

THE TWILIGHT OF THE OPERA PIRATES: A PREHISTORY OF
THE EXCLUSIVE RIGHT OF PUBLIC PERFORMANCE FOR
MUSICAL COMPOSITIONS

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The “main source of income” for modern-day songwriters, as well

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as more traditional musical composers, is the exclusive right to publicly perform their works.¹ This right can be a right of control or simply a right of royalty, depending on how the creator wishes to use it, allowing the work's creator to judge the best balance of the two. And yet few are aware that this right's genesis is comparatively recent compared to most copyright protections in America—the right of public performance was not established until over a century after the first copyright statute in 1790.² In the intervening century there were several attempts to institute a right of public performance for musical compositions, and the right was finally established in 1897.³ The story of how that law came to be has not been told until now. This article will trace the history of the development of the right of public performance, and, in doing so, shed light on the currents in the law that led to today's laws pertaining to public performance, pointing out the central irony of the trajectory of these laws—that in none of the bills granting rights of public performance was the creation of this right for music anything but a secondary concern to the drafters of the bills. Even when the right to exclusive public performance of a musical composition was established by statute in 1897, it went largely without comment. As such, this article ultimately tells more than the tale of the creation of the right, it tells the story of the two failed revisions of the copyright code that would have established the right, along with the amendatory act to the copyright laws which finally did.

Part I of this article describes the path of the Ingersoll Copyright Bill, a somewhat radical (for its day) copyright revision that died in committee in the early days of 1844. While the Ingersoll Copyright Bill was something of an outlier to the primary movement for a right of public performance in music, it represents a first attempt to create any type of statutory right of public performance for musical compositions. Part II describes the litigation over musical works in the 1880s which showed that the common law as it stood was insufficient to protect performing works, and that a legislative solution was needed. Part III describes the rancorous response to the Treloar Copyright Bill, a complete revision to the copyright laws which would have protected public performance of all literary works, including but not limited to music or drama. Part IV describes the origins, path, and success of the Cummings Copyright Bill, a narrow measure which simply aimed to expand the remedies for unlawful public performances of performance works, first for operas and dramatic works, and then for music more

¹ Nancy A. Bloom, *Protecting Copyright Owners of Digital Music—No More Free Access to Cyber Tunes*, 45 J. COPYRIGHT SOC'Y U.S.A. 179, 197 (1997).

² Act of May 31, 1790, ch. 15, 1 Stat. 124 (1790).

³ Act of Mar. 3, 1897, ch. 392, 29 Stat. 694 (1897). This being well after the same right for dramatic works, which was established in 1856. Act of Aug. 18, 1856, ch. 169, 11 Stat. 138 (1856).

generally, under the exclusive right of public performance.

I. THE INGERSOLL COPYRIGHT BILL

On December 7, 1843, almost immediately after the commencement of the first session of the 28th Congress, Philadelphia Congressman Charles Jared Ingersoll gave notice of his intent to introduce a bill on copyright.⁴ Introduced a month later, this bill would ultimately be amended by Ingersoll to establish a right of public performance for musical compositions. Mostly forgotten by history and given all of one line in Ingersoll's biography,⁵ this bill was really more a part of a line of previous congressional bills that had attempted to move copyright law towards a protection of the right of public performance for plays (leading to the 1856 Dramatic Copyright Act) than those that included music half a century later.⁶ Unlike its siblings, however, this bill *did* include public performance of musical compositions, and as such, was the first bill in America's history to do so. Moreover, it would be the last bill to do so for some time.⁷

Ingersoll was born to one of America's oldest and most prominent families.⁸ His grandfather came to Philadelphia as presiding judge of the King's vice-admiralty court, and his father stayed there, supporting the Revolution and later becoming the United States Attorney for the District.⁹ Ingersoll's father was also offered a nomination as one of the "midnight judges" (a position which he refused) during the tail end of John Adams' presidency to fill a vacancy created by the Judiciary Act of 1801.¹⁰ Ingersoll's brother also served in Congress, and the two brothers served together in the 28th Congress.¹¹ Even by the high standards of his immediate family, however, Ingersoll was uniquely

⁴ H. JOURNAL, 28th Cong., at 30 (1st Sess. 1843); H.R. 9, 28th Cong. (1844) *as amended* Jan. 18, 1844 [hereinafter Ingersoll Copyright Bill].

⁵ WILLIAM M. MEIGS, *THE LIFE OF CHARLES JARED INGERSOLL* 253 (Philadelphia, J.B. Lippincott Co. 1897) ("He also introduced into the next Congress a bill on the subject of copyright, and had it referred to a special committee, but it seems to have never been reported on.").

⁶ The first dramatic performance bill was presented in 1841. S. 206, 26th Cong. (1841). That bill, which did not contain an enforcement mechanism but simply asserted the right, was reported without amendment and tabled. *Id.*; S. JOURNAL, 26th Cong., at 235 (2d Sess. 1841). After the failure of the Ingersoll Copyright Bill in 1844, a dozen years would pass before the next dramatic copyright bill would be presented. That bill would eventually pass and be enacted into law. H.R. 500, 33rd Cong. (1856), *as enacted* 11 Stat. 138 (1856).

⁷ See THORVALD SOLBERG, *LIBRARY OF CONGRESS: COPYRIGHT IN CONGRESS 1789-1904*, COPYRIGHT OFFICE BULLETIN NO. 8 163-64 (Government Printing Office 1905).

⁸ Irwin F. Greenberg, *Charles Ingersoll: The Aristocrat as Copperhead*, 93 PA. MAG. OF HIST. & BIOGRAPHY 190 (Historical Soc'y of Pa. 1969).

⁹ *Id.*

¹⁰ Robert J. Lukens, *Jared Ingersoll's Rejection of Appointment as One of the "Midnight Judges" of 1801: Foolhardy or Farsighted?*, 70 TEMP. L. REV. 189, 199 (1997).

¹¹ Interestingly, the brothers were of different parties. Ingersoll stood opposed to most of Philadelphia society by becoming a Democrat, while his brother followed in the family tradition as a member of the Whig party.

accomplished. He served in Congress from 1812-1814 and 1837-1849, wrote several works of both history and drama, and was an accomplished orator. However, Ingersoll's reputation waned quickly after his death in 1862, owing in part to his association with pro-slavery factions prior to the Civil War, and partially because he was confused with his son, who had notoriously supported the confederacy.¹² Ingersoll's fall from the public memory can also be explained as a result of a degree of dilettantism—that he was simply “a gentleman first and a writer and politician second.”¹³

Ingersoll's experience as an author of dramatic productions helps to explain why he would later author a copyright bill. In 1801, when he was but eighteen years old, Ingersoll's play *Edwy and Elgiva* was performed at the New Theatre in Philadelphia.¹⁴ Three decades later he wrote another verse tragedy, *Julian*, although there is no record of it having been produced.¹⁵ Ingersoll's ardent nationalism was closely related to his artistic interests, and also plays an important role in understanding why he would advance a bill on musical copyright. In his famous *Discourse Concerning the Influence of America on the Mind*, Ingersoll made clear that he viewed copyright protections as an integral part of the advancement of the American arts, and that the current copyright statute (at the time, the original 1790 statute with some amendments) was “an inefficient act of Congress, the impotent offspring of an obsolete English Statute.”¹⁶ In his mind, American arts had not yet matched the greatness of those of Europe, and Ingersoll seemed to feel that there was no reason for that disparity. Indeed, Ingersoll felt that the influence of America on the mind gave American artists a unique advantage,¹⁷ and that such an advantage would need legal protections to lead to the blossoming of American artistic expression.

¹² See Greenberg, *supra* note 8; *The Arrest of Charles J. Ingersoll*, N.Y. TIMES, Aug. 26, 1862, at 8 (stating mistakenly that Charles J. Ingersoll was arrested); *The Arrest of Charles Ingersoll*, N.Y. TIMES, Aug. 28, 1862, at 1 (“Some of the New-York papers have mistaken this Ingersoll for his father, Charles Jared Ingersoll, the veteran statesman, who died a few months ago.”).

¹³ NATHANIEL BURT, *THE PERENNIAL PHILADELPHIANS: THE ANATOMY OF AN AMERICAN ARISTOCRACY* 371 (1963).

¹⁴ MEIGS, *supra* note 5, at 31-32. The New Theatre was one of the leading theaters in Philadelphia. *Id.* at 32.

¹⁵ BURT, *supra* note 13, at 371.

¹⁶ C. J. INGERSOLL, *A DISCOURSE CONCERNING THE INFLUENCE OF AMERICA ON THE MIND* 17-18 (Philadelphia, Abraham Small 1823). Ingersoll is presumably referring to the Statute of Anne, which formed the basis for America's first copyright statute. An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, During the Times therein mentioned, 1709, 1-12 Ann., c.19 (Eng.); see generally HARRY RANSOM, *THE FIRST COPYRIGHT STATUTE: AN ESSAY ON AN ACT FOR THE ENCOURAGEMENT OF LEARNING* (1956). Given his own substantial proposed revisions discussed here, it is unlikely he felt that the 1831 revisions were sufficient. An Act to Amend the Several Acts Respecting Copy Rights, ch. 16, 4 Stat. 436 (1831) [hereinafter 1831 Revision].

¹⁷ See generally INGERSOLL, *supra* note 16.

A. *The Original Bill*

On January 3, 1844, the Ingersoll Copyright Bill was introduced as H.R. 9, and referred to a preexisting select committee on copyright.¹⁸ This select committee dated from December 16, 1843, when John Quincy Adams had introduced a memorial for international copyright from publishers and booksellers of New York and Massachusetts.¹⁹ At that point, a select committee, chaired by Robert C. Winthrop, was suggested to handle this petition.²⁰ Representative Holmes moved to refer the petition to the Committee on the Library instead, and Ingersoll “reminded the House that he had already given notice of his” intent to present a bill on copyright, referenced in the House Journals.²¹ Ingersoll then made some suggestions on where his bill should be referred, but the reporter for the Congressional Globe could not hear him.²² A vote was held whether to refer the copyright materials to the library committee or to the select committee, and it was decided that the select committee would deal with these questions.²³ The petition introduced by Adams dealt with subject matter entirely different from the Ingersoll Bill, but it is unclear that anyone was fully aware of what the content of the Ingersoll Copyright Bill would be until its introduction.²⁴

Although this article’s focus is on the exclusive right of public performance of musical compositions, it would be unfortunate to not mention briefly the other extraordinary features of the bill in the context of the time in which it arose. The Ingersoll Copyright Bill was a revolutionary bill for its day, a good deal more progressive than the 1870 revision.²⁵ Its view on copyright law was more settled in twentieth century norms than those of the nineteenth century. This progressiveness likely played a role in the bill’s downfall—it was simply ahead of its time.

¹⁸ H. JOURNAL, 28th Cong., at 150 (1st Sess. 1844).

¹⁹ *Id.* at 58; MEMORIAL OF CITIZENS OF THE UNITED STATES FOR AN INTERNATIONAL COPYRIGHT LAW, H.R. DOC. 10 (1843). “A memorial is a request . . . that the Congress take . . . or refrain from taking certain action.” Paul S. Rundquist, *Messages, Petitions, Communications, and Memorials to Congress*, CRS REPORT FOR CONGRESS 2 (2003), available at <http://www.rules.house.gov/archives/98-839.pdf>.

²⁰ The members of the select committee were: Robert C. Winthrop (Chair W-MA); John Quincy Adams (W-MA); Edward Junius Black (D-GA); James B. Bowlin (D-MO); Reuben Chapman (D-AL); Joshua Herrick (D-ME); Charles J. Ingersoll (D-PA); Moses G. Leonard (D-NY); Emery D. Potter (D-OH). H. JOURNAL, 28th Cong., at 58 (1st Sess. 1844).

²¹ CONG. GLOBE, 28th Cong., 1st Sess. 40 (1844).

²² *Id.*

²³ *Id.*

²⁴ Certainly the Congressional Globe and House Journal give no details as to the content of the Ingersoll Copyright Bill. *See id.* at 18. H. JOURNAL, 28th Cong., at 30 (1st Sess. 1844). Even on January 3, when the bill was read twice and formally referred, it is unknown how many members were on the floor of the house at the time. H. JOURNAL, 28th Cong., at 150 (1st Sess. 1844); CONG. GLOBE, 28th Cong., 1st Sess. 98 (1844).

²⁵ An Act to Revise, Consolidate, and Amend the Statutes Relating to Patents and Copyrights, ch. 230, 16 Stat. 198 (1870) [hereinafter 1870 Revision].

The Ingersoll Bill was not a mere amendatory act; it was a complete revision, aimed at erasing the 1831 revision, only a decade old, from the books.²⁶ However, in technical areas, the bill followed the outlines of the 1831 revision fairly precisely. For example, the provision requiring that materials to be copyrighted be deposited in the district court was substantially unchanged from the 1831 law,²⁷ in contrast with the bill passed two years later establishing national depositories at the Smithsonian and the Library of Congress.²⁸ The bill somewhat modified the term for copyrighted works. Whereas in the 1831 revision the term of copyright was twenty-eight years with a fourteen year extension if the author or heirs were alive,²⁹ the Ingersoll Bill set a flat forty-two year period, with the alternative of life of the author plus seven years, whichever was longer.³⁰ One particularly interesting section of the bill asserted that copyright in a work was a property right, and not a mere government-granted privilege.³¹ The subject matter of copyright was not seriously changed in its scope.³²

The original bill seems to have intended to establish a right of public performance for musical compositions, but this right was not fully spelled out. The bill's definitions asserted "that the words 'dramatic piece' shall be construed to mean and include every tragedy, comedy, play, opera, farce, or other scenic, musical, or dramatic entertainment," but do not assert what additional protections this class of intellectual property should have.³³ Also, the bill noted that a listing in the register of the district court would be "in the case of dramatic or music pieces . . . *prima facie* proof of the right of representation or performance, subject to be rebutted as aforesaid."³⁴ A firm statement of the performance right and an enforcement mechanism would wait until the amendments.

With barely a quorum, the select committee on copyright "internal and external" met on January 5, 1844, in the chamber of the Committee on Foreign Affairs.³⁵ At this meeting, the conversation was more about

²⁶ Ingersoll Copyright Bill, *supra* note 4, § 1.

²⁷ *Compare id.* § 4 with 1831 Revision, *supra* note 16, § 4.

²⁸ An Act to Provide for the Payment of the Evidences of Public Debt in Certain Cases, ch. 180, 9 Stat. 106 (1846).

²⁹ An Act to Amend the Several Acts Respecting Copy Rights, ch. 16, §§ 1-2, 4 Stat. 436 (1831).

³⁰ Ingersoll Copyright Bill, *supra* note 4, § 3.

³¹ *Id.* § 15. Essentially, this may have had much to do with disagreements between Adams and Ingersoll over the role of copyright more generally, discussed below. For a discussion of the right/privilege debate over copyright in American history, see Gillian K. Hadfield, *The Economics of Copyright: An Historical Perspective*, 38 COPYRIGHT L. SYMP. 1 (1992).

³² Ingersoll Copyright Bill, *supra* note 4, § 2; 1831 Revision, *supra* note 16, § 1.

³³ Ingersoll Copyright Bill, *supra* note 4, § 2.

³⁴ *Id.* § 6.

³⁵ John Quincy Adams, *The Diaries of John Quincy Adams: A Digital Collection* (Jan. 5, 1844), http://www.masshist.org/jqadiaries/doc.cfm?id=jqad44_190. Among the members present were Chairman Winthrop, Adams, Ingersoll, Herrick and Leonard. *Id.* This location was also

copyright in general than the specific measures mentioned in the Ingersoll Bill, and John Quincy Adams “offered some suggestions as to the natural right of literary property to the principles of which, as entertained by [Adams], Ingersoll immediately declared his dissent.”³⁶ Adams then opined apropos of this that Ingersoll’s “principles are radically depraved, and never can harmonize with mine.”³⁷ The committee then adjourned for two weeks.³⁸

B. *The Amended Bill*

At the select committee’s next meeting on January, 19, 1844, the committee had trouble getting a quorum,³⁹ owing in part to Ingersoll’s late arrival.⁴⁰ While waiting for a quorum, a second memorial for international copyright was read to the committee by Chairman Winthrop, this one from Nahum Capen of Boston.⁴¹ The only other event of note at the committee meeting did not bode well for the bill. Representative Black, who had not been at the first meeting of the committee, announced his intent to write a report opposing the bill.⁴² Prior to adjourning, the committee agreed to print the Capen Memorial, as well as the amendments offered by Ingersoll to his bill.⁴³ It is unknown if the committee had actually read the amendments to the Ingersoll Bill (and even if the amendments were read at the meeting, only half the committee members were there).

The amendments to the Ingersoll Copyright Bill are of special interest to this article, since these would have established the right of public performance, both for musical compositions as well as dramatic productions, and everything in between (such as operas).⁴⁴ The relevant part of this section is worth quoting:

[T]he author of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, song, or musical composition, composed and not printed and published by the author thereof, or his

doubtless comfortable for Ingersoll, since he was the Chair of the Committee on Foreign Affairs.

³⁶ *Id.*

³⁷ *Id.* It is unclear if Adams was referring to principles related specifically to the bill, or to Ingersoll more generally.

³⁸ *Id.*

³⁹ John Quincy Adams, *The Diaries of John Quincy Adams: A Digital Collection* (Jan. 19, 1844), http://www.masshist.org/jqadiaries/doc.cfm?id=jqad44_207 (“It was near 11 before there was a quorum.”).

⁴⁰ *Id.* Herrick, Chapman, and Potter were absent; Ingersoll did not arrive until after the committee adjourned. *Id.*

⁴¹ *Id.*; NAHUM CAPEN, MEMORIAL OF NAHUM CAPEN, OF BOSTON, MASSACHUSETTS, ON THE SUBJECT OF INTERNATIONAL COPYRIGHT, H.R. DOC. 61 (1844).

⁴² John Quincy Adams, *The Diaries of John Quincy Adams: A Digital Collection* (Jan. 19, 1844), http://www.masshist.org/jqadiaries/doc.cfm?id=jqad44_207. This report was never presented or printed, and it is unclear that it was ever even written. Nor is there any record of his reasons.

⁴³ *Id.*

⁴⁴ Ingersoll Copyright Bill, *supra* note 4, § 19.

assignee, shall have, as his own property, the sole liberty of representing, or causing to be represented or performed, at any place or places in the United States, any such production as aforesaid.⁴⁵

Interestingly, this amendment may not have created a new right, strictly speaking, since it only applied to works that had not been “printed and published by the author”—the same right that already existed at common law.⁴⁶ Pursuant to this, a provision was set forth to allow manuscript works to be copyrighted solely by their title, “name and place of abode of the author or composer,” and “the time and place” of first performance—while still being kept in manuscript form.⁴⁷ As such, unpublished works would have been protected by a statute instead of the weaker common law, but this was not an unrestricted public performance right for published works as we think of it today. Damages for the illicit production or performance of a copyrighted musical or dramatic work pursuant to these provisions would cost two hundred dollars per performance, all profits, or compensatory damages, whichever would be the greatest of the three, with the possibility of injunctive relief.⁴⁸ These damages rates were rather high for the time, certainly when compared to the dramatic performance bill of 1856, which set damages at one hundred dollars for the first performance and fifty dollars for each additional one, and did not provide for injunctive relief.⁴⁹

Ironically, the insufficiency of the 1856 Act would be the impetus for the 1897 bill which would finally pass the public performance right for music into law.⁵⁰ The amendments also would have expanded the scope of copyright to include works such as sculptures, well before this protection was incorporated into law in the 1870 Revision.⁵¹ Industrial Design (when an item has both functional and aesthetic qualities) and ownership of a work for hire were also included in the coverage of the amendments to the Ingersoll Copyright Bill.⁵² In short, the Ingersoll Copyright Bill was tremendously ambitious, bringing together reforms of the next half-century. Its doom would be quick.

At a meeting on Feb. 9, 1844,⁵³ the select committee was read the Ingersoll Bill with amendments⁵⁴—this may well have been the first

⁴⁵ *Id.*

⁴⁶ *See infra* Part II.

⁴⁷ Ingersoll Copyright Bill, *supra* note 4, § 20.

⁴⁸ *Id.*

⁴⁹ An Act Supplemental to an Act Entitled “An Act to Amend the Several Acts Respecting Copyright,” Approved February Third, Eighteen Hundred and Thirty-one, ch. 169, 11 Stat. 138 (1856).

⁵⁰ *See infra* Part III.

⁵¹ Ingersoll Copyright Bill, *supra* note 4, § 21.

⁵² *Id.* §§ 24, 27.

⁵³ John Quincy Adams, *The Diaries of John Quincy Adams: A Digital Collection* (Feb. 2, 1844), http://www.masshist.org/jqadiaries/doc.cfm?id=jqad44_221.

⁵⁴ *Id.*

time some members of the committee actually knew the contents of the bill, since it had been printed after the last meeting of the committee.⁵⁵ John Quincy Adams was unequivocal in his opprobrium for the bill. He felt that it consisted “of an entire but most incongruous system of copyright property; fit for nothing but to multiply litigation, and not even touching upon the subject first referred to the committee, a memorial for international copyright law.”⁵⁶ Adams then took the time to read the bill, and was left questioning the necessity of a revision to the domestic copyright laws in the first place.⁵⁷ The committee adjourned until a later date, to be set by the Chair.⁵⁸ There is no record of the committee ever meeting again.⁵⁹

Ten days later, Ingersoll introduced a memorial from the authors of New York,⁶⁰ arguing that the lack of international copyright hurt American authors because they could not compete with cheap editions of foreign authors.⁶¹ It is possible that Ingersoll’s introduction of this memorial was an acceptance of Adams’ point—that the committee’s original purpose was international copyright. Larger issues were on the national horizon for Ingersoll to deal with as chair of the Foreign Relations Committee, most notably the annexation of Texas as a slave state, to which Adams was vociferously opposed. Even though Adams was sure to still oppose the Democratic efforts, perhaps Ingersoll felt that Adams’ visceral dislike of him could be tempered.

On New Year’s Day 1844, Ingersoll called on Adams, who noted in his diary that Ingersoll was the “cunningest and most treacherous cat of them all.”⁶² Adams’ dislike of Ingersoll is a current that runs throughout much of his diary in his later years.⁶³ Relations between the two men were once at least cordial,⁶⁴ but Ingersoll became one of Adams’ greatest foes on such issues as the gag rule on the discussion of slavery and the enmity between the two men grew to the point of infamy.⁶⁵ In the case of the Ingersoll Copyright Bill, a somewhat revolutionary measure sprung on Congress without anything more than

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ The diaries of John Quincy Adams do not discuss any further meetings, and neither the House Journal nor the Congressional Globe reports anything being sent back from the committee to Congress.

⁶⁰ H. JOURNAL, 28th Cong., at 427 (1st Sess. 1844).

⁶¹ Albert Gallatin et al., Author’s Memorial to the Senate and House of Representatives of the United States (Dec. 28, 1843) [hereinafter Author’s Memorial] (on file with author).

⁶² John Quincy Adams, *The Diaries of John Quincy Adams: A Digital Collection* (Jan. 1, 1844), http://www.masshist.org/jqadiaries/doc.cfm?id=jqad44_183.

⁶³ MEIGS, *supra* note 5, at 252 (“[M]any pages of [Adams’] diary are disfigured by the secret outpouring of his venom upon Mr. Ingersoll.”).

⁶⁴ *Landing of Penn.*, NILES’ WKLY REG., Nov. 12, 1825, at 161 (describing an oration by Ingersoll attended by then president Adams, who was warmly received).

⁶⁵ MEIGS, *supra* note 5, at 251.

passing warning, Adams' enmity seemed to seal the bill's fate. Ingersoll's own Democratic Party was not united behind him, with several representatives not showing up to any meetings, and Black opposing the bill. Meanwhile, Adams opposed the bill, and the chair of the committee was a Massachusetts Whig allied with Adams. There is no record of any support for the bill in the committee; although it is unclear whether it would be recorded in Adams' diary if there were. Furthermore, Ingersoll was not noted as a particularly skilled legislator,⁶⁶ and was well known for a unique and somewhat rambling style of address.⁶⁷ Doubtless, all of these factors contributed to the demise of this ambitious bill.

After the failure of the Ingersoll Copyright Bill, the committee on copyright passed out of practical existence. Congress continued to refer petitions and memorials to the committee, but none were ever reported back to be printed—they were simply filed away.⁶⁸ There is no record in Adams' diaries of the committee meeting again, and in any case, Congress recognized that the committee was no longer considering issues of domestic copyright, and referred to it for the first time as the select committee on international copyright roughly a month later.⁶⁹ It was not until after the passage of the International Copyright Bill of 1891 that Congress would reconsider a bill for an exclusive right of public performance for musical compositions.⁷⁰

II. *THE MIKADO* LITIGATION AND ITS ANTECEDENTS

In the late nineteenth century the winds of change began to blow towards a reform of the statutes governing public performance by increasing penalties for infringing public performances and by expanding the coverage of the public performance right to music and opera. In order to understand the bills which sought to change the laws

⁶⁶ *Id.* at 89 ("He had not that cool calculation and self-restraint [that] are needed, and his correspondence shows that his friends [found] him rather lacking in the sort of judgment necessary [for] such matters.").

⁶⁷ Public Ledger, *Lecture on Europe*, ATKINSON'S SATURDAY EVENING POST, Nov. 24, 1838, at 3.

⁶⁸ The House Journal lists the following petitions and memorials (aside from the three previously mentioned) as being referred to the committee after Feb. 19, 1844: A memorial of citizens of the State of New York, praying the passage of an international copyright law, presented by Rep. Fish Mar. 21, 1844, H. JOURNAL, 28th Cong., at 623 (1st Sess. 1844); A remonstrance of citizens of the State of Massachusetts, against the passage of an international copyright law, presented by Rep. Rockwell Mar. 26, 1844, *id.* at 683; A remonstrance of citizens of Bellows Falls, in the State of Vermont, against the passage of an international copyright law, presented by Rep. Foot Apr. 4, 1844, *id.* at 730; A remonstrance of citizens of Lee, Berkshire county, State of Massachusetts, against an international copyright law, presented by Rep. Rockwell Apr. 9, 1844, *id.* at 744; A petition of men of letters and citizens of the United States residing in Jackson, State of Tennessee, for the passage of a law for the proper regulation of the copyright of books, presented by Rep. M. Brown May 10, 1844, *id.* at 891.

⁶⁹ *Id.* at 623.

⁷⁰ An Act to Amend Title Sixty, Chapter Three, of the Revised Statutes of the United States, Relating to Copyrights, ch. 565, 26 Stat. 1106 (1891).

related to the public performance of music, it is useful to understand where the laws stood in the latter nineteenth century, and why a full legislative revision of the laws was needed in the face of developments in the theater. That there was no statutory right to exclusive public performance was fairly clear. However, whether there existed a common law right was less clear. The most important early case on this matter was *Wheaton v. Peters*, which stated:

That a man is entitled to the fruits of his own labour must be admitted; but he can enjoy them only, except by statutory provision, under the rules of property, which regulate society, and which define the rights of things in general.

. . . .

It is clear, there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent states; each of which may have its local usages, customs and common law. There is no principle which pervades the union and has the authority of law, that is not embodied in the constitution or laws of the union. The common law could be made a part of our federal system only by legislative adoption.⁷¹

Pursuant to this case, common law copyrights tracked along property lines. As long as a work remained in manuscript form, and thus was private property, the creator retained all rights in the work, including the right of public performance.⁷² However, as soon as a work was published, and thus public property, the work lost all rights except those saved by statute.⁷³ When the work in question was printed, publication was easy to determine, but the law regarding publication of other works, most notably dramatic and musical works, was deeply unsettled.⁷⁴ Furthermore, a line of cases set forth a general understanding that one could not take notes on or transcribe a performance and thus create a reconstruction for performance, but one could memorize a piece and transcribe it as best as could be recalled later.⁷⁵

In a line of cases mostly involving the operettas written by Gilbert and Sullivan, these questions were debated, leading up to the litigation surrounding Gilbert and Sullivan's *The Mikado, or The Town of Titipu*,⁷⁶ which finally ended most hopes of protecting the right of

⁷¹ *Wheaton v. Peters*, 33 U.S. 591, 658 (1834). The English cases from seventy years earlier regarding whether a common law of copyright existed after publication are not relevant here.

⁷² See generally *Authors' Rights Before Publication—The Representation of Manuscript Plays*, 9 AM. L. REV. 236 (1875).

⁷³ *Id.* at 237.

⁷⁴ *Id.* at 239.

⁷⁵ See *id.* at 241-42 (citing *Crowe v. Aiken*, 6 F.Cas. 904 (C.C.N.D. Ill. 1870)); *Keene v. Wheatley*, 14 F. Cas. 180 (C.C.E.D. Pa. 1861); *Keene v. Clark*, 2 Abb. Pr. (n.s.) 341 (N.Y. Sup. Ct. 1867); *Keene v. Kimball*, 82 Mass. (16 Gray) 545 (Mass. 1860).

⁷⁶ *The Mikado*, WIKIPEDIA, http://en.wikipedia.org/wiki/The_Mikado (last visited Nov. 4,

public performance via common law. The cases at the time mostly involved foreign composers, which was an additional wrinkle since this was before the International Copyright Act was passed in 1891.⁷⁷ However, even if the composers had been American (and indeed the litigation surrounding *The Mikado* included a valid American copyright), the lack of statutory protection would have doomed their chances. The litigation in the 1880s led directly to the legislation of the 1890s, as the lobbying resources of the copyright advocates were free once the struggle for international copyright was at an end. Important theater lawyers from the 1880s found themselves drafting or assisting the major bills of the 1890s, be it on behalf of the playwrights of the music publishers. Even more so, this litigation showed those parties who most wanted a right of public performance that the road to protection led not through the courts, but through Congress.

A. *Pre-Mikado Litigation*

In 1879 Gilbert and Sullivan (and their producer Richard D’oily Carte) had their first great success, *Pinafore*, and signs in England advertised that it was being “performed simultaneously in over one hundred theatres in America!”⁷⁸ This opened up new opportunities not just for continental composers and dramatists, but also for American copyright pirates and lawyers.⁷⁹ The first major copyright skirmish after the relatively uncontested American piracy of *Pinafore* was the *Pinafore* follow-up, *The Pirates of Penzance*, for which more intricate plans for protection were laid.⁸⁰

The orchestral score for *Pirates of Penzance* was kept in manuscript form, never published or revealed to the outside world.⁸¹ As such, copying was extremely difficult, since it would have had to have been done entirely by ear.⁸² As may have been expected though, in 1880, the music publishing firm of White, Smith, & Co. distributed a sheet-music of “popular airs” including a “potpourri” of tunes,⁸³ and

2006). The libretto (text) was by Sir William S. Gilbert, the music was by Sir Arthur Sullivan, and the promoter behind Gilbert and Sullivan was Richard D’Oily Carte. *Id.*

⁷⁷ An Act to Amend Title Sixty, Chapter Three, of the Revised Statutes of the United States, Relating to Copyrights, ch. 565, 26 Stat. 1106 (1891).

⁷⁸ Alexander P. Browne, *Sir Arthur Sullivan and Piracy*, 148 THE N.A.M. REV. 750 (1889).

⁷⁹ *Id.* Interestingly, one of the leading pirate orchestrations of *H.M.S. Pinafore* was prepared by none other than the eminent wind band composer, John Philip Sousa. EDWARD SAMUELS, THE ILLUSTRATED STORY OF COPYRIGHT 235 (2000).

⁸⁰ Browne, *supra* note 78, at 751 (“Appeals to ‘public opinion,’ ‘the self-respect of the American art-loving community,’ and similar phantasms having been tried in vain with ‘Pinafore,’ Carte decided to adopt different methods with the ‘Pirates.’”); *see also* “*The Pirates*” in *London*, N.Y. TIMES, Apr. 20, 1880, at 2 (stating that “no books of words [were] printed . . . [as] a precaution in the interest of the American copyright.”).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Sullivan v. White*, Equity Case No. 1391 (C.C.D. Mass 1879) (Affidavit of Alfred Collier, Exhibit A).

Louis P. Goulland put out *Favorite Melodies from the Pirates of Penzance*.⁸⁴ Litigation commenced.⁸⁵ When the case went to the Massachusetts Circuit Court, the judge expressed his dissent from the earlier precedents and allowed an injunction on the sale of the book.⁸⁶ While there is no record of the reasoning involved, it seems likely that the judge was not swayed by the aforesaid machination—he simply felt that publication had not occurred by the performance in a foreign nation. The ruling in this case would not, however, be uniformly applied. In a case involving the comic opera *Billee Taylor* a year later,⁸⁷ Judge Thomas J. Morris of the Maryland Circuit Court reaffirmed the line of cases that held that one could perform one’s aural recollection of another’s manuscript performance piece.⁸⁸ *Billee Taylor* was also a Carte production, although it was not written by Gilbert and Sullivan, and had a strong impact on Carte’s legal team and strategies.⁸⁹ This conflict of unpublished opinions between the Massachusetts and Maryland Circuit courts would soon resolve themselves in published opinions. Even though the Massachusetts Circuit Court carried more prestige, these splits made the law more unsettled than ever.⁹⁰

The next case to be decided on this issue, *Thomas v. Lennon*, would be a bit different from other cases in this line, in that it involved pure music, specifically the “Redemption” cantata of the noted French composer Charles Gounod.⁹¹ In this case the defendant, Lennon, sought to perform the piece from his own reconstruction of a piano score sold in England, which had markings indicating which orchestral elements were used at certain points.⁹² This was a case of first impression, because pirating a work of this abstract and “exalted” type had not been attempted before.⁹³ The orchestral score of the *Redemption* had never been printed anywhere (thus there was no foreign copyright issue), and

⁸⁴ *Sullivan v. Goulland*, Equity Case No. 1392 (C.C.D. Mass 1879) (Affidavit of Alfred Collier, Exhibit B).

⁸⁵ Browne, *supra* note 78, at 752; *The Pirates of Penzance in Court*, BOSTON DAILY GLOBE, Apr. 24, 1880, at 2; *Current Topics*, 22 ALB. L.J. 222 (1880). Interestingly, the Boston licensee of Gilbert and Sullivan had put together an intricate scheme by copyrighting the title page, but this was something of a folly, since it only gave him the right to write his own *Pirates of Penzance*, not any more protection to Gilbert and Sullivan’s *Pirates of Penzance*. *Music*, N.Y. TRIB., Mar. 12, 1880, at 4.

⁸⁶ *Sullivan v. White* (Final Decree); *Sullivan v. Goulland* (Final Decree); Browne, *supra* note 78, at 752-53. The Judge was Judge Lowell, the only full-time circuit judge (this being before the creation of the circuit courts of appeal, there was one full-time circuit judge, along with district and Supreme Court judges riding circuit). *Id.* The case was not reported as no written decision was published, but the case files have survived.

⁸⁷ “*Billee Taylor*” in *Court*, WASH. POST, Apr. 16, 1881, at 1.

⁸⁸ John T. Ford v. Edward E. Rice and Richard D’Oyly Carte, Equity Case No. 65 (C.C.D. Md. 1881); Browne, *supra* note 78, at 753; “*Billee Taylor*” in *Court*, *supra* note 87, at 1.

⁸⁹ Browne, *supra* note 78, at 753.

⁹⁰ Edward Marston, Editorial, *Copyright in Music*, N.Y. TRIB., Jan. 25, 1883, at 5.

⁹¹ *Thomas v. Lennon*, 14 F. 849 (C.C.D. Mass. 1883).

⁹² *Id.* at 850-51.

⁹³ Browne, *supra* note 78, at 753-54.

was assigned to Theodore Thomas in Boston for a period of “two years at least,” who planned to perform it with the Handel and Haydn Society of Boston.⁹⁴ Lennon had meanwhile engaged someone “intimately acquainted with Gounod and his style” to reconstruct a full score of the cantata.⁹⁵

The *Thomas v. Lennon* decision was a bit of a surprise to those unaware of the *Pirates of Penzance* decision, since no shift in the case law had been published. The Massachusetts court held that since the full score of the *Redemption* was not published, it remained private property, despite having been performed internationally.⁹⁶ Additionally, the court held:

[The theory that one can create orchestrations freely] has a logical and consistent appearance, but, as applied to a musical work of this kind, the practical objections are very great. Such a work is a single creation, of which the orchestration is an essential part; every reproduction of it from something else is necessarily an imperfect imitation, which, nevertheless, occupies the same field, and may ruin the original. In this respect an opera is more like a patented invention than like a common book; he who shall obtain similar results, better or worse, by similar means, though the opportunity is furnished by an unprotected book, should be held to infringe the rights of the composer.⁹⁷

It is not unreasonable to take this doctrine slightly farther, and hold that performance of an exact reproduction of the score is equally damaging to the opera, since there is still no artistic control by the original author over the production values of a pirated opera production.⁹⁸ This pirating could still lead to the cheapening of the original opera, as well as to the negative effects observed by the *Thomas v. Lennon* court. The *Thomas v. Lennon* holding can further be read as not just an extension of the copyright law, but as an early affirmation of the artist’s moral rights. Composers and their lawyers would eye this case with great interest, but its central doctrine would not hold in the courts for long.

It was just as well that a new paradigm was found for protecting

⁹⁴ *The “Redemption” Difficulty*, MUSICAL VISITOR, A MAG. OF MUSICAL LITERATURE & MUSIC, Feb. 1883, at 39. This litigation may have influenced the decision of the Handel and Haydn Society to submit a petition in favor of international copyright law (a copy of the petition of the Music Teachers Association of America) a few years later. Petition of Handel and Haydn Society of Boston to the Honorable Members of the House of Representatives, in Congress Assembled (July 3, 1884) (on file with author).

⁹⁵ *The “Redemption” Difficulty*, *supra* note 94, at 39. Lennon did try to acquire the American rights legitimately, but negotiations were already on with Thomas. *Thomas*, 14 F. at 851.

⁹⁶ *Thomas*, 14 F. at 852.

⁹⁷ *Id.* at 853.

⁹⁸ Ultimately, Lennon decided to follow the principle everyone agreed on, that the European-published piano-score could be freely performed, and thus produced *The Redemption* with two pianos and an organ, “to the eternal disgrace of musical art.” Browne, *supra* note 78, at 755.

orchestrations, since shortly thereafter the *Carte v. Ford* case (the *Iolanthe* case) involving another Gilbert and Sullivan operetta, would be brought in the Maryland Circuit Court in and decided in favor of the pirate, casting doubt on the usefulness of the *Pirates of Penzance* and *Redemption* cases.⁹⁹ The *Iolanthe* case raised nearly identical issues to *Pirates of Penzance*, but the court in *Iolanthe* disagreed completely with the holding of both *Pirates of Penzance and Redemption*, while siding with its own precedent in the *Billee Taylor* case:

[I]t is a proposition now so well settled as to be almost axiomatic, that, except so far as preserved to him by statute, when the composer of any work, literary, musical, or dramatic, has authorized its publication in print, his control over so much as he has so published, and of the use which others may make of it, is at an end. And in the present case it could not be and it is not denied that it is the right of any one to publicly perform all that the book contains, which would in fact be the whole opera as composed by the authors, substituting the piano-forte accompaniment for the orchestra.¹⁰⁰

The *Iolanthe* court then reached the holding that a work's score is not an integral part of the dramatic work. This decision was based on the ironic fact of the successes of pirates of *Pinafore* whose knockoff scores did not accurately copy the music.¹⁰¹ The *Iolanthe* holding was critical because the libretto to an opera was usually published, and quite profitably so. As such, simply publishing a piano score and the libretto would constitute a publication of the full-orchestra opera. This would seem to lead to the conclusion that in order to retain common law copyright one could not publish *any part* of an opera.

Needless to say, the *Iolanthe* decision was not encouraging, and for their next works, the lawyers for Gilbert and Sullivan would try one last legal scheme to achieve remuneration and justice for their clients by using a combination of common law and statutory protections. Pursuant to the *Redemption* decision, a plan was developed to protect the works of Gilbert and Sullivan from pirated performances.¹⁰² A Boston musician and composer, "Mr. George Lowell Tracey, was engaged and despatched to London" to create a piano score of the next Gilbert and Sullivan operetta, *Princess Ida*.¹⁰³ Tracey would then legally copyright the piano arrangement in America as an American citizen, and thus Gilbert and Sullivan would have protection against any unauthorized performance whatsoever.¹⁰⁴ Meanwhile, the actual orchestral score was

⁹⁹ *Carte v. Ford* (The "*Iolanthe*" Case), 15 F. 439, 447 (C.C.D.Md. 1883).

¹⁰⁰ *Id.* at 442 (internal citations omitted).

¹⁰¹ *Id.* at 444-45.

¹⁰² Browne, *supra* note 78, at 755-56.

¹⁰³ *Id.* at 756.

¹⁰⁴ *Id.*

kept in manuscript, under lock, key, and guard.¹⁰⁵ Through a slight quirk in the copyright laws, the score could be copyrighted in both England and America, provided the author was an American citizen who was present in England on the day of publication, and that publication occurred in both nations on the same day.¹⁰⁶ This being done properly, the lawyers for Gilbert and Sullivan waited for a battle which never came—*Princess Ida* was a flop, and was not pirated.¹⁰⁷ However, the subsequent success of *The Mikado* provided Gilbert and Sullivan's lawyers with the opportunity to use their newly devised scheme in the battle they had been awaiting.

B. The Mikado Litigation

The Mikado was first performed in London on March 14, 1885, to great success and acclaim.¹⁰⁸ While perhaps many had hoped otherwise, it was no surprise that the first American production was indeed a pirated one, opening at the Museum in Chicago on June 29, 1885, competing with a twenty-one-inch tall Mexican woman and a two-headed cow for the public's affections at that theater.¹⁰⁹ The pirated production of *The Mikado* did not attract much legal notice, perhaps because the theater's other acts gave the production a distinct air of disrepute, and also because it was the common consensus that "the people on the stage could neither sing nor act."¹¹⁰ Indeed, the performance was of such poor quality that the *Chicago Daily Tribune* listed as among the aggrieved parties of the piracy the "intelligent public."¹¹¹ A second pirated performance of *The Mikado*, also in Chicago, opened at Chicago's Grand Opera House on July 6, using some cast members from the Museum production.¹¹² The players were badly under-rehearsed, but reviewers thought the show had some

¹⁰⁵ See *id.* at 756-57.

¹⁰⁶ See *id.* at 756.

¹⁰⁷ *Id.* For a dramatization of the failure of *Princess Ida* and subsequent success of *The Mikado*, see TOPSY-TURVY (USA Home Entertainment, a Division of USA Films, LLC 2000).

¹⁰⁸ *Stage History of "The Mikado,"* N.Y. TIMES, May 29, 1910, at X7.

¹⁰⁹ *Id.*

There were three attractions all at the Museum at the same time—Lucia Zarete, the Mexican dwarf, 21 inches in height; a double-headed cow, and "The Mikado". . . . The manager of the double-headed cow became upset at the amount of business being done by "The Mikado," . . . and tried to claim a breach of contract. He used to take the cow to the door of the theatre, and then he claimed that it was the cow and not "The Mikado" which drew the crowds into the Auditorium. Finally there had to be a compromise with the cow manager.

Id.

¹¹⁰ *Notes of the Stage,* N.Y. TIMES, July 1, 1885, at 4.

¹¹¹ *The Museum—"The Mikado,"* CHI. DAILY TRIB., Jul 2, 1885, at 5. From the review, it sounds like an outright butchering of the work. Amusingly, later on the production would come to be regarded decently. See "The Mikado," CHI. DAILY TRIB., Oct 6, 1885, at 5.

¹¹² *Stage History of "The Mikado,"* *supra* note 108. Sir Arthur Sullivan apparently passed through Chicago at this time, and considered the sub par performance "extremely annoying." *Sir Arthur Very Wroth,* N.Y. TIMES, July 14, 1885, at 1.

potential given proper rehearsal.¹¹³ This performance was produced by Sydney Rosenfeld, who had brought much of his company from New York to test out the pirated show before bringing it back to New York.¹¹⁴ Apparently, Sir Arthur Sullivan and his associates did not care at all about the shenanigans in Chicago.¹¹⁵ The pirate productions in New York, however, would be a different question entirely.¹¹⁶

The first *Mikado* litigation was commenced as soon as plans for Rosenfeld's New York performance were announced. While some felt it would "be a Japanese burlesque and that is all,"¹¹⁷ D'oyly Carte and Albert Stetson, the American licensee of Carte, sued to enjoin the production, arguing, *inter alia*, that the orchestral parts had been stolen by bribing a musician at the Savoy Theatre in London.¹¹⁸ Represented by Alexander P. Browne and the eminent Joseph H. Choate, Carte and Stetson received a temporary injunction against Rosenfeld on the afternoon of July 20.¹¹⁹ However, it was thought that "[n]o power on earth" could prevent the performance of *The Mikado*, and indeed none did.¹²⁰ Rosenfeld simply assigned his interest to E.J. Abrahams, and the show went ahead as planned that night.¹²¹ The atmosphere in the theater was "intense," with the players wondering if any arrests would be made that night.¹²² While there were no arrests that night, the performance led to the jailing of Rosenfeld on the grounds of contempt of court, and the production would not be repeated.¹²³ Abrahams, the putative producer of this performance was arrested on July 29,¹²⁴ and Rosenfeld was arrested shortly thereafter.¹²⁵ At the trial, Rosenfeld was

¹¹³ See *Mr. Hamlin and the Production of "The Mikado" at The Grand*, CHI. DAILY TRIB., July 7, 1885, at 5. Apparently the show opened an hour and a half late because Rosenfeld had to scrounge to pay the theater-operator. *Id.*

¹¹⁴ *Amusements in Chicago*, N.Y. TIMES, July 7, 1885, at 2 ("The performance itself was more like a rehearsal than anything else."). The intent to bring the show to New York was announced the next day. *Amusement Notes*, N.Y. TIMES, July 8, 1885, at 4. Interestingly, Rosenfeld claimed a moral obligation to which he planned to pay a royalty, even if there was no legal obligation. "*The Mikado*," BOSTON DAILY GLOBE, July 2, 1885, at 5. There is no record of any such payment being made.

¹¹⁵ See *Sir Arthur Sullivan and "The Mikado"*, CHIC. DAILY TRIB., July 11, 1885, at 5.

¹¹⁶ *Id.* There were many smaller legal tussles in America over *The Mikado*, but they pale both in scale and historical impact. Since the focus of this paper is not on the history of this operetta in America, only the New York litigation is discussed.

¹¹⁷ *Gossip of the Theatres*, N.Y. TIMES, July 12, 1885, at 3.

¹¹⁸ *Actor, Manager, and Play*, N.Y. TIMES, July 19, 1885, at 3.

¹¹⁹ "*The Mikado*" *Enjoined*, N.Y. TIMES, July 21, 1885, at 1 (giving a full account of the court proceedings).

¹²⁰ *Gossip of the Theatres*, N.Y. TIMES, July 16, 1885, at 3.

¹²¹ *Stage History of "The Mikado"*, *supra* note 108. This tactic was one of the common ways of avoiding injunctions which the Cummings Bill meant to stop. See *infra* Part IV.

¹²² *Stage History of "The Mikado"*, *supra* note 108.

¹²³ *Id.* It most likely did not help the producers of this production that the judge who issued the injunction had to be called back from Vermont to hold the producers in contempt. Stephen Fiske, *Dramatic Feuilleton*, ART AMATEUR, Sept. 1885, at 68.

¹²⁴ *Learning a Little About Law*, N.Y. TIMES, July 30, 1885, at 5.

¹²⁵ Rosenfeld turned himself in on Aug. 1. *Actor, Manager, and Play*, N.Y. TIMES, Aug. 2, 1885, at 3; *Very Cheap Contempt*, N.Y. TIMES, Aug 2, 1885, at 4.

accused of using Abrahams as a pawn;¹²⁶ Rosenfeld was fined \$750 and Abrahams was fined \$250.¹²⁷ Rosenfeld was unable to pay, and thus spent a short period in jail.¹²⁸ This production was not permanently forestalled, as it was picked up by Harry Miner,¹²⁹ who paid the bond to lift the injunction, and subsequently presented *The Mikado* at his People's Theater.¹³⁰ Meanwhile, Rosenfeld languished in the Ludlow Street jail for his short sentence, where he was tormented by street organ players playing the music from *The Mikado* outside his window.¹³¹

A second line of litigation, while perhaps less packed with incident, was ultimately more important to the development of the law. While all the above was going on, a more reputable pirate production of *The Mikado* was being prepared by the Duffs, to be performed shortly before the October 1 production of the official version of *The Mikado*, produced in America by Stetson.¹³² The Duffs had been almost set to do the official production,¹³³ and when the deal fell through they lacked any substitute material to put on their stage.¹³⁴ The Duffs had previously produced the official production of *Iolanthe*, and it is quite possible that they only turned to piracy out of desperation over an empty theater, after they failed to reach an agreement on the terms of a license. The Duffs said that Carte insisted on impossible terms,¹³⁵ while Carte said that the Duffs had walked away from a very reasonable offer after extensive negotiation.¹³⁶ Whatever the case, the younger Duff simply went to several performances of *The Mikado* in England and made arrangements to ship costumes from there back to New York, while his father made arrangements to prepare an orchestration of the published piano score.¹³⁷ As was commonly noted, Gilbert's book for *The Mikado* was published in Britain,¹³⁸ and in any case anyone in the

¹²⁶ *Ignorance as a Defense*, N.Y. TIMES, Aug. 6, 1885, at 8. Abrahams claimed that he did not know of the injunction, and would have never let the show go ahead if he had.

¹²⁷ *Guilty of Contempt of Court*, N.Y. TIMES, Aug. 8, 1885, at 8.

¹²⁸ *Sydney Rosenfeld in Jail*, N.Y. TIMES, Aug. 9, 1885, at 5.

¹²⁹ Later, Representative Miner denounced the play pirates. See *infra* note 376.

¹³⁰ *Sydney Rosenfeld in Jail*, *supra* note 128; *Stage History of "The Mikado," supra* note 108.

¹³¹ *Stage History of "The Mikado," supra* note 108. By this time Rosenfeld was "head over ears in debt," and indeed had been for some time. *Music*, CHI. DAILY TRIB., Aug. 2, 1885, at 20.

¹³² *The Gossip of the Stage*, N.Y. TIMES, June 18, 1885, at 3.

¹³³ In fact, it seems that it was almost a done deal at one point. See *Mr. Duff and "The Mikado,"* N.Y. TIMES, Apr. 23, 1885, at 4.

¹³⁴ See *the Gossip of the Stage*, N.Y. TIMES, May 28, 1885, at 3.

¹³⁵ *Id.* These terms included sixty percent of the gross receipts, that they provide the orchestra and theater, and that there be a right of cancellation for Carte upon notice if proceeds were below a certain level.

¹³⁶ *D'oyly Carte Excited*, BOSTON DAILY GLOBE, June 29, 1885, at 4.

¹³⁷ *Id.* Amusingly, the senior Duff claimed that he was doing this with "no thought for the profit," and simply to survey the public's attitude towards theatrical copyright, leading to the sarcastic comment "thoughtful Manager Duff!" *Notes and News*, CHI. DAILY TRIB., July 5, 1885, at 6.

¹³⁸ *Echoes from the Stage*, CHI. DAILY TRIB., June 7, 1885, at 9-10 (noting that the publication of the libretto in England meant that Carte and Stetson had to stand on the *Redemption* case alone

United States could copy it since it was the work of a foreigner.¹³⁹ Since the piano score was copyrighted by an American, the question was thus freed from the international copyright frame and presented simply: could one legally prepare (and perform) a performing orchestration of a copyrighted piece of American music?

The Duffs were represented by ex-Judge Dittenhoefer, who is discussed later in this article.¹⁴⁰ While Dittenhoefer was ordinarily the attorney for Stetson, he was strongly of the opinion that copyright law did not protect public performance of music, and gave that opinion to Duff.¹⁴¹ Rosenfeld acted as a distraction from the Duffs for some time, as they had thought he would,¹⁴² and it was not until August 21 that the application for an injunction by Carte and Stetson against the Duffs was argued.¹⁴³ The attorneys for Carte and Stetson set forth the expected arguments, to which Dittenhoefer and his co-counsel A.J. Vanderpoel replied that the copyright was technically invalid, that the scheme of involving Tracey (as copyright holder of record for the score) was “subterfuge” of American copyright law, that the copy was made from an English printing of the piano score, and that anyone could make an orchestration if they wanted to anyway—“the only right secured was [the right] to multiply copies of the copyrighted work.”¹⁴⁴

The opinion of Judge Wallace of the Circuit Court was in favor of Duff.¹⁴⁵ The Judge noted:

They were well advised that, until publication of their manuscript, their exclusive right to multiply copies of their work and control its production upon the stage would be intact, but that after publication this right would become public property unless saved by statutory protection. Common-law rights of authors run only to the time of the publication of their manuscripts with their consent. After that the right of multiplying copies, and, in the case of a dramatic work, of representation on the stage, by the rule of the common law is abandoned to the public. It is immaterial whether the publication be made in one country or another. Such rights of authors as are saved by statute are not recognized extraterritorially. They can only be enforced in the sovereignty of their origin.¹⁴⁶

The court continued, having noted that since *The Mikado* had been

for their copyright).

¹³⁹ *The Threatened “Mikado” Litigation*, N.Y. TIMES, June 28, 1885, at 1.

¹⁴⁰ *See infra* Part IV.

¹⁴¹ *Actor, Manager, and Play*, N.Y. TIMES, July 26, 1885, at 3.

¹⁴² *See Gossip of the Theatres*, *supra* note 117.

¹⁴³ “*The Mikado*,” N.Y. TIMES, Aug 22, 1885, at 5.

¹⁴⁴ *Id.*

¹⁴⁵ *Carte v. Duff (The Mikado Case)*, 25 F. 183 (C.C.S.D.N.Y. 1885).

¹⁴⁶ *Id.* at 184. These last three sentences have been questioned by Elihu Inselbuch, *First Publication Abroad—Intensive, Divestitive, or Inoperative? A Territorial View of Copyright*, 35 FORDHAM L. REV. 477, 492 (1965). In this article, Inselbuch notes that this dicta was unsupported, and quite possibly incorrect. However, Inselbuch does not dispute the case’s actual holding, since the statutes were as they were at the time. *Id.* at 493.

performed in London, it was thus only protected by statutory protections, which do not grant a right beyond mere copying of the book.¹⁴⁷ Despite all the constructs seen in the *Redemption* and *Pirates of Penzance* cases, the court realized that American law contained no protection for the public performance of a musical composition:

[T]he complainant falls short of a case for the relief asked, because representing the arrangement on the stage is not the representation of a dramatic composition, but of a musical composition, as to which complainant's statutory title consists in the sole right of printing, copying, etc., and not of public representation.¹⁴⁸

With that, the door was closed on attempts by composers to recover for unauthorized performances of their works. The court had clearly stated the law, and the case would not be questioned judicially from this point forward. Immediately after this decision, Sydney Rosenfeld brought an action against Carte and Stetson for \$50,000 for restraining him from performing *The Mikado*.¹⁴⁹ The Duffs also got an injunction against Carte and others from any further suit against them.¹⁵⁰ To drive the point home that the problem in this case had been the lack of statutory protection for public performances of musical compositions, the circuit court would later decide that Tracey's copyright on his piano score was valid.¹⁵¹

Despite their victory in the courts, the Duffs lost the larger struggle. Carte pulled out all the stops to upstage the Duffs' performance at the Standard Theatre, by bringing in a British touring company to play at the Fifth Avenue Theatre,¹⁵² to be led by Sir Arthur Sullivan himself, only several days before the Duffs' production of *The Mikado* would open.¹⁵³ The Duffs' production could only pale in comparison,¹⁵⁴ and the Carte/Stetson production was a rousing success.¹⁵⁵ Sullivan gave a speech before the performance, against his custom, remarking:

It may be that some day the legislators of this magnificent country . . . may see fit to afford the same protection to a man who employs his

¹⁴⁷ *Carte*, 25 F. at 185 ("Strictly, the only invasion of a copyright consists in the multiplication of copies of the author's production without his consent. Any other use of it, such as for the purpose of public reading or recitation, is not piracy.")

¹⁴⁸ *Id.* at 187.

¹⁴⁹ *Rosenfeld Wants Damages*, N.Y. TIMES, Sept. 19, 1885, at 2. Former-Judge Dittenhoefer gave Rosenfeld's suit a decent hope of success. See *Actor, Manager, and Play*, N.Y. TIMES, Sept. 20, 1885, at 4.

¹⁵⁰ *D'oyly Carte Enjoined*, N.Y. TIMES, Sept. 30, 1885, at 4.

¹⁵¹ *Carte*, 27 F. at 865.

¹⁵² *D'oyly Carte and His Company*, CHI. DAILY TRIB., Aug. 23, 1885, at 19 (discussing how the company was brought over in near-complete secrecy).

¹⁵³ *Amusements*, N.Y. TIMES, Sept. 25, 1885, at 5.

¹⁵⁴ *John Duff's Mikado*, BOSTON DAILY GLOBE, Aug 25, 1885, at 2; "*The Mikado*," CHI. DAILY TRIB., Aug. 30, 1885, at 19 ("The result [of the Duff production] was disappointing in everything save the scenery.")

¹⁵⁵ "*The Mikado*" a *Success*, BOSTON DAILY GLOBE, Aug. 20, 1885, at 4.

brains in literature [as a mechanical inventor] But even when that day comes, as I hope and believe it will come . . . we . . . shall still, . . . trust mainly to the unerring instinct of the great public for what is good, right, and honest.¹⁵⁶

During this litigation, there was a brief glimmer of hope that international copyright could be established through something similar to the device used by Gilbert and Sullivan.¹⁵⁷ This hope was extinguished by the decision in *The Mikado* case. Seeing that the statutes could only foil them, those on the side of a liberal copyright law joined in the lobbying, first for an international copyright law,¹⁵⁸ and then for protection of the exclusive right of public performance for musical compositions. Many individuals from the litigation discussed above would return to the stage of Congress to press for these rights.

III. THE TRELOAR COPYRIGHT BILL

Tensions from the successful battle for international copyright died down several years after March 1891, and the creators of performing works made an effort to have the copyright statutes better protect the performances of their works. As a result of this, the 54th Congress would see two bills aimed at protecting the right of public performance for musical compositions. One bill, the Cummings Copyright Bill,¹⁵⁹ was comparatively limited, dealing solely with issues of performance of copyrighted works, and will be dealt with in the next Part. The other bill, the Treloar Copyright Bill, was a proposal for a full revision of the copyright code.¹⁶⁰ The Treloar Bill was introduced by Representative William M. Treloar, a composer, music teacher, and music publisher from Missouri.¹⁶¹

Treloar only served one term in Congress,¹⁶² and his very election was something of a fluke. The Democratic incumbent in the Ninth District of Missouri, Champ Clark, described both as an “orator”¹⁶³ and “weird,”¹⁶⁴ was popular, and considered to be a fairly safe bet to maintain his seat in Congress. Treloar was the fifth person offered the

¹⁵⁶ *Amusements*, *supra* note 153.

¹⁵⁷ *Foreign Copyright*, CHI. DAILY TRIB., Aug. 2, 1885, at 20.

¹⁵⁸ Browne, *supra* note 78, at 760.

¹⁵⁹ Cummings Copyright Bill, S. 2306, 54th Cong. (1896) [hereinafter Cummings Copyright Bill].

¹⁶⁰ Treloar Copyright Bill, H.R. 5976, 54th Cong. (1896) [hereinafter Treloar Copyright Bill], *as amended* by H.R. 8211, 54th Cong. (1896) [hereinafter Amended Treloar Copyright Bill].

¹⁶¹ *Treloar, William Mitchellson (1850–1935)*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=T000363> (last visited Nov. 5, 2006).

¹⁶² *Id.*

¹⁶³ *From Missouri*, ROLLA NEW ERA, Mar. 16, 1895, at 2. *See also From the Press Gallery, A Missouri Music Teacher*, WASH. POST, Apr. 12, 1896, at 21 (Champ Clark was “undoubtedly one of the best extemporaneous speakers Congress has known in many a day.”).

¹⁶⁴ *Pike County Copyright*, N.Y. TIMES, Mar. 5, 1896, at 4 [hereinafter *Pike County Copyright I*].

Republican nomination,¹⁶⁵ lending credence to the notion that no one else wanted to run in a race perceived as unwinnable. Treloar's own family gave him little chance of winning, and his friends felt that he was being taken advantage of by the Republican Party.¹⁶⁶ Treloar himself was so sure of losing that he did not make contingency plans for his teaching duties in case he won.¹⁶⁷ The Missouri Democrats were so sure of Clark winning that they stayed home, and, in unusual numbers, didn't bother to vote.¹⁶⁸ Yet, in the end, a man who was condescendingly regarded by many as a simple piano-tuner was now a member of Congress by a margin of 132 votes,¹⁶⁹—part of the Republican landslide of 1894.¹⁷⁰ The Cincinnati Tribune noted Treloar's background with amusement, commenting that "Mr. Treloar ought to be a great favorite in Washington society. He has been a director of amateur comic operas."¹⁷¹

Treloar was in fact somewhat more reputed than some suggested before coming to Congress. While not a composer who is well-remembered today, he was a fairly popular one, claiming to sell over 50,000 copies of his "Sleigh Ride" in 1890 alone,¹⁷² and more than 250,000 copies by 1908.¹⁷³ Treloar's pieces may have been gimmicky, calling for all sorts of extraneous implements to complement the piano, but they were not ignored.¹⁷⁴ Treloar was also a professor of music at Hardin College ("the Vassar of the west") and several other colleges, as well as the public schools.¹⁷⁵ Given this background, Treloar's interest in a copyright bill for composers is rather obvious. And yet to assume that his motivations were purely self-serving in introducing his copyright bill is perhaps overly cynical. As he explained in a letter to Robert Underwood Johnson:

[M]y copyright bill was drawn and introduced by me after a long

¹⁶⁵ *From Missouri*, *supra* note 163.

¹⁶⁶ *Good Stories for All*, BOSTON GLOBE, Nov. 29, 1894, at 4 (discussing Treloar and his campaign in detail).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* Champ Clark was magnanimous in defeat, noting that Treloar was in fact a well-respected professor of music and composer. *From Missouri*, *supra* note 163. Treloar was likewise generous after Clark replaced him in the next election. W. L. WEBB, CHAMP CLARK 83 (1912).

¹⁷⁰ *Faces Will Be Missed, Champ Clark's Revenge*, WASH. POST, Nov. 9, 1896, at 1.

¹⁷¹ *People in General*, WASH. POST, Dec. 6, 1894, at 4 (quoting the *Cincinnati Tribune*). This is of course more a comment on Washington than Treloar.

¹⁷² *The Sleigh Ride*, THE CHAUTAUQUAN, Mar. 1891, at 857.

¹⁷³ Peter A. Munstedt, *Kansas City Music Publishing: The First Fifty Years*, 9 AM. MUSIC 353, 371 (1991) (citing advertisement on back cover of sheet music, C.H. MEIERS, MID THE MAPLES NEAR THAT COTTAGE FAR AWAY (Treloar Music Co. 1908)). These figures, however, should probably be taken with several truckloads of salt.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 370. Nor did he only teach music. *Coming to Congress*, WASH. POST, Nov. 10, 1895, at 11 ("He also taught English, and his knowledge in this respect may give him an advantage over . . . his fellow Congressmen.").

study of the deficiencies in the present Copyright laws. I think when you examine the sections carefully, you will find that it is a vast improvement to our present law. It adds to the life of a copyright twelve years, which I think no one will object to. The object of the bill is to give absolute protection to authors and publishers, as you are probably aware that the present bill does not do this. It provides also for the creation and maintenance of a Copyright Department, which has the approval of not only the Librarian of Congress, but so far as I know, all who are interested in copyrights. Having some twenty years experience as author and publisher, I have had ample time to see the inefficiency of the present law. I hope after a careful examination of the bill, you will write me [with] your candid opinion in regard to it.

I have no axe to grind whatever, and am only endeavoring to enact such a law as will put the Copyright Department on a firm basis, and one that will protect all concerned.¹⁷⁶

With these good intentions, the Treloar Bill was introduced into Congress in its first form on February 13, 1896, a little over two months after the start of the session.¹⁷⁷ It seems likely that introducing this copyright bill was one of Treloar's primary objectives in Congress, explaining his appointment to the Committee on Patents, presumably on his request.¹⁷⁸ The Treloar Copyright Bill was referred to that committee, as expected.¹⁷⁹ From that point the bill was referred to a subcommittee for two weeks, to be followed by a hearing before the full committee.¹⁸⁰

A. *Opposition from the Copyright Leagues*

At the time of the Treloar Bill, Robert Underwood Johnson and George Haven Putnam were the leading proponents of the liberalization of copyright law, the guiding forces behind the American Authors and American Publishers Copyright Leagues, and major figures in the New York literary world. The Leagues had originally been formed to advocate for international copyright law, and after they triumphed in Congress in 1891 these Leagues did not dissolve, but rather established

¹⁷⁶ Letter from Rep. William M. Treloar, to J.N. Johnson, Esq., Sec'y, Am. Copyright League (Feb. 20, 1896) (on file with the Robert Underwood Johnson Papers, Manuscripts & Archives Div., N.Y. Pub. Library). Although intended for Robert Underwood Johnson, this letter was addressed to "J.N. Johnson," a rather startling bit of ignorance (given the importance of Johnson, discussed *infra*), suggesting that Representative Treloar was wading into currents of which he was not even dimly aware.

¹⁷⁷ Treloar Copyright Bill, *supra* note 160; Amended Treloar Copyright Bill, *supra* note 160.

¹⁷⁸ Notice from J. Browning, Chief Clerk of the House of Representatives, Dec. 21, 1895 (on file with The National Archives).

¹⁷⁹ Copyright bills had once been referred to the Library Committee in most cases, but this practice changed during the international copyright struggle.

¹⁸⁰ Letter from Rep. William F. Draper, Chairman, Comm. on Patents of the House of Representatives, to Robert Underwood Johnson, Esq. (Feb. 20, 1896) (on file with the Robert Underwood Johnson Papers, Manuscripts & Archives Div., N.Y. Pub. Library).

themselves as protectors of international copyright law, and indeed copyright law generally.¹⁸¹ Without question the road to copyright reform lay through the Leagues. Senator Orville Platt, the Chair of the Senate Committee on Patents, wrote that “I take my inspiration in regard to copyright from the League, and indeed from you.”¹⁸² Representative Draper, the Chair of the House Committee on Patents, was similarly solicitous of their opinions and advice on copyright matters.¹⁸³

These men received their first notice of the Treloar Bill from the French Embassy,¹⁸⁴ and shortly thereafter were sent a copy of the bill by Chairman Draper.¹⁸⁵ Johnson, Putnam, Platt, and Draper were not enthused with the Treloar Copyright Bill, despite their initial lack of familiarity with the contents of the bill, fearing that it would undo the international copyright legislation that the Leagues and its proponents had fought so hard over several years to pass. Putnam especially was unequivocal, stating that “I judge that we shall be quite unanimous in our prompt and cheerful opposition to the absurd Treloar Bill. I should like to know who is behind this wild Missourian in his troublesome undertaking.”¹⁸⁶ While Johnson was less critical in private, he was equally vociferous in his public opposition to the bill.¹⁸⁷ This

¹⁸¹ Arthur Stedman, *New York Topics*, 18 THE DIAL, Jan. 26, 1895, at 91 (discussing the nature, purpose, and recent activities of the American Copyright League). For a general history of the American Copyright League, see Carol Ellen Cutler, *A History of the American Copyright League, 1883-1909* (Aug. 7, 1973) (unpublished M.A. dissertation, Univ. of Chicago) (on file with author).

¹⁸² Letter from Sen. O.H. Platt to R.U. Johnson, Esq. (Nov. 12, 1894) (on file with the Robert Underwood Johnson Papers, Manuscripts & Archives Div., N.Y. Pub. Library). Senator Platt continued: “If you lead me wrong I shall find it out sometime and stop being led.” *Id.*

¹⁸³ See, e.g., Letter from Rep. William F. Draper, Chairman, Comm. on Patents of the House of Representatives, to Robert Underwood Johnson, Esq. (Feb. 20, 1896) (on file with the Robert Underwood Johnson Papers, Manuscripts & Archives Div., N.Y. Pub. Library) (“I have not as yet studied the [Treloar] bill, but would be glad to have your views upon it, and it may be you would like to be heard by the committee.”).

¹⁸⁴ Letter from Jules Boenefine, Ambassade de France Aux Etats-Unis, to Robert Underwood Johnson (July 15, 1896) (on file with the Robert Underwood Johnson Papers, Manuscripts & Archives Div., N.Y. Pub. Library) (Boenefine erroneously wrote that the Treloar Bill was “intended to revise the copyright law of March 3, 1891,” which would lead to confusion down the road.).

¹⁸⁵ Letter from Rep. William Draper, Chairman, Comm. on Patents of the House of Representatives, to Robert Underwood Johnson, Esq. (Feb. 20, 1896) (on file with the Robert Underwood Johnson Papers, Manuscripts & Archives Div., N.Y. Pub. Library); see also Letter from G.H. Putnam to R.U. Johnson (Feb. 20, 1896) (on file with the Robert Underwood Johnson Papers, Manuscripts & Archives Div., N.Y. Pub. Library). The letter reads:

I have just received from London Mr. Treloar’s copyright bill (H.R. 5976). It is in various respects decidedly revolutionary and will need attention.

I do not imagine, however, that there is any serious risk of its passage during the present Congress. The enlargement of the term of copyright to forty years is probably in itself enough to make the bill unacceptable to the “Granger” side of the House. It will, however, be desirable to give consideration to the matter in our joint Committee.

Id.

¹⁸⁶ Letter from G.H. Putnam to R.U. Johnson, Esq., The Century Co. (Feb. 28, 1896) (on file with the Robert Underwood Johnson Papers, Manuscripts & Archives Div., N.Y. Pub. Library).

¹⁸⁷ Letter from R.U. Johnson, Assoc. Editor, Century Magazine, to Edward Clarence Stedman,

opposition, at times both reasonable and unreasonable, would doom the Treloar Bill.

The Treloar Bill was in a subcommittee for two weeks, and during this time controversy brewed.¹⁸⁸ Shortly after the bill was introduced, both leagues, first the Authors Copyright League, and then the Publishers Copyright League,¹⁸⁹ adopted a formal resolution against the Treloar Copyright Bill. Reprinted in *Scientific American*, the resolution simply sets forth the objections of these leagues to the bill.¹⁹⁰

The first objection was that the bill limited copyright solely to citizens of the United States, effectively a repeal of the 1891 International Copyright Act.¹⁹¹ This objection was based on the fact that certain sections specifically stated that only United States citizens could receive copyrights under certain conditions, or required a United States address for a copyright.¹⁹² The bill's critics recognized that the bill did not directly abrogate the 1891 Act, but were troubled by the ambiguity of these provisions. It seems likely that ambiguity regarding the bill's treatment of international copyright emanated from a drafting error, and abrogation of the 1891 Act was not part of the substantive intent of the bill.¹⁹³ For starters, a manufacturing clause would make little sense if foreign copyrights in general were outlawed—it would merely prohibit American authors from having their works printed overseas.¹⁹⁴ Looking at the textual treatment of foreign copyright in past laws and bills also makes little sense. Both the 1831 and 1870 revisions had specific clauses denying copyright to foreign authors. Especially in light of the passage of the 1891 copyright bill, an explicit revocation of the 1891 Act would seem necessary, but none is found in the Treloar Bill. Section 32 of the Treloar Bill was very quickly amended, so that by the time of the congressional hearings on the bill, a little more than a month after it was introduced, it included the

Pres., Copyright League (Mar. 8, 1896) (on file with the Edward Clarence Stedman Papers, Rare Book and Manuscript Library, Columbia Univ. Library) (“[I]t is really not a bad measure though (as we ‘resolved’) a clumsy one.”).

¹⁸⁸ Letter from Rep. William B. Draper, Chairman, Comm. on Patents of the House of Representatives, to Robert Underwood Johnson, Esq. (Feb. 20, 1896) (on file with the Robert Underwood Johnson Papers, Manuscripts & Archives Div., N.Y. Pub. Library).

¹⁸⁹ *The Copyright Situation*, THE CRITIC, Mar. 14, 1896, at 188; see also Letter from G.H. Putnam to R.U. Johnson, Esq., The Century Co. (Feb. 29, 1896) (on file with the Robert Underwood Johnson Papers, Manuscripts & Archives Div., N.Y. Pub. Library).

¹⁹⁰ *A New Copyright Bill*, SCI. AM., Mar. 21, 1896, at 179.

¹⁹¹ *Id.*

¹⁹² See, e.g., Treloar Copyright Bill, *supra* note 160; Amended Treloar Copyright Bill, *supra* note 160.

¹⁹³ Editorial, *Copyright Remade*, PUBLISHER'S WKLY., Feb. 29, 1896, at 386-87. This editorial included a detailed explanation of the bill and then its (lengthy) full text—for many it must have served as their primary point of reference for the bill. While critical of the bill, the piece was much more measured in tone than what would soon come.

¹⁹⁴ While this may seem an attractive option nowadays, in the era of cheap shipping and cheap third world labor, this was not the case at that time, making the option most unattractive.

reciprocity provisions for international copyright in the 1891 Act.¹⁹⁵

While the first objection to the Treloar Bill was minor, and based only on a drafting error, the second objection of the resolution, that the bill extended the manufacturing clause of the copyright laws to include periodicals, maps, charts, dramatic or musical compositions, engraving, cuts, or prints, would come to be the main concern of those who opposed the Treloar Copyright Bill.¹⁹⁶ The 1891 International Copyright Act contained a clause requiring that all books, chromographs, photographs, or lithographs be printed from type set in the United States or from plates or negatives or drawings made in the United States.¹⁹⁷ Whether that clause should be broadly construed to include music or narrowly construed to specifically exclude music was debated for several years. Shortly before the Treloar Bill was introduced, the First Circuit Court of Appeals upheld a decision of the Circuit Court of Massachusetts, which firmly established that this provision should be read narrowly to exclude music.¹⁹⁸ The Circuit Court's decision explained the rationale in greater detail, noting that the specificity with which lithographs are included implicitly excludes music from the manufacturing clause.¹⁹⁹ Indeed, those who had proposed the manufacturing clause amendment to the 1891 Act (the typesetters) "had no interest in including the printing of music in [the] amendment. The music people took no steps to help themselves, nor to help [those who pushed for the manufacturing clause more generally]." ²⁰⁰ Furthermore, musical compositions and other items were included in the draft of the Frye amendment which put the manufacturing clause into the bill, but that line was crossed out before it was submitted.²⁰¹

The larger publishers (exemplified by G.H. Putnam) were against any manufacturing clause, either in 1891 or 1896.²⁰² Putnam had

¹⁹⁵ *Treloar Copyright Bill: Hearing on H.R. 5976 Before the H. Comm. on Patents*, 54th Cong., 1st Sess. (1896) [hereinafter *Treloar Hearing*].

¹⁹⁶ See Letter from Albert Smith, Boussod Valadon & Co., to R.U. Johnson, Esq., Sec'y, Copyright League (Feb. 19, 1896) (on file with the Robert Underwood Johnson Papers, Manuscripts & Archives Div., N.Y. Pub. Library) (calling the manufacturing clause the most troubling part of the bill).

¹⁹⁷ An Act to Amend Title Sixty, Chapter Three, of the Revised Statutes of the United States, Relating to Copyrights, ch. 565, 26 Stat. 1106, 1107, § 4956 (1891).

¹⁹⁸ *Oliver Ditson Co. v. Littleton*, 67 F. 905 (1st Cir. 1895). This was before the term "Circuit Court" came to refer only to the Circuit Court of Appeals, even though the Circuit Courts of Appeal had already been established earlier that decade. *Evarts Act*, ch. 517, 26 Stat. 826 (1891).

¹⁹⁹ *Littleton v. Oliver Ditson Co.*, 62 F. 597, 598 (C.C.D. Mass. 1894). The circuit courts were still trial courts even after the creation of the Circuit Courts of Appeals in 1891, until they were subsumed into the district court with the Judicial Code of 1911. An Act to Codify, Revise, and Amend the Laws Relating to the Judiciary, ch. 231, 36 Stat. 1087 (1911).

²⁰⁰ Letter from G.H. Donaldson to Robert Underwood Johnson (Apr. 18, 1891) (on file with the Robert Underwood Johnson Papers, Manuscripts & Archives Div., N.Y. Pub. Library).

²⁰¹ R. U. Johnson, *The Status of Music Under the New Law*, 15 THE CRITIC: A WKLY. REVIEW OF LITERATURE & THE ARTS, May 9, 1891, at 256.

²⁰² Letter from G.H. Putnam to R.U. Johnson, Esq., The Century Co. (Mar. 26, 1896) (on file

“accepted the manufacturing condition at the time only because we were all agreed that there was no other way in which a beginning of International Copyright could be arrived at.”²⁰³ However, he also recognized that the existence of a manufacturing clause for books significantly weakened the hand of the members of the book industry in debate, since the members of the music or other industries could simply retort that the book industry already had a manufacturing clause—why should the music publishers not enjoy the same?²⁰⁴ Recognizing that opposing the right of the music publishers to seek a similar right could backfire, Putnam instead argued that “[the music publishers] can do what you choose with your own amendment, but you have no right to assume for yourselves the responsibility of ‘revising’ our whole Copyright law.”²⁰⁵ This had the additional advantage of not antagonizing protectionists (like Rep. Draper) who might ordinarily support extending the manufacturing clause.²⁰⁶

The resolution’s third objection to the Treloar Bill was to the clause setting forth a maximum of \$5,000 in damages for the infringement of a literary copyright.²⁰⁷ This section did not in fact implicate “literary productions,” as was argued in the resolution,²⁰⁸ since books were not included in its coverage.²⁰⁹ Furthermore, these terms were not substantially different from those in a copyright bill which had been enacted the previous year, the Covert Copyright Act.²¹⁰ In reality, both opponents to and proponents of this section of the Treloar Bill were in fact arguing over the already enacted Covert Bill, since the Printers and Authors Copyright Leagues had not been happy with the compromise that the Covert Bill represented.

The fourth objection to the Treloar Bill was that the proposal to create a Commissioner of Copyrights and staff would be better implemented through independent bills separately in the House and Senate.²¹¹ Incidentally, at the same meeting of the Publishers Copyright

with the Robert Underwood Johnson Papers, Manuscripts & Archives Div., N.Y. Pub. Library).

²⁰³ *Id.*

²⁰⁴ Letter from G.H. Putnam to R.U. Johnson, Esq., The Century Co. (Apr. 16, 1896) (on file with the Robert Underwood Johnson Papers, Manuscripts & Archives Div., N.Y. Pub. Library).

²⁰⁵ Letter from G.H. Putnam to R.U. Johnson, Esq., The Century Co. (Mar. 26, 1896) (on file with the Robert Underwood Johnson Papers, Manuscripts & Archives Div., N.Y. Pub. Library).

²⁰⁶ *Id.*

²⁰⁷ *A New Copyright Bill*, *supra* note 190.

²⁰⁸ *Id.*

²⁰⁹ Treloar Copyright Bill, *supra* note 160, § 27; Amended Treloar Copyright Bill, *supra* note 160.

²¹⁰ An Act to Amend Section Forty-Nine Hundred and Sixty-Five, Chapter Three, Title Sixty, of the Revised Statutes of the United States, Relating to Copyrights, ch. 194, 28 Stat. 965 (1895). This Act capped damages from individual infringements and total liability lower than they had been before, in part to protect newspapers from photographers who would extort funds on the difficult-to-disprove charge that the photograph printed in the newspaper was copyrighted by the photographer. *Id.* § 4965.

²¹¹ See *A New Copyright Bill*, *supra* note 190. The bills were S. 425, 54th Cong. (1895) and H.R. 1243, 54th Cong. (1895).

League, the League adopted a separate resolution endorsing the separate bills to create a Commissioner.²¹²

The fifth objection to the Treloar Bill was whether the sometimes competing and sometimes complementary Cummings Copyright Bill would better protect public performance rights, since the Cummings Bill came unburdened with the other provisions. Although this may have been true when this resolution was passed, since both bills as introduced contained identical provisions for public performances,²¹³ the public performance language of the Treloar Copyright Bill would evolve so as to provide a broader scope of protection of public performances, including public performances of literary works, even by mechanical means.²¹⁴ However, the Treloar Bill would be brought back into lockstep with the Cummings Bill in the end, negating this advantage.

B. *Pike County Copyright*

Manufacturing clauses were generally popular in the age of nationalism and protectionism, and the Treloar Copyright Bill was aligned with these broad national sentiments, standing against the more elite sentiments that opposed a manufacturing clause.²¹⁵ Seeing this, the bill's antagonists adopted a course of loud and not always fair editorial assaults on the Treloar Copyright Bill.

Two of the nastiest editorials came in the *New York Times*, both condescendingly entitled *Pike County Copyright*.²¹⁶ The first editorial appeared on March 5, 1896, and seemed to know little, if anything, about Representative Treloar.²¹⁷ The simple argument from the first *Pike County Copyright* editorial was that the Ninth District of Missouri was a remote and uncosmopolitan place, and that the representative from such a district must be ignorant of the will of his uncosmopolitan constituents to introduce a bill relevant to cosmopolitan concerns. The editorial further commented that Treloar stood equally ignorant of current copyright law.²¹⁸ The editorial then pointed out, in what was

²¹² See *A New Copyright Bill*, *supra* note 190.

²¹³ Compare Treloar Copyright Bill, *supra* note 160, § 28 with Cummings Copyright Bill, *supra* note 159, § 4966.

²¹⁴ Amended Treloar Copyright Bill, *supra* note 160, § 16.

²¹⁵ This was because they were seen as protecting American printers and typesetters from market pressures that could be brought by printers abroad. However, some of the bill's opponents, including Representative Draper, were ordinarily fairly ardent protectionists.

²¹⁶ *Pike County Copyright I*, *supra* note 164. *Pike County Copyright*, N.Y. TIMES, Mar. 10, 1896, at 4 [hereinafter *Pike County Copyright 2*]. Pike County was associated with Mark Twain's stories of backwoods Missouri. MARK TWAIN, ADVENTURES OF HUCKLEBERRY FINN, at Explanatory Preface (Emory Elliot ed., Oxford University Press 1999) (1884).

²¹⁷ *Pike County Copyright I*, *supra* note 164; Letter G.H. Putnam to R.U. Johnson, Esq., The Century Co. (Feb. 28, 1896) (on file with the Robert Underwood Johnson Papers, Manuscripts & Archives Div., N.Y. Pub. Library).

²¹⁸ *Pike County Copyright I*, *supra* note 164.

probably not a coincidence, those flaws set out in the resolution of the copyright leagues against the Treloar Bill.²¹⁹

By the second editorial, the authors appeared to have consulted the Congressional Directory, and discovered Treloar's background in music.²²⁰ Following some more desultory discussion of the Ninth District of Missouri, the editorialist accused Treloar of wanting to steal the works of foreign composers:

It would be unjust and libelous to describe him as a pirate. He merely hopes to be. His way of fulfilling his hopes is to conciliate all interests and to manage all susceptibilities, except those of the holders of foreign copyrights, which do not count. He has conciliated the persons who hope to be piratical photographers by giving them the same letters of marque upon foreign works of art that he desires for himself concerning foreign music.

. . . .

That he has added [the uncontroversial parts of the bills already pending before Congress] to his own measure for the protection of TRELOAR constitutes no reason whatever why TRELOAR should be allowed to pillage the musicians of Europe in order to promote the culture of Audrain County.²²¹

These editorials were written more or less simultaneously with a series of hearings on the Treloar Copyright Bill, with the first one arriving on the pages of the *New York Times* the day after the first hearing on the Treloar Bill.²²² Attending that hearing were Robert Underwood Johnson, Charles A. Bolles and Bernard Lewinson of the Photographers' League, Charles B. Bayly of the Music Publishers Association of America, and Ainsworth R. Spofford, the venerable Librarian of Congress.²²³ Despite his clout, Johnson was the only voice against the Treloar Bill in the hearing, as was noted by Lewinson:

Mr. Robert U. Johnson was the only one who opposed that measure, all other interests were united in the support of the bill, and urged its passage as the most complete and satisfactory remedy for present copyright ills.

One and all, however, demanded, with Mr. Johnson, that those portions of the bill which seek to alter the present provisions of international copyright be stricken out, and the law as it is now be allowed to stand. And I may say that we had such assurances from

²¹⁹ *Id.*

²²⁰ *Pike County Copyright 2*, *supra* note 216.

²²¹ *Id.* Audrain is the county in Missouri, bordering Pike County, from which Treloar hailed. *See id.*

²²² *See Hearing on the Treloar Bill*, WASH. POST, Mar. 5, 1896, at 4; *Copyright Matters: Hearing on the Treloar Copyright Bill*, PUBLISHER'S WKLY., Mar. 14, 1896, at 474. As was the case with most hearings at the time, there exists no print of the content of the hearing.

²²³ *See Hearing on the Treloar Bill*, *supra* note 222; *Copyright Matters: Hearing on the Treloar Copyright Bill*, *supra* note 222.

individual members of the Patent Committee, and especially from Mr. Treloar himself, as lead us to believe that that demand will be respected, and that the bill when reported will make no change in the present none too liberal provisions for international copyright.²²⁴

Nonetheless, Johnson presented the resolutions of the copyright leagues, and especially noted the concerns regarding the possible revocation of the 1891 Act and the opposition to extending the manufacturing clause.²²⁵ Despite the support for the Treloar Bill, Johnson remained of the opinion that there was “not very much chance” of the Treloar Bill getting out of committee.²²⁶

C. *The Second Hearing*

The Treloar Bill next began a radical process of revision, in large part through a second hearing held on March 18-20, 1896.²²⁷ Unlike all other hearings on this matter, this hearing was mostly recorded and published, not by the government, but most likely by the advocates of the Treloar Bill.²²⁸ Included in the print is a copy of the Treloar Copyright Bill that is clearly in transition between the original bill as introduced, and the revised bill that would be re-introduced after the hearing. Given the comments made about the bill at the hearing, this version represents either the bill as it was at the hearing, or immediately thereafter, in response to Browne’s comments.

The revised bill included specific recognition of the international copyright system that had been established.²²⁹ However, the most notable fact of the revised bill is that the Treloar Copyright Bill now seemed to revoke the Covert Copyright Act which had been passed at the end of the previous Congress.²³⁰ The Covert Bill had protected

²²⁴ B. Lewinson, Letter to the Editor, THE EVENING MAIL AND EXPRESS, Mar. 5, 1896.

²²⁵ *Hearing on the Treloar Bill*, *supra* note 222.

²²⁶ Letter from Albert Smith, Bousood Valadon & Co., to R.U. Johnson, Esq., Century Magazine (Mar. 17, 1896) (on file with the Robert Underwood Johnson Papers, Manuscripts & Archives Div., N.Y. Pub. Library) (saying he was glad Johnson felt the bill had little chance of success).

²²⁷ *Treloar Hearing*, *supra* note 195. The hearing started a day earlier than indicated on the print. See Letter from G.H. Putnam to R.U. Johnson, Esq., The Century Co. (Mar. 19, 1896) (on file with the Robert Underwood Johnson Papers, Manuscripts & Archives Div., N.Y. Pub. Library).

²²⁸ There are several reasons for this belief. First, the hearing in general was rather favorable to the bill, especially the first two-thirds containing a lengthy explanation of the bill by Alexander P. Browne. Second, the hearing was published by Alfred Mudge & Son, Printers, who printed music among other items, including, in the past, works of European composers, and thus had a specific interest in seeing the manufacturing clause applied to music. Finally, the testimony of George Haven Putnam, which would have been easily available since it was submitted as a written précis to the committee, was not only not included, but Putnam’s presence was not even recorded. *Treloar Hearing*, *supra* note 195; Letter from G.H. Putnam to R.U. Johnson, Esq., The Century Co. (Mar. 19, 1896) (on file with the Robert Underwood Johnson Papers, Manuscripts & Archives Div., N.Y. Pub. Library).

²²⁹ *Treloar Hearing*, *supra* note 195, § 32.

²³⁰ An Act to Amend Section Forty-Nine Hundred and Sixty-Five, Chapter Three, Title Sixty, of the Revised Statutes of the United States, Relating to Copyrights, ch. 194, 28 Stat. 965 (1895)

newspapers from blackmail owing to immense liabilities from improperly using copyrighted photographs and other media by capping damages at one dollar per copy printed.²³¹ Unlike some other features of this bill, Treloar did not have the idea for this change—the *Chicago Tribune* was not being unreasonable to suggest that “[s]ome one has evidently imposed on Mr. Treloar.”²³² Shortly after the Treloar Copyright Bill was introduced, the Photographer’s Copyright League suggested amendments to the Treloar Bill, which would revoke the Covert Copyright Bill, in a lengthy memorandum written to Treloar, and sent as a copy to notables including Robert Underwood Johnson.²³³ Upon the incorporation of this amendment, the Photographer’s Copyright League got behind the Treloar Copyright Bill. It is hard to imagine why else the photographers would have supported the Treloar Bill, since they were certainly not angling to be covered by a manufacturing clause.²³⁴ This change would be printed into the second edition of the bill,²³⁵ and receive further scrutiny then.²³⁶

The effect of the revisions to the Treloar Copyright Bill regarding music, on the other hand, was extremely positive. The Treloar Bill’s public performance section was no longer a replica of the Cummings Bill, but was substantially more liberal in its scope than the Cummings Bill’s final version, even if the drafting of this section was still incomplete and included remnants of the section’s earlier version.²³⁷ The public performance section now included protection for “any literary composition, including any musical composition.”²³⁸ The breadth of this section is impressive, as is the prescience of the revised bill in including a section covering mechanical reproduction of musical and other works.²³⁹

On March 18, 1897, the hearing began with George Haven Putnam, the lone figure testifying against the bill, facing a cohort of

[hereinafter Covert Copyright Act].

²³¹ *Bad Feature of Copyright Bill*, CHI. DAILY TRIB., Mar. 6, 1896, at 3.

²³² *Id.*

²³³ Letter of Charles E. Bolles, Sec’y, Photographers’ Copyright League, to R.U. Johnson, Sec’y (Feb. 27, 1896) (on file with the Robert Underwood Johnson Papers, Manuscripts & Archives Div., N.Y. Pub. Library) (with attached memorandum by Bernard Lewinson, Gen. Counsel, Photographer’s Copyright League).

²³⁴ They were already covered by the manufacturing clause of the 1891 Act.

²³⁵ Amended Treloar Copyright Bill, *supra* note 160.

²³⁶ *See, e.g., Copyright Law Revision*, BOSTON DAILY GLOBE, Apr. 30, 1896, at 6.

²³⁷ *Treloar Hearing*, *supra* note 195, § 24. This reflected the suggestions of Browne. *See infra* notes 246-50 and accompanying text.

²³⁸ *Treloar Hearing*, *supra* note 195, § 24.

²³⁹ *Id.* § 31. Had this section been passed into law, a dozen years of controversy that led to the Supreme Court decision in *White-Smith*, and that decision’s overruling with the 1909 Copyright Revision, could have been avoided. *White-Smith Pub. Co. v. Apollo Co.*, 209 U.S. 1 (1908), *superseded by statute*, Copyright Act of 1976, 17 U.S.C. § 102(a), *as recognized in* *M. Kramer Mfg. Co. v. Andrews*, 783 F.2d 421, 432-33 (1986). *See* An Act to Amend and Consolidate the Acts Respecting Copyright, ch. 320, 35 Stat. 1075 (1909).

proponents of the bill.²⁴⁰ The day's testimony was not included in the hearing print, and Dr. Putnam's recollections of it are a bit hazy.²⁴¹ Putnam asked to speak first, and Representative Draper extended this privilege to a fellow veteran.²⁴² However, after Putnam spoke for only twenty minutes, there was an urgent matter on the floor, and the committee adjourned for the day.²⁴³ As Putnam left the room, Chairman Draper whispered that the bill would not be reported,²⁴⁴ but that it would "be desirable to have all legitimate influence that can be worked up through the Press brought to bear upon the Committee as promptly as practicable."²⁴⁵

For the next two days of the hearing, the clear star was Alexander P. Browne, a copyright and patent lawyer from Boston who represented music and art publishers, and was also the American counsel to Gilbert and Sullivan.²⁴⁶ He went on at great length, expounding the virtues of the Treloar Copyright Bill, and his comments regarding the section for public performance of music merit particular repetition:

[I]n that respect the Treloar bill is new. We heartily indorse it, and the public will, too. I do not think I will spend any more time upon that particular expression, but I want the committee to understand it is there, because we do not want it said that we are getting anything in underhand.²⁴⁷

With Browne's words, the discussion of the public performance right more or less ended. Browne went on to extol the virtues of the bill's other features, most notably the manufacturing clause, and the stage was set for amendment and resubmission of the Treloar Bill. The public performance section of the bill was meant to track the Cummings Bill exactly, so as not to interfere with the existing law once the Treloar Bill passed.²⁴⁸ This was especially important since the chair of the House Committee on Patents, Draper, felt that the Cummings Bill was

²⁴⁰ GEORGE HAVEN PUTNAM, MEMORIES OF A PUBLISHER: 1865-1915 390 (1915); *Copyright Matters: Further Hearing on the Treloar Copyright Bill*, PUBLISHER'S WKLY., Mar. 21, 1896, at 557.

²⁴¹ PUTNAM, *supra* note 240, at 390-91 (saying that the chair of the committee was ignorant as to the bill's content a month after it had been introduced, and two weeks after having had a hearing on it). Putnam freely admitted that these were memories and nothing more, since he had not kept a diary. *Id.* at v-vi. However, his recollections are not necessarily tainted as a result, and indeed help explain why the day was not included in the hearing print.

²⁴² *Id.* at 391.

²⁴³ *Id.* at 391-93. It seems likely that Ainsworth Spofford, the Librarian of Congress, also spoke that day of the necessity of amending the copyright laws to establish a commissioner for copyrights, but did not give a specific opinion on the Treloar Bill. *The Copyright Laws*, WASH. POST, Mar. 19, 1896, at 4.

²⁴⁴ PUTNAM, *supra* note 240, at 392.

²⁴⁵ Letter from G. H. Putnam to R. U. Johnson, Esq., The Century Co. (Mar. 19, 1896) (on file with the Robert Underwood Johnson Papers, Manuscripts & Archives Div., N.Y. Pub. Library).

²⁴⁶ *Treloar Hearing*, *supra* note 195, at 12, 22. Browne was introduced into this article *supra* Part II.

²⁴⁷ *Treloar Hearings*, *supra* note 195, at 28.

²⁴⁸ *Id.* at 64-65. "The Treloar Bill is the Cummings Bill . . ." *Id.* at 65.

“quite likely to become, law.”²⁴⁹ What is even more interesting about this section of the discussion is that Browne spoke as if he had written the Treloar Bill himself, or at least helped shape this part of it even before the hearing. Browne then concluded his lengthy testimony with an explanation of what mechanical reproduction was, and why it should be protected.²⁵⁰

Following Browne, John P. Rechten of Edward Schuberth & Co. (a music publishing company) gave a rebuttal, explaining why he felt that a manufacturing clause was not necessary for music.²⁵¹ Rechten was the only real opponent to the bill at the hearing’s final two days, and even he thought it was a good bill as amended, save for the manufacturing clause.²⁵² Following him, a representative of an art publisher and printer spoke in favor of the Treloar Bill,²⁵³ and the hearing was concluded by George W. Furniss from the Music Publisher’s Association.²⁵⁴ The hearing print closes with a copy of the petition of many of the music and art publishers urging the passage of the Treloar Bill, so long as it did not revoke the 1891 International Copyright Act.²⁵⁵ In many ways this was the high point for the Treloar Copyright Bill. Treloar had taken the suggestions of Browne and others to heart without a second thought, and shortly thereafter began revisions to his bill for resubmission. And yet those opposing the bill had power that had not yet truly been flexed. Not only did Johnson and Putnam oppose the Treloar Copyright Bill, but the chair of the committee, Representative Draper, did as well. The press and the chair would work in concert to delay the bill and change the public opinion of it, and would ultimately succeed in keeping the bill in committee for the duration of the 54th Congress.

B. *Further Opposition*

An additional opponent of the Treloar Copyright Bill made itself known in the Treloar Hearing, and would be a potent ally to the more traditional forces opposed to the bill—a faction of the music publishers and composers.²⁵⁶ Led by John P. Rechten of the Schuberths, a faction

²⁴⁹ *Id.* at 64.

²⁵⁰ *Id.* at 70-73.

²⁵¹ *Id.* at 73-76.

²⁵² Letter from John P. Rechten, Edward Schuberth & Co., to Robert Underwood Johnson (Mar. 21, 1891) (on file with the Robert Underwood Johnson Papers, Manuscripts & Archives Div., N.Y. Pub. Library).

²⁵³ *Treloar Hearing*, *supra* note 195, at 77.

²⁵⁴ *Id.* at 86.

²⁵⁵ *Treloar Hearing*, *supra* note 195, at 88-89.

²⁵⁶ Letter from G. H. Putnam, G.P. Putnam’s Sons, to R.U. Johnson, Esq., The Century Co. (Mar. 25, 1895) (on file with the Robert Underwood Johnson Papers, Manuscripts & Archives Div., N.Y. Pub. Library) (Putnam stated that he “took pains to write to the Presidents of the Academy of Design, the Society of American Artists, and the Society of American Water Color Painters, urging them to make protests against any interference with International Copyright in

of the music publishers and composers prepared a petition for composers and their friends to sign:

The undersigned composers and their friends all citizens or residents of the United States, desire to protest emphatically against that section of Mr. Treloar's proposed new copyright bill which requires musical compositions to be engraved and printed in the United States in order to be entitled to a copyright.

. . . .

[A]ccording to the proposed new law [a]n American composer finding a purchaser for his work in Europe must engrave and print such work in the United States if he desires to obtain copyright in his own country. The Foreign publisher is not very likely to consent to engrave the work bought by him in the United States, but even if he does and has the plates shipped to Europe, the copies printed from such plates cannot enter the United States and will be confiscated and destroyed by the authorities when discovered.

Such is Mr. Treloar's incredible proposition.²⁵⁷

This argument closely reflected Rechten's testimony at the Treloar Hearing,²⁵⁸ but the protest that was eventually used was even simpler, and more closely resembled the argument of the Copyright Leagues:²⁵⁹

The undersigned, a composer of music [or, professional musician], a citizen or resident of the United States, desires to protest against any change in the American Copyright Law which will compel the manufacture of music in the United States as a condition of copyright security. Such a condition would be distinctly against the interests of American music, and in practice would operate as a return to the lamentable condition of musical piracy which existed before the Act of 1891.²⁶⁰

Perhaps one or even ten of these petitions would have been ignored by the House Committee on Patents. However, it was much less likely that the two hundred and two of these petitions that the committee received would be ignored.²⁶¹ Nor were the form protests necessarily uniform, with several petitioners pinning additional notices

Art, and [he] judge[s] that such protests will be sent in.").

²⁵⁷ Letter from John P. Rechten, Edward Schuberth & Co., to Robert Underwood Johnson (Mar. 24, 1896) (on file with the Robert Underwood Johnson Papers, Manuscripts & Archives Div., N.Y. Pub. Library).

²⁵⁸ See *Treloar Hearing*, *supra* note 195 and accompanying text.

²⁵⁹ This similarity was not accidental. See Letter from John P. Rechten, Edward Schuberth & Co., to Robert Underwood Johnson (Mar. 24, 1896) (on file with the Robert Underwood Johnson Papers, Manuscripts & Archives Div., N.Y. Pub. Library) ("I leave of course, the finishing touch to be put on that petition, to you.").

²⁶⁰ See, e.g., Petition of Ferdinand Dunkley to the Senate and House of Representatives of the United States (Apr. 16, 1896) (on file with The National Archives).

²⁶¹ See William F. Draper, Cover Sheet for Petitions of Composers of Music and Professional Musicians to the House Committee on Patents (May 13, 1896) (on file with The National Archives).

to their protests.²⁶² These petitions were presented to Representative Draper on May 12,²⁶³ and were introduced in the House and then referred to the Committee on Patents a day later.²⁶⁴ There would be tensions, but ultimately this alliance against the Treloar Bill would be highly productive, with the cracks only visible to a few on the inside.²⁶⁵ Meanwhile, the split between composers and the music publishers was obvious, and would widen further shortly.

While those in the music business lobbied through petitions, those in the literary trade were working to influence the committee and the public through the press. In April 1887, *Century Magazine* had solicited letters from many composers of the era, asking for their opinion on international copyright protection.²⁶⁶ In 1896, in light of the controversy over the Treloar Bill, Robert Underwood Johnson, the Associate Editor of *Century Magazine*, felt it wise to revisit the tactic and solicit comments from composers of music on the Treloar Bill.²⁶⁷ Johnson had reason to believe that this tactic would be successful, since American composers had done well since the passage of the International Copyright Act, and would presumably not want to rock the boat.²⁶⁸ The resulting letters from professors of music at major universities in America in response to *Century Magazine's* solicitation

²⁶² For instance, one individual penned a note to Robert Underwood Johnson, suggesting in jest that the weight of the accumulated petitions be used to crush whoever had introduced this bill. Letter from E.J. Fitzhugh to Robert Underwood Johnson (Apr. 17, 1896) (on file with The National Archives). By contrast, Caryl Florio simply noted that “knowing what I do of American politics, I imagine this protest to be entirely useless.” Letter of Caryl Florio (no date or addressee, pinned to petition dated Apr. 17, 1896) (on file with The National Archives).

²⁶³ Petition of Composers et al. to the Senate and House of Representatives (May 12, 1896) (printed copy listing individual petitions which were included under separate cover. This information is on the last page, after the petition text and list of signatories) (on file with The National Archives).

²⁶⁴ H. JOURNAL, 54th Cong., at 489 (1st Sess. 1896).

²⁶⁵ Letter from G. H. Putnam, G.P. Putnam's Sons, to R.U. Johnson, Esq., The Century Co. (Mar. 25, 1895) (on file with the Robert Underwood Johnson Papers, Manuscripts & Archives Div., N.Y. Pub. Library).

The ground I took, however, in my own argument before the Committee, and in the written statement which I have since submitted, under the suggestion of General Draper, was in substance that whatever amendments or modifications the Copyright statute might require, the task of preparing a general revision of the law could not be safely confided to the music men, and that there was, in fact, no proprietary in their assuming the responsibility for such revision.

I reiterated that a simple amendment of the present law in behalf of the music publishers conceding to them the same “manufacturing privileges” as those now “enjoyed” by the book dealers would not be antagonized by the latter. I think this is the stand we ought to adhere to. We do not want to amend the Treloar Bill, but to have it killed in Committee.

Id.

²⁶⁶ See *Open Letters: International Copyright on Music*, 33 CENTURY ILLUSTRATED MONTHLY MAG., Apr. 1887, at 969-72.

²⁶⁷ Letter from R.U. Johnson, Assoc. Editor, The Century Magazine, to Edward Clarence Stedman, Pres., Copyright League (Mar. 26, 1896) (on file with the Edward Clarence Stedman Papers, Rare Book and Manuscript Library, Columbia University Library).

²⁶⁸ See *id.*

were strongly critical of the Treloar Bill, as might be expected.²⁶⁹ The questions asked to the various professors by *Century Magazine* were somewhat rhetorical, and meant to clearly elicit a certain response while characterizing the bill in a certain way:

1. Are you in favor of amending our present international copyright law by providing that copies of the musical compositions of American composers can be copyrighted only when the type is set up, or the plates made, or the copies manufactured, in the United States, and prohibiting the owner of the copyright from having the composition printed in England, Germany, or elsewhere and importing the copies for sale in the United States upon payment of duties?
2. Are you in favor of a copyright law which will compel the foreign composer to have his works printed in the United States in order to obtain copyright here; although the country of such foreign composer permits copyright there, without any such restrictions, of the compositions of an American?
3. Are you in favor of a copyright law which will compel a foreign publisher, who arranges with an American composer to publish the latter's work, to print the work in the United States and sell here only such copies as are printed here?
4. In your opinion will it promote the progress of the art of music, will it promote the quality of music, and the use and enjoyment of music by the public, to require, as a condition of copyright in the United States, that the copies must be printed and manufactured in the United States?
5. Is such a requirement, in your opinion, beneficial or injurious to the interests of the composer?²⁷⁰

The responses, from composers and professors of music such as John K. Paine of Harvard, Horatio W. Parker of Yale, and E. A. McDowell of Columbia, were in the negative as to all five questions, as might be expected.²⁷¹ The questions and erudite responses in a popular magazine helped present the opposition to the bill as at once practical and high-minded, which was undoubtedly the goal of Johnson. And yet ultimately, the battle itself, or rather the lack thereof, would be fought in the committee.

E. *The Committee's Inaction*

Chairman Draper was personally in favor of a more "liberal" copyright law, and as such opposed the Treloar Bill.²⁷² However, after

²⁶⁹ See *Open Letters: American Musical Authorities Against the Treloar Bill*, 52 CENTURY ILLUSTRATED MONTHLY MAG., Jul. 1896, at 474-76.

²⁷⁰ *Id.* at 474.

²⁷¹ *Id.* at 474-76.

²⁷² Letter from Jules Boenfine to Robert Underwood Johnson (Mar. 26, 1896) (on file with the

the March 18-20 hearing, Draper felt that a majority of the committee supported the bill.²⁷³ To counteract this, he adopted a simple policy: delay.²⁷⁴ The first delay was not entirely of his doing, although it had been his suggestion at the March hearing: the resubmission and reprinting of the amended Treloar Bill. However, Draper simultaneously kept the committee from meeting by visiting his home state of Massachusetts for ten days.²⁷⁵ On April 15, before the revised Treloar Bill was available in printed form, the Chair proposed that the committee not meet again on this subject until the following winter.²⁷⁶ However, this was not to be, and the next hearing on the revised Treloar Bill was held on May 13, 1896.²⁷⁷

At the May 13 hearing the committee heard from one opponent and two proponents of the Treloar Copyright Bill.²⁷⁸ Notably, by this time the bill's clause dealing with public performances was brought back into lockstep with the Cummings Bill.²⁷⁹ This was unsurprising given Representative Draper's suggestion of this at the prior hearing,²⁸⁰ but this change deprived the bill of some of its most progressive features regarding public performance. Protection for mechanical reproductions remained, but not for the public performances thereof, and not in the same section.²⁸¹ The more sweeping language regarding the coverage of the public performance clause was likewise swept out.²⁸²

This hearing would prove to be the last meeting of the Committee on Patents for the session, but Treloar requested that a subcommittee be appointed on the bill, and this request was granted.²⁸³ Over the summer, the bill was given over to the "tender mercies"²⁸⁴ of a subcommittee

Robert Underwood Johnson Papers, Manuscripts & Archives Div., N.Y. Pub. Library).

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ Letter from Rep. William F. Draper, Chairman, Comm. on Patents of the House of Representatives, to R.U. Johnson, Esq. (Apr. 15, 1896) (on file with the Robert Underwood Johnson Papers, Manuscripts & Archives Div., N.Y. Pub. Library).

²⁷⁷ *Copyright Bill Delayed*, N.Y. TIMES, May 14, 1896, at 2; Letter from O. H. Lane, Clerk, Comm. on Patents, to Robert Underwood Johnson, Esq., Century Magazine (May 5, 1896) (announcing the hearing on May 13, 1896). Interestingly, the 202 form petitions of composers and musicians were delivered on May 13 also, which was probably not a coincidence. *See supra* note 263.

²⁷⁸ *Copyright Matters: The Treloar Bill Goes over Till Next Winter*, PUBLISHER'S WKLY., May 23, 1896, at 861.

²⁷⁹ Compare Amended Treloar Copyright Bill, *supra* note 160, § 25 with Cummings Copyright Bill, *supra* note 159, § 4966.

²⁸⁰ *See Treloar Hearing*, *supra* note 195, at 64-65.

²⁸¹ Amended Treloar Copyright Bill, *supra* note 160, § 16.

²⁸² *See id.* § 25.

²⁸³ Letter from Rep. William F. Draper, Chairman, Comm. on Patents of the House of Representatives, to R.U. Johnson, Esq. (May 14, 1896) ("It is probable, however, that a subcommittee will be appointed to consider the bill during the interim between the two sessions. Mr. Treloar desires this and courtesy to him requires it.").

²⁸⁴ *Editorial Points*, BOSTON DAILY GLOBE, May 15, 1896, at 6.

chaired by Ben. L. Fairchild of New York and also comprising of Treloar and W.S. Kerr of Ohio.²⁸⁵ This step into subcommittee led Draper to believe that the Treloar Bill would now have a definite action by the committee in the next session, but in reality this was not to be.²⁸⁶ Others were of a different opinion: Robert Underwood Johnson was of the opinion that “most of Mr. Treloar’s powder has been set off” by early May,²⁸⁷ while the *Publisher’s Weekly*, on the other hand, welcomed this as a chance to make clearer the objections to the bill when congressmen would be less busy.²⁸⁸

It is thus perhaps strange that no record can be found of any activity by the subcommittee, or on the Treloar Copyright Bill generally during that summer, and this silence was the harbinger of the bill’s effective demise. The following fall the Treloar Copyright Bill lost its primary backer when the Music Publishers Association dropped their support for the bill.²⁸⁹ It is quite likely that the campaign of petitions and articles had an important effect on the constituents of the Music Publishers Association. With this development and the shortness of the session, Chairman Draper no longer felt that any more action need be taken on the Treloar Bill.²⁹⁰ A few months later, Treloar seemed to have accepted the fact that his bill would never make it out of committee:

We have had two meetings of the Committee, [Mr. Treloar] being present each time, and no business was transacted for want of a quorum. At the last meeting I announced that owing to the lack of interest, I should not call another meeting unless some special emergency should arise, in my opinion, or unless I should be requested to do so by some member. No objection was made to this, and it is probable that there will be no more meetings of the Committee this session.²⁹¹

The image is somewhat of a sad one—that of Representative Treloar, already a lame duck, showing up to every committee meeting in hope of moving his bill forward, and yet there was not even a

²⁸⁵ Letter from Richard Rodgers Bowker to Robert Underwood Johnson (May 21, 1896).

²⁸⁶ *Id.*

²⁸⁷ Letter from Robert Underwood Johnson to Richard Rogers Bowker (May 23, 1896).

²⁸⁸ See *Copyright Legislation*, PUBLISHER’S WKLY., May 23, 1896, at 856.

²⁸⁹ Letter from George W. Furniss (of the Oliver Ditson music-publishing house) to Robert Underwood Johnson (Apr. 12, 1897) (recounting events a few months earlier). See also Letter from William F. Draper, Office of Geo. Draper & Sons, to R.U. Johnson, Esq., Sec’y (Nov. 30, 1896).

²⁹⁰ Letter from William F. Draper, Office of Geo. Draper & Sons, to R.U. Johnson, Esq., Sec’y (Nov. 30, 1896) (on file with the Robert Underwood Johnson Papers, Manuscripts & Archives Div., N.Y. Pub. Library) (“I don’t believe that the committee will do very much this winter, as the session is short and several important bills that are now on the calendar, having passed the Committee, are not certain of consideration.”).

²⁹¹ Letter from Rep. William F. Draper, Chairman, Comm. on Patents of House of Representatives, to Robert Underwood Johnson, Esq., Sec’y (Jan. 18, 1897) (on file with the Robert Underwood Johnson Papers, Manuscripts & Archives Div., N.Y. Pub. Library).

quorum, let alone actual activity. A small consolation must have been that part of his proposed system had already been enacted as the Cummings Bill a week earlier. Upon leaving Congress, Treloar returned to Mexico, Missouri, taking a position as Assistant Postmaster.²⁹² He would then relocate to Kansas City, and then St. Louis, continuing to compose and sell music, passing away on July 3, 1935.²⁹³ He never again held elected office.²⁹⁴

F. *The Music Publishers*

The dust having settled, it is worth asking what the Treloar Bill really was. One interpretation is that it was the bill of an idealistic musician from Missouri who came to Congress on a fluke and saw a chance to help a cause he believed in. This would explain why he never had an ally in the Senate to introduce the bill concurrently there.²⁹⁵ While this explanation seems correct on the surface, the details of the bill's story give it less credence. As noted above, the support of the Photographers League was suspicious. Perhaps even more important, though, was a new group that had been formed less than a year before the bill's introduction, the Music Publishers Association of the United States.²⁹⁶ The group was formed in June 1895, in part to lobby for changes to the copyright law favorable to music publishers.²⁹⁷ The Music Publishers Association was initially among the bill's most ardent supporters, and when it removed its support, the bill lost all steam.

In the late nineteenth century, the American music industry was expanding in size, scope, and importance.²⁹⁸ As longtime musical copyright advocate Leonard Feist noted:

By the 1880s, America, though still predominantly rural, was becoming increasingly urbanized. The growth of manufacturing, new technologies, the transcontinental passenger and freight railroad, installment buying, and other innovations stemming from the era of free enterprise, established the piano and its cheaper brother, the harmonium, as a standard item of furniture in most middle-class, and

²⁹² See *Treloar, William Mitchellson*, *supra* note 161. He was one of many representatives from Missouri seeking political appointments after their terms. *Missouri Has Many Wants*, WASH. POST, Mar. 9, 1897, at 3.

²⁹³ See Munstedt, *supra* note 173, at 370-71.

²⁹⁴ See *Treloar, William Mitchellson*, *supra* note 161.

²⁹⁵ Letter from Sen. Orville H. Platt to R.U. Johnson, Esq. (Feb. 28, 1896) (wondering why Treloar's bill was not concurrently introduced into the Senate).

²⁹⁶ See About the MPA, MUSIC PUBLISHERS' ASSOCIATION OF THE UNITED STATES, <http://www.mpa.org/about/> (last visited Oct. 15, 2006).

²⁹⁷ *The Music Publishers' Association of the United States*, 65 AM. ART J. 11, June 22, 1895, at 171 (noting that one of the purposes of the new organization was "[t]he necessary action looking toward a revision and improvement of the administration of the present copyright system, with the view of making it an adjunct of greater value to the publishing interests of this country than it now is.').

²⁹⁸ See LEONARD FEIST, AN INTRODUCTION TO POPULAR MUSIC PUBLISHING IN AMERICA 28-29 (1980).

many poorer, homes. The business community had discovered advertising and supersalesmanship, taught it by the medicine show and the American phenomenon, the traveling salesman-the drummer. Improved printing presses and lithography, the ready availability of less expensive paper, and access to cheaper transportation made mass circulation of printed materials, including music, a national commonplace by the end of the century.

During the inflationary period following the Civil War, American vaudeville sprang almost full grown out of the variety halls, winerrooms, and saloons of New York City and then expanded nationally in the creation of performing circuits and the construction of ever larger theaters to house the new art form. All things were in place for the breakthrough about to occur, the birth of the modern American songpublishing business.²⁹⁹

In the 1890s, this breakthrough in music publishing would occur. The first million-selling song in America was “After the Ball” in 1893, and it would hardly be the last.³⁰⁰ At the same time, an industry locus was coalescing around 28th Street between Broadway and Sixth Avenue in Manhattan, which would come to be known as Tin Pan Alley.³⁰¹ By the middle of the 1890s, a call for copyright protection for musical performances would begin to sound in earnest.³⁰²

During the international copyright battles of 1891 and earlier, the music publishers were of no importance.³⁰³ They lost their chance to be covered under the manufacturing clause because they were not there to plead their case or to help other industries that were indeed fighting for the manufacturing clause.³⁰⁴ Given the expansion and consolidation of the music publishing industry, and the negative effects of its past disarray, the formation of an entity to represent the interests of music publishers was an obvious move, and resulted in the formation of the Music Publishers Association. While it did not maintain a high profile, the Music Publishers Association’s influence is clearly apparent over the history of both the Treloar and Cummings Bills, even if firmer evidence is absent.

Evidence that the Music Publishers Association was behind the Treloar Bill’s manufacturing clause is fairly apparent. In the hearing on the Treloar Bill, Alexander P. Browne, the lawyer from Boston who

²⁹⁹ *Id.*

³⁰⁰ *See id.* at 22-23.

³⁰¹ *Id.* at 31; FRANK J. ESPOSITO & TARA PRESTON, *MANHATTAN’S MUSICAL HERITAGE* 9 (2006).

³⁰² *Copyright in Music*, PUBLISHERS WKLY, Mar. 3, 1894, at 387 (“It seems therefore not unreasonable that . . . under certain conditions [a musical composition’s] performance or repetition in public may be protected, and that those who disregard this principle shall be brought to account.”).

³⁰³ Letter from G.H. Donaldson, Donaldson Bros., to Robert Underwood Johnson (Apr. 18, 1891).

³⁰⁴ *Id.*

represented music publishers, often sounded like he knew the bill better than Treloar himself, and at times his tone implied that he had wrote it. Representative Draper noted during the hearing that those interested in encouraging passage of the Cummings Bill included music publishers as well as the much more visible dramatists.³⁰⁵ And as soon as the music publishers dropped their support for the Treloar Bill, the bill was done.

Viewed in this way, the conflict between the newspapers and photographers recedes to the side, and the obscure Missouri Congressman fades into the background. The battle over the Treloar Copyright Bill was ultimately a battle between the established New York publishing houses and the much newer music publishing industry centered at Tin Pan Alley, over which industry would set the agenda for the nation's copyright reform. It is impossible to ignore the ethnic nature of this battle; the old-line New York publishers were largely Protestant, while the Tin Pan Alley publishers had "a Jewish complexion."³⁰⁶

Few records remain of the direct involvement of the Music Publishers Association in the fight for the Treloar Bill, but the Association's fingerprints are clearly visible. They are likewise visible on the path of the Cummings Copyright Bill.

IV. THE CUMMINGS COPYRIGHT BILL

The story of the march towards the exclusive right of public performance is replete with ironies, and yet none is quite as recurrent and curious as the fact that in all the copyright bills discussed in this article, the inclusion of the protection of musical compositions was not only an afterthought, but so much of an afterthought that its inclusion was not included until amendment. The Cummings Copyright Bill which was signed into law on January 6, 1897, would finally establish the right of protection of musical compositions just under fifty-three years after the amendments to the Ingersoll Copyright Bill first proposed this right, and yet the Cummings Copyright Bill's genesis was in problems of dramatic piracy, not musical piracy.³⁰⁷

A. *Problems with the Existing Dramatic Law*

The 1856 dramatic copyright bill had been passed without excessive controversy,³⁰⁸ the debates suggesting that Congress would

³⁰⁵ *Treloar Hearing*, *supra* note 195, at 67. See also *infra* Part IV.B.

³⁰⁶ ISAAC GOLDBERG, *TIN PAN ALLEY: A CHRONICLE OF THE AMERICAN POPULAR MUSIC* 108-109 (Frederick Ungar Publ'g Co. 1961) (1930) (noting that until the 1890s, music publishing was not notably Jewish, but then "[o]f a sudden, it seemed, the business took on a Jewish complexion.").

³⁰⁷ An Act to Amend Title Sixty, Chapter Three, of the Revised Statutes of the United States, Relating to Copyrights, ch. 392, 54th Cong., 29 Stat. 694 (1897) (enacted).

³⁰⁸ An Act Supplemental to an Act Entitled "An Act to Amend the Several Acts Respecting

pass almost any copyright bill so long as it did not involve international copyright.³⁰⁹ That act contained a fairly simple provision for relief—the play pirate would pay \$100 for the first illicit performance, and \$50 for each additional one.³¹⁰ Although injunctions were issued, they were not provided for in the statute.³¹¹ As time went on, this remedy proved deeply insufficient, and the pirates would simply pay their fine and still have plenty of proceeds left over. Injunctions likewise failed, as the play pirate simply took his production to a different circuit and performed it there, or simply signed over his interest to a puppet party who had not been enjoined.³¹² Indeed, this remedy was so insufficient that Bronson Howard, perhaps the leading American playwright of the day, had not copyrighted a play since 1878.³¹³

With lobbying towards a superior law in mind, as well as for motives purely social, the American Dramatists Club was formed as a dinner club in New York.³¹⁴ Bronson Howard was made president, and Charles Barnard secretary of the organization.³¹⁵ Sometime thereafter, Howard asked his longtime attorney, Judge Abram Jesse Dittenhoefer, to draft a federal bill to better protect dramatists.³¹⁶

Dittenhoefer was at the time one of the leading theater lawyers in the country.³¹⁷ Early in his life he was active in the Republican Party, becoming friendly with Lincoln and voting for him as an elector from New York.³¹⁸ Dittenhoefer served as a local judge during the Civil War, filling out the remainder of the term of a judge who had died on the bench, and carried the title of “Judge” for over a half-century more.³¹⁹ A recognized “authority in laws relating to the drama and the stage,” Dittenhoefer was a logical choice to draft the bill.³²⁰ His advocacy in favor of protection against piracy of operas is a bit puzzling

Copyright,” Approved February Third, Eighteen Hundred and Thirty-One, ch. 169, 34th Cong., 11 Stat. 138 (1856).

³⁰⁹ CONG. GLOBE, 32nd Cong., 1st Sess. 1643 (1856) (after Sen. Bayard explained the purpose of the 1856 Copyright Bill, there was little debate after Sen. Hunter’s question, “Is it confined to our own authors?” was answered in the affirmative).

³¹⁰ An Act Supplemental to an Act Entitled “An Act to Amend the Several Acts Respecting Copyright,” Approved February Third, Eighteen Hundred and Thirty-One, ch. 169, 34th Cong., 11 Stat. 139 (1856). See *supra* note 6.

³¹¹ *Id.*

³¹² *Congressman Covert’s Dramatists Bill*, BROOKLYN DAILY EAGLE, July 2, 1894, at 2.

³¹³ *The Stage*, L.A. TIMES, May 27, 1894, at 17 (under “Gossip in the Wings”).

³¹⁴ *Notes*, THE CRITIC, Jan. 30, 1892, at 76; *The Dining Clubs of New York*, THE CHAUTAUQUAN, May, 1893, at 217.

³¹⁵ *Notes*, *supra* note 314, at 76.

³¹⁶ *Protects Playwrights from Piracy*, WASH. POST, Dec. 15, 1896, at 4; *Current Topics*, 55 ALB. L.J. 1, 4-5 (1897).

³¹⁷ *A.J. Dittenhoefer*, 5 AM. LAWYER 363 (1897).

³¹⁸ See *A.J. DITTENHOEFER, HOW WE ELECTED LINCOLN* 1-6 (1916).

³¹⁹ See *A.J. Dittenhoefer*, 12 BANKING L. J. 165 (1895). He was also offered the post of U.S. district judge for the District of South Carolina by President Lincoln, but declined the nomination. *Judge Abram J. Dittenhoefer*, 10 MEDICO-LEGAL J. 338 (1894) (on file with author).

³²⁰ 2 A.J. DITTENHOEFER NEW YORK STATE’S PROMINENT AND PROGRESSIVE MEN 104 (Mitchell C. Harrison, comp., New York Tribune 1900).

in light of his involvement in *The Mikado* litigation on behalf of the Duff's pirate production, but it is worth noting that throughout that incident he was adamant about what he felt the laws were, and not whether these laws were particularly wise.³²¹

The first draft of Dittenhoefer's bill set forth a fairly punitive view of copyright law. The bill covered dramatic and operatic compositions, but not musical compositions. Thus, it would have saved Gilbert and Sullivan, but Gounod would still be out of luck. The same monetary damages as the 1856 Act were included, but producing a pirate production was now also a misdemeanor which carried up to a year of jail time, and these productions could also be enjoined by the circuit courts, with such injunctions being national in scope. Further, injunctions could be either *ex parte* or on hearing. A producer could sue to have the injunction lifted, but only on notice to the copyright holder.

B. *The 53rd Congress*

Dittenhoefer's bill was introduced to the House of Representatives by Representative Amos J. Cummings on April 24, 1894,³²² and by request to the Senate by Senator David Bennett Hill on May 3, 1894.³²³ Both men had colorful careers before coming to Congress, but neither was particularly influential once there. Cummings was a former journalist and, according to some, was the father of the human interest story.³²⁴ Hill, by contrast, was a former governor of New York, and a consummate machine politician.³²⁵ However, Hill was past his prime after having a dramatic fall from grace when he ran for president in 1892 and overplayed his hand, manipulating the voting in the New York primary with an unusual degree of chicanery.³²⁶ Because of the resulting outrage, the New York primary was repeated and any chance that Hill had at the presidency was lost.³²⁷ Despite their political shortcomings, both men would champion these bills to varying degrees until the end. The committee chairs would also champion these bills

³²¹ See *Actor, Manager, and Play*, N.Y. TIMES, July 26, 1885, at 3. Dittenhoefer had declined to represent Stetson and Carte, despite being Stetson's longtime attorney, since his "long opinion would be flaunted in [his] face," because he had already expressed his opinion in the case "irrevocably." *Id.*

³²² H.R. 6835, 53rd Cong. (1894).

³²³ S. 1991, 53rd Cong. (1894). Introducing a bill "By Request" rather than by standard sponsorship indicates that the bill is being introduced as a courtesy. See Richard C. Sachs, *Sponsorship and Cosponsorship of Senate Bills*, Order Code 98-279 GOV, CRS REPORT FOR CONGRESS, Apr. 21, 2003, http://lugar.senate.gov/CRS%20reports/Sponsorship_And_Cosponsorship_of_Senate_Bills.pdf.

³²⁴ See FRANK M. O'BRIEN, *THE STORY OF THE SUN*, NEW YORK: 1833-1918 241-42, 363 (1918).

³²⁵ See generally HERBERT J. BASS, "I AM A DEMOCRAT": THE POLITICAL CAREER OF DAVID BENNETT HILL (1961).

³²⁶ *Id.* at 221-24.

³²⁷ *Id.* at 235.

successfully. Representative James W. Covert was the chair of the House Committee on Patents in the 53rd Congress, and would guide the bill through its first rough stages.³²⁸ Representative William F. Draper, who we have already encountered in the Treloar Bill controversy, was the chair of the committee for the 54th Congress and was vital in pushing the bill through. The chair of the Senate Committee for the 54th Congress was Senator Orville Platt, one of the most powerful men in the Senate,³²⁹ and a veteran of the international copyright fight.³³⁰ He would prove instrumental in this fight as well.³³¹

These bills were then sent to the House and Senate Committees on Patents.³³² On May 7, a hearing was held in the House Committee on Patents, with the witnesses being various famous dramatists culled from the American Dramatists Club including Howard, Bayard, David Belasco, and several journalists.³³³ Although no member of the committee gave the measure his immediate support, the members promised to support the bill unless a reason not to support it was presented.³³⁴ The dramatists and their allies then called on the Speaker and other powerful representatives, and a few days later repeated this in the Senate.³³⁵ The American Dramatists Club also circulated a petition signed by many noted playwrights and other respected theater-people urging passage of this bill.³³⁶ Having set forward the practical reasons for the bill, another hearing was held on June 20, with Judge Dittenhoefer discussing the legal aspects of the bill with the committee for two hours.³³⁷

The Senate Committee on Patents reported their bill without amendment on May 24,³³⁸ but the House Committee reported the bill

³²⁸ *Covert, James Way: 1842-1910*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=C000814> (last visited Nov. 8, 2006).

³²⁹ Edwina Carol Smith, *Conservatism in the Gilded Age: The Senatorial Career of Orville H. Platt 1-3* (Mar. 1976) (unpublished Ph.D. dissertation, University of North Carolina) (on file with author).

³³⁰ Indeed, the final international copyright bill would be called the Platt-Simonds Bill. See generally AUBERT J. CLARK, *THE MOVEMENT FOR INTERNATIONAL COPYRIGHT IN NINETEENTH CENTURY AMERICA* (1960).

³³¹ LOUIS A. COOLIDGE, *AN OLD-FASHIONED SENATOR: ORVILLE H. PLATT OF CONNECTICUT 106-07* (1912).

³³² See H. JOURNAL, 54th Cong., at 354 (1st Sess. 1894); S. JOURNAL, 54th Cong., at 175 (1st Sess. 1894).

³³³ *Capitol Chat*, WASH. POST, May 8, 1894 at 4; *To Prevent Play Piracy*, PUBLISHER'S WKLY., May 12, 1894, at 714.

³³⁴ *Capitol Chat*, *supra* note 333.

³³⁵ See *id.*

³³⁶ *Notes*, 21 THE CRITIC, June 2, 1894, at 381. Another source states that the petition was signed by "thousands" from almost every state. *News and Notes*, 7 THE WRITER, June, 1894, at 94. It is not known whether this was the same petition that was circulated a year later. See *infra* note 377.

³³⁷ *Protection Against Play Pirates*, N.Y. TIMES, June 21, 1894, at 8.

³³⁸ S. Journal, 53rd Cong., at 206 (1st Sess. 1894).

with amendments on June 29.³³⁹ The House amendments were twofold, first requiring that the performance be for profit in order to trigger sanctions, and second requiring the clerk of the court from which the injunction was issued to transmit documents related to the injunction upon request.³⁴⁰ A day later, *Scientific American* published an editorial sharply critical of the Senate version of the bill,³⁴¹ and shortly thereafter the *Publisher's Weekly* did the same,³⁴² but the Chair of the House Patents Committee, Covert, nonetheless felt it would pass easily.³⁴³ Opponents of the bill argued that more criminal offenses should not be created, but Covert believed that this criticism would sway few.³⁴⁴ He was mistaken.

On July 28, 1894, rather than debating the amended bill, Covert asked that the House debate a substitute bill from the committee that he had not formally introduced, containing similar provisions but organized differently and less protective of plays.³⁴⁵ The bill was read, and Covert requested unanimous consent to have the substitute bill replace the amended Cummings Bill, but Representative Albert J. Hopkins of Illinois objected.³⁴⁶ After some arguments over whether the substitute bill needed to be printed, the original bill was reported with amendments due to the lack of unanimous consent.³⁴⁷ Representative Hopkins then entered into a debate with Covert over the substance of the Cummings Bill, questioning whether it was necessary to change the structure of injunctive relief in the federal courts.³⁴⁸ Hopkins persisted in this line, and subsequently other members of the House joined in his concerns.³⁴⁹ Covert attempted to defend this bill with a detailed statement of why it was needed, noting that nationwide injunctive relief was particularly important in this case since many play pirates traveled the country easily with their product and had few, if any, attachable means with which they could ordinarily be restrained.³⁵⁰ Covert then went on to explain the substitute version and why it was milder in its terms, which mollified the critics some.³⁵¹ The critics, however, remained concerned about the precedent the Cummings Bill would

³³⁹ H. Journal, 53rd Cong., at 458 (1st Sess. 1894). A report was also sent up with the amended bill. S. 1991, 53rd Cong. (1894).

³⁴⁰ H.R. 6835, 53rd Cong. (1894).

³⁴¹ *Proposed Criminal Enactment for the Protection of Dramatic Copyrights*, 70 SCI. AM., June 30, 1894, at 402 (calling the bill "very absurd").

³⁴² *See Dramatic Copyright*, PUBLISHER'S WKLY., July 7, 1894, at 10 (arguing that the bill was too vague as to what was a protected work).

³⁴³ *Covert's Dramatic Copyright Bill*, WASH. POST, June 27, 1894, at 7.

³⁴⁴ *See id.*

³⁴⁵ 53 CONG. REC. 7974 (1894). The text of the substitute bill is also available here. *Id.*

³⁴⁶ *Id.* at 7974-75.

³⁴⁷ *See id.* at 7975.

³⁴⁸ *See id.*

³⁴⁹ *Id.* at 7975-76.

³⁵⁰ *See id.* at 7976. *See also The Copyright of Plays*, WASH. POST, July 29, 1894, at 2.

³⁵¹ 53 CONG. REC. 7976 (1894).

make in terms of jurisdiction—giving a federal court national reach, even into other federal circuits.³⁵² After some additional discussion, the House adjourned, not to consider the Cummings Bill again in the 53rd Congress,³⁵³ despite Covert's meeting with the Speaker of the House to request another day for discussion.³⁵⁴

Especially in light of the previous optimism over the bill's fate, such intense opposition must have been a shock.³⁵⁵ Opposition in the committee had been either from those who did not believe that performance works were copyrightable at all, or from those who felt that imprisonment was an excessive remedy for stealing from "witty men's brains."³⁵⁶ Whatever the case, the bill returned to committee, where it faced more difficulty from a member inalterably opposed to any provision for criminal sanctions.³⁵⁷ A new version of the bill was prepared, reflecting the comments and changes of the House and Committee on Patents,³⁵⁸ but the bill would not pass during this Congress'. With the Republican landslide in the elections in 1894, the American Dramatists Club asked Covert to take no more action on the bill, planning to reintroduce it for the new 54th Congress, where the Republicans would more firmly deal with the objectors to the bill.³⁵⁹ Thus no activity was taken at the federal level for a little less than a year.

During the intervening time, the American Dramatists Club began to compile a list of copyrighted performance works and distributed it for free to managers and theaters in the United States and Canada.³⁶⁰ The American Dramatists Club also turned to convincing states to add complementary provisions to their own criminal code, making unauthorized public performances of unpublished manuscript works a crime.³⁶¹ In 1895, New Hampshire became the first state to pass into

³⁵² *See id.*

³⁵³ *See id.* at 7977. Hopkins apparently had more to say on this matter, and asked that his comments at the end of this debate be included in the appendix after revision rather than in the record. However, the appendix does not contain any remarks by Hopkins. *Id.* This was not the first time that Hopkins was strongly opposed to the expansion of the copyright laws; he had also strenuously objected to the 1891 International Copyright Act. *See* Albert Jarvis Hopkins, *Memoirs of Albert Jarvis Hopkins 183-202* (unpublished manuscript, on file with the Abraham Lincoln Presidential Library).

³⁵⁴ *The Copyright of Plays*, *supra* note 350.

³⁵⁵ *See Dramatic Piracy Bill Opposed*, N.Y. TIMES, July 29, 1894, at 4 (stating that the July 28 session "was unfortunate, in that the first bill presented by Chairman Covert met such opposition that, after a brief discussion, the house voted to adjourn").

³⁵⁶ *Protection Against Play Pirates*, *supra* note 337.

³⁵⁷ *The Dramatic Copyright Bill*, PUBLISHER'S WKLY., Aug. 11, 1894, at 207.

³⁵⁸ *See id.*

³⁵⁹ *Capitol Chat*, WASH. POST, Jan. 27, 1895, at 4.

³⁶⁰ *Copyright Matters: To Protect Dramatists*, PUBLISHER'S WKLY., May 18, 1895, at 782-83; THE AMERICAN DRAMATISTS' CLUB, THE AMERICAN DRAMATISTS CLUB LIST: A STANDARD OF REFERENCE FOR THE PROTECTION OF DRAMATIC PROPERTY (1896).

³⁶¹ RICHARD ROGERS BOWKER, COPYRIGHT: ITS HISTORY AND ITS LAW 194-95 (1912). The state statutes were: New Hampshire: 1895 N.H. REV. STAT. ANN. §§ 42:1, 42:7; New York: 1899 N.Y. LAWS § 475; Louisiana: 1900 La. Laws no. 75; Oregon: Or. H.B. 144 (1901); Pennsylvania:

law statutory protection for the public performance of dramatic and musical compositions.³⁶² While no other state would follow until 1899,³⁶³ the club had achieved its first success, and the inclusion of music in the New Hampshire statute would signal the movement towards including music in the federal dramatists' bill.

C. *The 54th Congress, 1st Session*

A group of theatrical managers and dramatists met in Manhattan on December 18, 1895, to discuss how to effectuate the passage of the dramatic copyright bill in the 54th Congress.³⁶⁴ Present were Bronson Howard, David Belasco, and an assortment of other managers and playwrights, ironically including Sydney Rosenfeld.³⁶⁵ Those at the meeting agreed to ask other managers and dramatists for funds to help defray the cost of introducing the bill, which had been introduced in the House the previous day by Representative Cummings.³⁶⁶ Sen. Hill once again introduced the bill in the Senate, after it had been introduced in the House, and again did so by request and not as a sponsor.³⁶⁷

The subject matter of these bills was similar to the original bill, including dramatic and operatic works, but not musical ones, in spite of the New Hampshire statute passed a few months earlier.³⁶⁸ There was language in these bills to allow for leniency. For example, after an initial one hundred dollar penalty for the unauthorized performance of a copyrighted work, the monetary penalty of fifty dollars for each subsequent performance was to be applied "as to the court shall appear to be just," rather than a purely mechanical application.³⁶⁹ Criminal sanctions were only available against individuals who willfully performed the copyrighted work unlawfully and for-profit.³⁷⁰ The text

1901 Pa. Laws no. 209; Ohio: 1902 Ohio S.B. 20; New Jersey: 1902 N.J. Laws ch. 249; Massachusetts: 1904 Mass. Acts ch. 183; Minnesota: 1905 Minn. Laws ch. 40; California: 1905 Cal. Laws ch. 276; Wisconsin: 1905 Wis. Laws ch. 281; Connecticut: 1905 Conn. Acts ch. 130; Michigan: 1905 Mich. Pub. Acts ch. 268. LIBRARY OF CONG., COPYRIGHT OFFICE BULLETIN NO. 3, COPYRIGHT ENACTMENTS OF THE UNITED STATES, 1783-1906 105-12 (Gov't Printing Office, 2d ed. 1906) [hereinafter COPYRIGHT ENACTMENTS]. The subject matter of these statutes did not expand on the existing state common-law protection of public performance rights—none included published works. The primary purpose of these statutes was to act as a complement to the proposed federal law, since uncopyrighted works were not included in the federal statute. Finally, the question of whether those statutes that remain in force are preempted by federal law remains open. See 17 U.S.C. § 301 (2006).

³⁶² See COPYRIGHT ENACTMENTS, *supra* note 361, at 105.

³⁶³ See *id.* at 105-12.

³⁶⁴ See, e.g., *To Prevent the Piracy of Plays*, N.Y. TIMES, Dec. 19, 1895, at 16; *The Copyright of Plays*, HARTFORD COURANT, Dec. 21, 1895, at 8; *Against Piracy of Plays*, PUBLISHER'S WKLY., Dec. 21, 1895, at 1193.

³⁶⁵ *To Prevent Piracy of Plays*, *supra* note 333.

³⁶⁶ H.R. 1978, 54th Cong. (1895).

³⁶⁷ S. 2306, 54th Cong. (1896).

³⁶⁸ See *id.* The New Hampshire law was signed on March 13, 1895. COPYRIGHT ENACTMENTS, *supra* note 361, at 105.

³⁶⁹ S. 2306, 54th Cong. (1896).

³⁷⁰ *Id.*

of the bill makes it appear as though the bill simply established a nationwide service of process for these injunctions.³⁷¹

In the 53rd Congress, the Cummings Bill had not received much attention from the copyright leagues. While public performance rights would never be a top priority to the leagues as a whole, for the 54th Congress the leagues brought the Cummings Bill under their tent by naming Bronson Howard the first vice-president of the American Authors Copyright League in early 1896.³⁷² Nonetheless, the other members of the copyright leagues were generally quite unaware of the progress of the Cummings Bill, often finding it difficult to get a copy of the latest draft.³⁷³ It is likely that they were distracted by fighting the Treloar Bill, but the fact that the copyright leagues were now officially behind the Cummings Bill certainly would not have hurt the bill's reception.

The first hearing was held on February 19, 1896, in the House Committee on Patents, under the Chairmanship of Draper. Bronson Howard was the first to speak, describing the necessity of nationwide enforcement of injunctions against pirate productions.³⁷⁴ Harrison Gray Fiske followed, explaining the many attempts that had been made so far to fight play piracy.³⁷⁵ Representative H. C. Miner was next, appearing in the capacity of a former theater-manager, issuing a stirring and damning condemnation of play pirates and their methods.³⁷⁶ A.M. Palmer then made comments along a similar line, and Judge Dittenhoefer concluded, giving a thorough explanation of the legal issues raised by the Cummings Bill. A petition was also prepared and given, describing the size and scope of the American theater industry and how this protection was needed for it to thrive³⁷⁷:

There are in the United States about three thousand theatres and opera houses, costing from \$10,000 to \$800,000 each. These theatres give employment to at least forty thousand people, exclusive of actors and actresses.

There are upward of three hundred manuscript plays written or owned by citizens of the Union, now giving employment to from four to five thousand actors and actresses. The cost of producing these plays ranged from \$2,000 to \$25,000 each. This enormous

³⁷¹ *See id.* As well as including opera, of course.

³⁷² *Notes*, 25 THE CRITIC, Feb. 29, 1896, at 154.

³⁷³ *See, e.g.*, Letter from Robert Underwood Johnson to Edmund Clarence Stedman, Pres., Copyright League (Mar. 8, 1896) (on file with the Edmund Clarence Stedman Papers, Rare Book and Manuscript Library, Columbia University Library) ("I learn that my associates have been hunting for the Cummings Dramatic Copyright Bill for you in vain.").

³⁷⁴ *See To Protect Dramatists*, N.Y. Times, Feb. 20, 1896, at 5.

³⁷⁵ *See id.*

³⁷⁶ *See id.* This is the same Harry Miner who a decade earlier had appropriated Rosenfeld's pirate production of *The Mikado* for his own theater when Rosenfeld lost his contempt case. *See supra* note 129 and accompanying text.

³⁷⁷ *For the Protection of Plays*, N.Y. TIMES, Feb. 19, 1896, at 5.

aggregate investment is entirely dependent upon the right to perform these plays.

The laws of the United States recognize the right to perform a play as the exclusive property of the author or owner of the play. The Copyright law imposes severe fines for the punishment of all persons who perform a play without the consent of the owner. The Federal Courts provide facilities for preventing, by injunction, the unauthorized performance of plays. It would, therefore, seem that the right to perform a play was thus perfectly protected.

But the law does *not* protect this class of property. There is under the Copyright law no real protection against the unlawful performance of a play. An injunction obtained against the unwarranted performance of **a play is of comparatively limited value. A man who steals a valuable** play can sell a copy for a few dollars, or perform it every night for months in practical immunity from arrest, fine, or imprisonment. There are innumerable companies in all parts of the country engaged at all times in the unlawful performance of plays to which they have no legal or moral right. The theft of successful new plays and the sale of stolen copies of the manuscripts has become a regularly organized business. There is one firm in Chicago alone that advertises the manuscripts of hundreds of plays to not one of which it has any right whatever.

These stolen plays are performed by irresponsible parties without means, local habitation or reputation. An injunction obtained in one Federal District is inoperative in any other, and by crossing an imaginary line the person conducting the unlawful performance may defy the United States law and continue to perform the play until its commercial value is completely destroyed. Entire sections of the country, East, West, North and South, are now so overrun with these unlawful producers of plays that reputable companies are completely debarred from entering them. The local managers and owners of theatres are nowhere in sympathy with these unlawful producers of plays, but it has now become almost impossible for them to detect a fraudulent production when contracting for performances in their houses.³⁷⁸

The list of dramatists signing the petition took up a full page, with Bronson Howard's name prominently at the top, and a list of other theater-people, which took up more than twenty more pages.³⁷⁹ At the hearing there was only one member who raised any qualms about the Cummings Bill, J. C. Hutcheson of Texas.³⁸⁰

³⁷⁸ The American Dramatists Club, Petition to the Senate and House of Representatives of The United States for the Amendment of the Copyright Law, Relating to the Fraudulent Production of Plays, from the Dramatists, Theatrical Managers and Other Members of the Dramatic Profession of the United States (1895) (editorial copy on file with the Rutherford B. Hayes Presidential Library).

³⁷⁹ *Id.* at 6.

³⁸⁰ *To Protect Dramatists*, *supra* note 374.

The Cummings Copyright Bill was favorably reported by the House Committee on Patents on March 12, 1896, with one significant amendment.³⁸¹ Rather than protecting “dramatic or operatic” works, it covered “dramatic or musical” works.³⁸² The Cummings Bill was finally in its form to protect the right of public performance for musical compositions. In the report on the amended bill, the committee explained:

Your committee recommend [sic] the amendment of the bill by substituting the word “musical” for the word “operatic” in lines 7, 9, and 29, in order to make it conform to the language of section 4952 of the Revised Statutes, which mentions “musical” instead of “operatic” compositions as the subject of copyright.

This amendment in no way affects the purpose of the proposed measure, which is twofold: First, to secure to musical compositions the same measure of protection under the copyright law as is now afforded to productions of a strictly dramatic character. There can be no reason why the same protection should not be extended to one species of literary property of this general character as to the other, and the omission to include protective provisions for musical compositions in the law sought to be amended was doubtless the result of oversight. The committee is of the opinion that the existing law should be so amended as to provide adequate protection to this species of literary production.

The bill provides, secondly, for added means for the protection of authors of dramatic and operatic works.³⁸³

A week later, at the hearings on the Treloar Bill, Chairman Draper was extremely upbeat about the prospects for the Cummings Bill,³⁸⁴ stating that, while it was not certain, what he heard led him to believe that it was “quite likely to become law.”³⁸⁵ Draper also noted, in a manner curious for a public hearing, that “I can say privately that there is a good deal of pressure being brought to bear by the musical, operatic, and dramatic, profession, and dramatic authors, upon various gentlemen to get that bill up, but whether it will pass when before the house I do not know.”³⁸⁶

Draper’s comment serves to explain the amendment to the bill a bit better, and reinforces the reasonable suspicion that amendments expanding the scope of a law rarely happen of their own accord. At the same time, the influence of the Music Publishers Association is not as clear in this case. The Dramatists Club had already pushed through a

³⁸¹ H. JOURNAL, 54th Cong. 301-02 (1st Sess. 1896).

³⁸² H.R. 1978, 54th Cong. (as amended, Mar. 12, 1896).

³⁸³ H.R. REP. NO. 54-741 (1896).

³⁸⁴ *Treloar Hearing*, *supra* note 195, at 64.

³⁸⁵ *Supra* note 249.

³⁸⁶ *Treloar Hearing*, *supra* note 195, at 67.

public performance bill in New Hampshire that covered music in March 1895, prior to the formation of the Music Publishers Association in June 1895. As such, there may not have been the same coordinated effort of music publishers for this amendment like there was for the Treloar Bill.

The next month would be fairly quiet, with the Executive Council of the American Copyright League passing a resolution in favor of the Cummings Bill, but not much else of note happening.³⁸⁷ During this time the Senate Committee on Patents deliberated the amended Cummings Bill, and the bill's advocates remained vigilant, with Dittenhoefer asking Senator Hill if a hearing could be set up on the Cummings Bill while he was in Washington for a case.³⁸⁸ Shortly thereafter another hearing was held in the Senate Committee on Patents, with Judge Dittenhoefer as the sole witness, although only four members were in attendance.³⁸⁹

On April 24, 1896, the Senate Committee on Patents reported back their version of the Cummings Bill with amendments.³⁹⁰ In substance it was a copy of the House version, but it changed the text in some cases in order to smooth over some rough patches of verbiage.³⁹¹ With this revision, the path of the bill as a House bill (H.R. 1978) would end, the bill being subsumed into a Senate bill (S. 2306). On May 20, 1896, Senator Hill asked the Senate to consider the bill, to which there was no objection.³⁹² Hill read the amendments to the bill, and it passed without objection, or even comment.³⁹³ Two days later the bill was sent to the House.³⁹⁴ Shortly thereafter, Draper moved to suspend the rules and pass S. 2306 in the House as well.³⁹⁵ Victory was now in sight. The bill "was read at length."³⁹⁶ The Speaker *pro tempore* said that the bill was not at the table, and changed the subject.³⁹⁷ The First Session of the 54th Congress ended almost immediately thereafter.

Why this happened is not entirely clear. What most likely happened, though, was simply that the Speaker, Representative Thomas B. Reed, wanted the session to end as soon as possible,³⁹⁸ and instructed the Speaker *pro tempore* not to allow any more bills to be argued. Reed nearly finished off another copyright bill by trying the same trick at the

³⁸⁷ *Activity in the Copyright League*, 25 THE CRITIC, Apr. 25, 1896, at 298.

³⁸⁸ Letter of A.J. Dittenhoefer, Esq., Law Offices of Dittenhoefer, Gerber & James, to Sen. David B. Hill (Mar. 20, 1896) (on file with the David Bennett Hill Papers, Department of Special Collections, Syracuse Univ. Library).

³⁸⁹ *Investigation of the Copyright Bills*, PUBLISHER'S WKLY., Apr. 4, 1896, at 625.

³⁹⁰ S. JOURNAL, 54th Cong., at 261 (1st Sess. 1896).

³⁹¹ See S. 2306, 54th Cong. (as amended, Apr. 24, 1896).

³⁹² 28 CONG. REC. S5464 (1896).

³⁹³ See *id.*

³⁹⁴ 28 CONG. REC. H5564 (1896).

³⁹⁵ *Id.* at H6292.

³⁹⁶ *Id.*

³⁹⁷ *Id.*

³⁹⁸ WILLIAM F. DRAPER, RECOLLECTIONS OF A VARIED CAREER 261 (1908) ("[S]till he would not give me time, as he wanted a short session.").

end of the second session.³⁹⁹ As a result of these and other tactics, Draper chafed under the speaker's "despotic" control,⁴⁰⁰ and felt that his committee work was going to waste.⁴⁰¹ This was doubtless particularly vexing since Reed gave the chairmanship of the Committee on Patents to Draper as a token of appreciation for not pushing for a seat on the Ways and Means Committee, for which many had been advocating.⁴⁰² Even after the bill was passed, bitterness over this incident had not, with Representative Draper noting:

While this is satisfactory to you so far as this particular matter is concerned, it is disappointing to me in other directions, and indicates a state of things not for the best public interest.

The difficulty is that having worked hard last winter, and placed some important measures on the calendar, we cannot get time for their consideration.

The House of Representatives is not a Democracy, but is absolutely under the control of half a dozen men, if not of one man—The Speaker;—and legislation, outside of revenue and appropriation bills, must appeal to this one of half a dozen men or fail to be considered.⁴⁰³

Despite having been "lost in the shuffle at the wind-up of the last session of Congress," another session was coming in the fall, and the American Dramatists Club kept up their efforts to support the bill.⁴⁰⁴ In addition to their usual efforts, they continued to update the list of copyrighted plays and operas, hoping to "stand off the play pirates until the passage of a law to punish them."⁴⁰⁵ One enterprising manager also invited a good number of House members from New York to his theater for a free show and, in between acts, discussed the bill with them.⁴⁰⁶ By the end of the show, most of these Representatives were on board.⁴⁰⁷

D. *The 54th Congress, 2nd Session—Victory*

Representative Draper entered the second (and final) session of the 54th Congress determined to pass the Cummings Bill, seeing it as "a matter of simple justice, needed to complete our copyright legislation."⁴⁰⁸ On the very first day of the second session, December 7,

³⁹⁹ See *id.* at 270.

⁴⁰⁰ See *id.* at 261.

⁴⁰¹ See *id.* at 262.

⁴⁰² See *id.* at 255.

⁴⁰³ Letter from Rep. William B. Draper, Chairman, Comm. on Patents of the House of Representatives, to Robert Underwood Johnson, Esq. (Jan. 18, 1897) (on file with the Robert Underwood Johnson Papers, Manuscripts & Archives Div., N.Y. Pub. Library).

⁴⁰⁴ See *Robbers of the Stage*, WASH. POST, July 19, 1896, at 18.

⁴⁰⁵ *Id.*; see also *The American Dramatists Club List*, PUBLISHER'S WKLY., June 20, 1896, at 1008.

⁴⁰⁶ *Dramatic Piracy Stopped*, N.Y. TIMES, Dec. 12, 1896, at 10.

⁴⁰⁷ *Id.*

⁴⁰⁸ DRAPER, *supra* note 398, at 266.

1896, the Cummings Bill was sent to the full House from the House Committee on Patents.⁴⁰⁹ Draper's concerns that the dramatists' bill would not even be considered⁴¹⁰ were mollified when, on December 10, the debate on the bill on the floor of the House was finally joined.⁴¹¹

First Representative Draper read the bill, along with a new report that followed fairly closely in the lines of the previous one.⁴¹² Then the debate commenced, with Representative Hopkins once again acting as the antagonist.⁴¹³ Hopkins' objections to the bill were to its feature of nationwide injunctions, an objection which he had raised two years earlier, and also that the one hundred dollar minimum damages were extended from dramatic works to musical ones also.⁴¹⁴ This time though, anticipating trouble, Draper had sent Hopkins a personal copy of the Cummings Bill in advance, which managed to effectively neutralize the procedural complaints Hopkins had made in the 53rd Congress.⁴¹⁵ Without these complaints, Hopkins did not play a major role in the debates. Representative John F. Lacey then addressed Draper, questioning the need for such harsh punishment as incarceration, and even if there was a need for a change at all in the dramatic copyright laws.⁴¹⁶ Draper responded to these charges ably, but was not as successful with the questions of Representative James A. Connolly, who took issue with the bill's provisions for an *ex parte* injunction—that is, an injunction that could be granted without giving notice to the other party.⁴¹⁷ As the debate continued, a string of amendments were proposed. First an amendment was proposed to take out the criminal liability clause of the bill, leading to a strong reaction from Representative Cummings.⁴¹⁸ Representative George W. Hulick next offered an amendment that “if said performance and representation shall be for charitable or benevolent purposes, it shall be a good defense to any prosecution under this act,”⁴¹⁹ leading Representative Covert to respond that such a performance was even worse, as it added hypocrisy to theft, since it would be doing wrong under the banner of doing right. As a result, the amendment failed.⁴²⁰ Covert's remarks were followed by some general debate over whether pirating a play was theft or

⁴⁰⁹ H. JOURNAL, 54th Cong., at 14 (2d Sess. 1896).

⁴¹⁰ Letter from Rep. William B. Draper, Chairman, Comm. on Patents of the House of Representatives, to Robert Underwood Johnson, Esq. (Nov. 30, 1896) (on file with the Robert Underwood Johnson Papers, Manuscripts & Archives Div., N.Y. Pub. Library).

⁴¹¹ 28 CONG. REC. 85 (1896).

⁴¹² H. Rep. 54-2290 (1896).

⁴¹³ 28 CONG. REC. 85 (1896).

⁴¹⁴ *See id.*

⁴¹⁵ *See id.*

⁴¹⁶ *See id.*

⁴¹⁷ *See id.* at 86.

⁴¹⁸ *See id.* at 87.

⁴¹⁹ *See id.* at 88.

⁴²⁰ *Id.*

something less sinister, to some reaction from the gallery.⁴²¹ After this, Representative Lacey suggested an amendment which gutted the entire Cummings Bill and the 1856 Act and made the “printing, publication, and sale” of a dramatic or musical work “sufficient consent to the public performance or representation thereof.”⁴²² This failed as well. With all other amendments having been disposed of, and the bill seemingly poised for a vote, Representative Connolly suggested one more amendment in line with his previous objections: to remove the provisions for an *ex parte* injunction.⁴²³ This failed at first, but then he asked for a division, noting that Draper was content with this amendment, and the amendment passed.⁴²⁴ Without further debate, the bill passed the House with the Connolly Amendment.⁴²⁵ Strikingly, these debates were the only time in Congress, up to this point, where there was an honest debate over whether a right of public performance for published works was really a good idea. These debates also addressed the question of what exactly a copyright is—whether it is a natural right or a government-granted privilege—which was a question that had been raised implicitly or explicitly by all public performance bills since the Ingersoll Copyright Bill.⁴²⁶

Draper’s attitude towards the Connolly amendment was that of pleased acquiescence. He noted in his autobiography that he was forced to accept it, but that it “perhaps was a real improvement to the bill.”⁴²⁷ The bill’s backers did not share his attitude, and suggested that the Senate consider “a non-concurrence” to the amendments.⁴²⁸ However, they also recognized that it was more important to get the Cummings Bill passed than to worry about a minor feature of the bill, and urged that if there was a chance of “losing the bill,” that the Senate concur in the amendments.⁴²⁹ Draper wrote to the bill’s proponents, also urging concurrence.⁴³⁰ Although Dittenhoefer still wished to keep that feature of the bill, he acknowledged that “[w]e are only anxious to pass the bill as quickly as possible.”⁴³¹

⁴²¹ *Id.* at 88.

⁴²² *Id.* at 89.

⁴²³ *Id.* at 91.

⁴²⁴ *Id.*

⁴²⁵ *See id.* *See also Passed the Copyright Bill*, WASH. POST, Dec. 11, 1896, at 3 (describing the actions on the floor during the debate of the bill).

⁴²⁶ *See supra* discussion Part I.A. *See generally* Brander Matthews, *The Evolution of Copyright*, 5 POL. SCI. Q. 583 (1890).

⁴²⁷ DRAPER, *supra* note 398, at 267.

⁴²⁸ Letter of A.J. Dittenhoefer, Esq., Law Offices of Dittenhoefer, Gerber & James, to Sen. David B. Hill (Dec. 11, 1896) (on file with the David Bennett Hill Papers, Dep’t of Special Collections, Syracuse Univ. Library).

⁴²⁹ *Id.*

⁴³⁰ Letter of A.J. Dittenhoefer, Esq., Law Offices of Dittenhoefer, Gerber & James, to Sen. David B. Hill (Dec. 12, 1896) (on file with the David Bennett Hill Papers, Dep’t of Special Collections, Syracuse Univ. Library).

⁴³¹ *Id.*

Despite this behind-the-scenes intrigue, to most individuals the Cummings Bill, along with the Connolly Amendment, was now a done deal.⁴³² The dramatists unsurprisingly thought it was the “best thing [Congress had done] in years.”⁴³³ *The Washington Post* was similarly ecstatic,⁴³⁴ and from this point on, things moved quickly. On December 14, the amended bill was reported to the Senate for concurrence.⁴³⁵ On the same day, the Vice President laid the amendment before the Senate, and Senator Platt moved that the Senate concur.⁴³⁶ Platt was asked what the effect of the amendment was, to which he explained the change and commented that he thought the amendment was proper.⁴³⁷ The amendment was concurred in without further debate.⁴³⁸

With the Cummings Copyright Bill finally through Congress, the bill’s advocates were a bit confused as to how the next step—that of getting the President to sign it—worked.⁴³⁹ Bronson Howard shortly thereafter went on a visit to Washington, and had an interview with the President’s private secretary, who took “a lively interest in the bill.”⁴⁴⁰ The President’s secretary also informed them that the bill would not be signed into law until after the holiday.⁴⁴¹ Thus, on January 6, 1897, it was signed into law.⁴⁴²

The impact of law’s passage reverberated among the play pirates across the country almost immediately:

[I]n the South and West, where such thieving has been common, a panic exists among the small, second-rate companies which have depended for their repertory upon stolen plays. The managers of these companies are now ready and eager to pay moderate royalties to the owners of plays already on [the American Dramatists Club] list.⁴⁴³

It was clear that the new law was an immediate and ringing success for the dramatists.⁴⁴⁴

⁴³² See *Dramatic Piracy Stopped*, *supra* note 406.

⁴³³ *Id.* The quotation is attributed to Charles H. Hoyt. *Id.*

⁴³⁴ See *The Stage: Law upon the Drama*, WASH. POST, Dec. 20, 1896, at 23.

⁴³⁵ 29 CONG. REC. 129 (1896).

⁴³⁶ *Id.* at 132.

⁴³⁷ *Id.*

⁴³⁸ *Id.*

⁴³⁹ Letter of A.J. Dittenhoefer, Esq., Law Offices of Dittenhoefer, Gerber & James, to Sen. David B. Hill (Dec. 14, 1896) (on file with the David Bennett Hill Papers, Dep’t of Special Collections, Syracuse Univ. Library); Letter of A.J. Dittenhoefer, Esq., Law Offices of Dittenhoefer, Gerber & James, to Sen. David B. Hill (Dec. 15, 1896) (on file with the David Bennett Hill Papers, Department of Special Collections, Syracuse University Library).

⁴⁴⁰ Letter from Bronson Howard to Robert Underwood Johnson (Dec. 23, 1896) (on file with the Robert Underwood Johnson Papers, Manuscripts & Archives Div., N.Y. Pub. Library).

⁴⁴¹ *Id.*

⁴⁴² An Act to Amend Title Sixty, Chapter Three, of the Revised Statutes of the United States, Relating to Copyrights, ch. 392, 29 Stat. 694 (1897); See *Musical Copyright Act Signed*, WASH. POST, Jan. 7, 1897, at 4; *The Bill to Protect Dramatists Becomes Law*, PUBLISHER’S WKLY., Jan. 9, 1897, at 32.

⁴⁴³ *Pirates of Plays*, HARTFORD COURANT, Jan. 20, 1897, at 8.

⁴⁴⁴ Charles Barnard, *Dramatic Copyright*, THE CRITIC, Feb. 27, 1897, at 154 (“The most

On March 20, 1897, a celebratory dinner was held at Delmonico's in New York.⁴⁴⁵ In attendance were all the major personages behind the new law, and all the major newspapers in the city covered what was said in detail.⁴⁴⁶ Invited to this affair were many luminaries, with Bronson Howard writing many of the letters of invitation himself.⁴⁴⁷ Howard was in the chair for this dinner, and gave the first speech toasting President Cleveland.⁴⁴⁸ Congress was then toasted. Senator Platt had apparently come on the condition that he not have to speak,⁴⁴⁹ but he did say a few words about drama and Congress.⁴⁵⁰ Draper followed, speaking about plays and property, and then explained the bill's progress through Congress.⁴⁵¹ Harry Miner and James W. Covert also responded to this toast, with the latter commenting that much of the opposition came from members from the west who did not understand the concept of intangible property.⁴⁵² Judge Dittenhoefer then gave a toast to the judiciary, describing how this stood as the next stage in the evolution of the understanding of intellectual property.⁴⁵³ A few others in attendance spoke, and the party did not end until after midnight.⁴⁵⁴ With this, the battle for protection for the right of public performance for musical compositions had drawn to a close with victory. Despite the celebratory mood and all the toasts given, not one speaker had mentioned the fact that the battle for the right of public performance for music was successful.

V. CONCLUSION—THE ROAD SINCE 1897

Reaction to the Cummings Bill's passage was mostly positive, as had been expressed after it passed the House. Negative reaction mostly came later, especially regarding the bill's inclusion of music, for which less stringent protection may have been desirable, since having music played is perhaps the primary engine for demand in that business.⁴⁵⁵ Others in the music field went further, saying that "it [would] be highly desirable that this absurd law . . . be amended as soon as possible."⁴⁵⁶ These criticisms were minor and rare though, and the bill was soon

remarkable result of the amendments is the immediate and apparently universal willingness . . . to conform to their requirements.").

⁴⁴⁵ *Copyright Act Welcomed*, N.Y. TIMES, Mar. 21, 1897, at 5.

⁴⁴⁶ *See id.*; *A Feast After Victory*, N.Y. DAILY TRIB., Mar. 21, 1897, at 7; *Dramatists Dinner*, BROOKLYN EAGLE, Mar. 21, 1897, at 32.

⁴⁴⁷ *See, e.g.*, Letter of Bronson Howard to Richard Watson Gilder (Feb. 26, 1897) (on file with the Richard Watson Gilder Papers, Manuscripts & Archives Div., N.Y. Pub. Library).

⁴⁴⁸ *Copyright Act Welcomed*, *supra* note 445.

⁴⁴⁹ *A Feast After Victory*, *supra* note 446.

⁴⁵⁰ *Copyright Act Welcomed*, *supra* note 445.

⁴⁵¹ *See A Feast After Victory*, *supra* note 446.

⁴⁵² *Copyright Act Welcomed*, *supra* note 445.

⁴⁵³ *A Feast After Victory*, *supra* note 446, at 9.

⁴⁵⁴ *Copyright Act Welcomed*, *supra* note 445.

⁴⁵⁵ *Amendments to the Copyright Law*, 76 SCI. AM., Apr. 10, 1897, at 226.

⁴⁵⁶ *Queer Copyright Law*, 14 MUSIC 91, May/Oct. 1898, at 92 (on file with author).

firmly ensconced into American law. The subsequent omnibus copyright revision of 1909 kept this right, while adding to it the right to make mechanical reproductions (as had been contemplated by the Treloar Bill), and introducing an exception for nonprofit performances.⁴⁵⁷ However, the right would go relatively unexercised until the formation of performing rights societies.⁴⁵⁸

The American Society of Composers, Authors and Publishers (ASCAP) was formed on February 14, 1914, by a group of composers to “assure that music creators are fairly compensated for the public performance of their works, and that their rights are properly protected.”⁴⁵⁹ Fairly shortly thereafter, the Supreme Court decided that all public playing of music was included under this clause of the Copyright Act, even such things as background music played in restaurants.⁴⁶⁰ Justice Holmes famously held:

If the rights under the copyright are infringed only by a performance where money is taken at the door, they are very imperfectly protected. Performances not different in kind from those of the defendants could be given that might compete with and even destroy the success of the monopoly that the law intends the plaintiffs to have. It is enough to say that there is no need to construe the statute so narrowly. The defendants’ performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers of conversation, or disliking the rival noise, give a luxurious pleasure not to be had from eating a silent meal. If music did not pay, it would be given up. If it pays, it pays out of the public’s pocket. Whether it pays or not, the purpose of employing it is profit, and that is enough.⁴⁶¹

With this doctrine in hand, ASCAP and other performance rights societies, composers, and writers of music were able to make the public performance right much more than a stage right, and a very profitable one at that, with revenues for ASCAP alone totaling over \$749 million in 2005, up \$50 million from the previous year.⁴⁶² Clearly this right has

⁴⁵⁷ See An Act To Amend and Consolidate the Acts Respecting Copyright, ch. 320, 35 Stat. 1075, § 1(e) (1909). The question of whether to include a not-for-profit exception had been decided in the negative in 1897 after some debate, but apparently Congress felt it would be a good idea after all. See *supra* Part IV.

⁴⁵⁸ See FEIST, *supra* note 298, at 52.

⁴⁵⁹ *The Birth of ASCAP (1914)*, ASCAP: THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, <http://www.ascap.com/about/history/> (last visited Oct. 24, 2006).

⁴⁶⁰ *Herbert v. Shanley Co.*, 242 U.S. 591, 594-95 (1917).

⁴⁶¹ *Id.*

⁴⁶² Press Release, ASCAP: The American Society of Composers, Authors and Publishers, ASCAP Adapts to Rapidly Changing Music Marketplace and Reports Record Revenues, Royalty Payments for Year 2005 (Mar. 13, 2006), *available at*

been of substantial benefit to composers and writers of music.

The effect of this right, however, has not been universally positive. In the classical music sphere, the negative impact of the right of public performance is much more visible. With a wide array of works in the public domain to perform, orchestras often shy away from performing works which will necessitate royalty payments.⁴⁶³ A similarly negative effect has been noticed in jazz music performance, where improvisatory works often include variations on an existing copyright work.⁴⁶⁴

With both its positive and negative qualities, the exclusive right of public performance in a musical composition has remained, now for over a century, and shows no signs of diminishing in importance. The right that arrived with a whimper now asserts itself with a roar.

http://www.ascap.com/press/2006/031306_financial.html.

⁴⁶³ See Amanda Scales, *Sola, Perduta, Abbandonata: Are the Copyright Act and Performing Rights Organizations Killing Classical Music?*, 7 VAND. J. ENT. L. & PRAC. 281, 284 (2005).

⁴⁶⁴ Note, *Jazz Has Got Copyright Law and that Ain't Good*, 118 HARV. L. REV. 1940, 1946 (2005).