Copyright duration in Australia: 1869 to 2014

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One of the most significant features of any copyright statute is the duration of the rights granted to works and subject matter other than works pursuant to that law. The most "appropriate" length of copyright also continues to be a recurring theme in legislative, policy and academic debates. However, despite both the significance of and interest in the term of copyright, there has been little empirical evidence presented on how long, in light of both statutory term and life expectancies, copyright will likely protect a work. This article provides a historical account of both the duration of copyright and its various extensions, from the introduction of the first colonial copyright statute through to today. It reveals that, while multiple legislative extensions have lengthened the term of protection, continual increases in life expectancies have also added to the duration of copyright, to the point where, today, copyright will likely protect a work for well over 100 years.

I. Introduction

In *EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd* [2011] FCAFC 47, where it was found that Men At Work's seminal Australiana song, "Down Under" infringed copyright in another seminal Australiana song, Marion Sinclair's "Kookaburra Sits in the Old Gum Tree", Emmett J, towards the end of his judgment, commented that:

> While there are good policy reasons for encouraging the intellectual and artistic effort that produces literary, artistic and musical works, by rewarding the author or composer with some form of monopoly in relation to his or her work (see *Ice TV* at [24]), it may be that the extent of that monopoly, both in terms of time and extent of restriction, ought not necessarily be the same for every work. For example, it is arguably anomalous that the extent of the monopoly granted in respect of inventions under the *Patents Act 1990* (Cth), being a limited period following disclosure, is significantly less than the monopoly granted in respect of artistic, literary or musical works, being a fixed period following the death of the author or composer, irrespective of the age of the author or composer at the time of publication.[1]

These comments echo those made by one Federal parliamentarian, Mr Alfred Conroy, over one hundred years earlier, during the passing of the first Australian copyright statute, the *Copyright Act 1905* (Cth). In criticising an extension to the term of artistic works, Conroy argued that:

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1 *EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd* [2011] FCAFC 47, [100].

> Considering that the proprietors of patents, which represent the highest efforts of mechanical genius, are protected for only fourteen years, surely that is a sufficiently long term to apply to artistic copyrights! I contend that in this Bill we are going too far, because we are lessening the rights of individuals. What would be thought if forty-two years had to elapse before we could take advantage of any patent? We must fix a reasonable period at which the public shall secure a return for the exclusive rights which they have conferred upon particular individuals.[2]

The duration of copyright protection for a work or subject matter other than work has arguably been, and continues to be, one of the most contentious matters of copyright law and policy. As highlighted in the comments above, the period of copyright protection heavily outweighs those provided by other forms of intellectual property (IP) under Australian law – for example, patents, where a standard patent can be protected for a maximum of 20 years,[3] or designs, for a maximum of 10 years.[4] Today, the shortest period of protection provided by the *Copyright Act 1968* (Cth) is 25 years, for a published edition;[5] for a literary, dramatic, musical or artistic work published during the life of the author, the relevant period of copyright subsistence is life of the author plus 70 years.[6] However, where publication never occurs, then copyright in that work will never expire.

A limited duration of copyright protection for published works is one of the ways that statutory copyright today recognises the existence of the "public domain".[7] While other facets of the public domain – for example, the idea/expression dichotomy, and the standard of originality – continue to be determined at common law,[8] the duration of copyright for a published work is, and always has been, within the remit of the legislature. Given that legislative influence, the term of copyright is one of the most important areas in which the "public" – those entitled to the benefit of copyright from the dissemination of protected works – can influence both the boundaries and development of the public domain. As this article will illustrate, the history of changes to the duration of copyright has not been kind to the public, or the public domain.

Most recently, there has been renewed interest in the duration of copyright as a result of term extensions in the European Union,[9] the United States[10] (US) and Australia,[11]

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2 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 18 December 1905, 7269 (Mr Alfred Conroy).

3 *Patents Act 1990* (Cth), s 67.

4 *Designs Act 2003* (Cth), ss 46, 47. It is worth noting that while a trade mark is registered for an initial period of 10 years, it can be renewed indefinitely if the owner chooses to do so: see *Trade Marks Act 1995* (Cth), ss 72, 75.

5 *Copyright Act 1968* (Cth), s 96.

6 *Copyright Act 1968* (Cth), s 33(2).

7 For an analysis of how Australia's copyright public domain is comprised of fifteen distinct "public rights" (not all statutory) see Greenleaf G and Bond C, "'Public Rights' in copyright: What makes up Australia's public domain?" (2013) 23 AIPJ 111.

8 In Australia, the most recent case law on these issues include *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* [2002] FCAFC 112; *IceTV Pty Ltd v Nine Network Australia Pty Ltd* [2009] HCA 14; *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* [2010] FCA 984; *Telstra Corporation Ltd v Phone Directories Company Pty Ltd* [2010] FCAFC 149.

9 See *Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights* [1993] OJ L 290/9.

10 *Copyright Term Extension Act 1998* (US).

from the Berne Convention-mandated life of the author plus 50 years,[12] to life of the author plus 70 years. In the US, this extension culminated in constitutional litigation, though this did not occur in other jurisdictions.[13] At the same time, a significant body of scholarship emerged debating this most recent extension and querying the appropriate length of protection, particularly given the advent of the Internet and rise of digital technologies.[14]

What has been mostly missing from this literature, however, is how the term of copyright has developed in both a legislative and practical context. Bently, for example, in an extensive 2008 paper, exhaustively examined the development of the term of copyright in the United Kingdom (UK) from 28 years to life of the author plus seventy years, in light of ideas of the "romantic author" and the influence of this concept on the development of duration.[15] This article undertakes a similar analysis in an Australian context (though with a different emphasis than romantic authorship), mapping the term of copyright from first colonial statute through to the duration under present day law, but also to take that analysis one step further. Using statistics on life expectancies from the Australian Bureau of Statistics, we explore the duration of copyright in a practical context: how long does copyright actually subsist in a work, on the basis of the term provided under law and life expectancies? Empirical work in copyright scholarship is scarce and can be problematic,[16] but from the research provided here we can map how the true duration of copyright - including both the life of the author plus any post-mortem period – has changed over time. Such analysis is useful from a historical perspective, to see how we reached this point both legislatively and practically, but also for future reform, if a term extension is again considered, either in Australia or beyond. Indeed, current drafts of the Trans-Pacific Partnership Agreement contain a reference to an extension of the term of copyright to life of the author plus 100 years, in line with the duration of copyright in Mexico.[17]

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11 *US Free Trade Agreement Implementation Act 2004* (Cth), Sch 9, s 120.

12 *Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, at Brussels on June 26, 1948, at Stockholm on July 14, 1967, and at Paris on July 24, 1971, and amended on September 28, 1979*, Art 7(1).

13 *Eldred v Ashcroft* 537 US 186 (2003).

14 See, for example, "Symposium: *Eldred v. Ashcroft:* Intellectual Property, Congressional Power, and the Constitution" (2002) 36 Loy LA L Rev 1; Packard A, "Copyright Term Extensions, the Public Domain and Intertextuality Intertwined" (2002) 10 J Intell Prop L 1; Alexander I, "Plus ÇA Change – Extension of Copyright Term in Australia" (2003) 55 IPF 6; Schwartz PM and Treanor WM, "*Eldred* and *Lochner*: Copyright Term Extension and Intellectual Property as Constitutional Property" (2003) 112 Yale LJ 2331; Rimmer M, "The dead poets society: The copyright term and the public domain" (2003) 8(6) First Monday, http://www.firstmonday.org/ojs/index.php/fm/article/view/1059/979; Crews KD, "Copyright Duration and the Progressive Degeneration of a Constitutional Doctrine" (2004) 55 Syr LR 189; Goldman KA, "Limited Times: Rethinking the Bounds of Copyright Protection" (2006) 154 U Pa LR 705.

15 See Bently L, "*R. v The Author:* From Death Penalty to Community Service 20th Annual Horace S. Manges Lecture, Tuesday, April 10, 2007" (2008) 32 Colum JL & The Arts 1, 64 - 89.

16 See, for example, Buccafusco C and Heald PJ, "Do Bad Things Happen When Works Enter the Public Domain?: Empirical Tests of Copyright Term Extension" (2013) 28 Berkeley Tech LJ 1.

17 See Reid A, "Open Letter to TPP negotiators – reject an extended copyright term", Australian Digital Alliance, 11 July 2014, http://digital.org.au/content/open-letter-tpp-negotiators-reject-extended-copyright-term; Choice Online, "The internet police are coming!", 7 November 2014, http://www.choice.com.au/media-and-news/consumer-news/news/tpp-makes-bad-copyright-law-worse-071114.aspx.

This article proceeds as follows. It is divided according to the various statutes and major amendments that have been introduced in Australia since 1869, starting with the relevant colonial legislation, through to today, and the most recent term extension introduced in 2004. In Part II we consider the colonial statutes and four terms of copyright: those provided for books, artistic creations, lectures and telegrams. We also introduce and analyse the statistics on life expectancies, and what, generally, would have been the actual terms of protection for creations at this time. In Part III we evaluate the short-lived 1905 statute and, in particular, examine how the term of copyright was considered a significant issue during the passing of this law. In Part IV, we examine the extension of copyright under the *Copyright Act 1912* (Cth), which introduced the Imperial *Copyright Act 1911* (Cth) in whole, including the Berne-mandated life of the author plus 50 years period of protection. In Part V, we commence by examining the duration of protection under the *Copyright Act 1968* prior to the 2004 amendments, and then turn to the amendments following the *Australia-United States Free Trade Agreement* (AUSFTA) in 2004 and consequent 20 year extension of the copyright term. Both Parts IV and V limit their analysis to books, as, for the most part, term extensions that were introduced for books also applied to other works, for example artistic or musical works. Throughout, this article considers, and calculates what has been the effective duration of copyright at various points in history, based on Australian longevity statistics, and how this affects the public domain in practice.

II. Multiple Durations Across Multiple Jurisdictions: The Colonial Position

Victoria was the first colony, in 1869, to introduce a copyright statute for the protection of works and designs created in that jurisdiction.[18] South Australia, New South Wales and Western Australia followed by introducing their own statutes over the course of the next 25 years.[19] In addition, Victoria, South Australia, Western Australia and Tasmania all introduced copyright-like laws for the protection of information conveyed by telegrams.[20] The benefits and deficiencies of those statutes have been considered elsewhere;[21] for the present purposes, our focus is on the term of protection provided for books, artistic creations, lectures and telegrams. In this discussion we use the Victorian *Copyright Act 1869* as our primary example as, for the most part, subsequent colonial statutes generally adopted that law, unchanged.

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[18] 33 Vict no. 350.

[19] 41 & 42 Vict no 95 (1878, SA); 42 Vict no 20 (1879, NSW); 54 Vict no 1076 (1890, Vic); 59 Vict no 24 (1895, WA). See also Robert Burrell, 'Copyright Reform in the Early Twentieth Century: the View from Australia' (2006) 27 JLH 239, 242.

[20] *An Act to Secure in Certain Cases the right of Property in Telegraphic Messages 1871* (Vic), 35 Vict no 414; *An Act to secure, in certain cases, the Right of Property in Telegraphic Messages 1872* (SA), 35 & 36 Vict no 10; *The Telegram Copyright Act 1872* (WA), 36 Vict no 7; *The Newspaper Copyright Act 1891* (Tas), 55 Vict no 49.

[21] See, for example, Bond C, "'Curse the Law!': Unravelling the copyright complexities in Marcus Clarke's *His Natural Life*" (2010) 15 MALR 452; Bond C, "'The play goes on eternally': Copyright, Marcus Clarke's Heirs and *His Natural Life* as Play and Film - Part One" (2011) 23 IPJ 267; Ailwood S and Sainsbury M, "The Imperial Effect: Literary Copyright Law in Colonial Australia", *Law, Culture and the Humanities*, published online 27 May 2014, http://lch.sagepub.com/content/early/2014/05/27/1743872114533871.abstract.

A. Books

One of the more consistent and least controversial aspects of the colonial copyright statutes concerned the term of copyright protection for books. Pursuant to section 14 of the Victorian statute, where a book was or had been first published in Victoria during the lifetime of the author, copyright would subsist for "the natural life of such author and for the further term of seven years commencing at the time of his death". However, where that seven-year posthumous period expired before 42 years had elapsed since publication, copyright would continue to subsist until 42 years passed.[22] Where the book in question was published posthumously, copyright protection extended for 42 years from first publication.[23] In both cases the terms of protection were identical with the period provided in the 1842 *Copyright Act* (UK).[24]

As we noted above, one of the gaps in copyright and public domain scholarship is any consideration of how long copyright actually subsists for, in light of statutory durations and life expectancies during a particular period. In a colonial context, this is significant given that two alternative terms of protection may apply. Of course, such an evaluation can only ever be an estimate: it cannot be said, across the board, that copyright would end for many works on a given date, or a specific year. Nevertheless, estimating how long copyright would have subsisted for, on the basis of life expectancies, provides an indication of how long copyright protection lasted, in practice, and thus how long it would have taken for works to enter the public domain.

Table A is organised as follows. The first column, "Age at Publication", gives the age of the author at the time that a hypothetical book was created. The second column identifies the sex of the author; as life expectancies differ between men and women, it is useful to differentiate in order to illustrate how sex may affect the duration of copyright. The third column provides the additional expectation of years of life for an individual during the period 1881-1890, based on data from the Australian Bureau of Statistics, while the fourth column, "Year of Death Based on Earliest Date as Calculation", provides the anticipated year that an individual would have died, based on the information in the third column. Finally, the fifth column states the term of copyright that would have applied to a book published in these circumstances, either life of the author plus seven years, or 42 years.

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22 See 33 Vict no 350 (1869,Vic), s 14; 41 & 42 Vict no 95 (SA), s 13; 42 Vict no 20 (NSW), s 3; 54 Vict no 1076 (1890, Vic), s 15; 59 Vic no 24 (WA), s 5(1), (2).

23 See 33 Vict no 350 (1869,Vic), s 14; 41 & 42 Vict no 95 (SA), s 13; 42 Vict no 20 (NSW), s 3; 54 Vict no 1076 (1890, Vic), s 15; 59 Vict no 24 (WA), s 5(3).

24 See 5 & 6 Vict c 45 s 3. For a discussion on the introduction of these terms pursuant to the *Copyright Act* in the UK – and the accompanying controversy – see Seville C, *Literary Copyright Reform in Early Victorian England* (Cambridge University Press, 1999) "Appendix II: Successive versions of the bill" pp 225 - 230.

TABLE A:
DURATION OF COPYRIGHT IN BOOKS PRODUCED BY MALES AND FEMALES IN LIGHT OF LIFE EXPECTANCIES IN THE PERIOD 1881-1890[25]

Age at Publication	Sex	Expectation of Additional Years of Life at that Age	Year of Death Based on Earliest Date as Calculation (1881)	Length of Copyright
15	Male	44.45	1925	Life of the author plus 7 years; for a total of 51.45 years protection
15	Female	47.54	1928	Life of the author plus 7 years; for a total of 54.54 years protection
25	Male	37.10	1918	Life of the author plus 7 years; for a total of 44.1 years protection
25	Female	39.67	1920	Life of the author plus 7 years; for a total of 46.67 years protection
35	Male	30.06	1911	42 years
35	Female	32.58	1913	42 years
45	Male	23.04	1904	42 years
45	Female	25.56	1906	42 years

A number of issues are evident from this Table. First, based on these calculations, the terms of copyright applied in generally equal proportions, with neither outweighing the other in practice. Second, and arguably more significantly, it is important to note that copyright in the majority of works would technically expire after the introduction of the *Copyright Act 1912*, discussed below, and the life-plus-50 year term extension that statute introduced. There were three exceptions to this: works produced by 35-year-old males, and 45-year-old males and females. However, in all other cases, copyright would have expired after the introduction of the *Copyright Act 1912* and the work would therefore be protected for a significantly longer period of time. It is unfortunate, though understandable, that life expectancies in the colonies were not recorded prior to 1881, which would allow us to determine whether there was any difference for individuals born a decade earlier. Those individuals would have enjoyed protection from its very introduction in the colonies and such copyright would probably have expired prior to the extension under the 1912 statute, discussed below.

[25] Australian Bureau of Statistics, *Australian Historical Population Statistics*, 3105.0.65.001, "Table 6.2 Life expectancy at single ages (ex), males, Australia, 1881 onwards" and "Table 6.6 Life expectancy at single ages (ex), females, Australia, 1881 onwards", 2014, http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/3105.0.65.0012014?OpenDocument.

It is important to note, however, that these figures are only relevant to published works. Statutory copyright only subsisted in a book once publication in the relevant colony had occurred. Pursuant to section 14 of the 1869 Victorian legislation, copyright subsisted in books that either had been or would be published in the colony of Victoria. This was consistent with UK legislation. Thus, the question arises: what was the position in relation to both the protection of copyright of unpublished books, and for what period would copyright subsist these unpublished creations? The answer to the former question is protection was provided under common law; the answer to the latter is that common law copyright would subsist until publication and, if publication did not occur, copyright would continue indefinitely.[26]

A number of decisions of the latter part of the 19th century both confirmed the existence of common law copyright in the colonies and debated the extent of its boundaries. In *Wilson v Rowcroft* (1873) 4 AJR 57, in 1873, the plaintiff argued that:

> If a man wrote a work and did not publish it, would it be contended that anybody had the right to steal the manuscript and publish it; and if he published it himself could any other person republish it? The principle of the common law was to recognise a general right in property, and the act of Parliament was rather a limitation than an extension of that right.[27]

In its 1878 report the Royal Commission on Copyright also notes the existence of common law copyright for unpublished documents, at least in the United Kingdom.[28] Further proof of its existence also provided in section 7 of the subsequent *Copyright Act 1905*:[29]

> Subject to this and any other Acts of the Parliament, the Common Law of England relating to proprietary rights in unpublished literary compositions shall, after the commencement of this Act, apply throughout the Commonwealth.

Under the 1905 Act statutory copyright began with first publication, consistent with the colonial copyright statutes and unpublished works were not subject to statutory protection.[30] Although section 7 was not technically required to enact UK common law protection for unpublished protection in Australia, it was included to avoid the new States legislating on this issue, thus causing inter-jurisdictional issues concerning enforcement.[31] However, its inclusion also confirms the intention of the Federal

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[26] A position noted by other commentators: see Bently L, "Copyright, Translations, and Relations Between Britain and India in the Nineteenth and Early Twentieth Centuries" (2007) 82 Chi-Kent L Rev 1181, 1183, footnote 6.

[27] Mr Holroyd, in argument for the plaintiff in *Wilson v Rowcroft* (1873) 4 AJR 57, 59.

[28] *Report of the Royal Commission on Laws and Regulations Relating to Home, Colonial and Foreign Copyrights* (1878, c 2036), "Digest of the Law of Copyright" by Sir James Stephen, Chapter I, Article I, lxv.

[29] As we discuss further below, it was not until the *Copyright Act 1911* (Imp), the Imperial British legislation incorporated into Australian law as part of the *Copyright Act 1912* (Cth), that formal statutory protection for unpublished literary works was introduced: see, eg, *Sands & McDougall Pty Ltd v Robinson* (1917) 23 CLR 49, 55. Common law copyright was also formally removed pursuant to section 31 of the 1911 Act.

[30] *Copyright Act 1905* (Cth), s 16(1).

[31] See, eg, Commonwealth of Australia, *Parliamentary Debates*, Senate, 13 September 1905, 2159 (Senator JH Keating). It is worth noting that in the US, the *Copyright Act 1909* contained a

Parliament that the common law should protect unpublished works and thus it appears that common law copyright in unpublished books was assumed to apply in the colonies.[32]

Two conclusions regarding the state of unpublished works in a colonial context can be drawn from section 7. First, it suggests that this common law copyright protection remained in Australian law post-Federation. Second, section 7 also indicates that common law protection was limited to "unpublished literary compositions". This appears to be a special category of copyright works that, as we discussed earlier, remains today, although this protection has subsequently been codified. Therefore although the Australian public domain would have and still is affected by the existence of indefinite protection for unpublished literary works, by implication it also suggests that perpetual copyright protection has never applied to published works, since the inception of statutory copyright in Australia. Indeed, two of the titles of the colonial copyright legislation stated that copyright protection was "for a limited period."[33]

B. Paintings, Drawings, Works of Sculpture, Engravings and Photographs

Previous research undertaken by Bond has revealed and analysed the unusual position regarding the terms of copyright introduced for artistic creations under the Victorian *Copyright Act 1869*.[34] While the Victorian legislature adopted the same term of protection as applied in the UK statute for books, it drastically reduced the term of copyright for what might be broadly termed "artistic creations".[35] In the UK, paintings, drawings and photographs were protected for life of the author plus 7 years;[36] for engravings, 28 years;[37] and for sculptures, 14 years plus an additional 14 years if the author remained alive at the end of that initial period.[38] In Victoria, section 36 of the 1869 statute provided the following terms of protection: 14 years for paintings, drawings, sculptures and engravings, and three years for photographs and the associated negatives. These reduced terms of protection were also adopted in the

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provision that maintained the right of the author of an unpublished work to pursue an action either "at common law or in equity" to protect the work. See *Copyright Act 1909* (US), s 2.

32 This assumption was never tested in Australian courts. It has been described (in the English context) as "the myth of a perpetual common law copyright in the author's *unpublished* manuscript": see Deazley R, *Rethinking Copyright: History, Theory, Language* (Edward Elgar, 2006) p 24 (emphasis in original). This view remains contested.

33 *An Act to secure to Proprietors of Designs for Articles and Works of Manufacture and Art, and to Proprietors of Works of Literature and Fine Art, the Copyright of such Designs and Works for a limited period* 33 Vict no 350 (1869) (Vic); *An Act to secure to Proprietors of Works of Literature and Fine Art and to Proprietors of Designs for Articles and Works of Manufacture and Art the Copyright of such Works and Designs for a limited period*, 42 Vict no 20 (1879) (NSW).

34 Bond C, "'There's nothing worse than a muddle in all the world': Copyright complexity and law reform in Australia" (2011) 34 UNSWLJ 1145, 1148 - 1152.

35 This information is also provided in "Table A: Comparison of Statutory Terms of Protection for Various Artistic Works in the Colonies and the United Kingdom" as it appears in Bond, above n 36, 1150.

36 See *Fine Arts Copyright Act* 1862 25 & 26 Vict c 68, s 1.

37 Originally, under the 1735 Act, copyright in engravings ran for 14 years from first publication. This was extended to 28 years under the 1766 Act. See 8 Geo II c 13 (1735), s 1; 7 Geo III c 38 (1766), s 7.

38 54 Geo III c 56 (1814), ss 2, 6.

copyright statutes subsequently passed in South Australia, New South Wales and Western Australia.[39]

The reasons for this reduction of the term of copyright remain unclear, with little information provided in either the accompanying parliamentary debates or other sources.[40] As will be discussed below, this length of protection was raised during parliamentary debate on the *Copyright Act 1905*, but that such a change had been introduced by Victoria, and any potential reasons for this change, were not discussed.

C. Telegrams

The decision to include copyright protection for telegrams under colonial law requires slightly greater explanation than for accepted categories such as books and paintings. Under traditional conceptions of copyright law and the public domain, "facts" and "information" lie outside the boundaries of copyright protection and are free to be used by all. However, in colonial Australia, a number of jurisdictions provided copyright-like protection for facts, where these were received via telegram, for a limited period of time.[41] That legislatures sought to provide such protection highlights the fact that newspapers were considered a significant resource and asset in the colonies; as Twopeny noted in his 1883 text *Town Life in Australia*, "[t]his is essentially the land of newspapers. … Excepting the Bible, Shakespeare, and Macaulay's 'Essays,' the only literature within the bushman's reach are newspapers."[42]

Newspapers were protected as "books" under the 1869 Victorian statute; however, it was the news itself that was most valuable in the colonies. Both publishers and parliamentarians noted the pilfering of news by smaller publications and the damage this practice caused colonial newspapers, who would often enter into pricey agreements with international news organisations for the latest news via telegram.[43] As Kinglake noted in an 1892 sketch of the colonies for those intending to settle there, the popular colonial newspapers "publish the news of the world every morning, and spare no expense to obtain it."[44] One Victorian colonial parliamentarian stated that:

> Five minutes after the *Argus* or any other newspaper published news so received [by telegram], the message would become common property, and any person who had a few shillings and a printing press could strike off any number of copies, and sell them at a farthing each.[45]

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[39] See 41 & 42 Vict no 95 (SA), s 34; 42 Vict no 20 (NSW), s 25; 59 Vic no 24 (WA), s 35.

[40] Bond, above n 36, 1150. See also Bowrey K, '"The World Daguerreotyped: What a Spectacle!' Copyright Law, Photography and the Economic Mission of Empire" in Sherman B and Wiseman L (eds) *Copyright and the Challenge of the New* (Wolters Kluwer, 2012) 11, pp 32 - 33.

[41] See also Bently L, "Copyright and the Victorian Internet: Telegraphic Property Laws in Colonial Australia" (2005) 38 Loy LA L Rev 71; Bowrey K and Bond C, "Copyright and the Fourth Estate: Does Copyright Support a Sustainable and Reliable Public Domain of News?" (2009) 16 IPQ 399.

[42] Twopeny REN, *Town Life in Australia* (Elliot Stock, 1883) p 221.

[43] Livingston KT, *The Wired Nation Continent: The Communication Revolution and Federating Australia* (Oxford University Press, 1996) pp 56 - 57.

[44] Kinglake E, *The Australian At Home: Notes and Anecdotes of Life at the Antipodes including Useful Hints to those intending to Settle in Australia* (Leadenhall Press, 1892) p 96. See also Bently, above n 41, 80 - 88.

[45] Victoria, Legislative Assembly, *Parliamentary Debates*, 16 November 1871, 1875 (Mr Mackay).

Four colonies subsequently introduced laws seeking to protect telegrams. By 1872 Victoria, South Australia and Western Australia had all enacted statutes that gave newspapers the rights to telegrams sent to them containing news information.[46] Tasmania followed in 1891 with a statute containing similar provisions.[47] Further, when Western Australia introduced a new copyright statute in 1895, it repealed its previous telegraphic messages law and included provisions to the same effect as its 1872 Act.[48] These statutes were, in the words of one member of Parliament, "an entirely new experiment."[49]

Pursuant to these laws, newspapers were entitled to an exclusive right to print information conveyed to them by telegram, for a limited period of time. For example, section 1 of the 1871 Victorian statute stated that:

> Where any person in the manner hereinafter mentioned publishes in any newspaper any message sent by electric telegraph from any place outside the Australian colonies, no other person shall, without the consent in writing of such first mentioned person or his agent thereto lawfully authorized, print and publish, or cause to be printed and published, during a period of twenty-four hours from the time of such first mentioned publication … the whole or any part of any such message, or … of the intelligence therein contained, or any comment upon or any reference to such intelligence, which will in effect be a publication of the same.[50]

The duration of these rights was, however, a contested issue. For example, when the Victorian Bill first came before the Legislative Assembly in late 1871, the original period of protection proposed was for 48 hours from first publication.[51] This period was eventually reduced to 24 hours, with many parliamentarians believing that limited term, combined with a limited period of application (until the end of 1872) made the Bill more acceptable.[52] In addition, one further amendment was suggested, which was also adopted in the subsequent South Australian and West Australian statutes: that publication of the telegram must occur within a certain time of receipt of the message.[53] The following periods, detailed in the Table below, were therefore adopted in each of the relevant colonies.

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46 *An Act to Secure in Certain Cases the right of Property in Telegraphic Messages 1871* (Vic), 35 Vict no 414; *An Act to secure, in certain cases, the Right of Property in Telegraphic Messages 1872* (SA), 35 & 36 Vict no 10; *The Telegram Copyright Act 1872* (WA), 36 Vict no 7.

47 *The Newspaper Copyright Act 1891* (Tas), 55 Vict no 49.

48 See 59 Vict no 24 (1895, WA), ss 20 – 23.

49 Victoria, Legislative Assembly, *Parliamentary Debates*, 16 November 1871, 1873 (Mr Stephen).

50 See also 35 & 36 Vict no 10, s 1 (SA); 36 Vict no 7, s 1 (WA).

51 Victoria, Legislative Assembly, *Parliamentary Debates*, 16 November 1871, 1872.

52 Victoria, Legislative Assembly, *Parliamentary Debates*, 21 November 1871, 1887 - 1889. Just prior to the passing of the Bill, Mr WC Smith attempted to get the 24 hour period further reduced to six hours, though this was ultimately rejected. See Victoria, Legislative Assembly, *Parliamentary Debates*, 21 November 1871, 1890.

53 Victoria, Legislative Assembly, *Parliamentary Debates*, 21 November 1871, 1889 (Mr Vale).

TABLE B:
LENGTH OF PROTECTION FOR TELEGRAMS FROM RECEIPT OF MESSAGE AND PUBLICATION, BY JURISDICTION

Statute	**Protection from Publication**	**Period Specified for when Publication had to occur by**
Victoria, 1871	24 hours (s 1)	36 hours (except Sundays) (s 1)
South Australia, 1872	24 hours (s 1)	36 hours (except Sundays) (s 1)
Western Australia, 1872	72 hours (s 1)	80 hours (s 1)
Tasmania, 1891	48 hours (s 3)	No period specified
Western Australia, 1895	72 hours (s 20(1)) For morning newspapers: publication deemed to be 7am For evening newspapers: publication deemed to be 2pm	No period specified

While the durations of protection provided here are not as substantial as those granted to books or artistic creations, it is significant that under these statutes, copyright restricted the reproduction and publication of facts, for between one to three days. That this occurred also highlights why it is useful to consider terms of copyright on a jurisdictional basis, as such legislative quirks indicate how, historically, not all legislatures have adopted a "one size fits all approach" to the protection of works and the duration of such protection.[54]

D. Lectures

One of the more unusual items (at least from a modern perspective) covered in the colonial copyright statutes concerned the subsistence of copyright in lectures, although such provisions were not unique to the colonies.[55] Pursuant to section 31 of the Victorian statute the author of a lecture, or a person sold a copy of the lecture for the purposes of delivery, had the "sole right and liberty of printing and publishing such lecture or lectures" where that lecture was first delivered in Victoria.[56] From the statute it does not appear that the lecture needed to be "fixed" in any way to gain protection. Where an individual took notes based on the lecture and published them without the permission of the author, the infringer would have to forfeit all prints and pay one penny for every infringing copy.[57]

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[54] Bowrey makes this point in relation to the UK and colonial copyright more generally: see Bowrey, above n 42, p 32.

[55] See *An Act for preventing the Publication of Lectures without Consent 1835* (UK), 5 & 6 Wm IV, c 65.

[56] See 33 Vict no 350 (Vic), s 31; 41 & 42 Vict no 95 (SA), s 30; 42 Vict no 20 (NSW), s 20; 54 Vict no 1076 (1890, Vic), s 32; 59 Vict no 24 (WA), s 30(1).

[57] See 33 Vict no 350 (Vic), s 31; 41 & 42 Vict no 95 (SA), s 30; 42 Vict no 20 (NSW), s 20; 54 Vict no 1076 (1890, Vic), s 32; 59 Vict no 24 (WA), s 30(2).

While the terms of protection for books, artistic works and telegrams were all carefully defined in the colonial statutes – whatever the reason for the choice of term – it appears that there was an oversight with the length of protection for lectures. Until the 1895 West Australian copyright statute, none of the prior colonial laws stated a term of protection for lectures.[58] Such an oversight was not limited to Australia: the UK statute also failed to state a term of protection. The 1878 Royal Commission on Copyright noted that "[t]he term of copyright in a lecture not printed and published but publicly delivered is wholly uncertain. The term of copyright in a lecture printed and published is the longer of the two periods of 28 years and the life of the author",[59] though it did not state the basis for that proposition. The latter was also not included in the colonial statutes.

It is unfortunate that such rigorous protection for lectures was included in the colonial copyright statutes without any specified term of protection. It may be that, as no period was specified, the right was intended to be perpetual. However, given that section 34 of the Victorian statute referred to the publishing of lectures "whereof the time hath or shall have expired within which the sole right to print and publish the same is given by the Act", copyright in lectures must have expired at some point. Nevertheless, when this occurred remains a mystery.

As highlighted in this section, the colonial statutes provided the foundations of copyright protection for works in Australia. For books, the term of copyright was identical as that provided in the UK, with the result that a book would generally be protected between 42 and 55 years, as illustrated in Table A. How these terms, and the practical duration of copyright developed, is explored in a post-Federation context in greater detail below.

III. Copyright at Federation: Duration Under the 1905 Statute

Pursuant to power granted to it under section 51(xviii) of the new *Australian Constitution*, the Federal Parliament could "make laws for the peace, order, and good government of the Commonwealth with respect to … Copyrights, patents of inventions and designs, and trade marks." Laws relating to each type of what today we refer to as IP were passed within the first decade of the new Australian Commonwealth. The Parliament took its responsibilities with respect to IP statutes seriously, with each law rigorously debated. From an Australian perspective, it is unfortunate then that the *Copyright Act 1905*, so carefully created, would only last until 1912, discarded in favour of international consistency.[60] In this Part, we now turn to how the term of copyright was considered, and the practical consequences of decisions made relating to duration.

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[58] See 59 Vic no 24 (WA), s 30(1), where it is stated the lecture will be protected "for the same period as is hereinbefore limited with respect to copyright in books".

[59] *Report of the Royal Commission on Laws and Regulations Relating to Home, Colonial and Foreign Copyrights* (1878, c 2036) [10].

[60] See Burrell, above n 20, 256, 260 - 261.

A. Books

Of the various issues that arose when the new Commonwealth Parliament sought to introduce a federal copyright statute in 1905, the term of copyright for books was considered among the most significant.[61] As Sir Josiah Symon noted, "[t]his is undoubtedly, if not the most important, one of the most important provisions of the Bill. The whole advantage or disadvantage of the Bill rests on the duration of copyright granted under it."[62] However, the original length of protection proposed in the *Copyright Bill* was quite different from that provided in the colonial copyright statutes and the later Act itself. Pursuant to section 17(1) of the *Copyright Bill* as introduced into the Senate:

> The copyright in a book, the performing right in a dramatic or musical work, and the lecturing right in a lecture, shall subsist for the term of the author's life, and thirty years after the end of the year in which he dies, and no longer.[63]

This period was intended to apply to all categories of creations, including an artistic work, with the intention of creating uniformity between Australia and any future UK copyright legislation.[64] While this period was longer than any term provided in the colonial statutes, it also purported to introduce another, more minor term extension: that copyright would subsist until the end of the year in which the author died.

The proposed term, however, did not remain. When the suggested provision was considered in the Senate, Senator Givens immediately requested an amendment.[65] Indeed, Senator Givens even argued that the existing Imperial and colonial term of 42 years was too long for copyright protection, later revealing that he believed 35 years to be more appropriate.[66] The Senator further stated that the suggested term "would have the effect of limiting the publication of valuable works at a time when they ought to be free to the public."[67] "Thirty" was subsequently replaced, in a number of separate amendments, with "forty-two years" and "the life of the author and seven years".[68] It would only be seven years before the more extensive life-plus-50 period of protection was introduced.

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61 The Bill was only just into its Second Reading when debate on the term of protection began: see Commonwealth of Australia, *Parliamentary Debates*, Senate, 30 August 1905, 1636 - 1640 (Senator Henry Dobson, Senator John Keating, Senator Edward Mulcahy, Senator Edward Millen, Senator Miles Staniforth Smith, Senator Sir Josiah Symon, Senator James Walker).

62 Commonwealth of Australia, *Parliamentary Debates*, Senate, 13 September 1905, 2181 (Senator Sir Josiah Symon).

63 *Copyright Bill 1905* (Cth), s 17(1). Section 17(2) then provided that where first publication, performance or delivery occurred following the death of the author, the relevant copyright, performing right or lecturing right would extend for 30 years following this first publication, performance or delivery.

64 See Commonwealth of Australia, *Parliamentary Debates*, Senate, 24 August 1905, 1430 (Senator John Keating).

65 Commonwealth of Australia, *Parliamentary Debates*, Senate, 13 September 1905, 2181 (Senator Thomas Givens). For the full debate on this provision, see Commonwealth of Australia, *Parliamentary Debates*, 13 September 1905, 2181 - 2190.

66 Commonwealth of Australia, *Parliamentary Debates*, Senate, 13 September 1905, 2182 (Senator Thomas Givens).

67 Commonwealth of Australia, *Parliamentary Debates*, Senate, 13 September 1905, 2181 (Senator Thomas Givens).

68 See Commonwealth of Australia, *Parliamentary Debates*, Senate, 13 September 1905, 2190.

Thus, under the *Copyright Act 1905* the length of protection for books remained the same as provided in the colonial statutes. Pursuant to section 17(1), copyright would subsist for the term of 42 years or the life of the author and seven years, whichever was longer. Section 17(2) was also amended, providing that where a book was published posthumously it would be entitled to 42 years protection. Again, this was the same as the colonial statutes, but longer than the Parliament had initially proposed. Section 17(3) provided for cases of joint authorship: where a book was written by joint authors, copyright would subsist for the longer between 42 years or "their joint lives and the life of the survivor of them, and seven years". This was the first time that joint authorship appeared in an Australian copyright statute.

As we noted above, one issue that is often overlooked in copyright law scholarship is how long copyright would have subsisted in a book produced by an author at a certain age, in light of life expectancies at the time. Once again, using statistical information collected by the Australian Bureau of Statistics, the following calculations can be made regarding the length that copyright would have subsisted in a book based on how many more years a person at a certain age would have been expected to live.

In this instance, separate Tables are used for male and female authors and Tables C and D are arranged slightly different to Table A above. In Tables C and D, the first column provides the age of the author at 1908, a hypothetical year of publication chosen for the present purposes. The second column states the additional years of life expectancy for an individual during the period 1901-1910, based on data from the Australian Bureau of Statistics. The third column illustrates the duration of copyright for that book; again, either life of the author plus seven years, or 42 years. The final column identifies what year copyright in the book would have expired in each case, had publication occurred in 1908.

TABLE C:
DURATION OF COPYRIGHT IN WORKS PRODUCED BY MALES IN LIGHT OF LIFE EXPECTANCIES IN THE PERIOD 1901-1910[69]

Age at 1908	Expectation of Additional Years of Life at that Age	Duration of Copyright	Year in Which Copyright Would Expire, If Book Published 1908
20	44.74	Life of the author plus seven years; for a total of 51.74 years protection	1960
25	40.60	Life of the author plus seven years; for a total of 47.60 years protection	1955
30	36.52	Life of the author plus seven years; for a total of 43.52 years protection	1951
35	32.49	42 years	1950
40	28.56	42 years	1950
45	24.78	42 years	1950
50	21.16	42 years	1950
55	17.67	42 years	1950
60	14.35	42 years	1950

The pattern that emerged under the colonial statutes remained here. Where a man wrote a book, until about the age of 35, the life-plus-seven term would protect that creation. In turn, when a man older than 35 wrote a book, the 42-year period applied. A similar pattern emerges when the same calculations are done for female authors:

[69] Australian Bureau of Statistics, *Australian Historical Population Statistics*, 3105.0.65.001, "Table 6.2 Life expectancy at single ages (ex), males, Australia, 1881 onwards", 2014, http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/3105.0.65.0012014?OpenDocument.

TABLE D:
DURATION OF COPYRIGHT IN WORKS PRODUCED BY FEMALES IN LIGHT OF LIFE EXPECTANCIES IN THE PERIOD 1901-1910[70]

Age at 1908	Expectation of Additional Years of Life at that Age	Duration of Copyright	Year in Which Copyright Would Expire, if Book Published 1908
20	47.52	Life of the author plus 7 years; for a total of 54.52 years protection	1962
25	43.36	Life of the author plus 7 years; for a total of 50.36 years protection	1958
30	39.33	Life of the author plus 7 years; for a total of 46.33 years protection	1954
35	35.37	Life of the author plus 7 years; for a total of 42.37 years protection	1950
40	31.47	42 years	1950
45	27.59	42 years	1950
50	23.69	42 years	1950
55	19.85	42 years	1950
60	16.20	42 years	1950

In this case, given that women generally had (and continue to have) a longer life expectancy, female authors who produced works at ages 20 through 35 would have enjoyed the seven-year posthumous term of protection. The only shift was for a woman who produced a book at age 35. Under the colonial statutes, the 42-year period would have applied, based on the fact a woman during that time would only be expected to live another 32.58 years. In the 1901-1910 period, however, a woman gained a little under three additional years and would be expected to live another 35.37 years. Thus, the life of the author-plus-seven years period would apply; though, as Table C illustrates, by what may have only amounted to a few months. From about the age of 40, the static 42-year period would have applied. On that basis, copyright subsisting in any book published in 1908 would have expired in 1950.

Further, when compared against the colonial statistics presented in Table A, it is apparent that there was no substantial increase in the term of protection for works created during this time. As under the colonial statutes, the shortest term of protection would have been for 42 years, though there was a slight shift in when this period would begin to apply. For males whose works were subsequently protected under either the colonial or 1905 statutes, any book published after the author turned 35 would have been protected for 42 years. In contrast, this period changed from 35 to 40 for females by the 1905 Act, so that only females who produced works after the age

[70] Australian Bureau of Statistics, *Australian Historical Population Statistics*, 3105.0.65.001, "Table 6.6 Life expectancy at single ages (ex), females, Australia, 1881 onwards", 2014, http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/3105.0.65.0012014?OpenDocument.

of 40 would have needed the 42-year alternate period of protection. The longest period of protection in Tables C and D was for females who produced books at age 20.

B. Artistic Works

Section 36 arguably provided one of the more significant changes to the duration of copyright made by the *Copyright Act 1905*. Pursuant to this provision, copyright began with the making of the artistic work and subsisted "for the term of forty-two years or for the author's life and seven years whichever shall last the longer."

The different lengths of protection available for artistic works were noted early in parliamentary debate on the *Copyright Bill*, though not subjected to any particular scrutiny.[71] However, some debate did occur when the *Copyright Bill* was finally considered in the House of Representatives on 18 December 1905, three days before the Bill received assent. When this clause was raised, House of Representatives member Mr Conroy vehemently opposed its introduction, making the comments noted in the Introduction to this article. He stated that "[w]e are now asked, without rhyme or reason, to extend the term of artistic copyright to forty-two years"[72] and moved that the term "forty-two" be replaced with "fourteen", thus attempting to restore the colonial period of protection to the Federal Bill. However, the amendment was rejected and a further proposal that a 28-year period be introduced was also denied.[73] Thus, it was not until three days before this Bill received assent that a member of the legislature recognised the substantial increase in the length of protection given to artistic works under that proposed legislation.

There are a number of reasons, however, why the UK periods of protection could have been restored. In a different context, some parliamentarians suggested that it would not be possible to pass any laws that conflicted with those enacted in the UK, reflecting an earlier comment made by Senator Symon that should a provision "be inconsistent with the Imperial law, it can have no effect until ratified by the Imperial authorities. It is, therefore, incumbent upon us to be particularly careful that we do not impinge on, or conflict with, that Imperial law."[74] On this basis, one reason why these terms of protection were introduced for artistic works may have been a fear that the shorter term of protection would not be permitted under then-current Imperial conditions. Another reason may be that the Parliament wished that all categories of creation protected under the *Copyright Act 1905* be for the same duration. Yet no formal reason was given for the change in parliamentary debate, echoing the silence

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71 See Commonwealth of Australia, *Parliamentary Debates*, Senate, 24 August 1905, 1429 (Senator John Keating).

72 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 18 December 1905, 7268 (Mr Alfred Conroy).

73 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 18 December 1905, 7269 (Mr William Webster).

74 Commonwealth of Australia, *Parliamentary Debates*, Senate, 30 August 1905, 1641 (Senator Sir Josiah Symon). Pursuant to the *Colonial Laws Validity Act 1865* (UK) 28 & 29 Vict c 63, a local Act could be voided where it was "repugnant" when compared with a similar UK Act of Parliament. The *Statute of Westminster 1931* (UK) 22 & 23 Geo 5 c 4 rectified this position by providing the Australian Parliament, in addition to others, with total autonomy over their national legislative processes.

of the Legislative Assembly of the colony of Victoria, the first legislature to introduce the reduced period of protection.

C. Lectures

A final point regarding duration and the *Copyright Act 1905* can be made in relation to lecture copyright. In contrast to the colonial and UK statutes granting copyright in lectures, as considered above, the *Copyright Act 1905* specified a term of protection for such rights. Pursuant to section 17(1), a lecture right subsisted for either 42 years or the life of the author and seven years, whichever of those two was the longer period. Under section 17(2), where a lecture was delivered after the death of the author, the period of protection would run for 42 years. The duration of a lecturing right was therefore the same as granted for books and artistic works. Some members of the House of Representatives questioned the period of protection granted to lectures, with Mr Conroy noting that "[w]e are making it possible for actions for infringement to arise after the generation which first heard the lecture had passed away."[75] Despite the correctness of such a statement, the period remained.

All terms of copyright would change, however, following the introduction of the next copyright law in Australia, the *Copyright Act 1912*.

IV. Fifty Years and an Imperial Act: Duration at 1912

One of the major changes to both Australian and UK copyright law under the *Copyright Act 1911* and *Copyright Act 1912* was the extension to the term of copyright protection. The term of copyright in the United Kingdom had remained, since 1842, at life of the author plus seven years, or 42 years from publication, whichever term was longer, as was the case in Australia under the 1905 Act.[76] Yet, for the first time since its creation in 1886, the Berlin revision of the Berne Convention specified a minimum period of protection for creations: "life of the author and fifty years after his death."[77] Thus, in order for the UK to comply with the Berne Convention, the existing term of protection required amendment and support for such a change is apparent in comments made by the UK Law of Copyright Committee, the Imperial Copyright Conference and, later, the Australian Federal Parliament.

In the course of its 1909 review, the UK Law on Copyright Committee questioned witnesses as to their opinion on the proposed term extension, with the vast majority – mainly author and publisher groups - favouring an increased term.[78] The only witness who believed such a term extension was "unreasonable" was Harry Vane Stow, Secretary to the Federation of Master Printers and representative of the London Chamber of Commerce.[79] Like the Law on Copyright Committee, the subsequent

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[75] Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 18 December 1905, 7262 (Mr Alfred Conroy).

[76] 5 & 6 Vict c 45 (1842), s 3.

[77] *Revised Berne Convention for the Protection of Literary and Artistic Works of November 13, 1908* Art 7.

[78] *Report of the Committee on the Law of Copyright*, Cd 4976 (1909) pp 16 -17.

[79] *Report of the Committee on the Law of Copyright*, Cd 4976 (1909) p 17.

Imperial Copyright Conference also endorsed the term extension.[80] The Australian representative to the conference, Lord Hallam Tennyson, was apparently influential in the adoption of this term – despite the fact that His Lordship had been given explicit instructions to deter any term extension to 50 years post-mortem.[81] Seville writes that, in addition to supporting the longer term from the outset of the Conference, Lord Tennyson also produced "lists of books which had fallen into the public domain, but would have been profitable to their families with the proposed extension" as evidence.[82] It is perhaps ironic then that, during the passing of the *Copyright Act 1912* Senator McGregor commented "I feel sure that the great majority of the people of Australia would be very well satisfied with his [Lord Tennyson's] representation at [the] Conference".[83]

By the time the proposed extension reached the Australian Parliament, this Imperial extension received little national criticism, despite the resistance that members of the Federal Parliament had expressed regarding any change to the term under the 1905 Act.[84] However, parliamentarian Patrick Glynn did comment that:

> I personally take a different view, and it would have been perfectly competent for us to limit the period [of copyright protection] to twenty-five years, thirty years, or forty years, instead of the fifty years arranged, in addition to the life of the author. At the same time, with a view to uniformity, and remembering that the Imperial representatives at the Convention in Berlin in 1908 had discussed these matters elaborately, it was thought inexpedient for the Commonwealth to suggest a shorter period than that adopted in the United Kingdom.[85]

Thus, in the first term extension for literary creations since the introduction of the Victorian copyright statute in 1869, pursuant to section 3 of the 1911 Act, copyright would subsist in a literary work for "the life of the author and a period of fifty years after his death". Where the work was created through joint authorship, under section 16(1) copyright subsisted for "the life of the author who first dies and for a term of fifty years after his death, or during the life of the author who dies last, whichever period is the longer". In the case of unpublished works that were published posthumously, section 17(1) provided that copyright continued to subsist indefinitely until publication and then for a defined period of 50 years following first publication. Therefore, in the case of unpublished works, the application of perpetual protection until publication (as originally provided under common law, discussed in Part II

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80 *Imperial Copyright Conference, 1910 – Memorandum of the Proceedings*, Cd 5272 (1910) 7.

81 Reasons for opposing a longer term of protection included the resistance of members of the Federal Parliament to a life-plus-30 term in 1905 and the fact that, given the low number of books published in Australia when compared to the UK, few Australian publishers would benefit from the term: see Atkinson B, *The True History of Copyright: The Australian Experience 1905 – 2005* (Sydney University Press, 2007) p 64. See also Burrell, above n 20, 258.

82 Seville C, *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century* (Cambridge University Press, 2006) p 141.

83 Commonwealth of Australia, *Parliamentary Debates*, Senate, 26 July 1912, 1334 (Senator Gregor McGregor). Although both Atkinson and Seville note the role of Lord Tennyson's influence on the adoption of the life-plus-50 year period at the Imperial Copyright Conference, Lord Tennyson makes no appearance in Bently's discussion on the enactment of the term extension. See Bently, above n 15, 78 - 81.

84 See Commonwealth of Australia, *Parliamentary Debates*, Senate, 13 September 1905, 2181 - 2190.

85 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 30 October 1912, 4864 (Mr Patrick Glynn).

above) was now incorporated into statute.[86] In one of the few Australian articles on copyright law penned prior to the introduction of the *Copyright Act 1968*, Sawer discussed section 17(1) and considered that "the possibility of a copyright continuing forever was probably never contemplated by the draftsman of the *Copyright Act*".[87] This statement was incorrect: the section reflected the previous position under the common law, which the legislative drafters arguably realised was perpetual.

The UK Parliament did include in the legislation what we might today consider a "compulsory licence", in an attempt to minimise the practical implications of the term extension. Under section 3, following the passing of 25 years, or, where copyright subsisted at the passing of the 1911 Act, 30 years after the death of the author, copyright would not be infringed if a copy of a literary work was made for the purposes of sale, where certain criteria were met, including the provision of notice in a prescribed form and the payment of royalties.[88] This "compulsory licence" was praised in the Federal Parliament by Senator McGregor, who noted that "[i]t would be injurious to the interests of the people, however, if, after liberal terms had been given to the owners of copyright, anything were done to prevent the public from getting the advantage of publication of the work."[89]

Further, by the time that copyright in many of the books entitled to this longer term would expire, technology had developed to allow greater reproduction of works by the individual – the photocopier, the computer, and, in some cases, the advent of the Internet. On that basis, it is arguable that the 1912 term extension is the event that has had the most impact on the history and future of Australia's public domain. Statistics on the duration of copyright confirm such a proposition, illustrating that the impact of the 1912 extension continues even today.

A number of issues must be noted before proceeding. First, given the different ages at which authors could create works it is infeasible to consider the duration of copyright for all works created by males and females at ages 20 through 60 based on the differences in life expectancies between 1912 and 1967. On that basis, two ages have been chosen as examples for each sex – 35 and 45 – and compared against statistical data available from the Australian Bureau of Statistics.

Second, unlike Tables A, C and D, as the period of protection was static at life of the author and 50 years, this column is omitted for Tables E (men) and G (women). In its

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86 This is in contrast to section 7 of the *Copyright Act 1905*. As noted above, that section provided a reminder that the common law of the United Kingdom protected "unpublished literary compositions", as opposed to providing statutory protection for such creations.

87 Sawer G, "Copyright in Letters Unpublished At Writer's Death" (1966) 3(3) *Archives and Manuscripts: The Journal of the Archives Section of the Library Association of Australia* 27, 29.

88 See *Copyright Act 1911* (Imp) s 3.

89 Commonwealth of Australia, *Parliamentary Debates*, Senate, 26 July 1912, 1336 (Senator Gregor McGregor); see also Atkinson's critique of the section 3 proviso in the UK: Atkinson, above n 83, pp 79 - 80. Note that a section 3-style provision was not included in the *Copyright Act 1968* (Cth). Indeed, in its 1959 report on Australian copyright law the Spicer Committee recommended the removal of section 3 and deemed its existence incompatible with the Brussels revision of the Berne Convention: Copyright Law Review Committee, *Report of the Committee Appointed by the Attorney-General to Consider What Alterations Are Desirable in the Copyright Law of the Commonwealth* (Chairman Sir John Spicer, hereafter the "Spicer Committee Report") (1959) [60]. See also Zines LR, "Revision of Copyright Law" (1963) 37 ALJ 247, 250 - 251.

place is an example of the publication year of a book, as a contrast with when that book would enter the public domain.

Third, as section 4 of the *Copyright Act 1912* repealed the *Copyright Act 1905*, works in which copyright subsisted pursuant to that latter statute would subsequently be protected under section 1 of the 1912 legislation.[90] This had the result of extending the length of protection where copyright initially subsisted under the 1905 law.

Fourth, the following Tables do not take into account the extension of the copyright term under the AUSFTA in 2004 and the subsequent *US Free Trade Agreement Implementation Act 2004* (Cth). These details can be found in the section below.

Fifth and finally, statistics on life expectancies for males and females are only available from the Australian Bureau of Statistics for the periods 1920-1922, 1932-1934, 1946-1948, 1953-1955, 1960-1962, and 1965-1967. Calculations are therefore given on the basis of these statistics.

[90] Under section 1(1), copyright would subsist where the work "was first published … [in] His Majesty's dominions". See *Copyright Act 1912* (Cth), Sch1, *Copyright Act 1911* s 1(1).

TABLE E:
DURATION OF COPYRIGHT IN LITERARY WORKS PRODUCED BY MALES IN LIGHT OF LIFE EXPECTANCIES IN THE PERIOD 1912-1967[91]

Year	Example of Age	Expectation of Additional Years of Life at that Age	Year of Death Based on Earliest Date as Calculation (eg 1920, 1932, etc)	Year in Which Copyright Would Expire
1920 – 1922	35	34.20	1954	2004
1920 – 1922	45	26.03	1946	1996
1932 – 1934	35	35.46	1967	2017
1932 – 1934	45	26.87	1958	2008
1946 – 1948	35	35.79	1981	2031
1946 – 1948	45	26.83	1972	2022
1953 – 1955	35	36.25	1989	2039
1953 – 1955	45	27.18	1980	2030
1960 – 1962	35	36.45	1996	2046
1960 – 1962	45	27.38	1987	2037
1965 – 1967	35	36.04	2001	2051
1965 – 1967	45	26.99	1991	2041

TABLE F:
DATE OF PUBLICATION COMPARED WITH EXPIRATION OF COPYRIGHT BASED ON TABLE E

Example	Date of Publication	Year in Which Copyright Would Expire	Complete Duration of Copyright Protection
1. Author is 35 in 1920; dies in 1954	1920	2004	84 years
2. Author is 35 in 1932; dies in 1967	1932	2017	85 years
3. Author is 35 in 1946; dies in 1981	1946	2031	85 years
4. Author is 35 in 1953; dies in 1989	1953	2039	86 years
5. Author is 35 in 1960; dies in 1996	1960	2046	86 years
6. Author is 35 in 1965; dies in 2001	1965	2051	86 years

[91] Australian Bureau of Statistics, *Australian Historical Population Statistics*, 3105.0.65.001, "Table 6.2 Life expectancy at single ages (ex), males, Australia, 1881 onwards", 2014, http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/3105.0.65.0012014?OpenDocument.

TABLE G:
DURATION OF COPYRIGHT IN LITERARY WORKS PRODUCED BY FEMALES IN LIGHT OF LIFE EXPECTANCIES IN THE PERIOD 1912-1967[92]

Year	Example of Age	Expectation of Additional Years of Life at that Age	Year of Death Based on Earliest Date as Calculation (eg 1920, 1932, etc)	Year in Which Copyright Would Expire
1920 – 1922	35	37.28	1957	2007
1920 – 1922	45	28.99	1948	1998
1932 – 1934	35	38.37	1970	2020
1932 – 1934	45	29.74	1961	2011
1946 – 1948	35	39.46	1985	2035
1946 – 1948	45	30.45	1976	2026
1953 – 1955	35	40.67	1993	2043
1953 – 1955	45	31.44	1984	2034
1960 – 1962	35	41.70	2001	2051
1960 – 1962	45	32.38	1992	2042
1965 – 1967	35	41.56	2006	2056
1965 – 1967	45	32.26	1997	2047

TABLE H:
DATE OF PUBLICATION COMPARED WITH EXPIRATION OF COPYRIGHT BASED ON TABLE G

Example	Date of Publication	Year in Which Copyright Would Expire	Complete Duration of Copyright Protection
1. Author is 35 in 1920; dies in 1957	1920	2007	87 years
2. Author is 35 in 1932; dies in 1970	1932	2020	88 years
3. Author is 35 in 1946; dies in 1985	1946	2035	89 years
4. Author is 35 in 1953; dies in 1993	1953	2043	90 years
5. Author is 35 in 1960; dies in 2001	1960	2051	91 years
6. Author is 35 in 1965; dies in 2006	1965	2056	91 years

The above groupings of statistics provide a distinct contrast to those presented in Tables A, C and D above and a number of points can be made regarding this data. First, the significant impact of the 1912 term extension is clearly illustrated by these

[92] Australian Bureau of Statistics, *Australian Historical Population Statistics*, 3105.0.65.001, "Table 6.6 Life expectancy at single ages (ex), females, Australia, 1881 onwards", 2014, http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/3105.0.65.0012014?OpenDocument.

statistics. Under the colonial statutes, the period of protection ranged from 42 years – 51.45 years (author aged 15 years at publication) for a male and from 42 to 54.54 years (15 aged years at publication) for a female.[93] This period was slightly extended when the same calculations were undertaken for the 1905 statute: 42 years – 51.74 years (author aged 20 years at publication)[94] and 42 years to 54.52 years (author aged 20 years at publication) respectively.[95] Yet Tables F and H illustrate that, due to the term extension, the full duration of copyright for works produced by males ranged between 84 – 86 years, and 87 – 91 years for females. This was an additional period of approximately 40 years protection.

Further, as indicated above, copyright would continue to subsist in these works across the creation and development of a variety of technologies. In fact, looking forward, in many cases, as the technologies that come to replace personal computers and the Internet develop, many of the works initially protected under the *Copyright Act 1912* will remain in copyright. For example, works produced by a 35 year old male and female will continue to be protected until 2051 and 2056 respectively. Again, this is even without the 20-year term extension that we will now consider in greater detail.

V. The 1968 Act: Duration Continuity, then Capitulation

By 1968, the term of protection for literary works was essentially a moot point, as the Berne-specified minimum period of protection was now firmly ingrained in Australian copyright law. Prior to the introduction of the *Copyright Act 1968*, in 1959 the Spicer Committee considered whether either a reduction or extension of the term of copyright was justified at that point, but ultimately elected to retain the existing duration.[96] The *Copyright Act 1968* did introduce one minor change to the life-plus-50 period of protection: rather than the term of copyright in a literary work expiring 50 years after the date of publication of the work, it would expire 50 years from the end of the calendar year in which publication occurred. The reason given for this minor extension during parliamentary debate was that "[i]t is usually much easier to remember or to find out the year in which a particular event occurred than the actual date on which it happened."[97]

On that basis, a number of preliminary calculations can be made regarding the length of protection for published literary works, prior to 2004. Tables I and J are constructed as follows. Separate Tables are once again employed for males and females. The first column of each table provides the relevant period of years. The second column states the age of the author during that period; given the period that each Table spans, the age has been set at 35. The third column provides the number of additional years that the author would have expected to live at that time, based on data from the Australian Bureau of Statistics. The fourth column states the approximate year of death of the author, based on the statistics provided in the third column. The

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93 See Table A above.
94 See Table C above.
95 See Table D above.
96 See Spicer Committee Report, above n 91 [50], [503]; see Zines, above n 91, 249 - 250; Atkinson, above n 83, pp 285 - 288.
97 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 16 May 1968, 1530 (Mr Nigel Bowen).

fifth column provides the year in which copyright would have expired (the year of death of the author, plus 50 years).

TABLE I:
DURATION OF COPYRIGHT IN LITERARY WORKS PRODUCED BY MALES IN LIGHT OF LIFE EXPECTANCIES IN THE PERIOD 1967-2004[98]

Year	Example of Age	Expectation of Additional Years of Life at that Age	Year of Death Based on Earliest Date as Calculation (eg 1970, 1975, etc)	Year in Which Copyright Would Expire
1970 – 1972	35	36.23	2006	2056
1975 – 1977	35	37.46	2012	2062
1980 – 1982	35	38.77	2018	2068
1985 – 1987	35	40.12	2025	2075
1990 – 1992	35	41.37	2031	2081
1995 – 1997	35	42.46	2037	2087
1997 – 1999	35	43.11	2040	2090
1999 – 2001	35	43.84	2042	2092
2000 – 2002	35	44.08	2044	2094
2002 – 2004	35	44.61	2046	2096

TABLE J:
DURATION OF COPYRIGHT IN LITERARY WORKS PRODUCED BY FEMALES IN LIGHT OF LIFE EXPECTANCIES IN THE PERIOD 1967-2004[99]

Year	Example of Age	Expectation of Additional Years of Life at that Age	Year of Death Based on Earliest Date as Calculation (eg 1970, 1975, etc)	Year in Which Copyright Would Expire
1970 – 1972	35	41.88	2011	2061
1975 – 1977	35	43.43	2018	2068
1980 – 1982	35	44.81	2024	2074
1985 – 1987	35	45.63	2030	2080
1990 – 1992	35	46.61	2036	2086
1995 – 1997	35	47.33	2042	2092
1997 – 1999	35	47.84	2044	2094
1999 – 2001	35	48.43	2047	2097
2000 – 2002	35	48.57	2048	2098
2002 – 2004	35	48.95	2050	2100

[98] Australian Bureau of Statistics, *Australian Historical Population Statistics*, 3105.0.65.001, "Table 6.2 Life expectancy at single ages (ex), males, Australia, 1881 onwards", 2014, http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/3105.0.65.0012014?OpenDocument.

[99] Australian Bureau of Statistics, *Australian Historical Population Statistics*, 3105.0.65.001, "Table 6.6 Life expectancy at single ages (ex), females, Australia, 1881 onwards", 2014, http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/3105.0.65.0012014?OpenDocument.

Tables I and J continue the trends established in the previous sections regarding the length of copyright protection. Copyright subsisted (and continues to subsist) longer in works created by females, given the increased and increasing life expectancy of women. This continues to be for approximately four additional years. Further, in contrast to the previous section, where the introduction of the life-plus-50 term pursuant to section 3 of the *Copyright Act 1911* had a substantial impact on the public domain, the minimal extension under the *Copyright Act 1968*, at its introduction, had little effect.

The more significant term extension occurred on 1 January 2005, as a result of the AUSFTA. That bilateral free trade agreement stipulated that both Australia and the United States had to provide copyright protection for literary (and artistic, musical and dramatic) works for the term of "life of the author and 70 years after the author's death" for published works.[100] In the case of posthumous publications, the term of protection was to be "70 years from the end of the calendar year of the first authorised publication of the work" for unpublished literary creations.[101] Where an authorised publication of the work had not occurred within 50 years from the creation of the work, it was also provided that copyright could end "not less than 70 years from the end of the calendar year of the creation of the work" – that is, copyright in unpublished works could expire after a period of 70 years.[102] As US law already included these terms of protection – and those amendments had survived a constitutional challenge in *Eldred v Ashcroft* 537 US 186 (2003) - only Australia was required to amend its copyright law. This was despite Australia previously resisting the introduction of a term extension after it was adopted by the European Union and an undertaking only a few years earlier by the same Federal Government that it would not extend the term of copyright.[103]

The proposed term extension attracted strong criticism across politics,[104] the judiciary,[105] industry,[106] public interest organisations,[107] the media[108] and academia.[109]

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[100] *Australia United States Free Trade Agreement 2004* Art 17.4.4(a).

[101] *Australia United States Free Trade Agreement 2004*, Art 17.4.4(b)(i).

[102] *Australia United States Free Trade Agreement 2004*, Art 17.4.4(b)(ii).

[103] In 2000 the Intellectual Property and Competition Review Committee recommended against the extension of the term of copyright: see Intellectual Property and Competition Review Committee, *Review of intellectual property legislation under the Competition Principles Agreement* (2000) p 84. In its response to the Committee, the Federal Government accepted the recommendation and further stated that "[t]he Government has no plans to extend the general term for works (life of the author plus 50 years)": see "Government Response to Intellectual Property And Competition Review Recommendations Information Package", http://arts.gov.au/resources-publications/publications/government-response-advisory-council-intellectual-property-rec-0.

[104] See, eg, Commonwealth of Australia, *Parliamentary Debates*, Senate, 12 August 2004, 26409 (Senator Aden Ridgeway); Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 9 December 2004, 26 (Mr Simon Crean).

[105] The Hon Justice Ronald Sackville, "Welcome" in Fitzgerald B (ed) *Open Content Licensing: Cultivating the Creative Commons* (Sydney University Press, 2007) 30, p 32.

[106] Australian Library and Information Association, Submission to the Senate Select Committee on the Free Trade Agreement Between Australia and the United States of America, 30 April 2004, p 4, http://www.aph.gov.au/~/media/wopapub/senate/committee/freetrade_ctte/submissions/sub295_pdf.ashx; *cf* Copyright Agency Limited, Submission to the Senate Select Committee on the Free Trade Agreement Between Australia and the United States of America, 7 May 2004, pp 3 - 5 http://www.aph.gov.au/~/media/wopapub/senate/committee/freetrade_ctte/submissions/sub309_pdf.ashx.

Australian Democrats Senator Aden Ridgeway, for example, noted in Senate debate that the term extension

> compounds the problem as far as social and education policy goes in terms of our young people and certainly our institutions of higher learning being able to access the information, which was always thought to be free in the public domain once it got there.[110]

Speaking extra-judicially, then-Justice of the Federal Court of Australia, Ronald Sackville, also questioned the efficacy of an extension to the term of copyright:

> Despite the [US] Supreme Court's ruling [in *Eldred*], and the willingness of Australian negotiators to accept the position of the United States, it is extremely difficult to understand the policy justification for a further extension for the term of copyright, let alone the application of the extension to existing copyright.[111]

The inevitable, requisite changes were implemented as part of the *US Free Trade Agreement Implementation Act 2004* (Cth) and section 33(2) of the *Copyright Act* today provides that copyright subsists in a published literary work "until the end of 70 years after the end of the calendar year in which the author of the work died."[112] For unpublished literary works that are published posthumously, copyright protection extends for 70 years following publication.[113] However, the Federal Government did not take advantage of the one clause of the AUSFTA that would have aided the public domain – the set period of 70 years protection for unpublished works was not

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[107] Electronic Frontiers Australia, Submission to the Senate Select Committee on the Free Trade Agreement Between Australia and the United States of America, 30 April 2004, pp 8 - 9 http://www.aph.gov.au/~/media/wopapub/senate/committee/freetrade_ctte/submissions/sub282_pdf.ashx.

[108] See, eg, Cochrane N, "Free trade at a price", *The Sydney Morning Herald*, 11 November 2003, http://www.smh.com.au/articles/2003/11/10/1068329472356.html; Shiel F, "Libraries caught in copyright changes", *The Age*, 11 February 2004, http://www.theage.com.au/articles/2004/02/10/1076388365432.html; Gittins R, "Costs aplenty in "free" trade IP deals with US", *The Sydney Morning Herald*, 24 July 2004, http://www.smh.com.au/articles/2004/07/23/1090464862088.html.

[109] See, eg, Rimmer M, "The Australia-United States Free Trade Agreement and the Copyright Term Extension. A Submission to the Senate Select Committee" (2004) http://works.bepress.com/matthew_rimmer/60/; Alexander, above n 14; Boymal J and Davidson S, "Extending Copyright Duration in Australia" (2004) 11(3) *Agenda* 235; Rimmer M, "Robbery under arms: Copyright law and the Australia-United States Free Trade Agreement" (2006) 11(3) First Monday, http://firstmonday.org/ojs/index.php/fm/article/view/1316; for a greater discussion of the AUSFTA process and the copyright extension see also Bowrey K, "Can We Afford to Think About Copyright in a Global Marketplace?" in Macmillan F (ed), *New Directions in Copyright Law: Volume 1* (Edward Elgar, 2005) p 54; Sainsbury M, "Governance and the Process of Law Reform: The Copyright Term Extension in Australia" (2006) 9 Canb LR 1; Bond C, Paramaguru A and Greenleaf G, "Advance Australia Fair? The Copyright Reform Process" (2007) 10 Journal of World Intellectual Property 284.

[110] Commonwealth of Australia, *Parliamentary Debates*, Senate, 3 August 2004, 25335 (Senator Aden Ridgeway).

[111] Sackville, above n 105, p 32.

[112] *Copyright Act 1968* (Cth), s 33(2) as amended by the *US Free Trade Agreement Implementation Act 2004* (Cth), Sch 9, s 120.

[113] *Copyright Act 1968* (Cth), s 33(3) as amended by the *US Free Trade Agreement Implementation Act 2004* (Cth), Sch 9, s 121.

introduced and thus perpetual copyright for unpublished literary works remains, an international oddity in Australian copyright law.[114]

It is important to consider whether the AUSFTA extension had as great an impact on Australia's public domain as the accompanying outcry suggested. Certainly, the extension did effect the Australian public domain, as reflected in Senator Ridgeway's statement: due to the extension it will be an additional 20 years before a literary work enters Australia's public domain. However, there is evidence to suggest that term extension was not as damaging as it potentially could have been, particularly as the extension was prospective rather than retrospective. The effect of the prospective extension was that only works still protected under copyright were entitled to the additional term; copyright in works that had already entered the public domain was not revived.[115] In contrast, US copyright law already provided that its extension of term was retrospective, and expired copyrights revived.[116] On that basis, this was only a case of "most of the way with the USA".

Further, when viewed against previous extensions to the term of copyright in Australia discussed in this article, it is apparent that the AUSFTA extension was not, in terms of impact, as significant as those that preceded it. As examined above, the extension to the term of copyright under the *Copyright Act 1912* generally added an additional forty years of protection, when life expectancies were taken into account. This is not to dismiss the detrimental significance of the AUSFTA extension, but simply to illustrate that, when viewed against the broader background of Australian copyright history, the previous extension had a greater impact. Nevertheless, Australia has, in common with the US and the European Union, departed from the Berne Convention standard of "life of the author plus 50 years", and users of works, and the public domain, are poorer as a result.

The following calculations regarding the future expiration of copyright in works in Australia support such a statement. It is important to note that the preceding tables commence with a period of publication of 1932 – 1934. As illustrated in Tables E and G above, copyright in any works produced in this period would continue until 2008 at the earliest, after the introduction of the 2004 term extension. On that basis the Tables presented below commence with copyright in works produced in this period and the corresponding impact of the term extension.

In Tables K and L, the first column identifies the period that publication of the literary work occurred. The second column provides an example of the age of an author; again, set at 35. The third column states the expected year of death of that individual, while the fourth column illustrates the year that copyright would have expired pursuant to a "life-plus-50" term. The fifth column provides a contrast to this with the year that copyright in that literary work will now expire, following the AUSFTA extension. The sixth column lists the total number of years that copyright would subsist in that work.

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[114] See Greenleaf and Bond, above n 7, 128.

[115] Greenleaf G, "National and International Dimensions of Copyright's Public Domain (An Australian Case Study)" (2009) 6 *SCRIPT-ed* 259, 278 - 279 http://www.law.ed.ac.uk/ahrc/script-ed/vol6-2/greenleaf.asp.

[116] See also *Golan v Holder* 132 S Ct 873 (2012), where the Supreme Court upheld the restoration of copyright in foreign works, where those works had previously entered the public domain.

TABLE K:
DURATION OF COPYRIGHT IN LITERARY WORKS PRODUCED BY MALES IN LIGHT OF LIFE EXPECTANCIES IN THE PERIOD 1932-2004 AND THE AUSFTA TERM EXTENSION

Period of Publication	Example of Age	Estimated Year of Death	Expiration of Term After Life Plus 50 Years	Post-AUSFTA Term	Total Term of Copyright
1932 – 1934	35	1967	2017	2037	105 years
1946 – 1948	35	1981	2031	2051	105 years
1953 – 1955	35	1989	2039	2059	106 years
1960 – 1962	35	1996	2046	2066	106 years
1965 - 1967	35	2001	2051	2071	106 years
1970 - 1972	35	2006	2056	2076	106 years
1975 – 1977	35	2012	2062	2082	107 years
1980 – 1982	35	2018	2068	2088	108 years
1985 – 1987	35	2025	2075	2095	110 years
1990 – 1992	35	2031	2081	2101	111 years
1995 – 1997	35	2037	2087	2107	112 years
1997 – 1999	35	2040	2090	2110	113 years
1999 – 2001	35	2042	2092	2112	113 years
2000 – 2002	35	2044	2094	2114	114 years
2002 – 2004	35	2046	2096	2116	114 years

TABLE L:
DURATION OF COPYRIGHT IN LITERARY WORKS PRODUCED BY FEMALES IN LIGHT OF LIFE EXPECTANCIES IN THE PERIOD 1932-2004 AND THE AUSFTA TERM EXTENSION

Period of Publication	Age	Estimated Year of Death	Expiration of Term After Life Plus 50 Years	Post-AUSFTA Term	Total Term of Copyright
1932 – 1934	35	1970	2020	2040	108 years
1946 – 1948	35	1985	2035	2055	109 years
1953 – 1955	35	1993	2043	2063	110 years
1960 – 1962	35	2001	2051	2071	111 years
1965 - 1967	35	2006	2056	2076	111 years
1970 - 1972	35	2011	2061	2081	111 years
1975 – 1977	35	2018	2068	2088	113 years
1980 – 1982	35	2024	2074	2094	114 years
1985 – 1987	35	2030	2080	2100	115 years
1990 – 1992	35	2036	2086	2106	116 years
1995 – 1997	35	2042	2092	2112	117 years
1997 – 1999	35	2044	2094	2114	117 years
1999 – 2001	35	2047	2097	2117	118 years
2000 – 2002	35	2048	2098	2118	118 years
2002 – 2004	35	2050	2100	2120	118 years

Even if consideration is restricted to the final column in each of the above Tables it is apparent that the term of copyright has come very far from the "life-plus-seven" or 42 year possible periods of protection that were Australian law only a century beforehand, under the *Copyright Act 1905*. The shortest period of protection above is 105 years, for a work published by a male aged 35 in the early 1930s. In addition, due to the increase in life expectancies over the 20th and 21st centuries, this period has been incidentally increased by a decade. Thus, even aside from the AUSFTA extension, because of increased life expectancies, copyright will now subsist in a work for well over a century. When the final three columns are viewed in their entirety, it is undeniable that the AUSFTA compounded this problem. Without that extension, for example, copyright in a book published by a 35 year-old female in 2002 would still subsist for approximately 98 years.

For works made today, the following calculations can be made:

TABLE M:
DURATION OF COPYRIGHT IN WORKS MADE TODAY

Period of Publication	Age at Publication	Sex	Life Expectancy	Estimated Year of Death	Total Duration of Copyright
2008-2010	35	Male	45.79	2055	115 years
2008-2010	35	Female	49.80	2061	119 years
2010-2012	35	Male	46.14	2058	116 years
2010-2012	35	Female	50.01	2062	120 years

In conclusion, it is important to note that the practical implications and broader impact on the public domain, where copyright extends for 120 years, are not yet known. Indeed, it is arguable whether future technologies may need to be designed with such restrictions in mind.[117]

VI. Conclusion

This article has examined how the term of copyright has developed in Australia over statutes and time, and in light of changes in life expectancy since 1881. Through an analysis of legislation and parliamentary debates, we have illustrated why any consideration of term extension needs to be accompanied by a careful examination of both legislative precedent and empirical evidence. As a result of the extensions to literary copyright in 1912 and 2004, copyright has changed from a minimum of 42 years protection, in 1869, to over 100 years protection today. Further, without any legislative impetus, copyright has continued to increase due to extended life expectancies. For every approximate four year period that passes, copyright generally will extend for another year in the future.[118]

[117] For a greater discussion on the future of law and technology see Zittrain J, *The Future of the Internet and How to Stop It* (Allen Lane, 2008), particularly Part III "Solutions".
[118] See, for example, the period between 1995 and 2004 in Tables K and L above.

To return to the comments made by Emmett J and Mr Conroy in the Introduction to this article, it is worth questioning whether IP terms are out of alignment when one form of creation – patents – only warrants a 20 year period of protection whereas another – copyright – garners 120 years.[119] The haphazard legislature approach to copyright terms identified in this article needs to cease, and a more considered approach taken. It feels akin to science fiction that, today, copyright in a work created by a 35 year old today will generally not expire until well after the deaths of a generation that is yet to be born, and extend for more than a century. Furthermore, given the current creations found to be "literary works", this would apply to, for example, a computer program, the practical utility of which will cease over a century before its copyright expires, and where its literary or artistic appeal never existed. On that basis, to quote Emmett J, "it may be that the extent of that monopoly, both in terms of time and extent of restriction, ought not necessarily be the same for every work".[120]

[119] This does not take into account, however, the differences in the nature of protection between the two type of IP; for example, the fact that a registered patent is generally subject to a stronger monopoly of rights than copyright.

[120] *EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd* [2011] FCAFC 47, [100].