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‘Curse the Law!’: unravelling the copyright complexities in Marcus Clarke’s His Natural Life

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Abstract

Few colonial novels have permeated Australia’s literary psyche to the extent of Marcus Clarke’s convict novel, His Natural Life. Yet, in spite of the popularity of this tale, it is often said that Clarke was unable to exploit its success financially due to the copyright laws in force in the colonies and the British empire at that time. In this paper, I analyse those colonial copyright statutes and illustrate the confusion that both Clarke and contemporary publishers experienced when dealing with copyright and how this affected re-publication of the story. I subsequently evaluate four issues with respect to colonial and imperial copyright and the protection of His Natural Life: the subsistence of copyright in the original serial version; the ownership of that copyright; and copyright protection for the subsequent 1874 Robertson and 1875 Bentley book editions, in the colonies and the United Kingdom respectively.

‘Curse the Law!’: unravelling the copyright complexities in Marcus Clarke’s *His Natural Life*

Catherine Bond[*]

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Few colonial novels have permeated Australia’s literary psyche to the extent of Marcus Clarke’s convict novel, ***His Natural Life****. Yet, in spite of the popularity of this tale, it is often said that Clarke was unable to exploit its success financially due to the copyright laws in force in the colonies and the British empire at that time. In this paper, I analyse those colonial copyright statutes and illustrate the confusion that both Clarke and contemporary publishers experienced when dealing with copyright and how this affected re-publication of the story. I subsequently evaluate four issues with respect to colonial and imperial copyright and the protection of* ***His Natural Life****: the subsistence of copyright in the original serial version; the ownership of that copyright; and copyright protection for the subsequent 1874 Robertson and 1875 Bentley book editions, in the colonies and the United Kingdom respectively.*

Introduction

On 21 May 1946, an administrative clerk from the Grahame Book Company, a Sydney publishing house, wrote to the Commonwealth Registrar of Copyrights to ascertain whether the literary work *For the Term of His Natural Life*,[1] penned by Marcus Clarke,

[*] Lecturer, Faculty of Law, University of New South Wales. This article is in part based on doctoral research contained in C Bond, *For the Term of His Natural Life . . . Plus Seventy Years: Mapping Australia’s Public Domain* (PhD Thesis, University of New South Wales, 2010). That research was supported by an Australian Postgraduate Award (Industry), connected to the Australian Research Council-funded ‘Unlocking IP’ project. Many thanks to Professor Kathy Bowrey, Professor Graham Greenleaf, Michael Handler, Louise Buckingham and Marie Hadley for their assistance with this work at various points; to Angela Kintominas for research assistance, as supported by the UNSW Faculty of Law Research Assistant Pool; and the anonymous referees for their useful comments. Copies of all National Archives of Australia and State Library of Victoria records are held by the author. The quotation in the title is derived from M Clarke, *For the Term of His Natural Life*, first published 1874, A&R Classics Edition, Sydney, 2002, p 266:

> ‘It is the Law, you know, my good man. I can’t help it,’ he said. ‘You shouldn’t break the Law, you know.’
>
> ‘Curse the Law!’ cries Dawes. ‘It’s a Bloody Law; it’s—there, I beg your pardon,’ and he fell to cracking his stones again, with a laugh that was more terrible in its bitter hopelessness of winning attention or sympathy, than any outburst of passion could have been.

[1] The original title of the text, *His Natural Life*, will be used throughout this article, except where reference is made to a version of the story that was published under the full title. The story is more commonly referred to under its longer title, *For the Term of His Natural Life*.

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was 'covered by a current copyright'.[2] Nine days later, the following response was given by the Chief Examiner of Copyrights:

> As there have been numerous devolutions of the title therein since [the date of registration] should further information be required a certified copy of the entries in the Register could be provided by this Office at a cost of nine shillings (9/-).
>
> The duration of Copyright is defined in paragraph 3 of the Schedule to the Copyright Act 1912–1935.[3]

This response is interesting for two reasons. First, due to its unhelpfulness: it might reasonably be expected that the Commonwealth Registrar of Copyrights could comment on the copyright status of a text previously registered with that office. Second, the response from the Chief Examiner of Copyrights—in particular the comment regarding the 'numerous devolutions' in ownership of copyright—hints at a bigger story surrounding copyright in *His Natural Life*. The relationship between Marcus Clarke, *His Natural Life* and copyright is a story that remains shrouded in confusion. Indeed, if *His Natural Life* is considered to be Australia's quintessential convict story, then, as this article reveals, the experience of Marcus Clarke and the subsistence and ownership of copyright of *His Natural Life* as serial and book could be considered Australia's quintessential colonial copyright tale. The experiences of Clarke illustrate broader problems with the protection afforded to colonial authors and other creators at a time when 'Australia' was developing its own community, economy and culture, against the backdrop of the British empire.

In this article, I both consider and attempt to answer a number of the questions surrounding *His Natural Life* and copyright law, employing a range of primary and secondary sources, many of which have not previously been examined in this context. Although academic commentators in other disciplines have noted how 19th-century copyright law affected Clarke and his ability to negotiate attractive financial agreements with international publishers, this previous literature has failed to engage with the specifics of the colonial laws in force at that time.[4] It is the specific dimensions of these colonial and imperial laws that had a substantial impact on Clarke and *His Natural Life* and on the ability of Clarke, his heirs and publishers of the story to capitalise financially on the success of his work.

In this article, I first provide a brief introduction to the life of Marcus Clarke and the writing of *His Natural Life*. I then consider the position of copyright in the colonies, at

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[2] National Archives of Australia: Copyright Office; A1336, 'Applications for Literary and Dramatic Copyright (with exhibits)', 1 Jan 1907 – 31 Dec 1969; 2790, For the Term of His Natural Life (title of work), Marian Clarke (applicant), date registered 1913; letter to Registrar of Copyrights from Grahame Book Company, 21 May 1946.

[3] National Archives of Australia: Copyright Office; A1336, 'Applications for Literary and Dramatic Copyright (with exhibits)', 1 Jan 1907 – 31 Dec 1969; 2790, For the Term of His Natural Life (title of work), Marian Clarke (applicant), date registered 1913; letter to Grahame Book Company from the Chief Examiner of Copyrights, 30 May 1946.

[4] See generally, LT Hergenhan, 'English Publication of Australian Novels in the Nineteenth Century: The Case of *His Natural Life*', in L Cantrell (Ed), *Bards, Bohemians and Bookmen: Essays in Australian Literature*, University of Queensland Press, Brisbane, 1976, pp 56–71; PD Edwards, 'The English Publication of *His Natural Life*' (1982) 10 *ALS* 520–26.

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the time of publication of *His Natural Life*, in its various forms, the difficulties posed by imperial copyright law during this period, and the limited copyright protection available to Clarke due to these splintered laws. I also examine—and formulate answers to—questions that have puzzled previous academic commentators: the division of copyright ownership between Clarke, as author, and Clarson, Massina & Co, as first publisher of *His Natural Life* in serial form; copyright protection of *His Natural Life* when first published in book form in 1874 in the colony of Victoria;[5] and subsequent copyright protection of that book (or lack thereof) when published in the United Kingdom in 1875.[6]

Before proceeding, it must be noted that in this article I deal solely with copyright and *His Natural Life* as serial and book, rather than the issues that arose with respect to dramatic versions of the tale. As will become apparent below, pursuant to the colonial copyright statutes, authors did not receive an exclusive right to dramatise their work and, subsequently, *His Natural Life* was adapted repeatedly by colonial playwrights.[7] This popularity resulted in one of the few copyright cases of this period, *Weekes v Williamson*.[8] Further, it is clear that once both this right and the right to make a cinematograph film of a literary work were introduced,[9] Clarke's heirs sought to exploit such rights, as evidenced by the some of the 'numerous devolutions' of ownership contained in the copyright registration documents on *His Natural Life*, as highlighted above.[10] My focus, however, is on the multiple copyright issues arising from the writing and publication of the original tale and does not stray past Federation.

Marcus Clarke and *His Natural Life*

Few colonial novels have permeated Australia's national and international literary psyche to the extent of *His Natural Life*. The story of Richard Devine/Rufus Dawes, wrongly convicted of murder and transported under brutal conditions to the penal colony of Tasmania, stunned 19th-century readers in the colonies and throughout the British empire with its depiction of the horrors on which the colonies of Australia were founded. In naming *His Natural Life* as one of 50 Australian classic tales, Jane Gleeson-White describes the book:

> Typical of much Victorian fiction, including the novels of Charles Dickens, George Eliot and Wilkie Collins, *His Natural Life* is filled with chance happenings, imposters, false names, disguises, unlikely coincidences, idealised characters and melodrama—and like

[5] M Clarke, *His Natural Life*, George Robertson, Melbourne, 1874.
[6] M Clarke, *His Natural Life*, Richard Bentley and Son, London, 1875 (3 vols).
[7] See generally, R Atkinson and R Fotheringham, 'Dramatic Copyright in Australia to 1912' (1987) 11 *Australasian Drama Studies* 47; E Webby, 'Adaptations: Stage, Screen and Other Versions of *His Natural Life*, 1886–1998', in M Clarke, *His Natural Life*, first published 1874, Academy Editions of Australian Literature edition, L Stuart (Ed), University of Queensland Press, Brisbane, 2001, pp 591–605; see also R Fotheringham, '*Furphy 2*— Some Echoes of Marcus Clarke' (1996) 36 *Notes & Furphies* 20 at 20–22.
[8] *Weekes v Williamson* (1886) 12 VLR 483.
[9] See Copyright Act 1905 (Cth) s 13(1)(e); Copyright Act 1911 (Imp) ss 1(2)(c), (d).
[10] See generally, National Archives of Australia: Copyright Office; A1336, 'Applications for Literary and Dramatic Copyright (with exhibits)', 1 Jan 1907 – 31 Dec 1969; 2790, For the Term of His Natural Life (title of work), Marian Clarke (applicant), date registered 1913.

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> most great nineteenth-century novels it is also a powerful, passionate outcry against social injustice, human cruelty and institutional corruption.[11]

Since publication, *His Natural Life* has 'rarely been out of print',[12] and today booksellers still feature multiple editions, enticing a new generation of readers to face Australia's convict and colonial past and appreciate Clarke's broader contribution to Australian literary culture.[13] In 2009 alone, an edited biography of Clarke was released,[14] along with a new edition of the book as part of Penguin Australia's Popular Penguins series.[15]

As with many other authors of the colonial period, Clarke came to the colonies after being born in the United Kingdom. Unlike the fictional Dawes, Clarke was not 'transported' to Australia,[16] but he did arrive under less than ideal circumstances: with the little inheritance he had been left following the death of his father, Clarke migrated to the Australian colonies to live with his extended family.[17] Clarke arrived in Melbourne, Victoria at a pivotal time in the development of that city, and settled into a life that at various points saw him as a banker, bohemian, author, playwright, journalist, editor and librarian.[18]

While working for the *Argus* newspaper, he travelled to Tasmania to research the history of that colony and its convict past.[19] Inspired, Clarke began *His Natural Life* and the instalments were published in serial form, the most common method for the publication and dissemination of local literature,[20] in the *Australian Journal*, a literary magazine produced by colonial printer and publisher Clarson, Massina & Co.[21] Two

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[11] J Gleeson-White, *Australian Classics: 50 Great Writers and Their Celebrated Works*, Allen & Unwin, Sydney, 2007, p 33.

[12] Ibid, p 37.

[13] See A McCann, *Marcus Clarke's Bohemia: Literature and Modernity in Colonial Melbourne*, Melbourne University Press, Carlton, 2004, p 153.

[14] L Hergenhan, K Stewart and M Wilding, *Cyril Hopkins' Marcus Clarke*, Australian Scholarly Publishing, North Melbourne, 2009.

[15] See 'Popular Penguins' <http://www.popularpenguins.com.au/> at 5 April 2010.

[16] For example, Rolf Boldrewood, author of the revered *Robbery Under Arms*, was born in the United Kingdom and came to Australia at age five: see TI Moore, 'Browne, Thomas Alexander [Rolf Boldrewood] (1826–1915)', *Australian Dictionary of Biography* <http://adbonline.anu.edu.au/biogs/A030247b.htm> at 7 April 2010.

[17] L Stuart, 'Introduction', in M Clarke, above n 7, p xix.

[18] See generally, B Elliott, *Marcus Clarke*, Clarendon Press, Great Britain, 1958, pp 27–29; McCann, above n 13.

[19] A McCann, 'Introduction', in M Clarke, *For the Term of His Natural Life*, first published 1874, A&R Classics Edition, Sydney, 2002, p x. However, Stuart argues that there are differing opinions as to why Clarke went to Tasmania in the first place: see Stuart, above n 17, pp xxvi–xxvii.

[20] See generally, L Stuart, 'Nineteenth-Century English and American Literary Periodicals and their Australian Counterparts' (1980) 4 *BSANZB* 180; E Morrison, 'Serial Fiction in Australian Colonial Newspapers', in JO Jordan and RL Patten (Eds) *Literature in the Marketplace: Nineteenth-century British publishing and Reading Practices*, Cambridge University Press, New York, 1995, pp 306–24; T Johnson-Woods, *Index to Serials In Australian Periodicals and Newspapers: Nineteenth Century*, Mulini Press, Canberra, 2001; P Eggert, 'Robbery Under Arms: The Colonial Market, Imperial Publishers, and the Demise of the Three-Decker Novel' (2003) 6 *Book History* 127.

[21] Elliott, above n 18, p 164; see also RG Campbell, *The First Ninety Years: The Printing House of Massina Melbourne 1859 to 1949*, A H Massina & Co, Melbourne, 1949; F Strahan, 'Massina, Alfred Henry (1834–1917)', *Australian Dictionary of Biography* <http://adbonline.anu.edu.au/biogs/A050252b.htm> at 21 September 2010.

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years later, in 1874, the story was published in a revised form by one of the few successful colonial book publishers, George Robertson.[22] Editions of the book were published in the United Kingdom and the United States shortly thereafter.

Throughout the revision of *His Natural Life* to just before his death, Clarke worked as a librarian at the Public Library of Victoria, with varying degrees of success.[23] When he died from the skin disease erysipelas in 1881 at age 35, less than a decade after *His Natural Life* had enjoyed peak readership in the *Australian Journal* and the subsequent first edition of the book, Clarke had lost his job.[24] According to Clarke's will and the accompanying probate documents issued by the Supreme Court of the colony of Victoria, Clarke left his widow, Marian, and children with an estate worth about £99, far less than his own father had left him a few decades earlier.[25]

Clarke's family was in such a weak financial position that in 1886, five years after Clarke's death, the Legislative Assembly of the colony of Victoria considered asking the governor of the colony to spend £1000 on the publication of new copies of Clarke's books, in recognition of his contribution to the colonies, with the royalties from sales to go to his widow and children.[26] After some discussion, the Legislative Assembly resolved to ask the governor to create a trust for the entire £1000 to support the upkeep of the family.[27] Parliamentary debate surrounding this decision reveals how revered Clarke and *His Natural Life* generally were in the colonies and elsewhere by this time: one parliamentarian notes that: 'It was sad to reflect that a man with [Clarke's] natural gifts was unable to provide for those who were near and dear to him.'[28]

I will now turn to consider how colonial copyright affected and restricted Clarke's ability to 'provide for those who were near and dear to him' and the complex relationship that Clarke and his publishers had with copyright law during this period. Clarke did not enjoy many of the benefits of copyright in *His Natural Life*; in the quotation extracted in the title of this article, Clarke could justifiably be describing the law of copyright. This is not to deny the fact that, often living outside his means, he was the cause of many of his own financial struggles: in contrast to the kind words expressed by one parliamentarian above, in the same sitting another describes Clarke as 'more or less of the Bohemian temperament, living for the day's enjoyment, and scattering his wit and genius about with such prodigality that he left very little of it in a durable form'.[29] There is much evidence to support such a claim, as it is well reported that Clarke filed for bankruptcy on several occasions, including making an appeal to the Insolvent Court of the colony of Victoria in

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[22] McCann, above n 19, p xv. This George Robertson must be distinguished from George Robertson of Angus & Robertson, a publisher and bookseller that has enjoyed greater longevity than the publishing house of the former.

[23] See generally, S Burt, 'Library Profile: Marcus Clarke at the Public Library' (2001) 67 *The La Trobe Journal* 55 <http://www3.slv.vic.gov.au/latrobejournal/issue/latrobe-67/t1-g-t8.html> at 18 October 2010.

[24] Elliott, above n 18, p 252: 'Marcus Clarke died at four o'clock on Tuesday afternoon, 2 August 1881, at the poorest house in which he had ever lived, in Inkerman Street, St. Kilda.'

[25] See National Archives of Australia: Copyright Office; A1336, 'Applications for Literary and Dramatic Copyright (with exhibits)', 1 Jan 1907 – 31 Dec 1969; 2790, For the Term of His Natural Life (title of work), Marian Clarke (applicant), date registered 1913; 'In the Will of Marcus Clarke late of Melbourne in the Colony of Victoria, Gentleman, deceased. Probate'.

[26] Victoria, *Parliamentary Debates*, Legislative Assembly, 15 September 1886, pp 1480–88.

[27] Ibid, p 1488.

[28] Ibid, p 1482 (Mr Zox).

[29] Ibid (Mr Pearson).

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the year of his death to dismiss a debtor's summons worth £298 10s.[30] Had Clarke received any/many copyright royalties, he might have squandered these in a similar fashion, but during his life he received little money for his literary efforts. I will now explore the laws that made this the case.

Copyright in the Australian colonies and first and subsequent protection for *His Natural Life*

In previous commentaries on Clarke and the writing of *His Natural Life*, a traditional account emerges with respect to the inception and publication of the story. Pursuant to this classic version, in late 1869 or early 1870 Clarke approached Alfred Massina, publisher of the *Australian Journal*, with an idea for a serialised convict tale, demanding an advance of £50, then £100.[31] Massina agreed but the many episodes of the story took longer to write than either Clarke or Massina could have anticipated; at one point Massina allegedly had to lock Clarke in a room with a pen, paper and a bottle of whisky so that Clarke would complete that month's edition.[32] In 1872, and 27 instalments later, Clarke finished *His Natural Life*.[33] According to Massina's oft-quoted tale, published on his retirement, Clarke asked Massina, 'Will you give the story to me?' and Massina 'did, there and then.[Clarke] went right away and got £25 for it to start with from [colonial publisher] George Robertson'.[34] Clarke spent two years revising the work and it was subsequently published in book form by George Robertson in 1874.[35] Following this publication Clarke negotiated, through George Robertson's literary agent, FF Baillière, with British publisher Richard Bentley and Son, for *His Natural Life* to be produced as a three-volume edition in the United Kingdom.[36] This was published in 1875.[37]

The issue of copyright has been discussed at a number of points in previous literature though it is acknowledged by the individual authors that many 'unanswered questions'[38] remain with respect to this history.[39] For example, in one of the earliest biographies on Clarke, Brian Elliott questions the transfer of copyright that reportedly occurred between Clarke and Massina ('Will you give the story to me?'), wondering whether Massina kept the copyright in the serial version of the *His Natural Life* as subsequent re-prints appeared in the *Australian Journal*.[40]

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[30] See 'Law Report. Insolvent Court. Tuesday, May 3 (Before His Honour Judge Noel) Re Aaron Waxman v. Marcus Clarke', *The Argus*, 5 May 1881, 6 <http://nla.gov.au/nla.news-article5968203> at 7 April 2010.
[31] 'A Master Printer. Fifty Years in Business. Mr A.H. Massina', *The Herald* (Melbourne), 2 March 1909, p 6; Elliott, above n 18, p 151; Hergenhan, above n 4, p 57; Stuart, above n 17, p xxvii.
[32] Campbell, above n 21, pp 81-5; Elliott, above n 18, p 155; Stuart, above n 17, p xxx.
[33] Stuart, above n 17, p xxix.
[34] See above n 31; Elliott, above n 18, p 164.
[35] See Clarke, above n 5; Stuart, above n 17, pp xxxiii–xl.
[36] Stuart, above n 17, p xli.
[37] See Clarke, above n 6.
[38] Edwards, above n 4, at 520.
[39] See Elliott, above n 18, pp 164–65; Hergenhan, above n 4, p 56; Edwards, above n 4, at 520.
[40] Elliott, above n 18, pp 164–65.

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In a similar vein, although Clarke requested in an early letter to Richard Bentley and Son that the publisher should 'secure me the copyright',[41] there are inconsistent interpretations regarding not only issues of ownership, but even the threshold question of whether copyright subsisted in the Bentley edition. Laurie Hergenhan states that 'there was no copyright to the first publication outside Australia'[42] and that publisher George Bentley (of Richard Bentley and Son) may have 'spelt [the copyright laws] out' for Clarke, in which case the publisher would not have needed to purchase copyright.[43] In contrast, PD Edwards reports that '[George] Bentley . . . claimed to have purchased the copyright in both the first English edition . . . and all subsequent editions' and then argues that on 'the question of copyright, [Ian] McLaren's research [into Bentley and Son papers] appears to confirm that there was no formal agreement between Bentley and Clarke in respect of the first English edition'.[44] That research undertaken by McLaren reproduces a letter penned by Clarke that sets out the financial details of the arrangement with Bentley; he also notes that '[s]ome Bentley agreements with authors were for a lump sum (with or without copyright), a profit-sharing agreement, or publishing on commission',[45] though fails to address the issue of copyright in any agreement existing between Clarke and Bentley.

A commentary on colonial Victorian copyright laws, however, penned shortly after Clarke's death in 1881, lends support to Hergenhan's initial interpretation:

> It will not appear invidious if I refer to a local author of great ability, who was lately cut off in his prime by the sternest of legislators—Death. I need not say that I refer to the late Marcus Clarke. He published a work in Victoria, 'His Natural Life', which was acknowledged to be powerfully written, and recognised as displaying an intimate knowledge with facts in the dark past, which, but for him, might never have been unearthed, and from which future writers may . . . suck forth the essence of his labours, and possibly build fortunes thereon. He also, subsequently, published the work in London. It is sadly to be feared that he made no profit out of the latter publication. But he was chained down by the inflexible law, and was not in a position to make a proper bargain with an English publisher. His property was comparatively valueless except in one small part of the world.
>
> . . .
>
> To carry the matter further, suppose that from some circumstance Mr. Clarke should obtain a sufficient posthumous fame, every printer in the world out of Victoria might print and publish the work, or any of his works, and utterly ignore every claim which the representatives of the deceased author might make.[46]

[41] Letter from Marcus Clarke to Richard Bentley and Son, 30 December 1874 (State Library of Victoria, Clarke, Marcus—Letters, 1874–1875 [manuscript]). A copy of the letter is held by the author but it also appears in full in Hergenhan, above n 4, pp 58–59 and IF McLaren, 'Richard Bentley and the Publication of *His Natural Life*' (1982) 6(1) *BSANZB* 3 at 5–6.

[42] Hergenhan, above n 4, p 60.

[43] Ibid, p 62.

[44] Edwards, above n 4, at 520; McLaren, above n 41, at 6–7.

[45] McLaren, above n 41, at 7.

[46] J Finnamore, 'Imperial Copyright, As Affecting the Colonies' [1881] *The Victorian Review* 713 at 720–21.

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Thus, it is clear that many of the 'unanswered questions' surrounding Clarke, *His Natural Life* and copyright involve gaps in reported accounts, inconsistencies in academic commentary, and no consideration of the actual copyright statutes in force in the colony of Victoria or elsewhere during this period. On that basis, I examine four issues that emerge in this area:

- the subsistence of copyright in *His Natural Life* in serial form, as published in the *Australian Journal*;
- whether Clarke or Massina owned that copyright;
- the subsistence and ownership of copyright in the 1874 Robertson edition; and
- the subsistence of copyright in the 1875 Bentley edition.

Copyright in the Australian colonies and the subsistence of copyright in *His Natural Life* as serial

Modern readers of *His Natural Life* may be surprised to learn that the phrase 'for the term of his natural life', today so synonymous with Australia's dark past, was not used exclusively in a convict or criminal context. It was a common term that appeared in a variety of British and, subsequently, colonial Australian laws. For example, pursuant to s 14 of the first colonially-enacted copyright statute, the Victorian Copyright Act 1869,[47] copyright was deemed to 'endure for the natural life of such author and for the further term of seven years commencing at the time of his death' or 42 years, whichever period was longer.

That statute had only been in force for one year when *His Natural Life* was published in serial form. This was due to the fact that, only a year earlier in 1868, the House of Lords had clarified the nature and application of the imperial copyright laws, as affecting the colonies, in force at that time. The main issue arose from the limited territorial application of the Literary Copyright Act 1842 (UK),[48] the legislation that protected all forms of published books. Pursuant to s 29 of that statute, it was provided that: 'And be it enacted, That this Act shall extend to the United Kingdom of *Great Britain* and *Ireland*, and to every Part of the *British Dominions*.'[49]

This provision did not mean, however, that a work published in, for example, the colony of New South Wales was entitled to copyright protection throughout the British empire pursuant to the Literary Copyright Act. Such an interpretation was rejected by the House of Lords in *obiter* in the 1868 decision *Routledge v Low*[50] ('*Routledge*'). In that case, the respondent publisher claimed that Routledge had infringed its copyright by reproducing for sale a book authored by the second respondent, Maria Cummins, titled *Haunted Hearts*.[51] Cummins lived in the United States but on the date of the publication of *Haunted Hearts* in London she was holidaying in Montreal, Canada, a British

[47] 33 Vic. no. 350.
[48] 5 & 6 Vict, c 45.
[49] Ibid, s 29 (emphasis in original). For an examination of the passage of this statute, see C Seville, *Literary Copyright Reform in Early Victorian England: The Framing of the 1842 Copyright Act*, Cambridge University Press, Cambridge, 1999, pp 1–39.
[50] *Routledge v Low* (1868) LR 3 HL 100.
[51] Ibid, at 107.

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dominion. Routledge in turn argued that Cummins, not being a resident of the British empire, was not entitled to copyright protection as an 'author' under the 1842 Act.[52]

The Lord Chancellor, Lord Cairns, identified three questions that were relevant to the determination of the case: 'First: where, in order to obtain a title of copyright, must the publication of the work take place? Second: what is the area in and throughout which the protection of copyright is given? And thirdly: who is the person entitled to that protection?'[53] The House of Lords ultimately found that the most significant issue arising from the case was whether the work was first published in Great Britain. It did not matter where the author was domiciled; any work would be granted protection under the 1842 Act so long as first publication occurred in Great Britain.[54] As Lord Cairns, states:

> the protection is given to every author who publishes in the *United Kingdom*, wheresoever that author may be resident . . . The intention of the Act is to obtain a benefit for the people of this country by publication to them of works of learning, of utility, of amusement. This benefit is obtained, in the opinion of the Legislature, by offering a certain amount of protection to the author, thereby inducing him to publish his work here.[55]

That protection was quite extensive. Where, however, first publication occurred in one of the colonies of the United Kingdom, the author would not be entitled to copyright protection under the 1842 Act.[56] This was reflected in the *obiter* of the case.[57] Thus, an interesting paradox emerged, as noted in an 1878 parliamentary review into UK, colonial and foreign copyright:

> Copyright in the United Kingdom extends to every part of the British dominions, but if a book be published first in any part of the British dominions other than the United Kingdom, the author cannot obtain copyright, either in the United Kingdom or in any of the colonies, unless there is some local law in the colony of publication under which he can obtain it within the limits of that colony.[58]

Any subsequent publication in the United Kingdom did not appear to alter that situation. It did not matter if the work was 'original', the general criteria for the subsistence of copyright[59] when compared with what had been previously published in the United Kingdom; first publication had to occur in the UK or imperial copyright protection would be lost to the author. Still, it was not always clear to colonial publishers and authors that

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[52] Ibid, at 107–08.
[53] Ibid, at 108.
[54] Ibid, at 110–11.
[55] Ibid (emphasis in original).
[56] See also *N. Hanbury Ltd v Dumsday* (1884) 10 VLR(E) 272; *Jones v Nicholson and Co.* (1892) 9 WN (NSW) 74 at 75–76.
[57] See (1868) LR 3 HL 100, at 108-110 per Lord Cairns; (1868) LR 3 HL 100, at 112-113 (Lord Cranworth).
[58] *Report of the Royal Commission on Laws and Regulations Relating to Home, Colonial and Foreign Copyrights* (1878, c. 2046) at [51].
[59] WA Copinger, *The law of copyright in works of literature and art: including that of the drama, music, engraving, sculpture, painting, photography and ornamental and useful designs: together with international and foreign copyright, with the statutes relating thereto, and references to the English and American decisions*, Stevens and Haynes, London, 1870, p 20.

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this was how the law had emerged and would be applied. For example, one witness providing evidence to the review noted that a 'colonial clergyman called upon me only yesterday and brought me his book, already published in the colony; he wanted to publish an edition in England. I said, "Are you aware that you have no copyright here?" He said, "No, certainly not...."'[60] Further, as noted in the Digest of the Law of Copyright accompanying the review into copyright: 'It is uncertain whether an author obtains copyright by publishing a book in the United Kingdom, after a previous publication thereof in parts of Her Majesty's dominions out of the United Kingdom.'[61] The accompanying footnote to this passage recognises that this confusion emanates from the *Routledge* case: 'These doubts arise from the language of the Law Lords ... all of whom declare in the most explicit terms that the first publication must in the United Kingdom in order that copyright may be gained. The case, however, cannot be said exactly to decide this point.'[62]

Indeed, as was further noted in this review, as a result of the operation of the law and the interpretation in *Routledge*, a colonial author was 'placed even in a worse position than a foreign author who is the subject of a country with which we can have an international copyright.'[63] On the basis of such conventions, if a 'foreign' individual first published a book in, for example, France, that author could also subsequently gain protection in the United Kingdom.[64]

Despite this confusion and the impact on the colonial and imperial publishing industries, 18 years passed after the *Routledge* decision before the British parliament sought to rectify this situation and enacted the International Copyright Act 1886 (Imp).[65] That statute subsequently provided protection for all books originally published in one of the dominions of the British empire, throughout the empire. However, after *Routledge* it only took the Victorian colonial legislature a year to pass a copyright law that would provide some protection for authors who published books within that jurisdiction.

Thus, the copyright laws introduced separately in the colonies of Victoria,[66] South Australia,[67] New South Wales[68] and Western Australia[69] were all drafted against this

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[60] E Marston Esq, cited in the *Minutes of the Evidence Taken Before Royal Commission on Copyright, Together With An Appendix* in *Report of the Royal Commission on Laws and Regulations Relating to Home, Colonial and Foreign Copyrights* (1878, c. 2046), 12 May 1876, [112].

[61] *Digest of the Law of Copyright* in *Report of the Royal Commission on Laws and Regulations Relating to Home, Colonial and Foreign Copyrights* (1878, c. 2046), at Art 7, p lxix (citation omitted).

[62] Ibid (see footnote 3).

[63] *Report of the Royal Commission on Laws and Regulations Relating to Home, Colonial and Foreign Copyrights* (1878, c. 2046), at [53].

[64] Ibid.

[65] An Act to amend the Law respecting International and Colonial Copyright 1886, 49 & 50 Vict. c. 33.

[66] Victoria superseded its 1869 statute with a new copyright statute, enacted in 1890: see An Act to consolidate the Law relating to Copyright, 54 Vic. no. 1076; Copyright Act 1890 (Vic).

[67] An Act to regulate the Law of Copyright, and for other purposes; 41 & 42 Vic. no. 95 (SA); The Copyright Act 1878.

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

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imperial backdrop.[70] Although the *Routledge* decision was not explicitly referenced, it is clear from parliamentary debate that the first piece of copyright legislation passed by an Australian colonial legislature, the 1869 Victorian statute, was created in response to the dilemma specifically created by this case.[71] However, given the nature and relationship of colonial laws at this time, publication in one colony did not mean automatic, 'inter-colonial' protection; copyright protection under a colonial law was limited to the boundaries of the colony of first publication.[72] Therefore, regardless of issues of ownership, which will be discussed in greater detail below, copyright had the potential to be worth very little at this time. It conveyed an exclusive right under law within a particular colony; beyond that jurisdiction, any further economic gain was on the basis of whatever benefit an author or publisher could negotiate.

The majority of the sections of these colonial copyright statutes were based on British legislation, with one key difference: although selected from the imperial laws, the various sections were amalgamated into one piece of legislation.[73] This move was based on limited precedent, and although bold it was arguably wise. As noted in the 1878 UK parliamentary review into copyright, the existing UK laws 'are drawn in different styles, and some are drawn so as to be hardly intelligible. Obscurity of style, however, is only one of the defects of these Acts. Their arrangement is often worse than their style'.[74] The colonial copyright statutes included provisions drawn from the Literary Copyright Act, the Lectures Copyright Act 1835 (UK)[75] and the Fine Arts Copyright Act 1862 (UK).[76]

The provisions most relevant to the present discussion concerned the protection of books, although the first colonial provisions, contained in the 1869 Victorian statute,

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[69] 59 Vic. no. 24; The Copyright Act 1895 (WA). In 1887, Western Australia did introduce the limited Copyright Register Act 1887, 51 Vic. no. 3 (WA), but this was repealed under the more expansive 1895 legislation.

[70] Queensland and Tasmania passed laws relating to certain aspects of copyright law; however, neither law was as all-encompassing as those passed in Victoria, South Australia, New South Wales or Western Australia. See generally, An Act to make Provision for the Registration of Copyright in Books and Dramatic Pieces Published in Queensland 51 Vic. no. 2; An Act to make Provision for the Registration of Copyright in Works of the Fine Arts in Queensland 1891 (Qld) 56 Vic. no. 6; The Copyright Registration Act 1898 (Qld) 62 Vic. no. 13; An Act to make better provision for the Protection of Copyright in the Contents of Newspapers 1891 (Tas) 55 Vic. no. 49.

[71] See, however, Victoria, *Parliamentary Debates*, Legislative Assembly, 31 August 1869, 1837 (Mr Higinbotham) (not explicitly referencing *Routledge* but noting a case of the House of Lords where it was established that copyright protection goes to the publisher rather than the author).

[72] See also *Report of the Royal Commission on Laws and Regulations Relating to Home, Colonial and Foreign Copyrights* c. 2046 (1878) at [49]–[58].

[73] S Ricketson, *The Law of Intellectual Property*, LawBookCo, Sydney, 1984, [4.51]. See also R Burrell, 'Copyright Reform in the Early Twentieth Century: The View from Australia' (2006) 27(3) *Journal of Legal History* 239 at 242–46. For a greater discussion of the political context underpinning the passing of these Acts, see J Finn, 'Particularism Versus Uniformity: Factors Shaping the Development of Australasian Intellectual Property Law in the Nineteenth Century' (2000) 6 *Australian Journal of Legal History* 113 at 127–29.

[74] *Report of the Royal Commission on Laws and Regulations Relating to Home, Colonial and Foreign Copyrights* (1878, c. 2046), at [9].

[75] An Act for preventing the Publication of Lectures without Consent 1835(UK) 5 & 6 Will. IV. c. 65.

[76] An Act for amending the Law relating to Copyright in Works of the Fine Arts, and for repressing the Commission of Fraud in the Production and Sale of such works 1862 (UK) 25 & 26 Vict. c. 68.

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were not identical to their equivalents in the Literary Copyright Act.[77] Pursuant to s 2 of the 1869 Victorian Act (and the equivalent provisions in the subsequent statutes of other colonies), the terms 'book' and 'copyright' were defined, respectively, to mean:

> That the word 'book' shall mean and include every volume, part or division of a volume, newspaper, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan, separately published.
>
> . . .
>
> That the word 'copyright' shall mean the sole and exclusive right and liberty of making, printing, writing, drawing, painting, photographing, or otherwise howsoever multiplying copies of any matter, thing, or subject to which the said word is herein applied, or to which any original design as hereinafter described in section three of Part I. has been applied.

Section 14 provided for the subsistence of copyright in 'every book . . . first published in the colony of Victoria in the lifetime of its author', for the period of the life of the author plus seven years, or 42 years, whichever period was longer.[78] Registration was not a requirement for subsistence—first publication in the colony of Victoria was therefore all that was needed—but in order to sue for copyright infringement registration was required.[79]

Given that Clarson, Massina & Co was based in Melbourne, it can be assumed that first publication of both the *Australian Journal* and the subsequent editions of the journal, featuring *His Natural Life,* occurred in Victoria. As the Victorian Copyright Act 1869 came into effect on 1 December 1869,[80] it would have been in operation by the time of the first publication of the first edition of *His Natural Life* in 1870. Therefore, pursuant to the application of the Copyright Act 1869, copyright would have subsisted in the serial version of *His Natural Life* from the publication of the first part in the *Australian Journal* (as a serial magazine and its various parts would have been caught under the definition of a 'book' pursuant to s 2).[81] However, on the basis of the finding in *Routledge*, and as later confirmed by the *Report of the Royal Commission on Laws and Regulations Relating to Home, Colonial and Foreign Copyrights*, that copyright would only have applied in the

[77] The definition of the term 'book' was fundamentally the same as the definition provided in the UK by virtue of s 1 of the Literary Copyright Act, with one exception—the term 'newspaper' was included in the definition of a 'book' in the colonial provisions: cf 5 & 6 Vict, c 45 s 2 with 33 Vic. no. 350 (1869, Vic) s 2. The definition of 'copyright' in the colonial and UK statutes contained more substantial differences. The only definition that the Literary Copyright Act gave to the term 'copyright' was 'that the Word "Copyright" shall be construed to mean the sole and exclusive Liberty of printing or otherwise multiplying Copies of any Subject to which the said Word is herein applied'. Although, by implication, the definitions may have been the same, the lack of a more concrete definition supports the statement of Lord Cranworth in *Routledge* (1868) LR 3 (HL) 100 at 112: 'It is remarkable that the modern statute [the Literary Copyright Act], though it repeals all the former statutes, nowhere defines or declares what is to be understood by the word "copyright". It assumes copyright to be a well-known right, and legislates in respect to it accordingly.'

[78] 33 Vic. no. 350 s 14.

[79] Ibid, s 28.

[80] Ibid, s 1.

[81] The applicable term of copyright will be discussed with respect to both the serial and 1874 Robertson editions below.

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colony of Victoria. It is unclear whether Massina, or indeed any other colonial publisher, realised the geographical limitations of their proprietary rights at this point in time.

I now turn to the more complex question raised in this situation; that is, who owned the copyright in *His Natural Life*—Clarke, as author, or Massina, as publisher?

Ownership of copyright in the *Australian Journal* serial edition

As noted earlier, the ownership of copyright in the serial version of *His Natural Life* has been queried in a number of previous academic commentaries. This is arguably in part due to Massina's oft-cited tale regarding the financing of the story (Clarke's request for £50, then £100) and Clarke's subsequent request that he be allowed to have the story (after Massina complained that he '[didn't] want to hear the name of the blessed thing any more!').[82] The main issue that arises is with respect to the legitimacy of this story: whether Massina was speaking truthfully about events and, indeed, the threshold issue of whether the copyright did in fact belong to Massina so that he could subsequently transfer that property.

Thus, for example, in his 1949 retrospective on A H Massina & Co, Ronald Campbell is critical of Massina's account, reflecting that:

> No doubt [Massina] had many bad moments while Clarke was writing it instalment by instalment, but he knew well enough that he had helped bring a literary masterpiece into the world and that its presentation had given *The Australian Journal* a prestige which nothing else could have done, and which would last for all time.[83]

In a similar vein, in a 1976 analysis of the publishing history of *His Natural Life*, Hergenhan notes that both of the stories Massina told regarding the commissioning and publication of *His Natural Life* are 'generally accepted but open to question . . . [Massina's] memory of much earlier years was unreliable at some points and his comments are obviously coloured by hindsight and by his desire to make the most of his association with a famous work'.[84]

With respect to the issue of copyright, Campbell questions the amount that Clarke received for the instalments of *His Natural Life*; Massina's account referred to the payment of £100, but Campbell comments: 'It would be interesting to know the amount the author actually received for the serial rights—whether the original hundred pounds with which it is said Massina subsidised him covered the whole story, or whether he received additional "refreshers" later.'[85] Elliott also assumes that Massina owned the serial copyright in his 1958 Clarke biography: 'Although Clarke claimed the copyright of the revision, Massina seems to have retained his rights over the serial version . . . The question of the copyright does not appear to be altogether clear although Clarke's rights in the revision were never challenged.'[86] Hergenhan also queries whether 'the rights of

[82] See above n 31.
[83] Campbell, above n 21, p 77.
[84] Hergenhan, above n 4, p 57 (citations omitted).
[85] Campbell, above n 21, p 82; see also Elliott, above n 18, p 156; Hergenhan, above n 4, p 57.
[86] Elliott, above n 18, pp 164–65.

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book publication were Massina's to give away . . . In the nineteenth century rights of serial and of book publication were often separate'.[87]

What these accounts do not consider, however, is the applicable law at this time: the Victorian Copyright Act 1869. That statute included a section on the ownership of copyright in individual articles published in newspapers, reviews, magazines and other periodical works. The applicable provision, s 24, was adapted from s 18 of the British Literary Copyright Act and ran for 35 lines with one full stop. It provided, in part, that where a publisher or proprietor of a periodical work of the type listed above:

> and shall have employed or shall employ any persons to compose the same, or any volumes parts essays articles or portions shall have been or shall hereafter be composed under such employment on the terms that the copyright therein shall belong to such proprietor projector publisher or conductor, the copyright in every such encyclopaedia review magazine periodical work and work published in a series of books or parts and in every volume part essay article and portion so composed and paid for shall be the property of such proprietor projector publisher or conductor, who shall enjoy the same rights as if he were the actual author thereof and shall have such term of copyright therein as is given to the authors of books by this part of this Act . . .

Section 24 also provided that an author could reserve for himself the right to publish a work composed under his employment in a separate form; that author would then be entitled to the copyright in that separate publication.

Thus, by default, under the Copyright Act 1869 the copyright in an essay or article would automatically be owned by the publisher of a magazine or periodical work, where that essay was written by a person who was paid by the publisher for the piece or was under the publisher's employment. This interpretation is supported by Walter Copinger, in the first edition of his seminal treatise, published in the same year as the first instalment of *His Natural Life*. With respect to the equivalent British provision, Copinger states that:

> In order to give the proprietor of a periodical a copyright in articles composed for him by others, it is not necessary that there should be an express contract that he should have the property in the copyright. The fact of the author being paid by the proprietor for articles supplied expressly for the periodical, raises the presumption that the copyright is intended to be the property of the proprietor. Otherwise, the articles might be published by the writers thereof simultaneously, or shortly afterwards; possibly to the detriment and injury of the purchasers of the articles for particular periodicals.[88]

From the law and accompanying commentary, however, it is unclear whether s 24 solely applied to those who were formally or permanently employed at such a publication (for example, a journalist employed at a newspaper) or hired or commissioned to write a particular article, essay or story. The statement by Copinger arguably supports both: a journalist employed by a newspaper to writes stories on the facts of the day would probably not contemplate seeking to simultaneously publish that material in another publication, as to write such stories was part of their employment. In contrast, an

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[87] Hergenhan, above n 4, p 58.
[88] Copinger, above n 59, p 42.

individual hired to write a fiction story might not assume such a restriction. Copinger's interpretation would apply in that latter instance.

The combination of the law and its interpretation sheds new light on Massina's story. Although some parts may have been exaggerated and are therefore open to interpretation —such as the amount of money Clarke was ultimately paid for the 27-part serial, or Massina's disdain for *His Natural Life* by the end of its run—for the purposes of copyright law, Massina's recollections highlight two key factors that assist in the determination of the ownership of copyright. The first is that Massina agreed to pay Clarke for the story, regardless of the amount or indeed whether there was any formal, written agreement between the pair. The second is that Clarke asked Massina for the story once the initial serial publication had ceased.

On this basis, while copyright would have subsisted in *His Natural Life* in its first iteration in serial form, pursuant to s 14 of the Victorian Copyright Act 1869, Clarson, Massina & Co, as publisher of the *Australian Journal*, may have owned that copyright on the basis of s 24. As discussed above, according to Copinger's interpretation, all that was required for this to occur was payment. Regardless of the amount, it is clear from Massina's account that some payment was made to Clarke. Further, the fact that Massina specifically mentioned Clarke asking him for the story also supports this interpretation. As Massina remembers:

> 'A funny thing,' continued Mr Massina, 'happened when Clarke brought in the last of his copy of For the Term of His Natural Life. He said, "There's the end of it", and I said, "Thank God!" Clarke said, "Why?" and I said "I don't want to hear the name of the blessed thing any more!" "Will you give the story to me?" said Clarke. I did, there and then. He went right away and got £25 for it to start with from George Robertson. I could have made a lot of money out of it, but at the moment was glad to get rid of it.'[89]

Hergenhan has been particularly critical of Massina's recollection of these events. He notes a number of inconsistencies in the story, particularly the fact that, by the time Massina was describing these events of 1872, over 30 years later in 1909, it was clear that 'neither Massina nor any Australian publisher would have made a lot of money out of the first, or any early, book publications'.[90] Indeed, Elliott notes that *His Natural Life* was repeatedly re-published in the *Australian Journal* and that the publisher stated that it felt 'pleasure in paying tribute to the genius of Australia's greatest prose writer by a donation to the fund for the maintenance and education of the children'.[91] This indicates that Massina was aware of the poor financial situation of Clarke's family and, thus, that *His Natural Life* had not been a lucrative publication.

It is interesting, then, that Massina included such details in his story. This information supports the suggestion that both Massina and Clarke knew that Massina, as proprietor of the *Australian Journal*, owned the copyright in *His Natural Life* and, in order to proceed with the story in a different form, Clarke needed Massina to give him the story, which Massina agreed to do. Although the issue of the subsistence of copyright in the 1874

[89] See above n 31.
[90] Hergenhan, above n 4, pp 57–58.
[91] Elliott, above n 18, p 165.

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Robertson edition will be discussed in detail below, it is worth recognising, in response to Elliott's previous comment that 'Clarke's rights in the revision were never challenged', that Massina would have had no right to challenge such rights. Pursuant to s 24 of the Victorian Copyright Act 1869, Massina may have originally owned the rights but, under this subsequent, alternative agreement between proprietor and author, Clarke owned all the rights in the re-publication of the story.

Before proceeding to a consideration of the copyright in that re-publication in 1874, one final issue remains with respect to the serial version: the right to re-publish the serial. Clarke later sanctioned the publication of a serial version of *His Natural Life* in 1875 in *The Queenslander*, and, despite the discussion above, following Clarke's death the story was re-printed a number of times in the *Australian Journal*. With respect to the serial reprint authorised by Clarke, a note appeared at the bottom of each edition stating: 'The copyright of "His natural Life" has been purchased by the proprietors of *The Queenslander* from Mr. Marcus Clarke.'[92] However, it is clear from the first instalment that this is a serialised version of the 1874 Robertson book edition, rather than a re-publication of the *Australian Journal* version;[93] even the dedication to Sir Charles Gavan Duffy that is included in the 1874 Robertson edition is reproduced.[94] As will be discussed below, however, it is debatable whether *The Queenslander* legally needed to purchase copyright from Clarke in order to re-publish the tale.

Further, despite the preceding discussion, Massina clearly believed that he still had some rights to re-publish the tale, leading Elliott to speculate that 'Massina seems to have retained his rights over the serial version'.[95] In a similar vein, a brief obituary following Massina's death in 1917, featured in the Adelaide newspaper *The Advertiser*, recalls that *For the Term of His Natural Life* was first published in the A H Massina & Co (as the publishing house was known by 1917) publication the *Australian Journal* and—oddly, given the circumstances surrounding the article—that the tale 'has since been republished several times by the firm, which still retains the copyright of the novel'.[96] As has been discussed above and will be considered in greater detail below, the firm did not own the copyright in the novel, but this random comment in Massina's obituary fuels further confusion with respect to ownership of the tale in serial form.

Following Clarke's death, *His Natural Life* was reprinted in full in the *Australian Journal*; the first part appeared in September 1881, only a month afterwards.[97] The reprint ran until January 1883. Another reprint of the serial again appeared in the *Australian Journal* between September 1886 and January 1888.[98] It could be that permission for the re-prints was sought from Clarke's widow, Marian, and payment was

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[92] See, eg, M Clarke, 'His Natural Life', *The Queenslander* (Queensland), 12 June 1875, p 7 <http://nla.gov.au/nla.news-article18336491> at 24 September 2010; M Clarke, 'His Natural Life', *The Queenslander* (Queensland), 3 July 1875, p 7 <http://nla.gov.au/nla.news-article18336877> at 24 September 2010.

[93] Stuart, above n 17, p xl, provides further detail on this serialisation.

[94] See Clarke, above n 92.

[95] Elliott, above n 18, p 164.

[96] 'Personal', *The Advertiser* (Adelaide), 7 February 1917, p 6 <http://nla.gov.au/nla.news-article5559618> at 11 October 2010.

[97] SR Simmons (edited with additions by LT Hergenhan), *Marcus Clarke: An Annotated Checklist: 1863–1972*, Wentworth Press, Surry Hills, 1975, p 7.

[98] Ibid.

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made; as noted above, Elliott reproduces a statement from the publisher that it had made ‘a donation to the fund for the maintenance and education of the children’. Thus, one question surrounding Clarke, Massina and *His Natural Life* remains unanswered: whether this ‘donation’ was a copyright payment, or whether Clarson, Massina & Co believed it still owned the copyright and therefore any payment was just a ‘donation’.

Subsistence of copyright in the 1874 Robertson edition

In contrast to other copyright complexities discussed in this article, the subsistence and ownership of copyright in the first book edition of *His Natural Life*, as produced in 1874 by colonial publisher George Robertson & Co, has received very little attention, though the literature in this area is not comprehensive. In Massina’s recollection of events, Clarke went to Robertson, following his acquisition of the story, received a partial advanced payment and commenced revisions to convert the serial into a book.[99] Hergenhan and Edwards have also speculated with respect to the ownership of copyright in the 1874 edition, although Clarke as author did not feature as a candidate in either discussion. Therefore, in this section I will consider first the subsistence of copyright in the 1874 first edition of *His Natural Life* as a book and, second, the ownership of that copyright.

I have established above that copyright subsisted in the serial version of *His Natural Life*, as published in the *Australian Journal*, pursuant to s 14 of the colony of Victoria Copyright Act 1869. However, the existence of copyright protection in the initial serial version did not act to preclude a new copyright subsisting in a later version: provided sufficient alteration to the text was made, a ‘fresh’ copyright would protect that subsequent publication. As noted in the second edition of Copinger’s copyright treatise, published in 1881: ‘A new edition of a book may be a reprint of the original edition, which does not entitle the author to a new term of copyright running from the new edition; or it may be so enlarged and improved as to constitute in reality a new work.’[100] Further information is provided as to how this might be established:

> [E]ach successive edition, which is substantially different from the preceding ones, or which contains new matter of substantial amount or value, becomes entitled to copyright as a new work, and it is immaterial whether the new edition is produced by condensing, expanding, correcting, re-writing, or otherwise altering the original work; or by introducing notes, citations, or other additions.[101]

It does not appear that any case law laid down a definitive guide to establishing what would be considered ‘substantial’ for this purpose and the cases discussed with respect to this issue in Copinger’s treatise are not informative for the present discussion.

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[99] See above n 31.

[100] WA Copinger, *The law of copyright in works of literature and art: including that of the drama, music, engraving, sculpture, painting, photography, and ornamental and useful designs: together with international and foreign copyright with the statutes relating thereto, and references to the English and American decisions*, Stevens and Haynes, London, 1881, 2nd edition, p 101.

[101] Ibid, p 102.

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Therefore, in order to establish a 'fresh' copyright in the first edition of *His Natural Life* in book form, that book must have 'contain[ed] new matter of substantial amount or value' and, from an examination of Clarke's revision of the serial version, it becomes apparent that this requirement was satisfied easily.

Although only a handful of articles have been written regarding the relationship between Clarke, *His Natural Life* and copyright, much has been written about the detailed revision of *His Natural Life* that Clarke undertook in order to ready the story for publication.[102] Even prior to the completion of the serial version, Clarke sought advice from friend Sir Charles Gavan Duffy (to whom the 1874 edition was eventually dedicated) with respect to possible changes for book publication.[103] Duffy recommended changes to both the beginning and end, though this had broader implications throughout the story.

At the beginning of the serial, Devine is found guilty of the murder of Hans Blinzler, after refusing to disclose his connection to Blinzler; later in the story, is it revealed that Devine was married to Blinzler's daughter and sought to protect her honour by remaining silent on this incident.[104] At the end of the serial, the love interest of Devine, Dora, dies, but Devine saves Dora's daughter, Dorcas, who he takes to Victoria, where the pair experience the gold rush and Eureka Stockade.[105] The serial concludes with Devine returning to Europe. In contrast, the 1874 book edition begins with Devine accused of the murder of Lord Bellasis, following a violent confrontation between Devine, his 'father' (who is discovered to be not his father at all), Sir Richard Devine, and Devine's mother, Lady Devine, who had been in love with Lord Bellasis.[106] The book ends with Devine and his love, Sylvia—changed from 'Dora' in the serial—perishing in a shipwreck, wrapped in each other's arms.[107]

The impact of the revisions on the size, structure and substance of the story has been noted regularly in Clarke literature. A 1906 commentary in *The Bulletin* notes that:

> Of the original version of *His Natural Life* the new generation knows little; and the bound volumes of *The Australian Journal* that contain it are on the way to become rare and precious books. Yet that original version is in several ways interesting. It contains perhaps twice as much matter as appears in the current edition, and much that is now omitted is marked with Clarke's own cachet of distinction. Of the matter retained, much has been varied; for the revision was keen and careful . . .
> Incontestably the work has been improved since the original publication. The old version has not the rounded shape, the vital form which Clarke has given to the new.[108]

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[102] See, eg, 'The Making of a Masterpiece', *The Bulletin*, 26–27 September 1906, p 1 (Joan Poole attributes this article to AG Stephens, but no author details are given on the page); L Rees, '"His Natural Life"—The Long And Short of It' (1942) 14(2) *AQ* 99; JE Poole, 'Maurice Frere's Wife: Marcus Clarke's Revision of *His Natural Life*' (1970) 4 *ALS* 383; A Stewart, 'The Design of *For the Term of His Natural Life*' (1974) 6 *ALS* 394; V Crittenden '*His Natural Life* and the Original Ending' (1996) 40 (November) *Margin* 7; Stuart, above n 17, pp xxxiii–xl.
[103] Stuart, above n 17, pp xxxiii–xxiv; Rees, above n 102, at 102–03.
[104] See, eg, Rees, above n 102, at 99; Stuart, above n 17, p xxxiv.
[105] See, eg, *The Bulletin*, above n 102; Stuart, above n 17, p xxxv.
[106] See, eg, Rees, above n 102, at 99; Stuart, above n 17, p xxxv.
[107] See, eg, Crittenden, above n 102, at 7.
[108] *The Bulletin*, above n 102.

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In a similar vein, comparing the serial and subsequent book versions of *His Natural Life*, Leslie Rees comments that: 'It is not merely that the longer version has nearly twice the number of words of the version most generally known abroad. The difference is more than one of abridgment. There are important structural variations, even changes in the names and motives of characters.'[109] Most recently, Lurline Stuart describes the 1874 edition as featuring a 'substantial revision and condensation'[110] that 'as a whole was a long and painstaking task', arguably illustrated by the delay between the conclusion of the serial in 1872 and its appearances in 1874.[111]

Given these changes, it is clear that a 'fresh' copyright would have subsisted in the 1874 George Robertson first edition of the book version of *His Natural Life*, pursuant to s 14 of the Victorian Copyright Act 1869. However, this copyright had a significant limitation: just as for the serial version, copyright in the book only applied in the colony of Victoria. Beyond the boundaries of that colony, any individual or publisher could reproduce *His Natural Life* without permission or payment. Thus, the editors of *The Queenslander*, when that paper published the 1874 edition of *His Natural Life* in serial form, were under no legal obligation to either pay Clarke or purchase any copyright. It is important to note, though, that the market was not flooded with unauthorised versions of *His Natural Life*[112]—perhaps a benefit of a general lack of understanding of colonial and imperial copyright law at the in time, though it is not clear whether Clarke and Robertson also realised this fact upon publication of the 1874 edition (and the broader consequences that this would have later). In contrast, by the time of Clarke's death and John Finnamore's commentary in 1881, this information was gaining broader circulation.[113]

Still, this 'fresh' copyright in the book had one further benefit: it meant that, eventually, the 1874 George Robertson edition of *His Natural Life* would be protected under the Copyright Act 1912 (Cth) and enjoy the longer period of protection provided under that statute. When the 1874 edition was published, s 14 of the Victorian Copyright Act 1869 provided that

> copyright in every book which shall, before or after the passing of this Act, have been or be first published in the colony of Victoria in the lifetime of its author shall endure for the natural life of such author and for the further term of seven years commencing at the time of his death . . . Provided that if the said term of seven years shall expire before the end of forty-two years from the first publication of such book in Victoria, the copyright shall in that case endure for such period of forty-two years[.]

Given that, under the first duration proviso, copyright would only have protected the 1874 Robertson edition for approximately 14 years (Clarke died in 1881, seven years after the book was published, plus the additional seven years stipulated by the statute), copyright would have lasted for the 42-year period. That term would have expired in approximately 1916 but for the operation of the Copyright Act 1912, which subsumed the colonial copyright statutes and Copyright Act 1905 (Cth), and granted prospectively a

[109] Rees, above n 102, at 99; see also Stewart, above n 102, at 394–95.
[110] Stuart, above n 17, p xxxiii.
[111] Ibid, p xxxix.
[112] Simmons and Hergenhan have created a comprehensive bibliography of Clarke's publications, including all editions of *His Natural Life*: see Simmons, above n 97, pp 5–8.
[113] See Finnamore, above n 46.

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term of life of the author plus 50 years to all literary works.[114] On this basis, copyright in the 1874 edition of *His Natural Life* would have continued until 1931 (Clarke's death in 1881, plus 50 years) and, during the 1912–1931 period the owner of the copyright would have been able to avail themselves of the expanded rights also provided under the 1912 statute.[115]

Determining who owned the copyright in the 1874 Robertson edition is slightly more complicated, though it arguably has a neater resolution. On publication of *His Natural Life*, either Clarke or Robertson could have been the owner of the copyright in the book: Clarke as author pursuant to s 14 of the Copyright Act 1869 (which provided that the copyright 'shall be the property of such author and his assigns') and s 24 (which provided that copyright in the republication of a serial piece would be owned by the author, if that provision did indeed apply); or Robertson as publisher (by virtue of any agreement with Clarke, perhaps entered into when Robertson gave £25 'to start with', as reported by Massina).

Previous literature provides little conclusive evidence as to who was the copyright owner. For example, Hergenhan hypothesises that at some point both George Robertson & Co and British publisher Richard Bentley and Son were joint owners of the copyright,[116] though also notes a 1911 edition of *His Natural Life*, published by Ward Lock, that features the statement 'published under the terms of the Copyright Act, 1911, by special arrangement with Mrs Marcus Clarke, the owner of the copyright'.[117] Edwards, in turn, argues, on the basis of the accounting records of Richard Bentley and Son, that given 'no payments to Robertson for the novel [were made], it is probably safe to assume that he did not share in the profits and was not regarded by Bentley as joint-owner of the Australian copyright'.[118] In contrast, payments were made to Clarke's widow until at least December 1898.[119]

In the absence of any letters or agreements between Robertson and Clarke, it is therefore difficult to determine who owned the copyright immediately upon publication of the novel in 1874. No copyright information is included with the 1874 edition[120] and Clarke's will does not mention any ownership of copyright or royalty payments.[121] Still, there is documentary evidence that illustrates Clarke's widow, Marian, was the owner of the copyright by at least 1913: the Commonwealth registration of copyright forms.[122] In April 1913, an application was made by Marian to register the copyright in the book *For the Term of His Natural Life*, pursuant to the Copyright Act 1912.[123] The date '21st May 1874' was given as the date of first publication of the book, the place of first publication

[114] See Copyright Act 1912 The Sch – Copyright Act 1911 s 3.
[115] See Copyright Act 1912 The Sch – Copyright Act 1911 (Imp) ss 1(2).
[116] Hergenhan, above n 4, pp 66–68.
[117] Ibid, p 68.
[118] Edwards, above n 4, at 521.
[119] Ibid.
[120] See Clarke, above n 5.
[121] National Archives of Australia: Copyright Office; A1336, 'Applications for Literary and Dramatic Copyright (with exhibits)', 1 Jan 1907 – 31 Dec 1969; 2790, For the Term of His Natural Life (title of work), Marian Clarke (applicant), date registered 1913; 'Will of Marcus Clarke'.
[122] National Archives of Australia: Copyright Office; A1336, 'Applications for Literary and Dramatic Copyright (with exhibits)', 1 Jan 1907 – 31 Dec 1969; 2790, For the Term of His Natural Life (title of work), Marian Clarke (applicant), date registered 1913.
[123] Ibid.

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listed as ‘Melbourne Victoria Australia’, and first publication by ‘George Robertson’.[124] The registration record also illustrates that, upon the death of Marian, the copyright passed to Clarke’s daughters, Rose and Ethel, with son Ernest managing the family business affairs.[125] As a result of this, Marian Clarke and her heirs were able to exercise the exclusive rights available to the copyright owner, as expanded under the Copyright Act 1911, for the longer duration of protection provided under that statute. This became particularly important in the creation of an authorised film version of *His Natural Life*.[126]

Thus, the most significant copyright issue with respect to the 1874 Robertson edition was the limited territorial application of that copyright: protected to the boundaries of the colony of Victoria, but no further. The consequences of this publication will be discussed in greater detail below with respect to the 1875 Bentley edition in the United Kingdom.

Subsistence of copyright in the 1875 Bentley edition

One of the enduring questions surrounding the publishing history of *His Natural Life* is the subsistence and ownership of copyright in the Richard Bentley and Son three-volume, 1875 first edition of the book in the United Kingdom. I will examine the three issues that have arisen in this area. First, I will discuss previous academic commentaries that have examined this matter. Second, I will consider what Clarke and Bentley believed the legal position at the time to be. Third, I will evaluate this position against the relevant law to determine whether such views were, in fact, correct.

As discussed earlier, opinion is divided as to both the threshold question of whether copyright subsisted in the 1875 Bentley edition and, if it did, who owned that copyright. Both Finnamore[127] (in his 1881 commentary) and Hergenhan[128] (in his more recent account) state that copyright did not subsist in the 1875 Bentley edition, with Hergenhan reproducing a letter from Bentley, written shortly after Clarke’s death, indicating that Bentley was aware of this fact.[129] McLaren indicates details of an agreement between Clarke and Bentley.[130] Edwards reports that Bentley ‘claimed to have purchased the copyright’ in *His Natural Life*.[131] Stuart quotes a letter sent from Frances Cashley Hoey (whose role in this story will be discussed in greater detail below) to George Bentley, referring to the initial payment made to Clarke, that is ‘confirmed by an entry in the Bentley cashbook of £50 paid for copyright, dated 30 January 1876 well after the novel had been accepted for publication’.[132]

These accounts are not entirely mutually exclusive; Bentley could have purchased the ‘copyright’ from Clarke (Edwards’ suggestion) prior to the release of the novel and only after publication discovered that, by virtue of the earlier colonial edition, copyright did not subsist in the UK edition (the Finnamore and Hergenhan arguments). Perhaps if

[124] Ibid.
[125] Ibid.
[126] See above nn 7–10 and accompanying text.
[127] Finnamore, above n 46, at 720–21.
[128] Hergenhan, above n 4, p 60.
[129] Ibid, p 64–65.
[130] McLaren, above n 41, at 5–7.
[131] Edwards, above n 4, at 520.
[132] Stuart, above n 17, p xliv (citation omitted).

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Bentley had realised that copyright would not subsist in its edition of the novel, the firm may not have been willing to expend the time, effort and cost that would have been associated with publishing a story originating in one of the British colonies. In the alternative, all parties may have realised that no copyright would subsist in the edition just prior to publication but Bentley, on account of Clarke's strong personal connections, may have felt unable to pull the book,[133] and Clarke, desiring the potential reputational benefits that could come with the release of a novel in Britain, also wanted to proceed.[134] Still, the fact that the title page of each volume of the 1875 Bentley edition features the words 'All Rights Reserved' arguably indicates that copyright was an important issue to the publishing house.[135]

Copyright was also important to Clarke. In his initial 1874 letter to Richard Bentley and Son, Clarke asked that the publisher to 'secure me the copyright', though in a second letter in 1875, acknowledged Bentley was to pay him £50 on publication, but makes no reference to the issue of copyright.[136] It is clear from his original 1874 letter that Clarke believed copyright would subsist in the 1875 Bentley edition, indicating why he would be so adamant about retaining the copyright. Given the fact that a new copyright subsisted in the 1874 Robertson edition, it is arguably understandable that Clarke would have believed a new copyright would also protect the Bentley version. Still, it is unclear whether Clarke understood that copyright subsisted in the 1874 Robertson edition because of the substantial revisions he had made, or its publication in book rather than serial form. With respect to the Bentley version, Clarke may have believed that publication in a new jurisdiction would create a fresh copyright or that the proposed changes to the ending (discussed in greater detail below) would be sufficient to assert a new copyright.

Clarke himself possessed a reasonable understanding of the operation of colonial copyright law. This is evidenced by a letter Clarke penned to the *Australasian* newspaper in 1872, upon discovering that his dramatisation of British author Charles Reade's novel *Foul Play* had been performed, without Clarke's permission, at the Victoria Theatre in Sydney, New South Wales.[137] In response to this unauthorised performance, Clarke initially threatened legal action, but in his later letter explained that he had been advised by a solicitor not to pursue this claim.[138] Although Clarke does not explicitly state the reason in his letter, this would have been due to the fact that he could not enforce his copyright in New South Wales. More significantly for the present purposes, in the same comment Clarke complained about the lack of copyright protection for authors in this area:

> Why should not copyright be at least intercolonial, instead of purely Victorian? Why should not my drama be played in New Zealand and New South Wales (as it has been played repeatedly) without my being paid or being able to recover payment? It may be urged with equal force—why should I be able to dramatise Mr. Reade's novel *Foul Play*

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[133] Hergenhan, above n 4, p 66.
[134] Stuart, above n 17, p xli; but see Hergenhan, above n 4, p 62.
[135] See Clarke, above n 6.
[136] Letter from Marcus Clarke to Richard Bentley and Son, above n 41; Letter from Marcus Clarke to Richard Bentley and Son, 21 April 1875 (State Library of Victoria, Clarke, Marcus—Letters, 1874–1875 [manuscript]).
[137] See *The Australasian,* 6 April 1872, p 434.
[138] Ibid.

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> without paying him for the privilege? To which I reply—I am willing that the copyright law be altered, for Mr. Sefton Parry dramatised my novel, *Long Odds*, and played it for nearly a month in London without paying me for it.[139]

This suggests Clarke realised that colonial copyright was jurisdiction-specific, at least with respect to dramatisations. The statement also recognises a broader issue that an author had no exclusive right to dramatise his or her book at this time. The broader comment, however, lends support to the theory that Clarke may have believed that publication in another, non-colonial jurisdiction—the United Kingdom—would create a new copyright.

Bentley's beliefs regarding the subsistence of copyright in the 1875 edition have been the subject of greater academic commentary although, as noted above, the various accounts on this issue need not be considered mutually exclusive. From this literature, it is possible to distil a few facts: that Bentley paid Clarke £50 for the initial publication (whether this was directly for the copyright remains open to interpretation), but at some point realised that a 'new' copyright did not subsist in that firm's edition. This is supported by a letter, included in Hergenhan's commentary, from Richard Bentley and Son to an individual Hergenhan believes was Marian Clarke's lawyer,[140] stating that 'strictly speaking there is and was no copyright protection to the work in this country, it having first appeared in Australia'.[141] This was no rectified until five years later, with the introduction of the Imperial International Copyright Act 1886. After that statute was enacted, the Victorian 1874 Robertson edition (and, indeed, the *Australian Journal* serial edition) became protected throughout the British empire.

Despite these interpretations, it is clear that the only way a 'fresh' copyright could have subsisted in the 1875 Bentley edition of *His Natural Life*, pursuant to s 3 of the UK Literary Copyright Act, was if Clarke made enough changes before publication of this version, as occurred with respect to the 1874 Robertson edition. As noted above in the discussion on the subsistence of copyright in *His Natural Life* in serial form, it does not appear that a subsequent, facsimile publication of the book in the UK would have automatically entitled Clarke to a 'fresh' copyright in that jurisdiction, as first publication had occurred in Victoria. However, if sufficient change was made to the book and that version was first published in the United Kingdom, then it could attract a 'new' copyright through this avenue.

Still, with respect to such changes, it appears from his first letter to Richard Bentley and Son that Clarke was not keen on making any changes, though he had already received notice of one required revision: a happier ending.[142] In his initial letter, Clarke acknowledges this request and included details for how the change would be undertaken,

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[139] Ibid.

[140] Clarke's will, included as part of the registration documents for *For the Term of His Natural Life* in 1913, indicates that John S. Woolcott, the recipient of the Bentley letter, was either Clarke or Marian Clarke's solicitor at this time: see National Archives of Australia: Copyright Office; A1336, 'Applications for Literary and Dramatic Copyright (with exhibits)', 1 Jan 1907 – 31 Dec 1969; 2790, For the Term of His Natural Life (title of work), Marian Clarke (applicant), date registered 1913; 'In the Will of Marcus Clarke late of Melbourne in the Colony of Victoria, Gentleman, deceased. Probate.'

[141] Letter from Richard Bentley and Son to J S Woolcott, 2 December 1881, reproduced in Hergenhan, above n 4, pp 64-5.

[142] Letter from M Clarke to Richard Bentley and Son, above n 41.

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but was insistent that this be the sole alteration to the text, stating (Clarke used an underline in his letter to emphasise the points in italics below):

> I desire that the *correction which I send* [Mr Sterry, who was involved in the Bentley publication], *be the only correction in the novel*. Unless you can see your way to publish "His Natural Life" as I have written it (replacing the original end with by the M.S. sent to Mr. Sterry) and retaining the *appendices etc*. I would rather not have it re-published at all.[143]

As it transpired, no change to the ending eventuated; indeed, no reference to this previous proposal is even made by Clarke in his second letter to the Bentley firm in April 1875, outlining the financial details of the UK publication (£50 when the book was published, an additional £50 when 750 copies had been sold, and £50 for every additional 250 books after that).[144]

Prior to publication, however, *His Natural Life* did undergo a quite detailed revision, although Elliott describes these as 'only minor revisionary differences',[145] arguably on the basis that the changes were made mainly to the language rather than the substance of the story. Stuart, in the 2001 Academy Editions of Australian Literature publication of *His Natural Life*, provides details of the number and type of differences between the 1874 Robertson and 1875 Bentley versions.[146] As this research reveals, '[t]here are substantial textual differences between [the two editions] . . . computer collation reveals some three-and-a-half-thousand variants'.[147] Although these changes might have been comparatively 'minor' and, in fact, unnoticeable, the sheer number of such differences is quite considerable.[148]

There is debate regarding who was responsible for these changes. Edwards hypothesises that at least some of the revisions could have been made by Clarke, on the basis of a possible offer from Bentley at some point during December 1874 and April 1875, 'of a cash payment in return for copyright in the novel—the offer to which Clarke responded in his letter of 21 April 1875 . . . condition[al] on Clarke's undertaking or accepting a further revision'.[149] It is generally believed, however, that a third party, Frances Cashel Hoey, who was known to Clarke and worked for Bentley, was responsible for these revisions, rather than Clarke.[150] That an employee of the publisher undertook these revisions, rather than the author, would not have affected the subsistence of copyright, though may have gone to the issue of ownership, if copyright was found to subsist.

From the preceding analysis, it seems that Bentley—and, eventually, Clarke—believed that these typographical changes were not enough to establish a new copyright

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[143] Ibid (emphasis in original).
[144] Letter from M Clarke to Richard Bentley and Son, above n 136.
[145] Elliott, above n 18, p 165.
[146] Stuart, above n 17, pp xliii–xlviii.
[147] Stuart, above n 17, p xliii. Stuart also notes that when Bentley re-published *His Natural Life* in a single volume edition in 1878, an additional 500 changes were made, though these will not be considered here: Stuart, above n 17, p xlix.
[148] See Edwards, above n 4, at 522–23; Stuart, above n 17, pp xliv–xlviii.
[149] Edwards, above n 4, at 524.
[150] Elliott, above n 18, p 165–66; Hergenhan, above n 4, pp 61; McLaren, above n 41, at 6; Edwards, above n 4, at 524–26; Stuart, above n 17, pp xliii–xlviii.

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and that, given the 1875 Bentley edition was essentially a reprint of the 1874 Robertson edition first published in the colony of Victoria, there was no copyright protection for the later version. However, when viewed through the lens of historical copyright, it is possible to speculate that a new copyright may in fact have subsisted in the 1875 Bentley edition, as a result of the many minor changes that occurred before the book was published. The view that copyright did not protect the Bentley version does not appear to have been either challenged or validated during this period, but that does not mean it was correct. Had such a challenge occurred, it would have been interesting to see how a court compared the two editions (admittedly unassisted by the computer analysis undertaken by Stuart).

Thus, the question remains whether these minor textual changes between the first Robertson and first Bentley editions, though large in number, could have been enough to create a fresh copyright. As Copinger opines in the second edition of his treatise, published in the same year as Clarke's death:

> The general rule is, that each successive edition, which is substantially different from the preceding ones, or which contains new matter of substantial amount or value, becomes entitled to copyright as a new work, and it is immaterial whether the new edition is produced by condensing, expanding, correcting, re-writing, or otherwise altering the original work; or by introducing notes, citations, or other additions. Nor is it essential that the new edition should be an improvement on the old, the sole question is whether it is substantially different. A few mere colourable alterations in the text or the addition of a few unimportant notes will not be enough to sustain copyright as in a new work. As Lord Kinloch said in *Black* v. *Murray*, to create a copyright by alterations of the text, these must be extensive and substantial, practically making a new book.[151]

Given the sheer quantity of typographical amendments to the 1875 Bentley version, it is difficult to describe such changes as 'the addition of a few unimportant notes', but in terms of quality, it is questionable whether the changes were 'extensive and substantial, practically making a new book'.

Still, it appears that there was one way open to Clarke that would have guaranteed him a fresh copyright in *His Natural Life*, though this would have involved changing the story himself—something he expressly stated he did not want to do. Although the question remains with respect to how much of the book Clarke would have had to revise to create a new copyright, a change to the ending, the inclusion of an additional chapter, or some other revision, would unequivocally have guaranteed Clarke this imperial copyright. Yet Clarke was adamant that such changes should not occur. Had he known that making these changes would have guaranteed him copyright protection throughout the British empire, it is reasonable to suggest that Clarke would have acted to satisfy such requirements. In refusing to make any further amendments, Clarke essentially closed the final avenue through which he could have received a new—and more geographically substantial—copyright for *His Natural Life*.

Conclusion

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[151] Copinger, above n 100, p 102 (citation omitted).

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In this paper, I have considered a period often forgotten in legal history, and the relationship between the law and one of the most popular and enduring novels published during this time. I have examined, from a colonial and imperial copyright perspective, four questions raised by previous literature on Marcus Clarke and the publication of *His Natural Life*: the subsistence of copyright in *His Natural Life* in serial form; the ownership of that copyright; the subsistence and ownership of copyright in *His Natural Life*, as published in book form in Melbourne in 1874 by George Robertson; and the subsistence of copyright in *His Natural Life*, as published as a three-volume edition in the United Kingdom in 1875 by Richard Bentley and Son. Although many of these questions have been answered by considering the applicable law, a number of issues still remain; perhaps illustrating that, in the absence of meticulous publisher records, there are some copyright mysteries that even today are incapable of being solved. It is unfortunate then, though not surprising, that Clarke struggled to make a living from his writing, dealing with numerous copyright complexities and, as Finnamore describes it, 'property [that] was comparatively valueless except in one small part of the world'.[152]

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[152] Finnamore, above n 46, at 720.

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