 Captain Bagot MLC, in the Legislative Council second reading debate: South Australia, *Parliamentary Debates*, 17 August 1859, 522.

35 Minute 6 August 1872, Minutes and V & P of Leg Co of Western Australia, 1872.

Even the least developed Australasian colony, Western Australia, which appears not to have had any private patent Acts to this time,[36] took the view that because of the 'peculiar circumstances of the colony and its limited population' it would be inexpedient to initiate a system whereby patents were granted in London that would extend to the colony, preferring to remain with a system of local registration and grant.[37]

That opposition to the idea of imperial patents was caused by concern about the possibility of colonial interests being jeopardised by a system that would operate to favour British inventors or manufacturers seems clear from the interest the colonial legislators showed in some form of reciprocal colonial legislation to allow either enforceability inter se of patents granted in the Australian colonies or a high degree of uniformity of colonial law. As early as the 1850s there had been suggestions for uniform legislation on a variety of subjects, of which patents was one.[38] In 1863 an Intercolonial Conference recommended that a patent granted in any one colony should be valid in the other colonies on registration.[39] A decade later in 1873 another Intercolonial Conference specifically considered the desirability of uniform laws on patents, and agreement was reached not only that uniformity should be sought but that the Victorian government would prepare a draft bill for the purpose.[40] Although nothing concrete came of these initiatives, they are evidence that a principal motive for the local legislation was not disapproval of the principles of

36 There is correspondence between the Colonial Office and the governor concerning the grant of a private patent Act to a Mr Crease for an excavating machine (which Crease had patented in England already). The colonial authorities promised to introduce a Bill for the purpose, but no consequent Act has so far come to light. See Hampton to Newcastle, 12 September 1862, CO 18/124.

37 Fitzgerald to Newcastle, 3 November 1853, CO 18/76.

38 John Ward, *Earl Grey and the Australian Colonies, 1846–1857* (1958) 350.

39 'Inter-colonial Conference: Minutes of the Inter-colonial Conference held in Melbournein the Months of March and April, 1863' printed in Victoria, *Votes and Proceedings of the Legislative Assembly* (1862–63) vol 1, no 669, 6 ff.

40 Minutes of Intercolonial Conference 1873 for 11 February 1873: South Australia, *Minutes of Intercolonial Conference 1873*, Parl Paper No 31 (1873) 39.

similar patent laws, but an underlying concern that British interests would dominate any imperial system.

Despite the failure of Merivale's proposal for an imperial system, subsequent secretaries of state for the colonies returned to the issue of patent law over the next few years. In 1856 Henry Labouchere sought information from the various colonies as to their current laws and the documents (and fees) required for a local patent by 'Inventor or British Patentee'.[41] More significantly in 1872 a House of Commons Select Committee on Patents recommended that the British government take the lead in attempting to achieve uniformity of patent law between the 'civilised countries of the world' and should ask foreign and colonial governments if they were willing to enter into some international convention for this purpose. In pursuance of that recommendation, Lord Kimberley, the then Secretary of State for the Colonies, wrote to the colonial governments asking their views.[42] The colonial governments appear to have been reasonably supportive of the principle, though pointing to the inevitable difficulties caused by the difference in the institutions appropriate to the volume of applications.[43]

A last suggestion for an imperial system operated from Britain was made as late as 1883, and once again was met with a firm rebuff from the colonial politicians who believed that patents (and trademarks, for these too were included in the suggestion) were matters solely for the colonial governments and legislatures.[44]

Of course, in the late years of the century, there was a degree of reform of patent laws simply because colonial laws were revised to accord with

41 Labouchere, circular despatch, 11 July 1856. For replies see, inter alia, Kennedy to Labouchere, 23 January 1857, CO 18/98; Gore Browne to Labouchere, 17 November 1856, CO 209/139 and Barkly to Labouchere, 12 January 1857, file A 2367, DL.

42 Kimberley's request and the House of Commons committee's recommendations are printed in South Australia, *Patents*, Parl Paper No 43 (1873).

43 See, for example, Du Cane to Kimberley, 25 December 1873, CO 280/382.

44 Derby, circular despatch, 29 October 1883 and see eg Strahan to Derby, 19 February 1884, CO 280/390.

British legislation, which itself had been prompted by the need to ensure compliance with obligations and rights under the new international conventions on intellectual property rights such as the Paris Convention of 1883 on industrial property.[45] (As is discussed below, much of this legislation also revised the various colonial laws relating to trademarks.) Indeed Tasmania went so far as to repeal all its earlier statutes on patents and trademarks, and substituted the current United Kingdom enactments, a result described as 'thus bringing the Tasmanian law upon the subject of Patents; Designs and Trademarks into harmony with the Law of England and most of the Australasian Colonies'.[46]

The resulting close alignment of Australasian intellectual property law with that of England was sometimes welcomed by the more conservative colonial legislators, for whom reliance on British expertise was preferable to colonial innovation. A paradigm statement of such views was that of the Hon G S Whitmore, in the New Zealand Legislative Council, where in what was apparently the only substantial discussion of the Patents Designs and Trademarks Bill 1889, Whitmore said that he

> wished to know if he was to understand that the only thing new in the present Bill was what was taken from the English Act in the same subject. Were the alterations to be made in the existing law of this colony merely extracts from the law at the present time in force in England? If he understood that to be the case he had no objection to the Bill at all; but, if not, and they were to depend on the collective wisdom of own department, the proper course would be to give the fullest time for careful investigation.[47]

45 *Patents, Designs and Trademarks Act 1889* (NZ); *Patents, Trademarks and Designs Act 1890* (Qld); *Patents, Designs and Trademarks Act 1893* (Tas); *Patents, Trademarks and Designs Act 1894* (WA).

46 Attorney-General's report on statutes of 1893, 4 January 1894, for enclosure with Governor's despatch to Colonial Office, file GO 74, AOT.

47 New Zealand, *Parliamentary Debates*, 2 July 1889, 122.

## *Copyright*

For the most part the Australasian colonies were almost as slow as the Canadian colonies to enact local copyright legislation. Only in New Zealand was a local Act passed before 1869. That enactment, the *Copyright Ordinance 1842* (NZ) has the character of a private Act passing under the guise of a public one in that it was passed to protect a soon-to-be-published work on Maori grammar.[48] However it remained in force until well into the twentieth century.[49]

Apart from that isolated initiative, the statutory regulation of copyright in Australasia begins with Victoria's *Copyright Act 1869*. This statute was a local compilation and adaptation of English enactments, affording copyright protection to literary, dramatic and artistic works and also, for the first time in the colonies, protection to industrial designs.

It is indicative of the course of Australasian colonial law making that this Victorian Act appears to have originated as a private member's Bill introduced with the acquiescence of the colonial government who had received several deputations urging the introduction of a local law.[50] This Victorian Act was later to be re-enacted almost verbatim in South Australia[51] and New South Wales (*Copyright Act 1879*).[52] The New South Wales statute of 1879 was also a private member's Bill. The mover,

48 Foden, *New Zealand Legal History* (1965) 182.

49 It was repealed by the *Copyright Act 1908* (NZ), though other aspects of copyright law had been altered by the enactment of the *Fine Arts Copyright Act 1877*, and amendment to that Act in 1879, the *Photographic Copyright Act 1896* and the *Dramatic Copyright Act 1903*. For an indication of the degree to which the 1842 Ordinance left New Zealand copyright law uncertain, see *Cooksley v Johnson & Sons* (1905) 25 NZLR 834 (SC and CA).

50 Victoria, *Parliamentary Debates*, 31 August 1869, 1005, 1837–9.

51 The statement by A Giles, 'Literary and Artistic Copyright in the Commonwealth' (1905) 3 *Commonwealth Law Review* 107, 112 that the South Australian legislation came from the English law appears to be made without consideration of the evidence of a strong Victorian influence.

52 *Copyright Act 1878* (SA); *Copyright Act 1879* (NSW) and see South Australia, *Parliamentary Debates*, 23 July 1878, 441.

William Windeyer (later to be Attorney-General and a judge of the Supreme Court) was one of the colonial lawyers who subscribed to the 'textbook' theory—that it was best to copy the English statutes so as to obtain the benefits of judicial decisions on the English Act.[53] He must however receive credit for enabling legislation to succeed where the cabinet, though in favour of reform, had considered there was insufficient public demand to make action desirable.[54]

Some years later Queensland took a rather different tack. The *Copyright Act 1887* (Qld), a government measure, first declared a number of British Acts to be in force in Queensland, but went on to add provisions for local registration. There were also provisions for the deposit of copyright works that were identical to those in New South Wales.[55] This statute in turn was used by Western Australia for its Act of the same year.[56] Western Australia enacted a further measure only a few years later, but drew on a different source. The *Copyright Act 1895* (WA) was largely taken from the Victorian *Copyright Act 1890*, except that Western Australia omitted the provisions concerning designs and works of manufacture.[57]

It may be that the Australian colonies were more ready to enact copyright legislation largely replicating imperial statutes than patent Acts because in this area the Colonial Office on occasion sought colonial opinion before, rather than after, Bills were introduced into the British Parliament. It is not clear just how widespread this practice was, but on at least three occasions draft British Bills were sent to the Victorian government for comment by the colonial Attorney-General.[58] It is possible, too, that the somewhat more congenial tone of the Colonial Office dealings with copyright law

53 Robin Parsons, *Lawyers in the New South Wales Parliament 1870–1890: A Study in the Legislative Role of Private Members* (PhD Thesis, Macquarie University, 1972) 147–8.

54 Ibid 241.

55 Queensland, *Parliamentary Debates*, 26 July 1887, 95–103.

56 *Copyright Register Act 1887* (WA).

57 Cf W F Craies, 'Review of the Legislation of the British Empire in 1895. Part 6: Western Australia' (1896) 1 *Journal of Comparative Legislation* 54, 58.

58 See Canterbury to Kimberley, 6 November 1872, VPRS.1084/7; Attorney-General to Governor, 23 June 1876, VPRS.1084/8 and Normanby to Hicks Beach, 10 Feb 1880, VPRS.1084/9, VPRO.

owe something to the influence of Sir Henry Holland (later Lord Knutsford), a sometime legal adviser to the Colonial Office and an expert on copyright who was Assistant Under-Secretary at the Colonial Office in 1867–74 before leaving to begin a political career that later brought him back to colonial affairs as Secretary of State for Colonies 1887–92.[59]

## *Trademarks*

The early history of trademark law in the colonies is both shorter and more uniform than was the case with patents. It seems that few if any colonies regulated the use of trademarks by statute until the latter half of the nineteenth century. Here again the impetus for action came from the Colonial Office, but in rather a different manner and with a different result. In 1863 Lord Newcastle circulated to the colonies a request for information as to any existing colonial trademark laws, together with a copy of the British *Merchandise Marks Act 1862* (Imp) and a suggestion that the colonies might wish to consider legislation on those lines.

This circular received a very different reception from that encountered by Merivale's proposals of ten years earlier in relation to patents. Tasmania had itself earlier adopted a measure largely based on the British Act,[60] but most of the other colonies not only promised to consider the issue[61] but did in fact introduce and secure passage of legislation over the next few years. Thus substantially, though not totally, similar trademark Acts were passed in most Australasian colonies between 1864 and 1866.[62] Western Australia declined to act, on the basis that there was little or no occasion for trademark legislation, given the 'present limited state of the population and trade of Western Australia'.[63]

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59 Brian Blakely, *The Colonial Office 1868–1892* (1972) 157.

60 *Trademarks Act 1863* (Tas).

61 For favourable colonial reaction see eg Grey to Newcastle, 1 December 1861, CO 209/175 and Darling to Newcastle, 22 Jan 1864, file VPRS.1084/5, VPRO.

62 *Fraudulent Trademarks Act 1864* (Vic); *Merchandise and Trade Marks Act 1864* (Qld); *Trade Marks Act 1865* (NSW); *Trade Marks Act 1866* (NZ).

63 Hampton to Newcastle, 14 December 1863, CO 18/129.

The problem for users of trademarks within the empire was that the colonial measures of the 1860s soon became somewhat obsolete in the face of the development of international law and practice relating to industrial property. British law was significantly changed by a number of statutes that both improved the domestic law and gave effect to her international obligations under the Paris Convention of 1883, which Britain signed on the basis that the convention could be extended by Britain's action alone to British possessions.[64] As has been mentioned, Britain found the colonies unwilling to accept any system of imperial intellectual property law that eliminated colonial control over its own laws, and so the Colonial Office was obliged to rely on exhortations and requests that the colonies would enact appropriate legislation. It seems that the path to conforming colonial legislation had been eased by discussion of the trade marks issue at the Colonial Conference of 1887, although the British Act may not have entirely reflected the conference discussion.[65] Some colonies did enact legislation quite quickly—the trademark provisions of the *Patents, Designs and Trademarks Act 1889* (NZ) largely replicated the *Merchandise Marks Act 1887* (Imp)—but many were much slower to do so.

In Tasmania the requests for action did not result in the introduction of a Bill until 1893, and even then the Bill was nearly derailed by the apparently perennial and ubiquitous problems of possibly misleading trademarks on fertilisers and the re-use of bottles embossed with trademarks.

Just as slow, but much better documented, was the pace of proposed reform in New South Wales. There are unusually good archival sources in this area,[66] and it provides an interesting and useful illustration of the

64 Circular Despatch of 9 July 1884. It and other documents on which the preceding passage is based are in file TA 315 GO 5/8, AOT.

65 See Griffiths to Musgrave, nd, enclosed with Musgrave to Derby, despatch 87/87, 7 November 1887, CO 234/48, where Griffith had pointed out that the British Act did not deal with the question of proof of the falsity of a mark, an issue which had been discussed at the conference.

66 See the documents contained in 'Documents relating to Amendment of the Law relating to Patents and Trademarks', File 5/7746.1, GANSW, on which the following account is based.

difficulties surrounding reform. When the Colonial Office circular letter to the colonies requesting them to legislate against the use of fraudulent marks on merchandise was received in Sydney, it was circulated to the relevant officials for comment. The Registrar of Patents recommended that such an Act be passed. The Registrar of Copyright made a fuller report stating that, as trademark use in New South Wales was still governed by the local Act of 1865 which was drawn from the British Act of 1862, reform was long overdue and immediate legislation was recommended.

No action was taken in 1887 or 1888, despite representations from interested trade organisations (as in other colonies, the most concern was expressed by the bottlers of aerated waters and cordials who were concerned at the use of their marked or embossed bottles by other bottlers) but in 1889 a departmental minute drew attention to proposed legislation in Victoria. The Victorian Bill of 1889 was procured and correspondence ensued between the Department of Justice and the Parliamentary Counsel's office about the desirability of using the Victorian statute as a model for New South Wales. The Parliamentary Counsel appears to have been the source of delays which saw the discussion meander on throughout 1889, 1890 and 1891, punctuated by occasional pleas from London for action, only to be diverted into fresh channels by consideration of a Queensland Bill in 1892. In that year the bottlers suggested that a stop-gap Bill be prepared specifically to resolve the difficulties surrounding the use of bottles, but this plea too fell on deaf ears. Finally in 1893 a Bill was introduced and passed. Such a delay is perhaps an extreme case and may be attributable, at least in part, to the fact that the proposed change would have taken the registration of trademarks away from the Colonial Secretary's Office and transferred it to the Justice Department.

## ANTI-MONOPOLY FEELING

No mention of the intellectual property legislation of the colonies would be complete without mention of the school of thought that opposed any form of intellectual property statute on the ground that the protection of intellectual property was productive of monopolies and should not be undertaken on that ground alone. Such a belief appears on occasion among politicians of different hues: Waterhouse, the quondam premier of

South Australia and of New Zealand, expressed opposition to any form of patent protection as it was monopolistic.[67]

More curious is one case in which an important government official appears to have doubted the principles underlying the intellectual property legislation that he was charged to supervise. In 1892 one J Sprunson, the Registrar of Copyright in New South Wales, was asked to report on the desirability of amending the law to revert to an earlier system of enforcement of copyright in the colony by the use of customs procedures to seize illicit or pirated editions. The Registrar's report strongly opposed the use of the customs procedure, noting that only Victoria of the Australian colonies still made use of it. In Sprunson's view the appropriate model for Australasian law was Canada, which he considered to be in a similar position to Australasia as a net consumer of publications though Canada did have a greater printing industry than the combined Australian colonies. The underlying basis for his views was that he was not in favour in principle of the protected monopoly of publishers in books to which they held the copyright. His opposition was the stronger because he believed the publishers were exploiting that monopolistic position to the detriment of colonial consumers.[68] Nothing, however, appears to have eventuated from his suggestions for change.

## CONCLUSION

When the three areas of intellectual property law are looked at as a whole, three things stand out. The first is the strong British influence and inspiration that determined the basic elements of the law in the Australasian colonies and were highly influential even in the rather different Canadian legislation. Secondly there is the strong particularist influences which meant that, despite repeated Colonial Office suggestions to the contrary, most colonies insisted on erecting their own legal structure governing intellectual property, even though the architecture of these structures was often very derivative. In the last place, though less of a

67 See his speech on the New Zealand Patents Bills 1870: New Zealand, *Parliamentary Debates*, 21 June 1870, 33.

68 J Sprunson, *Report on Copyright Law* (1892), Papers relating to the Law of Copyright in New South Wales, Colonial Secretary's Department, File 5/7725, GANSW.

feature here than in some other areas of nineteenth-century law, it is notable that intellectual property law was frequently developed not by governmental action but by pressure groups and private members, a feature which makes its relative uniformity the more unusual.