"The World Daguerreotyped – What a Spectacle!" Copyright Law, Photography and the Commodification Project of Empire

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Abstract

This paper concerns copyright law and the history of photography. As has been documented by other writers such as Edelman, Bently and Deazley, the inclusion of photography in the copyright regime was controversial because of the mechanical and scientific nature of the method of production. However there is more to the story of copyright law and photography than one about classificatory objections and the derisory attitudes of particular legal and cultural elites about a new technology. The legal history needs to be understood in light of a much wider celebration of the wonder of photography and its importance to the world. Enthusiasm for the photographic medium impacted on political, economic and social life. This in turn left a mark on copyright law. This paper considers how the inclusion of photography within the copyright act served a larger economic ambition of Empire. Photography was an important new tool for representation of peoples, character and place in this world and the law encouraged new forms of exhibition and consumption that impacted on social, economic and private life across the British Empire.
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Abstract

This paper concerns copyright law and the history of photography. As has been documented by other writers such as Edelman, Bently and Deazley, the inclusion of photography in the copyright regime was controversial because of the mechanical and scientific nature of the method of production. However there is more to the story of copyright law and photography than one about classificatory objections and the derisory attitudes of particular legal and cultural elites about a new technology. The legal history needs to be understood in light of a much wider celebration of the wonder of photography and its importance to the world. Enthusiasm for the photographic medium impacted on political, economic and social life. This in turn left a mark on copyright law. This paper considers how the inclusion of photography within the copyright act served a larger economic ambition of Empire. Photography was an important new tool for representation of peoples, character and place in this world and the law encouraged new forms of exhibition and consumption that impacted on social, economic and private life across the British Empire.

Photography has been much studied as a disruptive technology. In producing an image photography captures the subject using machinery and scientific technique. This has challenged established ideas of the originality, creativity and authorship of images. Existing legal histories have primarily focused on how the artistic reception of photography affected its passage into the category of artistic works in copyright law and the peculiarities of the new legal category. This chapter builds on that heritage but takes the inquiry onto a broader terrain. Copyright historians have barely engaged with what is going on in the images. In the UK and the Australian colonies, the legislature was especially interested in the production of imagery that affected the public imagination, representing British civilization, progress, virtue and character. There was far more concern over the formation of a public visual imagination, seeing the world as empire, as a fascinating, exotic, material realm of commercial opportunity, than there was with analyzing the authorship claims of photographers or the authorship claims of other artists.

Photography sat at the interface of value creation and the development of international trade. Access to photography created a new and wondrous capacity to discover, represent and communicate the unknown, civilization, science, novelty and entrepreneurial opportunity. Not only did particular images have value because of what they discretely represented, through the production, mass reproduction and exhibition of imagery en masse, photography and its regulation promoted a way of seeing the world in terms of commercial potential. This rationale left its mark on ownership provisions in the British *Fine Art Copyright Act* 1862, with the advance of trade and moderating unruly market behaviour being a higher priority than the interests of artists or photographers in both the UK and Australian colonies.

The history of photographic copyright is a story about the origination of individual claims to own private property in photographic images, but it is also about the desire for images and the role played by law in feeding and training the public appetite for images. Existing legal histories that focus only on the creation of private rights, divorced from a larger discussion of the commercial purpose of the private rights, depoliticize photographic copyright. They focus on what was arguably the least interesting aspect of a fascinating time when copyright supported a major transformation in culture and society that has significantly affected how we see, act and relate to the world.

*Controversial technology*

Early photographic techniques originate from the 1820s however the most important early inventions were the Daugerreotype for which the French Government purchased the patent in 1839 and the calotype perfected by Fox Talbot around the same time. There was significant debate about the merits of both techniques and respective patents.¹

The daugerreotype involved numerous stages including preparing the copper faced plates by buffing; mounting and covering them in buckskin; sensitizing the plates in a dark room by coating them with a thin layer of bromo-iodide of silver; placing the plate in the plate holder for exposure in the camera; arranging the subject in front of the camera; lighting the scene; taking the shot; developing the plate in the dark room which involved exposure to heated mercury; fixing the plate by applying a solution of hyposulphite of soda; washing and gilding the plate; then drying it over a spirit lamp. The finished picture was protected by a cover glass, and the edges of the glass and plate were securely sealed by a strip of paper attached by means of an adhesive coating. Daugerreoptypes involved a

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very complex chemical procedure yet at the conclusion, it only produced one print.\(^2\)

Fox Talbot’s calotypes used sensitive paper coated in silver iodide, with later improved versions using gallic acid and silver nitrate. The negative was exposed in the camera, developed in a dark room and then printed on sensitive paper. It was possible to produce multiple positive prints from the negative.

Another important process was albumen silver prints, which date from the 1850s. These used egg whites to bind the photographic chemicals to the paper and presented a more commercially exploitable method of producing a photographic print on a paper base from a negative. Albumen print technology largely supplanted calotypes and was the basis of the trade in carte-de-visites or postcards.\(^3\)

With all of these processes it was apparent that photography involved a very specialised skill and science, and in the mid 19\(^{th}\) century, without the requisite knowledge and skill it was impossible to create the images. However in artistic terms the composition techniques and staging of scenes borrowed from traditional portraiture and oil painting. The selection and staging of the subject and composition of the shot was an intrinsic part of the process but this input need not have been provided by the photographic technician.

Daguerreotypes, calotypes, albumen prints and images made from other similar inventions were produced by complicated technical processes involving the manipulation of machinery, chemistry and light. These technologies recorded visual ‘facts’. As inventor Fox Talbot noted:

> One advantage of the discovery of the Photographic Art will be that it will enable us to introduce a multitude of minute details which add to the truth and reality of the representation, but which no artist would take the trouble to copy faithfully from nature.\(^4\)

Photographs were not like the imaginative or expressive works produced by hand by painters or sculptors. Whilst engraving was itself a complex technical art, photography seemed to produce similar results but require less intensive and less skilled labour processes. With photography, the technological process started to replace manual labour by the artist. During much of the 18\(^{th}\) century and into the 19\(^{th}\), the explosion in commercialisation of culture was accompanied


\(^3\) There is an excellent account of early commercial photographic processes and attendant divisions of labour in Oliver Wendell Holmes, ‘Doings of the Sunbeam’ in The Atlantic Monthly 12(69) (1863): 1.

by a definition and reassertion of the importance of cultural classifications and
discriminations.⁵ Photography challenged the existing classifications.

The conventional legal story

There are a number of legal writings that puzzle over the relationship between
copyright law, the requirement of originality and photographs.⁶ Doubts about
the capacity of the law to accept the creative validity of photography relate not
only to questions about its mechanical origins, but a related concern about the
identity of the original creative work produced by these technical processes.
Photography is perceived to be fundamentally different to other art. Copyright
requires an original expression in order to identify the creative moment and
actor, and correctly attribute ownership of the rights. A technology like
photography, where it is difficult to locate an original creative effort amongst
photographic copies and the image captures ‘reality’, is especially challenging to
accommodate. However mostly legal writers have been more preoccupied with
understanding the philosophical implications of the inclusion of photography for
legal principle today than with providing a detailed exploration and analysis of
the historical record.

A notable exception is the seminal French work of Bernard Edelman, Ownership
of the Image.⁷ This book traces the reclassification of photography and
cinematography, from processes involving manual labour and incapable of
sustaining a copyright, to creative endeavour deserving protection. Edelman
argues that when photography was a craft practised by small tradespersons and
amateurs it was seen as mechanical activity. There was no labour involved
capable of attracting a copyright. However especially with the cinema industry
attracting investment, particularly after the development of the talkies, the court
changed the way they interpreted photographic activity. They ‘corrected’ the

⁵ See John Brewer, ‘Cultural Production, Consumption and the Place of the Artist’, Brian
University Press, 1995).

⁶ Works not discussed here in further detail include Keith Lupton, ‘Photographs and the
concept of originality in copyright law’, European Intellectual Property Review 10(9)
Alistair Abbott and Kevin Garnett, ‘Who is the “author” of a photograph? European
Paintings in the Public Domain: A Response to Garnett’ European Intellectual Property
Review 23(4) (2001): 17; Simon Stokes, ‘Grave’s Case and Copyright in Photographs:
Bridgeman v. Corel (US)’ in Daniel McClean & Karsten Schubert (eds) Dear Images. Art,
Copyright and Culture, (London: Ridinghouse, 2002): 108; Roberta Rosenthal Kwall,

error of their previous classification and recharacterised the labour as a creative
deuvoir. Edelman argues that the subject served by this was not the creative
photographer because s/he automatically consented to the disposal of her/his
rights in the image by way of a labour contract. It was ‘capital’ that copyright
created and rewarded. Copyright reduced the risk to investors of a ‘plagiarised’
film competing with the ‘original’.

There are some difficulties with Edelman’s Althusserian-inspired legal analysis.
Commercial photographic reproduction, including fine art reproduction, had
become an established and booming business with a significant market by as
early as the 1860s.8 Copyright protection was conferred on photographs as
artistic works in the UK, France and Germany around this time;9 coincidentally
around the time of the births of the Lumiere brothers, credited with founding
moving pictures. As the French also conferred protection on photography before
the arrival of cinema, there must already have been some form of labour that
was broadly recognized as deserving protection.10 This problem suggests the
need for closer inquiry into the inclusion of photography in 1860s legislation.

The work of Lionel Bently11 takes up this challenge in relation to the UK,
considering the rationales for the passage of the Fine Art Copyright Act 1862,12
and the reasons for inclusion of photography. Bently’s work breaks from looking
at the issue through a focus on nature of the labour entailed in making
photographs to reconnect the inquiry with a discussion of the broader
development of copyright as a category of law in the nineteenth century. He
notes that the introduction of the Act was part of a larger project of reforming
copyright legislation concerning the arts. Legislation modeled on the Statute of
Anne 171013 had protected the rights of sculptors and protected the designs of
engravers from as early as 1735.14 However neither the drawings or paintings
that underlay these reproductions were covered by the engravers’ acts. This

8 See generally Anthony Hamber, A Higher Branch of the Art, (London: Routledge, 1996),
11.  

9 See for example, Court of Cassation on photography (1863), Primary Sources on
Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org. For a
brief comparison of the situation in these three countries see Hamber, Ibid, 11-13.

10 While Hamber does not reference Edelman he does note historical inaccuracies about
the discussion of photography in the much referenced work by Walter Benjamin, ‘The
Work of Art in the Age of Mechanical Reproduction’ (1936), Ibid, 23.

Karsten Schubert (eds) Dear Images. Art, Copyright and Culture, (London: Ridinghouse,
2002), 331.

12 Fine Art Copyright Act 1862 (25 & 26 Vic., c.68).

13 Statute of Anne 1710 (8 Anne, c.19).

14 Engravers’ Act 1735 (8 Geo. II, c.13) amended in 1767 (7 Geo 3, c. 38), and in 1777 (17
Geo 3, c. 57).
created the anomaly that the design of the painting for purposes of engraving and the derivative artistic labour of the engraver was legally recognized, but not the copyright of the 'original' artist or painter in the painting itself. However the primary beneficiary of this law was not the engraver. The engraver was primarily paid as an artisan employed by the art dealer. The art dealer arranged for the engraving and subsequent sales of the images and benefited from copyright protection.

Bently argues that photography was especially controversial because it disrupted the established commercial relations between painters and print sellers, where painters could demand high prices from art dealers for the sale of works that had potential for engraving. There was also a recognized problem with pirated engravings, available at both the high and low quality ends of the market. Photography provided an additional means to pirate engravings, and photographs also reproduced designs on a reduced scale.

The courts were unsympathetic to piracies. This can be seen from Gambart v Ball (1863), brought under the Engravers’ Act 1735. The defence put into question ‘whether a resemblance taken by means of photography, which is a mechanical as much as a chemical process, is not a copy within the meaning of the acts’. The defence argued that the act could not include forms of reproduction that were unknown to the legislature of the day. Erle, C. J., dismissed that suggestion:

The object of the statute, to my mind, was not merely to prevent the reputation of the artist from being lessened in the eyes of the world, but to secure to him the commercial value of his property — to encourage the arts, by securing to the artist a monopoly in the sale of an object of attraction... a photographic copy may excite in the mind of the beholder the same pleasurable emotions as would be communicated by a copy of any other description: and I see no reason why these very wide and general words should not be construed ... to be held to apply to any mode of copying known at that time and to such other modes of multiplying copies as the ingenuity of man may from time to time discover.

What activated the need for remedy was the potency of photographic images that undermined the value of engraved works. The expansive interpretation of the Engravers’ Act and the inclusion of photography in the Fine Art Copyright Act 1862 broadened the law to protect the existing reproductive market because as

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16 Gambart v Ball (1863) 14 C.B. (N.S.) 306 at 311.

17 Ibid at 317.
than its function’.\textsuperscript{18}

This is not to suggest that there were not serious misgivings about elevating the status of mechanical labour to sit alongside the creative labour of other arts practitioners. This is an issue taken up by Ronan Deazley.\textsuperscript{19} He describes the inclusion of photography in the Fine Art Copyright Bill in 1862 as a surprising late development. There was concern over awarding legal protection to a mechanical process, consistent with Edelman’s comments about derisive attitudes toward mechanical labour. In Parliament, in response to the comment that photography was not a fine art but a mechanical process, the Solicitor General Sir Roundell Palmer responded:

\begin{quote}
\textit{...although, strictly and technically speaking, a photograph was not in one sense to be treated as a work of fine art, yet very considerable expense was frequently incurred in obtaining good photographs. Persons had gone to foreign countries — to the Crimea, Syria, and Egypt — for the purpose of obtaining a valuable series of photographs, and had thus entailed upon themselves a large expenditure of time, labour, and money.}\textsuperscript{20}
\end{quote}

Deazley notes that concerns over the mechanical nature of photography were overlooked in part out of deference toward protecting the financial interests of British Gentlemen photographers who founded the burgeoning trade in travel photography by recording life and civilization in far flung and exotic places.\textsuperscript{21}

Bently’s and Deazley’s accounts are primarily oriented around explaining the place of photography within the new expanded legal category of fine art copyright. They show that jurisprudential concern for the originality of photographs was not so great an obstacle that it trumped other issues in the mid 19th century. Both writers also hint at conservative and establishment politics being part of the explanation for its inclusion, but whilst they are attentive to exploring the creation of the legal category that we now know as artistic works, they leave the broader politics of photography and its social impact largely unexplored.

Their focus raises important questions about historical method and the creation of copyright law as a legal category. Does an understanding of copyright law

\textsuperscript{18} Bently, ‘Art and the Making of Modern Copyright Law’, 341.


\textsuperscript{20} Copyright (Works of Art) Bill, Commons, March 20, 1862, 1891.

\textsuperscript{21} Deazley, ‘Breaking the Mould?’, 305.
require us to restrain ourselves from looking too closely at the images, so we come to think of them as works in bare abstraction, as primarily related to the institution of law, rather than society? For any lover of the sensuality of images there is an unsatisfactory sparseness and restraint that marks all the existing discussion of the origins of photographic copyright. The widespread enthusiasm for photography as an invention at the time also seems to get lost along the way in the existing accounts. It is strange that photographs would be relatively unremarked on in copyright history as images. Images are cultural objects and bearers of meaning. Imagery confirms perceptions of reality, of our being in the world, and can help us conceive of new possibilities. Images can produce significant social and emotional affects with economic and other reverberations.

At the time of passing the Fine Art Copyright Act 1862, British politicians were working through their understandings of the way photography impacted on representations of identity as well as the peculiarities of the markets for images. They were situating the controversy around photography within an understanding of much broader cultural dynamics and new commercial logics. These dynamics deserve to be further explored. The new law did not just create a new copyright category of fine art. It affected the way people saw and related to the world and each other.

The World Daguerreotyped

As a technology photography was widely and wildly received as an incredible, improbable and exciting triumph of human ingenuity. The following extract from American jurist Oliver Wendell Holmes brings to life the sense of marvel and delight with the new technology:

Before another generation has passed away, it will be recognized that a new epoch in the history of human progress dates from the time when He who

never but in uncreated light
Dwelt from eternity—

took a pencil of fire from the hand of the ‘angel standing in the sun,’
and placed it in the hands of a mortal.22

There are similar high-spirited references in newspapers and periodicals following the camera as it travelled across the globe. There was no doubt in the minds of educated people that the technology was itself evidence of human progress.

Badger argues that the controversy about photography was less about the precise nature of the artistic endeavour entailed than about the social disruption it facilitated:

Photography was too indiscriminate, too democratic. It cut across hierarchies of accepted subject-matter. And in so doing, photography potentially subverted the rigid class structures of 19th century Europe. The professional portrait studios that sprang up almost overnight in Europe and the United States enabled the proletariat to have likenesses made of themselves. It gave the lower orders — the rising middle classes, at least — some control of the means of representation, of knowledge, and therefore potential power. In New York in the 1840s, one could be ‘daguerreotyped’ for a dollar. Any young man off the streets, without refinement or art education, could set himself up in business as a camera ‘operator’. 23

Badger goes on to add, beneath the controversy about whether photography was art or science lay another set of discriminations between the amateur and the professional, and between grasping commerce and noble art.24

Parliamentarians were wary of the social disruption caused by this new tool of representation and this concern underpins some of the negative discussion of photography. However they were also keen to harness the power of photography for their own ends and to strengthen the British nation and Empire.

Part of the impetus for the hurried passage of the Fine Art Copyright Act 1862 was a broader public interest concern — the desire to make accessible a spectacular array of photographic images about the world and from around the world at the London International Exhibition of 1862. The International Copyright Act 184425 had provided foreign authors with protection for works of literature, drama, music and art. In introducing the Fine Art Copyright Bill the Solicitor General explained, 'It was of considerable importance in the present year that such a Bill, if the principle was approved by the House, should be passed with despatch; foreign artists, who had a copyright in their own country in those works which we were most anxious to see in the Great Exhibition, must either withold their contributions or expose themselves to the danger of having their rights invaded.'26

The 1862 London International Exhibition followed on from the Great Crystal Palace Exhibition of 1851 that had so captured the Victorian imagination and demonstrated the ‘success’ of British manufacturing and science. The 1862 display 'attempted both to exploit the memory of the Crystal Palace and to differentiate the 1862 show at South Kensington by arranging exhibits according to “classes, and not countries”, adding music and painting, and encouraging

24 Ibid, 19.
25 International Copyright Act 1844, 7 & 8 Vict., c.12.
26 Parliamentary Debates on the Fine Art Copyright Act: Hansard, 3rd Ser., 165 (Feb, 28, 1862), 845.
objects that demonstrated “the progress of Industry and Art” since 1851’.27 The colonies were well represented. Typical colonial subject matter included indigenous curiosities, as well as ‘incontrovertible proof of the expansion of Empire, Towns, public and domestic buildings, ports, railways, bridges and farms- all the material signs of “successful” colonization were extensively documented’.28 Realist portrayals dominated, and as one Australian of the time observed at a later International Exhibition, the displays were chiefly of the resources of the country in terms of its raw materials, suggestive of what the colonies lacked and what they promised.29 Photographs were not simply included in great numbers as part of the display but were key to teaching visual literacy to the masses attending. The connection was astutely noted in the press at the time:

‘The Great Exhibition itself,’ remarked one newspaper columnist in 1851, ‘is a representation to the eye,... is a part of the same progress’ of vision as the illustrated press and photography.

Like 'sun Painting [early photography] it [the Great Exhibition] speaks all tongues' as it literally speaks to the eye....

‘It is, indeed, the World Daguerreotyped. What a spectacle!’. 30

Exhibitions were designed to shape the way visitors would come to understand ‘how the material world was classified, observed and interpreted — or, in general, naturalized and consumed’.31 The taxonomy of exhibition provided an aesthetic grammar for observation and consumption that reinforced the view of the world from the perspective of the British aristocratic and commercial class.32 As well as demonstrating historical accomplishment, the message was forward looking. The world was there for exploring through imagery, and for the entrepreneur, for the taking.

In this context, the award of photographic copyright should not be understood as simply about the controversial decision to protect the labour of photographers or to reimburse the personal expenses of Gentlemen photographers on tour. The public motivations for its passage are equally important. That is, the award of rights to photographers did not stem from a desire to extend a private property right to an expanded category of creators. The rights granted under the *Fine Art


29 Hoffenberg, *An Empire on Display*, 132.


31 Ibid, 71.

32 Hoffenberg notes working men’s critique of the displays and neglect of applied arts, ibid, 211-12.
Copyright Act 1862 helped realize a public purpose. In the sense that it was also a response to Exhibition, the Act supported the building of Empire and international commerce at a time when evidence of cultural progress and commercial opportunity was of paramount concern to all modern governments.

There is a natural link between the politics of representation of Empire, and within the colonies of attracting migrants and investment, and the terms of the legal protection of photographs. The enthusiasm to create and display en masse particular imagery was sufficient to swamp any concerns over the legal fit of photography amongst the other fine arts. At the same time, photography’s inclusion in the Fine Art Copyright Act 1862 spoke to and facilitated a shift in the meaning of fine art. The inclusion of photography in the Act diluted the authority of the traditional custodians of the meaning of art and art classifications with a legal classification that was more responsive to 'democraticising' commercial and social pressures. The inclusion further assisted and strengthened art entrepreneurialism in British society. While fine art retained its traditional function as a source of moral and aesthetic education for civilised people, art increasingly instructed the public through circulation as commodity, with imagery made far more broadly accessible through exhibition and through the sale of authorised and unauthorized reproductions.

Supporting commodification

The Fine Art Copyright Act 1862 created ownership presumptions that favoured commercial actors over artists. In this way the Act entrenched the already dominant position of art dealers in the marketplace. Thus whilst the rights of painters were recognized for the first time in the Act, this did not initiate significant change in the way commercial art dealers negotiated contracts with artists over works that were considered to have strong commercial prospects.

Commissioner and Purchaser rights

The Fine Art Copyright Act 1862 supported commercialization in the way that ownership was demarcated. Section 1 awarded an exclusive right of copying, engraving, reproducing or multiplying such painting or drawing or design thereof, or such photograph or the negative, by an means and of any size for a term of life of the author plus seven years. However where works were commissioned, the copyright was automatically granted to the commissioner. Copyright also passed to the purchaser of a painting, drawing or photographic negative, unless the right was reserved in writing by the artist. Copinger comments, without citing authority:

This remarkable section places artists in a most peculiar position in regard to copyright, and numerous cases of hardship have been known to arise through artists, architects, and others entertaining a mistaken impression as to the rights conferred on them by this Act.
Artists must particularly bear in mind that, except where their work is
executed upon commission, the copyright is absolutely lost if at the
time of the first sale...there is no agreement as to whom the copyright
shall belong...The work has fallen into the public domain, and any one
may copy it unless he can be restrained on the ground of breach of
faith!.33

The grant of copyright to the purchaser of a painting in the Fine Art Copyright Act
1862 mirrors French provisions that Rideau attributes to the expectations of
powerful and influential art buyers.34 As Deazley notes, the award of copyright
to the purchaser is not a result of a naïve misunderstanding of the connection
between the tangible work and the intangible right, given the distinction
between invention and design of painting was already well developed through
the engravers’ rights, now well over a century old.35 The main reason the
purchaser would want the copyright was to facilitate commercial engraving and
lithographic reproduction of the image. Photo-mechanical processes did not
supplant lithography in the UK until the 1880s.36

The engraving and sale of paintings was a sophisticated business and copyright
was a key part of the transaction. As Bently notes, from the late 18th century
onwards, commercial art dealers solicited marketable paintings for reproduction
and artists could demand extremely high prices for suitable works to engrave.
Jeremy Maas suggests that the creation of an artwork or painting was becoming
less a discrete object of commerce than a point of origination for a much larger
set of commercial relations between artist, art dealer and the public:

Many a picture ‘worked out’ between a patron and an artist
presupposed a copyright by the very nature of the picture’s subject
and intended treatment, even before it was executed...In effect, when
the picture appeared to be a finished product, it was at the same time
essentially a stage in the sequence of events from inception to

and Haynes, 1904), 367.

34 Frederic Rideau, ‘Nineteenth Century Controversies Relating to the Protection of
Artistic Property in France’, in Deazley, Kretschmer, & Bently, (eds) Privilege and
251.


36 Hamber, A Higher Branch of the Art, 23. Note however English artist Dante Rossetti
was exceptional in embracing the new medium because with photography he was better
able to control reproductions himself which he considered preferable to dependency on
engravers. Alicia Craig Faxon “Rossetti’s Reputation: A Study of the Dissemination of His
Art Through Photographs” in Helene Roberts (ed), Art History through the Camera’s
acceptance by a nation-wide, even a world-wide public.37

Many of the most lucrative works art dealers sought to purchase were ‘sensation paintings’. These images were produced with a view to their market potential as engravings, with interest heightened by creating a spectacle of the work. There was public exhibition and touring of these paintings, with orders for replicas and lists of subscribers compiled by the entrepreneur along the way to facilitate further marketing and sales of reproductions.

The painting *Derby Day* by William Powell Frith provides an interesting example of the commercial logic of sensation paintings.38 Gambart employed a photographer to record the races at Epsom to provide Frith images to assist in framing the intended work. The painting was a very detailed representation of British characters and types at the races, likely to appeal to a broad middle class audience. The spectacle of dress, rather than the horses, was the main feature of the image.

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38 This account is taken from Maas, ibid and Andrew Montana, ‘From the Royal Academy to a Hotel in Kapunda: The Tour of William Powell Frith's *Derby Day* in Colonial Australia’, 31(5) *Art History*, (2008): 754.
Gambart bought the engraving and exhibition rights for four and a half years (later extended) from the outset. He arranged for the work to be exhibited at the Royal Academy of Art in 1858 and the painting was pre-sold to a wealthy collector and philanthropist, Jacob Bell, who bequeathed the painting to the British nation in 1859. The display of this kind of subject matter at the Royal Academy was controversial with the *Art Journal* noting the painting represented a deterioration in standards, demonstrating a shift from ‘the highest aim and holiest duty of art’ to a pandering to public tastes. Gambart created a further controversy (perhaps deliberately leaking the story to *The Athenæum*) by employing a French engraver Blanchard, rather than a British artisan, to inscribe the quintessentially British work. The advance publicity he generated led to the police needing to be called to keep the London crowds at bay. There were further stories in the press that such were the crowds that a railing needed to be constructed to prevent the public clamoring to see the work from harming it.\footnote{Maas, *Gambart*, 100.} The work was viewed by Queen Victoria, Prince Albert and the Queen of Portugal, and a sketch of the occasion in the *Illustrated London News* shows their Royal Highnesses, the painting and the railing.\footnote{Ibid, p. 757. Note omitted.} As well as the fee for viewing the exhibition, Gambart took the names of subscribers with a view to later selling them prints.

This was a international art spectacle. A world tour of *Derby Day* was organized, beginning in Melbourne, organized by Gambart and a local commercial agent, William Shield. However as the bequeath of the painting had been well reported, there was further controversy in the UK and colonial press about the authenticity of the work on display in Australia. As Montana notes:

Wherever Derby Day travelled in Australia, some members of the public, in letters to the press, questioned whether it was the original painting, and Shield wrote explanation after explanation defending its provenance. Without copyright laws governing art and ornament in Australia until 1869, the difference between owning a work of art, and owning the copyright and the right to exhibit the work for a period of time, was not clear to many people. Their confusion forms a part of the tour’s reception.

The UK Parliament inquired into the whereabouts of the painting and the circumstances of its commercial tour in view of the bequest to the nation. This led to Gambart instructing Shield to return the painting to London, which he did after further hasty exhibition in Sydney and Melbourne, with a view to bolstering

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\footnote{William Frith’s *Derby Day* currently hangs in the Tate Britain, \url{http://www.tate.org.uk/servlet/ViewWork?workid=4672}.}

\footnote{Maas, *Gambart*, 100.}

\footnote{Montana, ‘The Tour of William Powell Frith’s *Derby Day*,’ 757.}
print sales. Gambart apparently noted there was no specified delivery date attached to the bequest to the British Nation.

To give an indication of the commercial value of the copyright for sensation paintings, in negotiating with Gambart over copyright in *The Finding of the Saviour in the Temple* (1854-60), Pre Raphaelite artist William Holman Hunt sought advice from Charles Dickens. Hunt obtained £3000 up front and £3200 contingent on the success of the engraving:

As recorded by Rosetti, ‘Gambart buys the picture with copyright for £5,500, of which £3000 was to be paid last Wednesday, and the remainder in bills in eighteen months. This is a miraculous draught of fishes...A little time ago the receipts at the door were £30 a day, and a very easy sum in arithmetic will show what this would come to throughout the year. (£9,390- for the year less Sundays)’.43

Whilst I am not aware of any detailed empirical study of artist contracts and copyright of the period, art historians do not suggest that the introduction of artist’s copyright in the *Fine Art Copyright Act* 1862 fundamentally changed the bargaining power of artists in negotiating rights with art dealers in a significant way. The new presumptions as to ownership of artistic copyright appear to reflect the status quo in relation to copyright.

The Act did however introduce a registration requirement that was controversial and particularly unpopular with artists. When queried in Parliament the response given was that it provided protection to purchasers, given that copyright may pass to them with the painting. In *Tuck and Sons v Priester* (1887) the court also claimed the effect of the registration right was intended ‘to bridle the (artist’s) right — to limit it’.44 Deazley notes, citing Blaine,45 there was concern to reign in unscrupulous artists who would sell an original work, then proceed to recreate and sell another replica to unsuspecting buyers. Buyers could be alerted to the previous work, through consulting the copyright register.46 The court however soon found that failure to register did not deliver artist’s works to the public domain. In *Graves Case* (1869) copyright was upheld notwithstanding the original copyright in a photograph having not been registered, though subsequent assignment of the right was.47 Nonetheless the

43 Maas, *Gambart*, 121. See also discussion of the contract for the engraving of Benjamin West’s *The Death of General Wolfe* in 1777 in Deazley, ‘Commentary on the *Fine Art Copyright Act* 1862’.

44 *Tuck and Sons v Priester* (1887) 19 Q.B.D. 629 at 636.

45 See Blaine, *On the laws of artistic copyright*.

46 Deazley, ‘Commentary on the *Fine Art Copyright Act* 1862’.

47 *Graves Case* (1869) L.R. 4 Q.B. 715. For the adequacy of the description required in the register see *Ex Parte Beal* (1868) LR 3 Q.B. 387.
registration requirement remained very unpopular with artists and the Copyright Commission later suggested it should only be necessary when the copyright and the picture are in different hands.\textsuperscript{48}

The presumptions to ownership and registration requirement reflect a market logic that maximized commercial efficiency and financial return. What the law supported was freedom of contract. It did little to enhance the existing bargaining position of artists. The unfairness this created was exacerbated because the strong bargaining power of the most successful art dealers extended far beyond the negotiation over the copyright. The large dealers had considerable influence over access to key exhibition spaces, promotion of works and distribution channels. This further fed into the spectre of vulnerable artists at the mercy of grasping art dealers who were more interested in money making than supporting the creation of original and worthy art- a popular view in the romantic era and today.

The treatment of artists as a distinctive class of copyright owners in some ways mirrors the dynamics underlying the development of literary property where the interests of printers and stationers, rather than the natural or common law right of authors, had also dominated.\textsuperscript{49} Arguably one consequence of this indifferent legislative response to the moral or natural rights of artists was that the questionable claim of photographers to the class of authors was made far easier for the law to accommodate. Cultural authority over art had already been diluted by commercial considerations and law played a role in assisting this movement. However whilst all photographers produced images, not all photographers would be accorded the status of authors.

\textit{Photographers as authors}

As Deazley notes, the expense of travel photography provided a key justification for extending copyright to photographers. High quality photographs of expeditions were sold to subscribers and could circulate in a restricted manner. However without copyright protection they could also be reproduced as, what Oliver Wendell Holmes described in 1863 as ‘the greenbacks of civilization’, cheap carte-de-visites or postcards for the masses.\textsuperscript{50} Copyright protection of photographs permitted greater control over circulation, allowing for recoup on investment in travel documentary. Protection also assisted in maintaining the exclusive status attached to owning particular works. Thus as with the treatment of photographic piracies under the \textit{Engravers’ Act}, the expansion of copyright


\textsuperscript{50} Holmes, ‘The Stereoscope and the Stereograph’,
supported the logic of capital accumulation by creating an artificial scarcity at a time when the Victorian visual imagination could barely be sated by the demand for images.

However section 2 Fine Art Copyright Act 1862 included a peculiar provision concerning images of natural scenes or objects:

> Nothing herein contained shall prejudice the Right of any Person to copy or use any Work in which there shall be no Copyright, or to represent any Scene or Object, notwithstanding that there may be Copyright in some Representation of such Scene or Object.

In the House of Lords Earl Granville explained that section 2 was required because as copyright did not previously exist in paintings, drawings or photographs, it ensured that the Act did not have retrospective application and affect the status of reproductions or representations of scenes previously made.\(^{51}\) Earl Stanhope added that it meant that the great publishing houses would not, by passage of the Act, lose their existing property in their valuable illustrated works.\(^{52}\) He also provided an additional justification:

> It was quite possible for two or more persons to take photographs of the same scene, building, or work of art from the same spot, and under the same circumstances, and of course producing similar results; ... A person, for instance, might make a photography copy of a photograph — say of the Colosseum — originally taken by another; who could say that the copy was not an original photograph?\(^{53}\)

Where images captured public vistas and especially fixed objects, private rights could be inconvenient and confusing for the courts and the public. This led to a clause that pointed to the difference between photographs of scenes, buildings, and works of art and works of portraiture, especially as in the latter case it would be possible to ascertain who the original artist was.

The award of copyright to portraits was also however considered controversial. This can be seen from the cryptic response by Mr Hennessy to the Solicitor General Mr Palmer about protecting travel photography. Hennessy ceded that protection may be required because of the expense associated with the tours abroad but noted, ‘that at all events photographic portraits should be excluded. A visit to the Holy Land was not necessary for the taking of a portrait of the hon. and learned Gentleman, and yet it would be hard to prevent the public from obtaining a copy of his likeness.’\(^{54}\) This comment perhaps echoes a more general concern about portraiture, that:

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51 Parliamentary Debates on the Fine Art Copyright Act: Hansard, 3rd Ser., 166 (May 22, 1862), 2013.


54 Ibid.
it pandered to the personal vanity of the sitter, rather than representing ideals that elevated the national character. The genre was attacked by those who were critical of the effect of commerce on the arts and on the moral character of individuals.\footnote{Holger Hoock, \textit{The King's artists: the Royal Academy of Arts and the politics of British culture, 1760-1840}, (London: Clarendon Press, 2003), 71.}

This further echoes Badger's comments on concern with the social changes wrought by photography. Carte-de-visites made portraits more widely accessible, but whether a Gentleman should stoop to trade in them or may require a copyright as an incentive to have copies produced was another matter.

Gentleman travel photographers and the photographers commissioned by eminent persons to take their portraits were literally a class above mere photographic ‘operators’ or technicians. Tensions and reservations over the latter's inclusion in the class of copyright owner came to the fore when the judiciary first considered the meaning of photographers as authors.

In \textit{Nottage v Jackson} (1883) Brett M.R. noted, ‘It is difficult to say who is the author of the photograph. Neither of them make the picture because, after all, that is done by the sun’.\footnote{\textit{Nottage v Jackson} (1883) 11 QBD 627 at 632.} Although the Act had introduced originality as a requirement for all artistic works for the first time the inclusion was not because of photography and there was no discussion of the copyright meaning of originality in the case.\footnote{The inclusion is discussed in Deazley ‘Commentary on the \textit{Fine Art Copyright Act 1862}’.} ‘The author’ was interpreted as the one who was the ‘effective cause of the picture’, meaning the person who ‘superintended the arrangement’. This meant that the author was the photographer who chose the arrangement for the snapshot, rather than the employers who came up with the idea of the subject (a photo of an Australian cricketer) and provided a photographer in their employ with appropriate equipment and materials, and the suggested location to take it. Because the registration of the employers as ‘authors’ was deemed invalid, their action against an alleged pirate failed.

However in \textit{Melville v Mirror of Life} (1895) the court reassessed the significance of the mechanical labour of operating the machinery, compared with the involvement of managerial labour on site. The court suggested that because the party claiming authorship appeared to be in effective control of the shoot, this made the actual operator a mere ‘agent’, the ‘principal photographer’ being the party capable of assuming control of the process. Authorship was vested with reference to the intention of the parties and the managerial labour associated with the taking of the shot, rather than with the mechanical operation of the apparatus. Later legislation clarified the situation with specific provisions vesting ownership of commissioned artworks with the commissioner, and
recognising the ownership rights of employers.\textsuperscript{58} Here, as with Edelman’s discussion of French photography, we see that a distinction between the photographer as author and as mere technician was created to support the commodification of photographic labour and reward larger scale investment in the photographic establishments.

The notion of the author–photographer as the one with supervisory control as developed in \textit{Nottage v Jackson} was influential and extensively quoted in the US decision \textit{Burrow-Giles Lithographic Company v Sarony} \textsuperscript{111} U.S. 53 (1884) regarding copyright protection for photographs of Oscar Wilde.

\textit{Oscar Wilde No. 18}

\textit{Carte-de-visite by Napoleon Sarony} (1882)

Noting that there may be cases where the photographs involved ‘mere mechanical reproduction’ or ‘simply .. manual operation by the use of these instruments and operation’\textsuperscript{59} the case centred on the significance of the more artful aspects of human labour:

\textsuperscript{58} s. 5 \textit{Copyright Act} 1911 (UK).

\textsuperscript{59} \textit{Burrow-Giles Lithographic Company v Sarony} 111 U.S. 53 (1884) at 59.
In regard to the photograph in question, ... it is a useful, new, harmonious, characteristic and graceful picture, and that plaintiff made the same... entirely from his own original mental conception, to which he gave visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by plaintiff he produced the picture in suit. 60

These efforts amounted to original authorship. Thus when there was a need to justify photography as deserving of a copyright, the law simply minimised recognition of the technical expertise required to produce a photograph, and stressed the significance of more abstract and intellectual contributions antecedent to the taking of the shot, the production of the negative and the making of photographic copies. This approach also carries a presumed separation between the domains of art and science into copyright law.

There is a similar distinction between photographer as author and as technician in operation in one of the first UK cases of photographic piracy, reported in *The Times* in January 1863. John JE Mayall, a well respected photographer who produced the first carte-de-visite of Queen Victoria61 sued over a piracy of a photograph of Sir Edward Bulwer-Lytton M.P. (later Baron Lytton). The well known politician/playwright/poet/novelist had commissioned the portrait which had been registered under the *Fine Art Copyright Act* 1862 by the photographer. The Defendant, had made alterations to the image, colouring it and penciling in changes to the curtain in the background, the table at which the figure stood, and the carpet. He suggested that because of his alterations to the original image it was not a piracy. In fining the defendant £3, 0s. 6d and £2, 2s costs, the magistrate noted, ‘The copies were a disgrace to any man pretending to a knowledge of photography’62. Reputable photography adhered to particular standards and copyright law protected against tampering with the veracity of the image and the chosen style of representation, especially where, as in this case, the photographer’s style of portrait reflected the good taste of respectable society.

Parliamentary debates in the UK reveal some controversy over the appropriateness of recourse to the Magistrates court to enforce the copyright because it was felt that the facts in such matters were liable to be misinterpreted and as such, these complex issues needed to be decided by a court of record.

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60 Ibid, at 60.

61 A copy is in The Royal Collection, Windsor Castle.

62 *Re Daniels*, 'The copyright in photographs', *The Times*, 22 January, 1863, 12. Section 7 set the maximum penalty available for summary proceedings at £10 or not exceeding double the full Price at which the infringing works were offered for sale. Section 11 provided an additional right to seek damages.
However the choice of venue was supported because of fears that if such cases ‘were driven into the Court of Chancery or the courts of common law, the value of the remedy would be destroyed’.  

Piracy was a criminal offence. In re Prince 1868 a debtor fined and convicted for piracy of engravings by photography was imprisoned. He was not entitled to discharge from prison because ‘the imprisonment is the real punishment for the offence, but he can get off by paying the penalty. Whether the penalty would be proveable or not under the bankruptcy of the prisoner makes no difference’. Thus was the harsh reality of copyright enforcement.

The few cases reported in the press show Magistrates caring little for the more ponderous discussions about the merit of photographs or proof of ownership or copying, notwithstanding the proceedings required interpretation of new legislation. The first recorded prosecution of a photographer under the Fine Art Copyright Act 1862 involved pirated carte-de-visites of a photograph of the well known Lyceum Theatre burlesque performer, Miss Lydia Thompson, the copyright registered by the reputable firm Southwell Brothers.  

The seller, Mr Hayward, claimed ignorance of the new law. This was considered no defence, however as he had offered up his remaining copies Southwell did not push for damages. The fine was 10 shillings plus costs. The same Times report also notes a summons issued against a Mr Milford. There is very scant detail as to the details of the complaint however it was noted ‘it was well known that a great deal of underhand trading took place in photographs, and that copies were sold without any inquiry being made into their copyright. He considered proof of trade of sale was sufficient.’ The fine was 40 shillings.

A month later there is a report of a summons issued against Mr Daniel concerning pirated photographs of the very popular satirical character played by the actor Edward Sothern, Lord Dundreary.
The eccentric character of Lord Dundreary was a character in the 1858 British play *Our American Cousin* by Tom Taylor developed and performed by Sothern for the American stage before touring London. Sothern’s biographer notes:

Lord Dun-dreary, it was said, had become popular in New York because the American theatregoers of those days revelled in a gross and insulting caricature of an English nobleman; in London the performance would, no doubt, be condemned as entirely wanting in humour, taste, and judgment... It must have been very gratifying to the actor to find that Lord Dundreary was at once understood by English folk. There was no suggestion of bad taste; the impersonation, extravagant though it undoubtedly was, was not considered foolish; it excited laughter, it gained applause, it interested as much as it amused, and it became the rage not only of London but of England.70

The photographer, Mr Hering, had printed ‘Copyright secured’ and his name and address on the reverse of his images of Lord Dundreary. Hering had first sought the permission of the actor to publish the work, and sales were not made available till after he secured registration. As with the piratical burlesque photographs of Lydia Thompson, copyright in the image of Lord Dundreary was protected without comment. For his piracies Mr Daniel was fined £3, 0s. 6d and £2, 2s costs.

The small selection of reported cases in *The Times* Police Reports gives a general indication of the public taste and demand for images at the time, as well as the role of law. The tenor of all the newspaper reporting suggests that piracy of popular images was ubiquitous and the Magistrates courts had no time to hear excuses for it, for discussion of uncertain points of law or about the virtues of the images. As one might expect at that level of justice, Magistrates sought to provide an order to the photographic trade as best they could and without entering into extensive debate. Through the Magistrates courts the copyright of photographers as a whole class was advanced, with commercial imperatives further ameliorating remaining legal reservations and distinctions between different kinds of photographers and their legal rights as artists and authors. Through recourse to the lower level of the judicial order the law assisted in the democratizing of society, suppressing discussion of the merits of different kinds of imagery, and recommending them only as commodities worth protection.

**Entrepreneurialism in the Colonies**

The British *Fine Art Copyright Act* 1862 was international in ambition in the sense that it addressed Britain’s place the world. However it was also international in the sense that this was far more than national law. As well as intersecting with the *International Copyright Act*, sections 1 and 4 anticipated implications for all the Empire’s subjects. The Act applied to authors who were ‘British subjects or resident within the Dominions of the Crown’. Initiatives to extend the territorial domain of copyright beyond the United Kingdom faced problems in practice.71 The requirement of a registration provision was recognised in the British Parliamentary debates as particularly problematic for residents in the colonies with Lord Taunton noting that Australian artists may be unaware that a work was registered and still be subject to penalties.72 However at the time of enactment the intention that the Act would have extra territorial implications was clear.

71 _Graves & Co v Gorrie_ (1903) A.C. 496 found that the words of the statute did not confer any copyright in the British Dominions and residents of the Dominions had to rely upon any protection conferred by colonial laws alone. Conversely British copyright owners could not rely upon the 1862 Act to extend their rights to the Dominions and had to comply with local requirements for protection, such as making the work within the jurisdiction. Thanks to Sarah Bannerman for this point. The *International Copyright Acts* had similar problems in extending territorial application of rights. See Acland Giles, ‘Literary And Artistic Copyright In The Commonwealth’, Part One, *Commonwealth Law Review* 3 (1905-1906): 112, and in relation to Canada, Catherine Seville, *The Internationalisation of Copyright. Books, Buccaneers and the Black Flag in the Nineteenth Century*, (Cambridge: Cambridge University Press, 2006).

72 Parliamentary Debates on the Fine Art Copyright Act: Hansard, 3rd Ser., 166 (May 22, 1862), 2095. For reasons outlined in note 42 the danger to infringing colonials was perhaps not so great.
Colonial newspapers of the period show a ready interest and awareness of UK debates about photography, its status as a fine art, the content of UK copyright commissions, and broader discussions of copyright law. Significant items from *The Times*, *The Spectator* and *The Atheneum* concerning UK copyright, cases and international copyright were republished in the colonial press within a few months of the original story appearing, and much faster after the completion of the Australian Overland Telegraph line in 1872 connecting the colonies to the rest of Europe via cable through Singapore and Java to Darwin. At a time when international and colonial exhibitions were major global trade events, the UK law provided impetus for equivalent legislative provisions across the Empire including the first Canadian statute in 1868 and the first Australian colonial Act in Victoria in 1869. However whether law was required to play the same role in the colonies as in the UK bears some further investigation, given the very different degree of access to art and quite distinct cultural differences and art markets across the Empire.

A consideration of the debates surrounding the first Australian colonial copyright act in Victoria shows key political values were shared between the Mother country and colony, but UK law was not simply transplanted to new jurisdictions. Further whilst Victoria, which saw itself as the cultural leader of the Australian colonies, enacted a law very soon after the UK, other Australian colonies were very slow to act. Two colonies, NSW and South Australia, did nothing for over an entire decade, WA and Queensland waited for close to two decades and Tasmania chose not to enact a copyright law at all. These differences reflect the different priorities, character and aspirations of the various Australian colonies. Whilst Victoria sought to demonstrate cultural leadership and a civilized attitude towards the arts, there was also an unusual alteration to the law applicable in the colony. The term of protection under the UK legislation was now linked to the life of the author plus seven years, but § 36 *Copyright Act* (Vic) reduced the term to fourteen years for paintings, drawings, sculptures and engraving and to only *three years* for photographs and the negative. There is no recorded explanation for this remarkable departure from the UK Act and the singling out of photography in particular for a radically

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73 *Copyright Act* 1868 31 Vict., c.54. The Canadian legislation was also based on the American model. See Sara Bannerman, ‘Copyright: Characteristics of Canadian Reform’ in Michael Geist (ed) *Canadian Copyright And The Digital Agenda: From Radical Extremism To Balanced Copyright*, (Toronto, Irwin Law, 2010), 18.

74 *Copyright Act*, 33 Vic. No. 350 (1869, Vic).

75 Alan Davies, Curator of Photography, State Library of NSW notes he has not ever come across discussion of copyright in the 1860s for Australian photographers. Personal Correspondence, State Library of NSW, 26 November 2010.

76 See Copyright Act 41 &42 Vic. No 95 (1878, SA); 42 Vic. No. 20 (1879 NSW); 51 Vic. No. 2 (1887 Qld); 59 Vic. No 24 (1895, W.A.). See also Merilyn Merril, *A Nation’s Imagination. Australia’s Copyright Records 1854-1968*, (Canberra: Commonwealth of Australia, 2003), 25.
reduced term of protection.\textsuperscript{77} We thus need to look more closely at the visual culture of Victoria for clues as to the different role played by the law in the colonies.

\textit{The Colonial Victorian Copyright Act 1869}

Political ambitions may have been shared between UK and colonial legislatures, but different practical circumstances dictated slightly different legal priorities and emphases. There were enormous difficulties to be overcome in ‘recreating’ British culture in her far flung dominions. Whereas in the UK there were also concerns over the lack of good taste and art education of the masses, the problem was far more acute when there was a real scarcity of any European art and culture. Copyright was one platform of a much larger cultural project, but it was not thought of in contemporary terms of providing private incentives to make works available and accessible in the marketplace. Making art available and accessible in the form of original works and reproductions was a major public enterprise. Creating access to good imagery was too important to be left to market forces.

In the period leading up to the new law, and following similar UK initiatives, the Victorian Government established a Fine Arts Commission 1863-1867. The terms of reference gives an indication of the concerns and priorities of government of the day:

The Commission’s role was to inquire into the subject of the promotion of the Fine Arts in this said Colony, and to propound and submit unto us a scheme for the formation, conduct and management of a public museum or museums, Gallery or galleries and Schools of Art for our said colony.\textsuperscript{78}

The progress of colonial art and culture was considered problematic if there were not good examples available to learn from. Unable to afford Old Masters from the £1000 per annum allocation from the public purse, the discussion in establishing public collections in Victoria, (and later in New South Wales), revolved around the merits of collections of copies:

The impossibility of procuring for such a purpose any of the large works of those masters leaves, as is suggested, no alternative but the purchase of copies; and the presence of copies in many galleries of Europe, public and private, establishes a precedent which might legitimately be followed here.\textsuperscript{79}

\textsuperscript{77} Thanks to Kate Bond for this point.

\textsuperscript{78} Second Progress Report of the Commission on the Fine Arts 1864-5 (Vic). Chairman Sir Redmond Barry. Records of the State Library of Victoria, Accession No MS 7855; MS Box 1199/2.

\textsuperscript{79} Ibid, 15.
The objective was to establish a ‘useful’ rather than a famed collection. Replicas and engravings could serve this purpose. Photography was also mooted as an alternative:

Modern science supplies one means of reproducing all the features of a picture, except the colour, with absolute fidelity. A photograph will cost a few shillings, and will give light and shade, the composition, the outline, the expression with perfect truthfulness, and by this means a complete collection of old Masters (not a few typical specimens) could be obtained and yet leave the bulk of the vote for the purchase of original pictures. I cannot therefore but hope that the Board will decide against the purchase of copies [replicas].

The lack of colour reproduction in photography was however considered problematic. The Gallery took advice from the London commercial art dealer, Ernest Gambart, who also assisted with procurement of replicas. Gambart advised Australian galleries that his copies were far preferable to an inferior collection of originals, and the Gallery obtained several works from him.

A letter published in the *Sydney Morning Herald* reports the view of Sir Redmond Barry, President of the Trustees of the Public Library, Museum, and National Gallery of Victoria and chairman of the Victorian Fine Art Royal Commission. He noted that a Canadian collection made entirely of copies was an ‘absolute failure’ notwithstanding serious attempts at promoting the endeavour. Ultimately the collections in Victoria and NSW were founded on the purchase of originals, engravings and replicas, the combination preferred because:

the true principles of Art must remain the same in every country and throughout all time — that the excellencies or peculiarities of the renowned painter may be displayed as effectually in one of his small works as in his largest performance — that the possibility of obtaining when required a few originals of a moderate size is not beyond expectation, and one of our number has been assured, upon unquestionable authority, that such may be obtained, and at prices not much if at all exceeding those which much be paid for copies worthy to serve as examples for imitation.

The Report added:

We believed that visitors to a Gallery of Art supported by public funds

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80 Letter from Professor Wilson to Sir Redmond Barry 3 Sept 1863, Records of the State Library of Victoria, Accession No MS 7855; MS Box 1199/2.


83 Report of the Commission on the Fine Arts 1864-5, Records of the State Library of Victoria, Accession No MS 7855; MS Box 1199/2, 5.
would expect to find there the productions of original genius pourtraying (sic) what is congenial to the feelings and habit of thought of the present age...\textsuperscript{84}

The Victorian Gallery opened in Dec 1869, a month after the passage of the Copyright Act (Vic).\textsuperscript{85} The Report of the Trustees 1870-1 notes the collection comprised 48 oil paintings, 22 water colours, 60 engravings, 813 photographs, lithographs, drawings and etchings and 151 statues and busts.\textsuperscript{86} Thus a very significant number of works on show were reproductions.

The Gallery opening coincided with the beginning of the world tour of \textit{Derby Day} organised by Gambart and Shield. Unsurprisingly \textit{Derby Day} proved to be a larger attraction,\textsuperscript{87} but whether this was of concern or celebrated by the Trustees in unclear.

The sensation created by \textit{Derby Day} was parodied in the colonial press, with the text below the sketch of the exhibition event noting a 'Photographic view of the above celebrated picture, as seen by our special reporter (A short Gentleman) who was much impressed with the figures in the foreground'.\textsuperscript{88}

The Trustees of the National Gallery of Victoria also produced a propaganda piece, Marcus Clarke’s \textit{Photographs of the pictures in the National Gallery Melbourne} (1875) as a major public statement about Victoria’s cultural

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\textsuperscript{84} Ibid, 5-6.


\textsuperscript{86} Records of the State Library of Victoria Archive MS 12855.

\textsuperscript{87} Montana, ‘The Tour of William Powell Frith’s \textit{Derby Day}’, 758.

\textsuperscript{88} Melbourne Punch Feb 9, 1865, reproduced in Ibid, 754.
leadership, that was well received in London. The Prefatory note explained it was desirable to publish the volume (originally produced in parts) because of the circulation of ‘indifferent photographs’ of the Pictures in the Gallery, and photographic reproductions of student copies of paintings being sold as copies of the original works. The concern was that these inferior copies disrupted the Gallery mandate of fostering ‘correct taste’ in art. A statement attributed to Gallery Committee member, James Smith noted that:

The copyright of these pictures belongs to the state, and the trustees should only allow them to be copied under conditions which would prevent any copy being sold which did not do justice to the original. Unless they take some precautions for this purpose, many people will be completely misled as to what constitutes true art.

The Victorian Gallery arranged for the special photographer for the government, Charles Nettleton, to photograph the collection. A search of copyright registrations shows, amongst a number of entries in Nettleton’s name, three that refer to photographs of oil paintings held at Gallery. It seems that a small number of registrations was felt sufficient for the Gallery to make a statement as to ownership and intention. However rather than enforce purported rights as copyright owner, the gallery simply went into competition with the pirates, producing photographic copies of paintings in their collection. This effectively democratised the collection by making it more widely accessible. Holden notes, ‘In this way an elite eighteenth century vision of the educative moral value of the fine arts was being replaced by a Victorian vision of art as accessible entertainment for all’. Both the Victorian and NSW Galleries also retained a Copybook that recorded student copying of works with student access to the collection regulated by rules based on those of the Royal Academy of Arts. These practices, coupled with surprising short term of the Victorian legislation shows that copyright law would be used not to protect owners’ rights per se, but to facilitate the greater good of society by enabling access to the arts and art education, as benefited by the availability of good, cheap copies.

There are similar motivations to foster access to ‘useful’ images revealed in the


90 Ibid, 34.


93 National Archives of Australia: A1187, 242-244.

practices of successful commercial photographers who appeared to ignore rights under the Copyright Act 1869 (Vic) altogether. The American and Australasian Photographic Company (A&A Co) was established by Henry Beaufoy Merlin in Melbourne in 1866. The business thrived through taking photographic portraits, with extensive touring across country towns. Centuries before Google embarked on their street map exercise, the A&A Co claimed to have invented ‘street photography’. An advertisement declared:

The A. and A. P. Co. have already taken photographs of almost every building in Melbourne, as well as in every town of any importance in Victoria. The negatives (many thousands) are deposited in the Company’s office in Melbourne, to which place, by forwarding the number, copies can be dispatched to any address at an hour’s notice. The south-eastern townships of this colony have already been taken, while others are in course of completion, each town averaging about 300 separate views ...

The main object the company have in view is simply the collection of a series of trustworthy views which will be of public interest and utility.⁹⁵

The financial motivation for partaking in such an enormous enterprise puzzled many:

The question with most persons will be, what object has the company in view, seeing that their representative does not press the sale of photographs in any way, although they are procurable at a very moderate cost? By stating what has been done in Victoria we will solve the problem. Every building of any importance in every town in Victoria has already been taken, and very carefully arranged and displayed at the company’s offices, so that if an insurance or an investment is desired to be effected, or any other object in which the importance or knowledge of the actual appearance of the town would be an advantage, the necessity of a personal visit is rendered unnecessary, as a call at the company’s rooms will just as well secure the object in view. To afford this information, the company charges a small fee, we believe one shilling.⁹⁶

The company also produced panorama shots of streetscapes and vistas.

The company had the benefit of copyright in Victoria, but not in NSW. This difference appears to be of little consequence as there are no registrations in Merlin’s name (or his apprentice Charles Bayliss), or the company’s name, on the Victorian register at all. However given the huge volume of negatives produced, copyright registration would have been infeasible, except for their very rare and exceptional images.

⁹⁵ Sydney Morning Herald, 5 September 1870, 8.

There was significant commercial value in a ‘a carte-de-visite library of cities, towns and residences - an image bank of the colony, from which reproductions could be purchased.’97 ‘Imitators’ soon stepped in. A public notice appeared in the Sydney Morning Herald claiming that ‘several photographers in Sydney have commenced to pirate the Company’s idea of photographing the city’.98 The ‘pirate’ works were considered to be technically inferior but able be mistaken as works of the A&A Co, whose name would ordinarily appear on the back of their images. The notice warned:

The A. & A. P. Co., .. rest their claim for support on the superiority of their work ... NOT ALL THE UNITED EFFORTS OF THE PHOTOGRAPHIC PROFESSION IN THE COLONIES HAS BEEN ABLE TO EQUAL ...

The A. & A. Photographic Company desire further to remind the public that these negatives are not taken for the mere immediate object of sale, but that being registered, copies can at all times be had.99

The company relied upon their reputation and quality for competitive advantage, rather than copyright law.

There were also other legal avenues that were used to protect images in the colonies. Trade mark law was one alternate avenue to protect valuable photographs. Based on the Merchandise Marks Act 1862 (UK),100 Victoria passed the Trade Marks Act 1864.101 It was noted in Parliament that fictitious labels are the same as fictitious bank notes.102 While NSW, Queensland and Tasmania were comparatively disinterested in copyright protection, they quickly enacted similar trade mark legislation.103 There is also a suggestion that in the colony of Tasmania, which had no copyright law, registration under the Merchandise Marks Act was the usual method for protection of photographs.104 A reported

97 Davies, Ibid, 66.

98 Sydney Morning Herald, 21 September 1870, 1. See also Catherine Bond, For the term of his natural life ... plus seventy years: mapping Australia’s public domain, PhD thesis, UNSW, (2010) 151ff.

99 Sydney Morning Herald, 21 September 1870, 1.

100 Merchandise Marks Act 1862 25 & 26 Vict. c. 88.

101 The Trade Marks Act 27 Vic No 221 (1864, Vic).

102 The Argus, 1 March 1864, 5.

103 Merchandise Marks Act 28 Vic No 5 (1864, Qld); 28 Vic No 6 (1864, Tas); 28 Vic No 9 (1865, NSW).

Victorian case *Frith v Levy* 1865 shows the use of trade mark protection to protect photographs.

The plaintiff’s stock in trade was photographic portraits of the Wesleyan clergy of Victoria, a trade allegedly worth £200 yearly until British made copies flooded the market. The plaintiff’s trade mark was simply a name, address and profession presented on a garter designed in wreath form, printed on the reverse side of their photographs. Some ‘pirate’ copies were only of the photograph, but some included the trade mark on the back. Damages were only sought for the counterfeit use of the trade mark. Damages were paid into court for £75 and the matter was adjourned.105

Paul Costigan notes the affixing of trade marks to many carte-de-visites in colonial Australia.106 It seems the practice of affixing marks survived alongside the passage of the colonial copyright acts and such use may have reinforced the value of trade in stocks of negatives, as well as served as akin to a copyright notice or intention to assert whatever legal rights could be had. It is worth remembering that legal rights can be used in quite creative and opportunistic ways to protect commercial advantage. Further at a time when the subject matter of the different intellectual property categories was not settled, overlaps and duplication went unremarked. The Victorian register for copyright in artistic works has many entries for trade marks, recorded as ‘an Engraving of a label... in three colours’ or ‘a label of a patented food drink’ and also ‘engravings of a list of registered stock and mortgages’. There are also numerous registrations of photographs. However overall, there are very, very few registrations of art in the form of paintings, sculptures or drawings on the Victorian register of artistic works. This underlines the commercial realities of the colony.

Notwithstanding this, the first colonial copyright case involved a photographic piracy of a watercolour drawing of the Missionary ship, the Dayspring. It appears that Rev McDonald was either painter, purchaser or commissioner. He sent the painting to Mr Norman for framing, where it was then sent on to be photographed in large and small sizes by Mr Patterson, with pirate prints produced in large volumes with the expectation of selling several thousand copies. It may be that McDonald came to appreciate the potential reproduction value of the painting through learning of these piracies. Copyright in the painting had not been registered at the time of execution of the ‘pirate’ photographs. However the well regarded Charles Nettleton was engaged by McDonald to make photographs for sale, before the pirated prints were offered for sale. Copyright in the drawing was registered in the name of Donald McDonald, recording Nettleton as publisher. Nettleton also registered himself as owner of photographs in several sizes.107 Mr Norman agreed to destroy his photographs

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106 Paul Costigan, Photo Web, Personal Correspondence, 1 February 2010.

107 National Archives of Australia: A1187, 40-43.
and negatives. The bench issued a fine of £3 plus £3, 3s costs. As the first copyright case in the colony this was ‘intended as a warning to other photographers’.108

The Australian colonial experience demonstrates a degree of variation across Empire in legal responses to photography and to photographic piracy. There is an awareness of UK copyright law, and a nod towards its significance, but not a strong reliance on it by government or private actors who rely on other strategies to advance their interests and make images available for public consumption. Photographic copyright can create a revenue stream, but rather than reliance on exclusive rights, there is recourse to the technical superiority of productions, controlling access to originals and negatives, and marketing strategies to educate and inform the public about the value of ‘authentic’ works. The priority of developing a public visual culture, of creating access to useful works and creating useful information about the commercial value of public vistas and space affects the approach to the exercise of legal rights by both public and private actors.

**Rationales for legal protection of photographs**

At the time of the passing of the British *Fine Art Copyright Act* 1862 and related colonial laws the demand for imagery of all kinds was clearly significant. The inclusion of photography in the Acts provided a mechanism to moderate and discipline the conduct of photographers and educate their customers, and as such supports the process of commodification.

While there is the suggestion that what was at stake was the right of artists and the claims of photographers as authors, the legislation does not support the moral rights of authors, nor protect their labour beyond supporting freedom of contract. Photographers also gained entry into the class of potential authors, but they were not necessarily considered as owners of the copyright in their efforts. There are particular examples such as travel photography that warranted exclusive rights to protect labour and investment, but it was the cultural cache associated with these ventures that the law really protected, as much as the economic return. Travel photography was already common well before enactment of the legislation and conducted for reasons other than expectation of profit. As such both cultural and economic motivations underpinned the legislation and the connection between the two needs to be kept in mind in accounting for the origins of photographic copyright. The expansion of private rights did further enshrine the importance of respect for intellectual property more generally and helped secure a more orderly market for images — orderly in the sense of supporting the expectations of established entrepreneurs.

For some commercial actors, such as Gambart, the law did not go far enough. He considered copyright inadequately protected artistic works from piratical

reproduction. He further argued that the commercialisation strategy behind sensation pictures was an anti-piracy measure.

Gambart had frequently sought to enforce his rights to engravings against pirated copies, noting enormous legal costs compared to damages awarded and difficulties recovering from defendants. Either the defendant quit the country, went to the insolvency court or used reforms to bankruptcy law to frustrate the sale of seized goods. He argued that both lithography and photography were evil in permitting copies to be produced at small expense, whilst it took considerable expense for him, estimated at thirty times the cost, to produce the first engraving. Both kinds of piracies, through exhibition in shop fronts and sales, ‘discredit... the original work by making it common, and vulgarising it by such generally wretched reproductions’. He argued that these renditions were not a replacement for fine art as no-one of taste would be induced to purchase them and when the price is so low but there is still ‘the loss of the patronage of those who prefer a select article, or who could not appreciate a good one’. The advantage of sensation paintings was that:

The picture is exhibited before an engraving is issued, the public is induced to subscribe for the print, while no piracies can be offered in competition with it, as it is not yet issued, and without a copy of it no photographic pirate can act. The mischief is thus much lessened to the publisher, for he can secure a goodly list of subscribers to the print before a single copy is issued. It is the subscriber who is injured in this case, by piracy and consequent depreciation of the value of his impression.

Gambart blamed piracy for a transformation that turn art into a commodity, failing to recognize his own contribution to processes that undermined the aura or exclusivity of the original work. Replicas and engraving, even as relatively limited forms of mass reproduction, detracted from the uniqueness of the work, overcoming the ‘original’s’ unavailability and specific location in space and time. Gambart’s (and others’) mass marketing of prints turned paintings into


111 Ibid.

112 Ibid, 21.

exhibition and product that was ‘readily available, affordable, and designed to be mass produced for a consumer market’,\textsuperscript{114}

There is no such thing as an exclusive or an original print, despite attempts to market them as such. The point of differentiation between available copies only relates to the quality of the reproduction and price. There are simply authorized and unauthorized copies. It was not piracy that undermined the exclusivity of reproduction art, as ‘Prints do not partake of aesthetic exclusivity of the original and because of the wide audience they draw rich and poor together’.\textsuperscript{115}

It was his capacity to change the rules by which Victorians experienced art that Gambart’s biographer, Maas, notes was a significant part of his legacy:

\begin{quote}
If the Royal Academy signified the social standing of the artist and provided an arena in which he achieved fame with its attendant financial rewards, it was the printsellers who were the unacknowledged legislators of the art world.\textsuperscript{116}
\end{quote}

As Bently concludes, photography only extended a cultural and economic dynamic already set in train by engravers. Copyright law was relied upon to create a simulacrum of exclusivity that inflated the profits of owners by restricting access and limiting supply. However there was arguably much more at stake with photography. It did more than affect the domain of fine art. It had a profound affect on the public’s visual grammar and literacy — on how they saw the world and its potential.

\textit{Conclusion}

The \textit{Fine Art Copyright Act} 1862 supported a major cultural transformation by recognising the original authorship of the photographer at first instance, but also in passing on ownership of the copyright to the commissioner or purchaser of the original art, in watering down registration requirements, and in facilitating enforcement of rights. Each of the legal technicalities supported the burgeoning trade in ‘exclusive’ reproductions, fostering a new kind of order and authority in the mass circulation of images.

As might be expected, the rights awarded posed very little disruption to the status quo. The conditions of award served the interests of Empire, colonial governments, art elites, Gentlemen photographers and even benefited the commercial activity of religious ministers. Where copyright law appears to be of marginal relevance, as in the case of the A&A Co’s street photography, or it simply fails to adequately secure protection from piracy as identified by

\\textsuperscript{114} Dianne Macleod, \textit{Art and the Victorian Middle Class}, (Cambridge: Cambridge University Press, 1996), 188.

\textsuperscript{115} Ibid.

\textsuperscript{116} Maas, \textit{Gambart}, 28.
Gambart, other strategies are worked out to secure financial benefit. In this sense copyright is shown to be valuable, but not the only tool available to organise terms of trade in imagery.

The new copyright laws provided a platform for advancing a mix of public and private interests. However with photography copyright less clearly demarcates a public domain than with texts, because this area of law supported the creation of a new visual order to the world. It promoted a way of seeing the world in terms of an ongoing process of commodification that blurred identification of what was public and private. What the public saw represented in imagery potentially signaled a private opportunity to enjoy — whether in the form of consumption of a postcard image of a popular actor, a Minister or work of architecture, or through revealing much larger material for commercial development.

The inclusion of photography in the *Fine Art Copyright Act 1862* came at a time when national identity, commerce and international trade was still imagined in terms of material properties and assets. Photography was an important new tool for representation of peoples, character and place in this world. As such, photography was much more than a controversial technology. The new law provided an impetus for the production and sale of further imagery on any subject technologically able to be captured. In so doing the law encouraged new forms of exhibition and consumption that impacted on social, economic and private life across the British Empire.

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