

A NON-MATERIAL FORM OF COPYRIGHT: THE STRANGE HISTORY OF LECTURERS' COPYRIGHT

It is generally held that one of the fundamental principles of copyright is that the form of protection that copyright grants is based on the material form of the idea, rather than the idea itself. This has been famously expressed by Lord Hodson as "copyright is not concerned with the originality of ideas, but with the expression of thought, in the case of literary work with the expression of thought in print or writing".¹

However recent developments in digital technology have forced legislators and courts to reassess the nature of this requirement in the age of digitised storage of information. One of the responses has been to amend the *Copyright Act 1968* to incorporate an extended definition of material form for computer programs which only requires a theoretical ability to reproduce the information in material form.²

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1 *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 at 287.

2 The Copyright Act 1968 was amended in 1984 to include the following definitions:

"computer program" means an expression, in any language, code or notation, of a set of instructions (whether with or without related information) intended, either directly or after either or both of the following:

- (a) conversion to another language, code or notation;
- (b) reproduction in a different material form;

to cause a device having digital information processing capabilities to perform a particular function;

...

"literary work" includes:

- (a) a table, or compilation, expressed in words, figures or symbols (whether or not in a visible form); and
- (b) a computer program or compilation of computer programs;

"material form", in relation to a work or an adaptation of a work, includes any form (whether visible or not) of storage from which the work or adaptation, or a substantial part of the work or adaptation, can be reproduced; The Copyright Act 1968 was amended in 1984 to include the following definitions:

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Despite these changes the High Court has re-emphasised the importance of the material form requirement:

...the traditional dichotomy in the law of copyright [is] between an idea and the expression of an idea. As Lindley LJ. said in *Hollinrake v. Truswell* (1894) 3 Ch 420, at p 427: "Copyright ... does not extend to ideas, or schemes, or systems, or methods; it is confined to their expression; and if their expression is not copied the copyright is not infringed." The distinction has been criticized and it is true that it is often difficult to separate an idea from its expression, but it is nevertheless fundamental that copyright protection is given only to the form in which ideas are expressed, not to the ideas themselves.³

However it would seem that despite the insistence on the fundamental nature of the requirement of material form, the digital era is making the requirement an increasingly uncomfortable basis for copyright. It is therefore interesting to realise that the history of copyright has until this century included at least one form of non-material copyright.

Although little known, copyright law in England and the Commonwealth did extend to protection of the spoken word until 1911, albeit in a restricted and confused form. In 1835 the *Lectures Copyright Act* was passed by the UK Parliament. This Act sought to provide copyright protection for lectures - lectures which did not necessarily have to have any material form. In fact the main aim of the Act was to protect the lecturer from having a member of the audience take that lecture and reduce it to a material form in which the audience member themselves could then claim copyright. However the extent of the protection was poorly framed

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³ *Autodesk Inc & Anor v Dyason & Ors* (1993) 173 CLR 330 per Dawson J.

and it was rarely litigated. The protection survived until 1911 when it disappeared during reforms to the copyright laws. The development, use and decline of this form of copyright protection charts a backwater in intellectual property law but one that current concerns over the relevance of the requirement of material form in a digital age have again made topical.

BACKGROUND: CURRENT PROTECTION OF LECTURERS UNDER AUSTRALIAN COPYRIGHT LAW.

Under section 32(1) of the *Copyright Act* 1968, copyright subsists in any original literary, dramatic, musical or artistic work of an Australian citizen that is unpublished. Section 32(2) grants copyright to all original literary, dramatic, musical or artistic works of Australian citizens that have been first published in Australia.

However section 29(3) states:

For the purposes of this Act, the performance of a literary, dramatic or musical work, ... does not constitute publication of the work.

Section 27(1)(b) states:

Subject to this section, a reference in this Act to performance shall:

... (b) in relation to a lecture, address, speech or sermon - be read as including a reference to delivery.

Otherwise the Act does not contain any references to lectures and lecturer's rights.⁴ Thus it would appear that, under the present law, a lecturer may have copyright in a manuscript prepared for the purposes of a lecture, a copyright that vests under s32(1) as an unpublished literary work. Delivery of a lecture from that manuscript does not constitute publication of the manuscript through the combined operation of sections 29(3) and 27(1).

⁴ Sections 40(1A) and 40(1B) refer to "lecture notes". However Hansard indicates that this phrase is intended to refer to course material compiled for external students, etc. and not to notes taken of lectures actually given (*Australian Parliament Senate Parliamentary Debates* 4 May 1989 p 1776ff).

Thus the *Copyright Act* 1968 has nothing to say about a lecturer's right to prevent persons taking notes of the lecture and subsequently publishing those notes on the basis that the notes have been created by the hearer from a speech and as copyright deals with material form⁵, not the ideas themselves, a lecturer would need to look elsewhere for protection.

Since *Walter v Lane*⁶, it has been held that a person taking such notes is entitled to copyright in those notes as against the rest of the world, but it remains unclear to what extent they would have copyright as against the lecturer. Presumably if the lecturer reads verbatim from his or her manuscript the person taking notes can either be acting as an amanuensis or be seen to be making an unauthorised copy of the unpublished manuscript.

But in most cases lecturer's notes are just an outline of what the lecturer intends to speak on and most of the lecture is *ex tempore*. If a member of the audience had reduced the lecture to material form during the lecture and the lecturer then did the same following the lecture a major issue could arise as to who had copyright in the lecture. *Walter v Lane* seems to suggest that both have independent copyrights. This is clearly unsatisfactory from the lecturer's point of view.

The problem has been noted by the Whitford Committee which reported to the British Parliament in 1977 on reforms to copyright. At para 590 of their report they suggested:

Speeches and lectures delivered *ex tempore* do not acquire copyright unless and until fixed. We think it would be right to make it clear that, as and when such material is fixed, albeit by someone else, a copyright in the material should be created which will vest in the speaker. There would also come into existence at the same time a separate copyright in the recording or transcript as such, whether or not made with the consent of the speaker, such copyright to vest in the maker of the recorded version. To exploit the recorded version it would therefore be necessary to obtain the consents of the owner of the copyright in the speech or

⁵ *Copyright Act* 1968 ss22, 10(1).

⁶ [1990] AC 539. See also *Sands & McDougall Pty Ltd v Robinson* (1917) 23 CLR 49 and *Express Newspapers plc v News (UK) Ltd* (1990) 18 IPR 201.

lecture and the owner of the copyright in the recorded version thereof.⁷

The suggestion was not acted on and the issue remains unresolved both in the United Kingdom and Australia.⁸

The current uncertainty is a product of a long and confused history. Indeed, in 1825, a specific *Copyright Act* was enacted to protect the interests of lecturers. How that Act came about, how it came to be repealed, and how it has led to the present uncertain state of the law all stem from a famous case, *Abernethy v Hutchinson*.

ABERNETHY V HUTCHINSON⁹

Abernethy v Hutchinson is generally regarded as a confusing but important case. This case, together with two following cases *Prince Albert v Strange* and *Morison v Moat*, are seen as the cases which established the equitable doctrine of breach of confidence, a doctrine which is undergoing a latter day renaissance - mainly in the guise of protecting trade secrets.

While the case is the first in time of the three decisions, commentators tend to emphasise the other two cases as stating the principles of the doctrine. This probably has much to do with the confused nature of Lord Eldon's decision in *Abernethy v Hutchinson*. As Meagher, Gummow and Lehane put it:

... he was in the twenty-second year of his Chancellorship and the miasma which enveloped his prose thickened as he grew older and his hesitations grew greater.¹⁰

The doctrine of breach of confidence has an uncertain legal basis, with Lord Eldon in *Abernethy v Hutchinson* founding it on either on property, contract, or trust (ie confidence). This uncertainty of basis bedevils the doctrine to this day. This paper is however not primarily concerned with the development of the modern action of breach of confidence. What it is

⁷ *Report of the Committee to consider the Law on Copyright and Designs* (Chairman: The Hon Mr Justice Whitford), Cmnd 6732, 1977, reprinted 1978 para 509.

⁸ Lahore, *Copyright Law*, 1988 at 3.8.245 (Service 27).

⁹ (1825) 3 L.J. (Ch) O.S. 209; also reported in abbreviated form in 1 H & TW 28; 47 ER 1313 and in the *Lancet* (see references in footnotes below)

¹⁰ Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies*, 3rd Edn, para 4106.

concerned with is the subject matter of *Abernethy v Hutchinson* and the implications the decision had for the development of the modern law of copyright with its uneasy relationship to lectures.

The case appears to be the earliest case - of the surprisingly few - to consider the position of lecturer's rights to control publication of their lectures. The case is a complex and difficult case to extract clear principles from, mainly as the plaintiff's case presented to the Court was unsatisfactory from an evidentiary point of view. As a result the reports of the case consist of three sets of hearings with three judgments by the Lord Chancellor, together with comments made by the Lord Chancellor throughout those hearings.

The case concerned the publication of lectures on surgery delivered by Mr John Abernethy in the new periodical, the *Lancet*, edited by Thomas Wakley and published by G. L. Hutchinson. The *Lancet* was intended to not only spread generally recent medical information (a radical idea in itself) but also to expose the nepotism of metropolitan medical appointments. As the Dictionary of National Biography puts it:

In the first number, which appeared on 5 Oct. [1823], Wakley made a daring departure in commencing a series of shorthand reports of hospital lectures. These reports were obnoxious to the lecturers, who feared that such publicity might diminish their gains and expose their shortcomings¹¹

The initial series of lectures published were delivered by Sir Ashley Cooper. However on his retirement in 1824, the *Lancet* resolved to print the lectures of John Abernethy. The Dictionary of National Biography records Abernethy as probably the outstanding medical lecturer of his age, a man whose popularity was so great that St Bartholomew Hospital built its theatre specifically for his classes.¹² Abernethy, unhappy with seeing his lectures in print, took the *Lancet* to court.¹³

¹¹ "Wakley, Thomas (1795 - 1862)" in *The Dictionary of National Biography From the Earliest Times to 1900*, ed Stephen and Lee, Oxford University Press, 1917, Volume XX, p 462.

¹² "Abernethy, John (1764 - 1831)", Vol 1 p 50.

¹³ Following the case, in a "triumph" of investigative journalism, The *Lancet* proved that Abernethy was not acting on his own but that this was a test case organised by a group of surgeons opposed to The *Lancet*'s activities. Hearing that a meeting of this group had been held in the Freemason's Tavern to discuss the case, the *Lancet* went to the Tavern on the hunch that the surgeons had not bothered to pay their bill. The bill had not been paid, and the *Lancet* after duly

THE PARTIES' ARGUMENTS

Abernethy deposed that he was a lecturer on surgery at St Bartholomew's Hospital who was giving a series of thirty lectures in St Bartholomew's theatre to "his pupils and to students desirous of acquiring a knowledge of surgery" and who had enrolled in his course and paid the required fees. The lectures were delivered:

as from writings the property of the plaintiff, and composed by him, and which the plaintiff has not yet printed or published, and that they are his own sentiments and language¹⁴

The *Lancet* had reported, and intended to continue to report, verbatim accounts of Abernethy's lectures. In his defence Hutchinson argued that, amongst other grounds;

no stipulation or condition had ever been made or imposed by the Plaintiff, or by his predecessors in the office of surgeon or lecturer of such hospital, upon the admission of students to attendance upon such lectures, as to the manner in which the said students should make use of the knowledge or information acquired at the said theatre; [and] that the principles inculcated and delivered by the plaintiff in such lectures were not new principles originating with him but were substantially the same principles and practice of surgery as were originally promulgated by the late surgeon, John Hunter.¹⁵

Abernethy's counsel argued¹⁶ that he had a right to restrain publication on two grounds. Firstly on the ground that:

paying published with glee the itemised account, emphasising the highhandedness of the surgeons in not paying the bill and commenting unfavourably on the miserliness of their refreshments. The *Lancet* Vol VI p 225-227.

¹⁴ At 210; 29; 1315.

¹⁵ At 211; 32; 1314-5. Fascinatingly, The Dictionary of National Biography records that in the field of physiology he became known as "the defender of John Hunter, whose views, after his death and before the posthumous publication of his lectures, Abernethy had almost a monopoly in expounding." , "Abernethy, John (1764 - 1831)", Vol 1 p 50.

¹⁶ These arguments and Lord Eldon's findings relate to proceedings on December 10 and 18, 1824

although the lectures may exist incorporeally, and merely in language and ideas unembodied and unfit for use, still they have a right to the protection of the Court, independently of the Statute of Anne, as the law existed and was administered in this court long before that statute was introduced.¹⁷

Further they claimed that in relation to Abernethy's right to his property in his "sentiments and language" the onus lay on Hutchinson to prove his right to publish the lectures by proving the implied contract between Abernethy and his students extended beyond a right to take notes for their own use. Their second ground was that:

these lectures were delivered as from a written composition ... to be afterwards varied by additions and illustrations which may occur during the course of his oral delivery. [The subject matter of his lectures has been] so reduced into writing as to give him a special property - that special property excluding all right in anyone else to publish them to the world.¹⁸

Analysing these arguments from a modern perspective it is clear that the case raised in the second ground the issue of common law copyright in unpublished works but that the first ground argued for a right to protect "ideas and sentiments"; lectures which were purely oral, though reducible to a material form (as in fact the *Lancet* had done).

LORD ELDON'S PRELIMINARY JUDGMENTS

The case was first mentioned before Lord Eldon on Friday 18 December 1824. The *Lancet* duly reprinted the report of the hearing in *The Times* which included the following comment:

It was easy to see that the Lord Chancellor's opinion was decidedly hostile to the publication.

To which the *Lancet* added its own comment:

¹⁷ At 212.

¹⁸ At 212.

At the end of his Lordship's [statement of the issues in the case], he added, 'I shall make short work of that'.¹⁹

Following a fuller hearing on Saturday December 18, 1824 Lord Eldon held²⁰ that he would refuse to give relief on the plaintiff's second ground, that of literary composition, until such time as Abernethy produced to the court the manuscripts on which his lectures had been based. Otherwise, Lord Eldon stated, he must decide the matter based on the lecture being an oral delivery with the question of any property held by Abernethy coupled with the doctrines of trust and of fraud.²¹ The matter was stood over.

When the matter came back before the Court Abernethy failed to produce the manuscripts. Instead he produced another affidavit stating that:

the lectures [were] so delivered by him, though not verbatim the same as his notes and writings, yet were in substance, arrangement, and statement of the facts, substantially the same; that such lectures varied from time to time, both in the language and arrangement, according to circumstances, and from any new matter that might have occurred to him by way of illustration or otherwise.²²

Lord Eldon was unimpressed.

If Mr Abernethy had produced in court the writings from which he says his lectures were really based on ... I should have had no difficulty with this case.... The consequence of all this is, that I am compelled to look at the present case as that of a lecture delivered orally.²³

Turning then to the plaintiff's first argument, that of a protection of incorporeal ideas and sentiments, Lord Eldon held:

¹⁹ The *Lancet* Vol V 1824 p 378.

²⁰ Presumably on 18 December 1824.

²¹ At 214. At 215 Lord Eldon further stated that his decision related to the publishing of notes of orally delivered lectures and not to the right to publish notes of lectures which had been orally given but then later reduced to writing by the lecturer, whether or not the lecturer intended to publish those notes.

²² At 216; 34; 1315. Indeed Abernethy's counsel argued that Abernethy's affidavit was all that the Lord Chancellor could reasonably require .

²³ At 216-217.

Upon the question of property in language and sentiment not put into writing, I give no opinion, but only say it is a question of mighty importance.²⁴

This was because although a great deal had been said on the point in *Millar v Taylor*²⁵, no decision had been reached and therefore a judge in equity was not permitted to grant an injunction upon it before it had been tried.²⁶

However he stressed that this was not to be taken as suggesting that:

persons who attend lectures, and take notes, are to be at liberty to carry into print those notes for their own profit, or for the profit of others.

Abernethy clearly had a right to prevent this. But this right resided in the doctrines of contract or breach of trust.²⁷ Abernethy could attempt to prove either an express or implied contract, under which Abernethy had warned students not to publish their notes or a breach of trust by a student could be implied. Lord Eldon therefore refused the injunction but gave leave for Abernethy to make a motion on the points of contract or trust.

LORD ELDON'S FINAL JUDGMENT

Abernethy recast his allegation in these terms²⁸ and on 17 June 1825 Lord Eldon made his final judgment.²⁹ He held that:

where the lecture was orally delivered, it was difficult to say that an injunction could be granted upon the same

²⁴ At 218; 38; 1317.

²⁵ (1769) 4 Burr 2303

²⁶ At 217

²⁷ At 217.

²⁸ There was some delay on Abernethy's part in so doing. As a result the *Lancet* prematurely proclaimed victory and published two editorials extensively refuting two of Abernethy's arguments against publication: his likely pecuniary loss and injury from non-attendance of students. (The *Lancet* Vol VI 1825 pp 59-62; 89-92.

²⁹ For some reason the Law Journal report now reports Lord Eldon in the third person rather than verbatim. By this stage Abernethy now had four counsel (one of whom had always been the Solicitor General) and Hutchinson was represented by three counsel. The *Lancet* records Lord Eldon as halting proceedings on the 15th, stating that he wished to consider his decision for 48 hours before delivering it. (The *Lancet* Vol VII 1825 p 379)

principle upon which literary composition was protected; because the Court must be satisfied that the publication complained of was an invasion of the written work; and this could only be done by comparing the composition with the piracy.³⁰

However, he noted that since the last hearing he “had the satisfaction of now knowing” that there was authority³¹ to prevent publishing for profit information communicated in orally delivered lectures.

He was, therefore, clearly of the opinion, that, when persons were admitted as pupils or otherwise to hear these lectures, although they were orally delivered, and although the parties might go to the extent, if they were able to do so, of putting down the whole by means of shorthand, yet they could do that only for the purposes of their own information, and could not publish for profit that which they had not obtained the right of selling.³²

He noted that there was no evidence before the court on how Hutchinson had got the notes of the lectures but:

as they must have been taken from a pupil, or otherwise in such a way as the Court would not permit, the injunction ought to go upon the ground of property.

Although there was not enough evidence to support an implied contract between Abernethy and Hutchinson, the notes must have been obtained “in an undue manner from those who were under a contract not to publish for profit” and this was sufficient to authorise an injunction, even if it was not sufficient to maintain an action.³³

SUMMARY OF REASONING

In summary then, it appears Lord Eldon made the following findings. There was no evidence of the lectures being read from an existing literary

³⁰ At 39; 1317.

³¹ It is a great pity Lord Eldon did not mention these authorities as no other writer or judge appears to have ever found them.

³² At 40; 1317.

³³ It is this finding on which the modern law of breach of confidence is based. A contractually based doctrine would see third parties, such as Hutchinson free from liability unless one could prove the tort of induced breach of contract.

work. Therefore common law copyright in unpublished works was unavailable to Abernethy. As a result his action had to be based on the oral delivery of his own "ideas and sentiments". As there was no authority on a copyright existing in non-material ideas Lord Eldon was unable to decide the case on common law copyright.

But, Lord Eldon held that Abernethy could found his action on the ground of implied contract. In the circumstances of the case he found an implied contract between Abernethy and the audience. That audience, though permitted to take notes, could not publish those notes for profit.

However there was no evidence that Hutchinson had been in the audience so no implied contract could be found between Abernethy and Hutchinson. Consequently it was necessary to found the injunction against Hutchinson on yet another ground.

The exact ground Lord Eldon relied on here is unclear. But it was based on the fact that Hutchinson must have gained the notes in an undue manner. This undue behaviour is the basis from which the modern action for breach of confidence springs. To Lord Eldon however, the impropriety of Hutchinson's actions were so obvious that the doctrinal basis of the injunction did not require further analysis.

A QUALIFICATION: RESTRICTIONS ON ABERNETHY'S RIGHT TO CONTRACT

It had been argued by Hutchinson that Abernethy was not in the position of a clergyman of the church or a professor of a university, but rather a person appointed to give lectures and that therefore he was not at liberty to give or withhold his lectures, and by implication, prevent their publication. Commenting on this argument Lord Eldon had stated in his earlier judgment:

Now, if a professor be appointed, he is appointed for the purpose of giving information to all the students who attend him, and it is his duty to do that; but I have never yet heard that any body could publish his lectures; nor can I conceive on what ground Sir William Blackstone had the copyright in his lectures for twenty years, if there had been such a right as that; we used to take notes at his lectures; at Sir Robert Chamber's lectures also the students used to take notes; but it never was understood that those lectures could be published; - and so with respect to any other lectures in

the university, it was the duty of certain persons to give those lectures; but it was never understood, that the lectures were capable of being published by any of the persons who heard them.³⁴

The Lord Chancellor qualified his final judgment by noting that there had been no evidence of whether the terms of Abernethy's contract precluded him from publishing his own lectures for profit. The lack of evidence on the terms of Abernethy's appointment meant that Lord Eldon could not consider the issue and the injunction was granted. Whether in this judgment he was referring to Hutchinson's argument that there was no copyright in lectures delivered as part of the duty of the person holding a lecturing position is unclear. This issue is important however, as lecturers in this position were to become known as "public" lecturers and their rights were unclear.

THE DISSOLUTION OF THE INJUNCTION

Despite Lord Eldon's efforts to help Abernethy prevent the publication of his lectures, the later production of the terms of his employment appears to have eventually undone Abernethy. In both of the subsequent cases of *Nichols v Pitman*³⁵ and *Caird v Sime*³⁶ the judges in those cases noted that Abernethy's injunction had been dissolved but that no record had been kept of why this had occurred.³⁷

However the eventual outcome is recorded in the *Lancet*. Under the heading "Triumph of the Medical Press" the following report appears:

Court of Chancery, Monday, Nov 28, 1825

The *Lancet*

Mr Horne [Hutchinson's counsel] said he had a motion to make in the case of "Abernethy v Hutchinson" which he mentioned at the last seal, to dissolve the injunction granted against the defendant, restraining him from continuing to publish or sell Mr Abernethy's Lectures in The *Lancet*. At the last seal, the learned Gentleman understood that the

³⁴ At 215.

³⁵ (1884) 26 ChD 374.

³⁶ (1887) H.L.(SC) 326.

³⁷ Eg Lord Watson in *Caird v Sime* (1887) H.L.(SC) 326 at 347.

Solicitor-General [Abernethy's counsel], or some other gentleman, was to appear for the plaintiff, to oppose the present motion, but he was now given to understand, that it was not intended to be opposed, therefore he moved for the dissolution of the injunction, and submitted that he was entitled to his order.

Lord Chancellor: I dissolve the injunction³⁸

The reason for this outcome was explained by the *Lancet*:

The circumstances which distinguished Mr Abernethy's Lectures from those of a private Lecturer were touched upon in argument, when the case was before the Court, and adverted to in the Lord Chancellor's judgment - for nothing that is urged in argument ever escapes him; but as the facts were not proved, they could not be judicially noticed. This defect in our case was supplied by our affidavit of last week, which attested to the fact of Mr Abernethy having tendered his resignation as Hospital Surgeon, which resignation the Governors of St. Bartholomew's Hospital refused to accept, unless Mr Abernethy resigned, at the same time, the situation and emoluments of Hospital Lecturer.

The distinction appeared to be that, *prima facie*, the position of Hospital Lecturer seemed to be a private position in which Abernethy, with the imprimatur of St Bartholomew's, was permitted to teach students and charge whatever rates he wished. However the *Lancet* seems to have proved that although this position was nominally private and voluntary he was only permitted to hold the position while he also remained in the public position of Hospital Surgeon. This then meant that the position of Hospital Lecturer was a *de facto* public appointment.

No argument on the impact of this discovery was put to the Lord Chancellor as the motion to have the injunction dissolved was not opposed. It is unclear whether Abernethy chose not to oppose the motion on the grounds that he conceded that his position was now indefensible or whether the game was no longer worth the candle. This is unfortunate in light of Lord Eldon's previous comments on Blackstone's lectures which

were later interpreted in *Caird v Sime* to be that the holding of a public position was not a relevant consideration.³⁹

In 1835, Wakley, now also a Member of Parliament, in debate on the *Lectures Copyright Bill* stated that the reason for Abernethy's acquiescence was thus:

Subsequently, however, it was proved in the Court of Chancery that it was a public lecture delivered on a public occasion and the plaintiff in the suit thus finding he could not sustain his cause abandoned it altogether.⁴⁰

The Dictionary of National Biography supports Wakley's claim:

The injunction was, however, dissolved on 28 Nov. because hospital lectures were delivered in a public capacity and were therefore public property.⁴¹

If so, then the subsequent interpretation of Lord Eldon's remarks on Blackstone's lectures may have been wrong. In any event Wakley's conviction that this was the ultimate basis of the case had a major impact on legislation designed to protect lectures.

THE LECTURES COPYRIGHT ACT 1835

The *Lectures Copyright Bill* which was passed into law as *An Act Preventing the Publication of Lectures without Consent* 1835⁴² appears to have been passed in response to uncertainty over the basis of Lord Eldon's judgment in *Abernethy v Hutchinson*. The origins of this Act are shrouded in mystery.

The preamble to the Act stated that it had been drafted in response to the printing and publishing of lectures and the delivery in public of lectures by

³⁹ Discussed below.

⁴⁰ *Hansard* vol xxx, 3rd Series, 953 Wakley also went on to say in subsequent debate on the Bill that while private lecturers were entitled to copyright protection: "he could not see that such Lecturers as those at St. Bartholomew's Hospital (who on the aggregate derived an income of 8,000l. from this source) were in any respect entitled to a similar protection" At 977. (*Hansard* then goes on to record the House of Lords debate over the *Tithes on Turnips Bill*.)

⁴¹ "Wakley, Thomas (1795-1862)", The Dictionary of National Biography, Vol XX, p 462.

⁴² 5 & 6 William c65.

printers, publishers and other persons without the consent of the authors of those lectures.

Section 1 of the Act gave the sole right to print and publish lectures to their authors or assignees and prohibited the printing and publishing of any copies of such lectures “by taking down the same in Short Hand or otherwise in Writing, or in any other Way” without consent. Any person printing, publishing or selling such unauthorised copies was liable to forfeit all copies and be liable for a fine of one penny for each unauthorised sheet found in their possession, one half of which sum would be payable to the Crown and the other half to the author.

Section 2 extended the Act’s strictures to newspapers. Section 3 enacted that the payment of a fee by a student to attend lectures did not entitle them to print, copy and publish such lectures, a measure presumably in response to one of the issues traversed in *Abernethy v Hutchinson*.

Sections 4 and 5 contained exemptions to the Act. Section 4 ensured the Act did not apply to lectures already published and that the Act did not revive any copyrights that had expired under the *Statute of Anne*⁴³ as amended by the *Copyright Act 1814*.⁴⁴

Section 5 required that for the Act to have effect notice in writing of the lecture had to be given to “Two Justices living within Five Miles from the Place where such Lecture or Lectures shall be delivered Two Days at the least before delivering the same”. Following amendment in the House of Commons,⁴⁵ Section 5 also exempted from the Act any lectures delivered in any university, school or college or by a person by virtue of a gift, endowment or foundation.

THE BILL’S PASSAGE THROUGH PARLIAMENT

It was introduced into the House of Lords and passed without discussion. When it appeared in the House of Commons on 24 August 1835 for its Second Reading⁴⁶, Wakley thundered against this and the fact that it had reached this stage of its passage in the House of Commons “without observation”.⁴⁷

43 8 Ann c. 19.

44 54 G. 3. c. 156. This Act extended the period of copyright to 28 years.

45 See below.

46 *Hansard*, vol xxx, 3rd Series, p 953.

47 At 954.

The Lord Advocate introduced the Bill thus:

the principle of the Bill was this, that every man had as much right to claim security for his lectures as for his books, or any other fruits of his labours or his ingenuity. And no man coming merely with the professed object of gaining instruction, should have the right of publishing those lectures which were (or ought to be) the lecturer's own property; some of them perhaps the result of the studies or the labour of a whole life, and worth often upwards of a 1000 l to their author.⁴⁸

Mr Wakley's animus against Mr Abernethy and the providing of protection to rich St Bartholomew's Hospital lecturers has already been mentioned. But his tub thumping was more widely directed. He foreshadowed that he would divide the House against the motion unless proper amendments were introduced.⁴⁹

The amendments he wished made were to prevent the shielding of public lecturers from criticism. He pointed out that no law was needed to protect private lecturers as *Abernethy v Hutchinson* had laid down that "private lectures could be protected if it were proved there was a breach of an implied contract between the lecturer and the individual hearers".

Abernethy's case had ultimately failed as his lectures were actually public lectures. This was an important distinction as:

would it not be very improper, for instance, when a public lecturer delivered what was injurious to the peace, the health, or the morals of society, that he should be shielded from public observation? By such a law as that lecturing would be ten times more easy than it was at the present; as it was, a great part of the public lectures were a mere farce, for it was absurd to suppose that any art could be taught by a lecture, when the great organ of information, the eye, was shut, not called into exercise. How much worse would they be if by such a law as this they were rendered secure from observation and animadversion.⁵⁰

48 At 953.

49 At 954.

50 Shortt, *The Law Relating To Works Of Literature And Art: Embracing The Law Of Copyright, The Law Relating To Newspapers, The Law Relating To*

The Bill had apparently come down from the House of Lords without any distinction between public and private lectures. As a consequence on the next day, 25 August 1835, when the Bill was considered in Committee, Mr Wakley moved the omission of Clause 2. This was defeated 29 votes to 9.⁵¹ Section 2 of the Act as enacted read:

And be it further enacted, That any Printer or Publisher of any Newspaper who shall, without such Leave as aforesaid, print and publish in such Newspaper any Lecture or Lectures, shall be deemed and taken to be a Person printing and publishing without Leave within the Provisions of this Act, and be liable to the aforesaid Forfeitures and Penalties in respect of such printing and publishing.

Without any distinction between public and private lecturers Wakley's *Lancet* would have been forced to suspend printing medical lectures, a mainstay of its popularity. It seems that Wakley's attempt to remove this Clause was therefore an attempt to insulate the *Lancet* from the Act's effect. If he had succeeded, presumably only lectures published in a book form would have been liable.

But it seems his efforts were not in vain for although not being able to alter the Bill at its Second Reading it was in fact amended before its representation for a Third Reading.⁵² The amendment was to the end of section 5 - the clause requiring notice of the lecture to be given to two magistrates before the Bill could be relied on - the amendment adding the further proviso that the Bill did not apply to:

... any Lecture or Lectures delivered in any university or public School or College, or on any public Foundation, or by any Individual in virtue of or according to any Gift, Endowment, or Foundation; and that the Law relating thereto shall remain the same as if this Act had not been passed.

Contracts Between Authors, Publishers, Printers, Etc. And The Law Of Libels With The Statutes Relating Thereunto, Forms Of Agreements Between Authors, Publishers, Etc. And Forms Of Pleadings, 2nd Edn, London 1884 p xxxiv.

51

Hansard, op cit, p 977.

52

Shortt, *The Law Relating to Works of Literature and Art* , at xxxiv.

This amendment was accepted by the House of Lords and the Bill passed into law.⁵³

The passage and amendment of the Bill had emphasised two issues that were to continue to dominate lecturers rights: the distinction between public and private lectures; and the need to keep public lecturers accountable and open to criticism. Wakley's *Lancet* had been founded on exposing the shortcomings of lecturers he considered to form part of public life and his exertions in the House of Commons ensured that the issue remained alive until 1911.

*NICHOLS V PITMAN*⁵⁴

Thus by the end of 1835 the protection of copyright in any lecture was governed by one of two legal bases. To use Wakley's terminology, if the lecture was a "private" lecture it was governed by the *Lectures Copyright Act* but if it was a "public" lecture it was governed by Lord Eldon's uncertain doctrine of "implied contract". But no cases discussed the law in this area until 1884 when *Nichols v Pitman* fell to be determined by Justice Kay.

Mr Nichols was a fellow of the Geological and Royal Geographical Societies and an author and lecturer on various scientific subjects. Mr Pitman had developed a system of shorthand he called "Phonography" and published works which explained and taught this system.

On 14 October 1882 Nichols delivered a lecture on "The Dog as the Friend of Man" at the Working Men's College, Great Ormond Street to room of people who had gained admittance through possession of tickets which had been gratuitously issued by the college's committee. Nichol's delivered his lecture from a prepared manuscript which he later intended to publish and was based on:

many years personal observation, experience and study of the physical and mental characteristics of various races of dogs.⁵⁵

53 Shortt, *The Law Relating to Works of Literature and Art* at xxxiv.

54 (1884) 26 ChD 374.

55 At 375.

Pitman attended the lecture, took a verbatim account of it in *Phonography* and then published that account, in *Phonography*, in his periodical "The Phonographic Lecturer".

Both parties agreed that the *Lectures Publication Act* did not apply to this case, an approach Kay J. agreed with - both because no notice had been given to Justices and because the lecture had been given in a public college. As a result the law as expressed in *Abernethy v Hutchinson* applied.⁵⁶ This interpretation of Section 5 was not universally accepted⁵⁷, but it was upheld by majority in *Caird v Sime*.

Kay J. noted the way in which the arguments and judgments in *Abernethy v Hutchinson* had evolved. He then quoted a number of passages from Lord Eldon's final judgment. After quoting some of Lord Eldon's general obiter comments, Kay J. held:

I understand that to mean that every person who delivers a lecture which is not committed to writing, but which is orally delivered from memory, has such a property in the lecture that he may prevent anybody who hears it from publishing it for profit.⁵⁸

After quoting Lord Eldon's final comments Kay J. stated his interpretation of the ratio of *Abernethy v Hutchinson*:

Now it is quite true that the learned Judge seems at one moment to refer to the ground of property and at another to that of implied contract. But I take his meaning to be this, that where a lecture of this kind is delivered to an audience, especially where the audience is a limited one admitted by tickets, the understanding between the lecturer and the audience is that whether the lecture has been committed to writing beforehand or not the audience are quite at liberty to take the fullest notes they like for their own personal purposes, but they are not at liberty, having taken those notes, to use them afterwards for the purpose of publishing the lectures for profit.⁵⁹

⁵⁶ At 381-2.

⁵⁷ eg see Shortt, *The Law Relating to Works of Literature and Art*, p xxxiii ff, and Lord Fitzgerald's dissent in *Caird v Sime* (1887) H.L.(SC) 326 discussed below.

⁵⁸ At 380.

⁵⁹ At 381.

Kay J. saw no difference between publication in a system of shorthand from publication in any other form and granted a perpetual injunction against Pitman. However Kay J. never stated the legal ground for this decision other than the passage extracted above. As a result it is unclear whether Kay J. saw *Abernethy v Hutchinson* as founding the doctrine in property, contract or breach of faith.

However, if the earlier analysis of *Abernethy v Hutchinson* is correct then Kay J.'s judgment can be seen as finding that a right to prevent publication of lectures can exist independently of copyright and that this right is founded primarily in implied contract, the existence of which can more easily be found to exist if entry is by ticket only.

***CAIRD V SIME*⁶⁰**

The issue finally came before the House of Lords in 1887 on appeal from 13 Lords of the Scottish Court of Sessions Second Division. Professor Edward Caird lectured in moral philosophy at the University of Glasgow. The lectures were based on notes prepared by Caird. A former student of his, William Brown had taken notes of these lectures and had arranged to have them published by William Sime. Caird had launched a court action against this and the matter had settled. However Sime had subsequently published two cribs on Moral Philosophy written by Brown, which were extensively based on Brown's notes of Caird's lectures. Caird again instituted legal proceedings and this time pursued them all the way to the House of Lords.

Three Lords gave opinions, Lords Halsbury, Watson and Fitzgerald. Both Lords Halsbury and Watson agreed that the *Lecturers Copyright Act* did not apply to the case, as the lectures were delivered at the University of Glasgow and thus fell within the exception to the Act. They therefore upheld Kay J.'s interpretation of section 5's import.

While before the Second Division, the existence of manuscripts from which Caird had lectured was uncertain. However, by the time the matter reached the House of Lords their existence was not in doubt. Thus the decision of the House of Lords concerns the issue of the right to prevent or restrict publication of notes taken from the oral delivery of an already existing material form of the lecture. This means that the case is properly seen as a case on the common law of copyright in unpublished literary works.

60 (1887) H.L.(SC) 326.

Lord Halsbury held that there were two propositions which were not in dispute:

It is not denied, and it cannot in the present state of the law be denied, that an author has a proprietary right in his unpublished literary productions. It is further incapable of denial that that proprietary right may still continue notwithstanding some kind of communication to others ⁶¹

Lord Watson held similarly. But he also noted that since *Jeffrey's v Boosey*⁶² the author's right of property ceased to exist on the author's communication of the lecture to the public and any rights of the author rested only in copyright which was a creature of statute. The issue was therefore whether the common law proprietary rights of Caird had been abrogated by publication.

Lord Halsbury's opinion was based substantially on the two propositions outlined above⁶³, his opinion stating that the case law did nothing more than establish the two propositions. As to the legal basis on which a lecturer had the right to restrain publication of a lecture, he declined to give a definitive answer suggesting it could arise from either an implied contract or an existing relationship between the parties. His opinion was that the publishing of cribs rendered nugatory the "process of mental digestion that is intended to form the substance of the teaching" through lectures and that there was nothing in the university's regulations requiring Caird to forgo his right to restrict publication.

Lord Watson's judgment was more detailed. He formulated the common law position to be that if a lecturer were to deliver a lecture to a select audience:

... the retention of the author's right depends on its being either a matter of contract or an implied condition, that the audience are admitted for the purpose of receiving instruction or amusement, and not in order that they may take a full note of what they hear, and publish it for their own profit, and for the information of the public at large.⁶⁴

61 At 337.

62 4 H.L.C. 815

63 At 338

64 Per Lord Watson at 344.

Lord Watson also relied on *Macklin v Richardson*, where it was held that the public performance of a play did not imply an abandonment of the author's copyright in the script.⁶⁵

Lord Watson stated that in *Abernethy v Hutchinson*, Lord Eldon had granted a perpetual injunction:

... on the ground that all persons who attended these lectures were under an implied contract not to publish what they heard, although they might take it down for their own instruction and use.⁶⁶

He held that *Abernethy v Hutchinson* applied "strictly" to this case.

The principle that pervades the whole of the reasoning is, that where the persons present at a lecture are not the general public, but a limited class of the public, selected and admitted for the sole and special purpose of receiving individual instruction, they may make any use they can of the lecture, to the extent of taking it down in shorthand, for their own information and improvement, but cannot publish it.⁶⁷

Caird's lectures were not given to the public but only to matriculated students. It was immaterial whether the lecturer or the university selected the class. In response to the argument that while a contract could be implied in *Abernethy v Hutchinson*, no such implication was possible here, Lord Watson replied:

That may be so, but what Lord Eldon held was that the restriction of the hearer's right to use the lectures arose from the relationship established by contract between them and Mr Abernethy. In that case the restriction necessarily became an implied term of the contract; but the condition itself is the legal consequence of the relation in which the parties stand to each other, and must receive effect, whether

⁶⁵ 2 Amb 694. While beyond the scope of this paper, this line of authority is crucial to a full understanding of current protection of lecturers rights following the decision of the 1905 Committee to assimilate lecturer's rights to dramatic rights.

⁶⁶ At 347.

⁶⁷ At 348.

a similar relation exists, whether it be established by contract or in any other way.⁶⁸

Contrary to the argument of Sime and a number of the Scottish justices, Lord Watson could see no distinction in Lord Eldon's judgment between public and private lectures. He noted that Lord Eldon had referred to the copyright in Blackstone's lectures.

It was not the habit of Lord Eldon to overlook such obvious differences as did exist between the position of Mr Abernethy and that of Sir William Blackstone; it is manifest that his Lordship was clearly of the opinion that these differences could not disturb the application of the same principles of law to both cases alike.⁶⁹

Lord Fitzgerald however dissented. His dissent was based on a close reading of the *Lectures Copyright Act* and an interpretation of its provisions which differed from the approach taken by his fellow Lords and by Kay J. in *Nichols v Pitman*.

Lord Fitzgerald, agreeing with Lord Young's judgment in the Second Division, echoed the complaint of Wakley in 1825:

My Lords, I concur with the learned Lord (Lord Young), in opinion, that it is essential to the public safety that university teaching be exposed to comment, searching criticism and to the full blaze of public opinion. How can this be obtained if the contention of the pursuer is well founded? If the lecturer can prevent all other publication of his lectures than that which take place in his class-room, the nation may be left in Cimmerian darkness as to the teachings of its youth in the great universities. Unless there be full and complete publicity, criticism would be impracticable, and a mere empty sound.⁷⁰

68 At 348.

69 At 350.

70 At 355. It seems that Lord Fitzgerald had read Wakley's comments in the House. At p 359 of his judgment he noted that Hansard of the debate in the House of Commons on the *Publication of Lectures Bill* recorded that the suit was abandoned as it was found Abernethy held the position of public professor. Lord Fitzgerald also noted that the Member of Parliament who made this statement, Mr Wakley, was the founding and continuing member of the *Lancet*.

Turning to the Act he noted that section 1 was broad enough to encompass all lectures without distinction, and that the excepting of lectures in public universities in section 5 had arisen as a compromise in the House of Commons. He stated:

There is difficulty of construction in every part of this short statute, but especially in sect. 5. I am unable to read the concluding proviso of sect. 5 save as indicating a statutable declaration that lectures delivered in a university, which is necessarily a public institution, become thereby public property for the purposes of publication and public criticism. As to the concluding sentence, "that the law relating thereto shall remain the same as if this Act had not passed", the words seem to me to have no real force.⁷¹

This was because he was of the opinion the only common law right Caird had was:

a right of property in his lecture when composed, and before its public delivery in the university. There seems to be no decision whatever on the subject of lectures delivered in a public university prior to the passing of that Act. I am unable to accept *Abernethy v Hutchinson* as final or satisfactory on the propositions, if any, which it was supposed to decide. It arose on motion only .. there was never a plenary hearing of the case. Lord Eldon treats as a pure question of law, which he would not decide, "property in sentiments or language not deposited on paper". He then goes off into implied contract, or breach of trust, which is wholly inapplicable to the case before us, and it observable that his strictures are principally, if not wholly, directed against printing for profit.

He notes that the injunction was at first refused and then the motion renewed:

on the ground of "contract" only; and Lord Eldon's decision of the motion is expressed in these words: "He was clearly of the opinion that whatever else might be done

with it, the lecture could not be published for profit.” That is the whole decision of Lord Eldon.⁷²

In relation to the passing reference to Blackstone’s lectures, Lord Fitzgerald’s comment is that the reference amounts to nothing because although it is clear that Lord Eldon’s reference to twenty years copyright refers to Blackstone’s commentaries (which were based on an expanded form of his lectures) it is unknown if Blackstone ever published his lectures themselves with the result that Lord Eldon’s comment is unintelligible.⁷³

ANALYSIS

The decision in *Caird v Sime* is highly unsatisfactory. On the facts of the case⁷⁴, the decision must be based on common law copyright in unpublished manuscripts. Lord Halsbury confirms this in his first proposition. But then both he and Lord Watson base their opinions on *Abernethy v Hutchinson* (though Lord Halsbury does this implicitly), a case which dealt with delivery of a lecture not reduced to material form. In other words while it should have been possible for the decision to be based on copyright, they in fact base it on a doctrine that assumes no manuscript of the lecture was made by Caird.

They compound this error by basing their opinions on “implied contract or some other existing relationship”. But there is neither between Caird and Sime, such a relationship or contract could only exist between Caird and Brown.

Further in upholding Caird’s right to restrict publication of his lectures, Lords Halsbury and Watson also cut the Gordian knot of the public/private issue implicit in the Lectures Copyright Act by essentially ignoring it. Their reasoning, while it resolved the ongoing uncertainty of the issue, nevertheless was made at the cost of seeing the proviso in Section 5 of the *Lectures Copyright Act* as being otiose.

Their decision on this point was however probably the only commonsense solution. Sir James Stephen’s *Digest of Copyright Law* prepared for the

⁷² At 358.

⁷³ At 358.

⁷⁴ Unpublished documents were not covered by statute but were protected by the common law of copyright: *Donaldson v Beckett* (1774) 4 Burr 2408.

1878 Royal Commission⁷⁵ was also in agreement with the House of Lords and one can assume the Lords were aware of this. The proviso had only been inserted on Wakley's insistence. It assumed a difference in the common law between public and private lectures which was based on the outcome of *Abernethy v Hutchinson*, but an outcome that had never been the result of judicial reasoning. In overlooking this Wakley had created a confusion that even the decision in *Caird v Sime* could not completely remove.

BRITISH REFORM OF THE COPYRIGHT LAWS TO 1900

In 1878 a Royal Commission appointed to review the numerous and unsatisfactory nature of legislation on copyright recommended the consolidation of the many different copyright Acts into one. In the course of its Report it dealt with the law relating to lectures. Relevant paragraphs of the report included the following:

“15. With respect to unpublished documents .. we do not suggest any alteration in the law.

82. Lectures are peculiar in their character, and differ from books, inasmuch as, though they are made public by delivery, they have not necessarily a visible form capable of being copied. .. Although lectures are not always capable of being copied, because not always reduced to writing, many lectures written for the purpose of delivery are not published, and many are written that the matter of them may be preserved, or that they may be capable of delivery in the same form or other occasions. Moreover lectures, though not put in writing by the author, may be taken down in shorthand, and thus published or re-delivered by other persons. The present Act of Parliament, which gives copyright in lectures, seems to only contemplate one kind of copyright, namely that of printed publication, whereas it is obvious that for their entire protection lectures require copyright of two kinds, the one to protect them from the printed publication by unauthorised persons, the other to protect them from re-delivery.

⁷⁵ The Report of the Royal Commission into Home, Colonial and International Copyright 1878, C 2036.

85. ... we [] suggest that though the author should have the sole right of publication, he should be presumed to give permission to newspaper proprietors to take notes and report his lecture, unless, before or at the time when the lecture is delivered, he gives notice that he prohibits reporting.

86. By the present law, ..., a condition is imposed of giving notice to two justices Without entering into the origin of this provision we find that it is little known and probably never or very seldom acted upon; so that the statutory copyright is practically never or seldom acquired. We therefore suggest that this provision should be omitted from any future law.

87. We do not suggest any interference with the exception made in the Act as to lectures delivered in universities and elsewhere, wherein no statutory copyright can be acquired.

Attached to their Report and referred to throughout was a *Digest to the Law of Copyright* compiled by Sir James Stephens. In Article 19 of that Digest he stated the law as follows:

Copyright in Lectures

The author of any lecture has [probably] at the common law the same right as by statute, without giving such notice as required by statute, but he cannot recover the penalties provide by the Act ...

However it was not until 1888 a Parliamentary Select Committee of the House of Lords was set up to draft a new *Copyright Bill* and it reported back in July 1899 in relation to Literary Copyright with a Bill drafted by Lord Thring.

Clause 6 of that Bill read:

6 (1) Lecturing right means the exclusive right of the owner of such right to deliver, or authorise the delivery of, a lecture in public throughout the dominions of Her Majesty

(2) Lecturing right shall subsist in respect of any lecture, whether the author is or is not a British subject, which has, after the commencement of this Act, been first delivered in Her Majesty's dominions.

That Bill was never introduced. However its provisions in relation to lecturers right (as it had now become known) does appear to have become the basis for the lecturing provisions in the Australian *Copyright Act* 1905.

In the *Minutes of Evidence Taken Before the Select Committee* annexed to its report, the Committee discussed the draft provisions. Their discussion reveals that a point of continuing concern was over the distinction between public and private.⁷⁶ Clause 6(1) of the Bill appears to have originally referred to protection of lectures delivered "in public or private" but the reference to private was dropped in the final version.

It seems clear that all regarded the law as uncertain and a major aim of Clause 6 was to ensure that the delivery of public lectures provided the same protection to the lecturer as *Caird v Sime* had confirmed deliverers of private lectures had. However to ensure that public comment could be made of lectures, the lecturer was deemed to permit newspaper reports unless they made the requisite notice that no reports were to be made.

Lord Thring's solution seems to have been to ensure statutory protection of all public lectures, leaving private lectures to the common law. This was presumably on two grounds. The first being that the common law protecting private lectures was relatively unquestioned, and secondly that statutory copyright, as it then was, only referred to published works. As the tenor of the cases on private lectures were that such lectures were not published there would have been no place for statutory copyright protection for them.

Importantly, Lord Thring's Bill finally resolved the public lectures issue, granting clear statutory protection to them. Clause 6 was expressed widely enough to cover lectures which were delivered *ex tempore*, a fact the Committee must have been aware of. Thus, under the Committee's suggested amendments copyright was to extend, in the case of lectures, to a non-material form.

76 Paras 122-165, pp 10-12.

LECTURER'S RIGHTS IN AUSTRALIA

On 14 May 1879 the Parliament of New South Wales passed 42 Victoria, No 20, the *Copyright Act 1879*. This Act, based heavily on British law included in sections 20-24 a virtual re-enactment of the *Lectures Copyright Act 1825*. Unfortunately Parliamentary Debates for New South Wales were only first recorded in October 1879 so Parliament's understanding of the effect of sections 20-24 is unknown. No cases appear to have considered these sections.

Twenty six years later, the newly constituted Federal Parliament found itself unable to wait for the British Parliament to consolidate its copyright legislation which had been awaiting reform since the 1878 Royal Commission recommendations and in 1905 passed its own consolidation. The Act received bi-partisan support and had been largely drafted by the previous government.⁷⁷ The provisions in the Act relating to lecturing rights followed the same scheme as those in Lord Thring's 1899 Bill.

The vital section was section 15(1):

15(1) The lecturing right in a lecture means the exclusive right to deliver it, or authorise its delivery, in public, and, except as hereinafter provided, to report it.

The section, following Lord Thring's Bill, is drafted widely enough to cover *ex tempore* lectures, and as the Act did not extend to unpublished manuscripts retains the remnants of Wakley's distinction by referring to "public" lectures. Interestingly, the Act contains a clear conceptual distinction between copyright (s13), performing right (s14) and lecturing rights(s15).

In the course of extensive debate of the Bill in both the House of Representatives and the Senate a number of references to these clauses were made. The responsible Minister, Senator Keating, introducing the Bill in the Senate made it clear that the Government saw these clauses as protecting lectures given in universities.⁷⁸ In Committee he stated:

Under this clause [15] a University student would be at perfect liberty to take whatever notes of a lecture he thought necessary for his private use, but he would not be

⁷⁷ Senator Sir Josiah Symon, Hansard Senate 30 August 1905 p 1634

⁷⁸ 24 August 1905, p1431

allowed to take an extended note, such as a shorthand note, and publish the lecture without the authority of the lecturer. A student should not be permitted to deprive the person who has prepared the lecture of the material advantage likely to be gained from his right to its delivery.”⁷⁹

In the House of Representatives, Mr Groom, Minister for Home Affairs, when asked if criticism of a lecture could infringe the lecturer’s right stated:

It all depends on the nature of the review. The report might possibly involve a criticism of the lecture, but it must not reproduce the lecture in such a way as to substantially interfere with the lecturing right⁸⁰.

Interestingly when first introduced in the Senate the Bill contained the following definition of lecture:

‘Lecture’ means a piece for recitation of any address, but does not include a political speech or a sermon delivered in a place of public worship

However, in Committee, although Senator Keating noted that the meaning of lecture was unclear and had never previously been defined, the definition was deleted and on Senator Dobson’s insistence protection extended to sermons.⁸¹ No further reference to political speeches was made. The definition, if it had remained would have raised the interesting issue whether “a piece” implied material form.

In the House of Representatives a short, but spirited debate concerned the long term effect of giving lecturers the right to prevent publication, some members fearing that this could result in lecturers prohibiting the publication of whole areas of knowledge and “was not in keeping with modern ideas on educational questions”⁸² While some dissent thus existed over the right to restrict print publication, all members appeared to agree that a lecturer was entitled to copyright in the re-delivery of his or her lecture.⁸³

79 13 September 1905, p 2180.

80 Hansard House of Representatives 7 November 1905 p 4652.

81 12 October 1905, Senate, p 3462.

82 18 December 1905, House of Representatives, p 7265.

83 p 7267.

THE IMPERIAL COPYRIGHT ACT 1911

In 1909, the British Parliament appointed yet another Select Committee to report back on copyright reform. The event which finally precipitated action was the amendment of the *Berne Convention on Copyright*. As a result Britain felt that it should undertake the long overdue task of consolidating its own laws and also, as far as possible, bring them into line with the new version of the *Berne Convention*.

This Committee, in dealing with reform of copyright, discussed its preferred approach to the reform of lecturer's rights. At page 10 of its report it said:

The Committee notes that in par. 1 [of the Berne Convention] lectures are not mentioned as subject-matter of protection, nor are sermons and speeches. But it is clear to the Committee that it would be desirable in any amendment of the British Law that further provision should be made for the protection of these matters, the provisions of the Lectures Copyright Act, 1835, being in their opinion, inadequate to deal properly with the conditions of the present day. The suggestion the Committee makes is that the right of delivery of lectures, sermons and speeches should be assimilated to that of dramatic authors, that is to say, the right of delivery should be protected, and the condition at present imposed of giving notice to two magistrates should be abolished; and with regard to the reports of lectures, sermons, and speeches, newspapers should be entitled to report them unless at the time when delivery takes place should be given prohibiting publication.⁸⁴

This time a reforming Bill was produced, introduced and passed. The new consolidated Act, the *Imperial Copyright Act 1911*, was designed to apply to all colonies to ensure copyright uniformity throughout the

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Report of the Committee Appointed to examine the various points in which the revised International Copyright Convention, signed at Berlin on November 13, 1908, is not in accordance with the law of the United Kingdom, including those points which are expressly left to the internal legislation of each country, and to consider in each case whether that law should be altered so as to enable His Majesty's Government to give effect to the Revised Convention aka Report of the Committee on the Law of Copyright, 1909, Cd. 4976, British Sessional Papers 1910 Vol XXI p 241.

Commonwealth. Consequently Australia repealed its 1905 Act and in 1912 enacted the *Imperial Copyright Act* 1911 as the *Copyright Act* 1912. There was no mention of lecturer's rights in debate on the Bill.

In addition a vital change had also occurred in copyright as a result of the British Government's decision to adopt the *Berne Convention*. For the first time Commonwealth statutory copyright extended to unpublished works. Consequently the common law rights in unpublished works was abolished.

This, combined with the decision to see lectures in the same light as dramatic works, the performance of which since *Macklin v Richardson* had been to not constitute publication, meant that the way in which the rights of lecturers were protected had again changed. This time it was in a form very similar to the present 1968 Act.

Lectures would be deemed to be unpublished. Common law copyright would be abolished and statutory copyright would extend to unpublished works. The Schedule (ie the *Imperial Copyright Act*) enacted:

"1(1) Subject to the provisions of this Act, copyright shall subsist throughout the parts of His Majesty's dominions to which this Act extends ..., if:

...

(b) in the case of an unpublished work, the author was ... a British citizen ...or resident in such parts of His Majesty's domains as aforesaid; ..

1(2) For the purpose of this Act, "copyright" means the sole right ... in the case of a lecture to deliver, the work or any substantial part thereof in public.

1(3) ... publication, in relation to any work means the issue of copies of the work to the public, and does not include the performance in public of a dramatic or musical work, the delivery in public of a lecture ..."

31 No person shall be entitled to copyright or any similar right in any literary, dramatic, musical or artistic work, whether published or unpublished, otherwise than under and in accordance with the provisions of this Act, or of any other statutory enactment for the time being in force,

but nothing in this section shall be construed as abrogating any right or jurisdiction to restrain a breach of trust or confidence.

Section 2(1)(v) enacted a similar provision to the 1905 Act in relation to newspaper reports of lectures -exempting such reports from infringement of copyright unless the lecturer had prohibited such reports by conspicuous notice during the lecture.

The fascinating aspect of this Act lies in section 31. It is at least arguable that by listing the different types of rights abolished⁸⁵, the failure to mention lecturing rights which had been seen as conceptually separate in the 1905 Act and Lord Thring's Bill means that any common law lecturer's rights were never abolished by this Act. In any event the saving of breach of trust or confidence actions seems to clearly ensure the continued relevance of *Abernethy v Hutchinson*.

THE CURRENT AUSTRALIAN LAW

In 1952 the Gregory Committee reported to the British Parliament on reforms to the Copyright Law and a new Act was passed in 1956. Following this, in 1959 the Spicer Committee reported to the Australian Parliament on these reforms and suggested complementary Australian reforms. The Australian Parliament then passed the present Copyright Act in 1968. In neither of the Committee reports, nor the debate in Parliament, were lecturer's rights mentioned. Presumably with their assimilation to dramatic rights and the decline of lecturing as a means of entertainment of general public instruction no one thought it worth discussing.

In the 1968 Act the unpublished nature of lectures was maintained, though in a more roundabout way - but importantly the mention of publicly delivered lectures disappeared. Finally, the public/private distinction had disappeared. The ability to prevent a newspaper report by conspicuous notice also disappeared, no doubt absorbed into the fair dealing provisions.

The result was that lectures no longer had a place in copyright in their own right. They were reduced, presumably by dint of their reduced current importance and popularity, to being excluded as a means of publication.

CONCLUSION

The net result is that despite the eventful 19th century history of the lecturer's right, the extent and basis of protection of lecturer's rights remains unclear. Since 1912 statutory copyright has extended to unpublished manuscripts. This has replaced the common law copyright in such documents⁸⁶, which is suggested is the correct doctrinal basis for the decision in *Caird v Sime*.

The modern development of the equitable doctrine of breach of confidence suggests that protection of ex tempore lectures may be safeguarded by this doctrine, however with the development of the doctrine of breach of confidence in the late 20th century in the context of trade secrets and the emphasis on the confidentiality of the communication, the findings of Lords Halsbury and Watson that Professor Caird's lectures were private and thus confidential seem whimsical if not clearly wrong. Thus while the doctrine might assist lecturers in situations similar to Nichols and possibly Abernethy it would be unlikely to assist those in Caird's position.

Both the reasoning in *Caird v Sime* and the precedents on which it was based are questionable, and the whole line of authority appears to have arisen because of the *Lancet's* original inability to publish medical lectures. Further, as a result of Wakley's emphasis on the public/private distinction in lectures the area of law never had a settled theoretical basis. This appeared to have finally been resolved in Lord Thring's Bill and the Australian 1905 Act which seems to have extended statutory coverage to include both manuscript based and ex tempore lectures delivered in public. However, the *Imperial Copyright Act*, in extending statutory copyright to unpublished works and declaring the delivery of lectures to not constitute publication closed the legislative opening that had covered ex tempore lectures and thus pushed them back upon the uncertainties of *Caird v Sime* and *Abernethy v Hutchinson*, together with the additional uncertainty of proving such rights were separate from common law copyright - which had been abolished. The present Act does nothing to resolve this difficulty.

In summary then, the protection of ex tempore lectures is unclear. No case on the issue has been decided this century and those few that have been decided were decided in an environment both legally and socially different to the present. If a case were to be run today, it seems the doctrine of

⁸⁶ However, while the 1912 Act abolished common law copyright, there is no such provision in the 1968 Act and as that Act repeals the 1912 Act, it may be possible to argue that common law copyright in manuscripts has revived.

breach of confidence would be the basis of the case, but as confidentiality would be a major stumbling block, Lord Eldon's implied contract may be the necessary, though artificial ingredient that would found the breach by a third party by alleging the tort of induced breach of contract.

Turning to the legislative history of copyright, the *Lectures Copyright Act* is evidence of at least one form of protection for incorporeal expressions of ideas. This might tend to support an argument that the insistence on material form as a fundamental requirement of copyright law is a 20th century gloss on the law which can be discarded in a digital age. However the circumstances which gave rise to the passing of the Act and the lack of interest in its enforcement or amendment suggest that its existence is due more to the energies of a disappointed litigant than to any considered doctrinal development. Despite this the strange history and continuing confusion over the basis for protection, if any, of *ex tempore* lectures illustrates yet again that despite the constant attempts to codify and systematise the law, its theoretical bases are not always so logically based as they might be made to appear. Often legal developments owe more to forceful personalities than any other factor.