

The Twilight of the Opera Pirates:  
A Prehistory of the Exclusive Right of Public Performance for Musical Compositions  
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The main source of income for modern-day songwriters, as well as more traditional musical composers, is the exclusive right to publicly perform their works.<sup>1</sup> This right can be a right of control or simply a right of royalty, depending on how the creator wishes to use it, allowing the work’s creator to judge the best balance of the two. And yet few are aware that this right’s genesis is comparatively recent compared to most copyright protections in America – it

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<sup>1</sup> Nancy A. Bloom, *Protecting Copyright Owners of Digital Music – No More Free Access To Cyber Tunes*, 45 J. COPYRIGHT SOC’Y U.S.A. 179, 197 (1997).

was not established until over a century after the first copyright statute in 1790.<sup>2</sup> In the intervening century there were several attempts to establish a right of public performance for musical compositions, and the right was finally established in 1897.<sup>3</sup> The story of how that law came to be has not been told until now – this paper will attempt to remedy that situation. In doing so, I hope to shed light on the currents that led to today’s laws pertaining to public performance, pointing out the central irony of the trajectory of these laws.

The central irony is that in none of these bills was the creation of this right anything but a secondary concern to the drafters of these bills, and even when the right to exclusive public performance of a musical composition was established by statute in 1897, it went largely unremarked on. As such, this paper ultimately tells more than the tale of the creation of the right, it tells the story of the two failed revisions of the copyright code that would have established the right, along with the amendatory act to the copyright laws which finally did.

This paper is divided into four main sections. The first will describe the path of the Ingersoll Copyright Bill, a somewhat radical (for its day) copyright revision that died in committee in the early days of 1844. While it was something of an outlier to the primary movement for a right of public performance in music, it represents a first attempt to create any statutory right of public performance for musical compositions. The second section will describe the litigation over musical works in the 1880s which showed that common law was insufficient to protect performing works, and that a legislative solution was needed. The third section will describe the rancorous response to the Treloar Copyright Bill, a complete revision to the copyright laws which would have protected public performance of all literary works, including but not limited to music or drama. The fourth section will describe the origins, path, and success

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<sup>2</sup> 1 Stat. 124 (1790).

<sup>3</sup> 29 Stat. 694 (1897). This being well after the same right for dramatic works, which was established in 1856. 11 Stat. 138 (1856).

of the Cummings Copyright Bill, a narrow measure which simply aimed to expand the remedies for unlawful public performances of performance works, and first included operas, and then music generally, under the exclusive right of public performance.

## I. THE INGERSOLL COPYRIGHT BILL

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

Charles Jared Ingersoll was born to one of America's oldest and most prominent families.<sup>8</sup> His grandfather came to Philadelphia as presiding judge of the King's vice-admiralty court, and his father stayed there, supporting the revolution, and later becoming the United States

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<sup>4</sup> 28<sup>th</sup> Cong., 1<sup>st</sup> Sess., HOUSE J. 30 (1843); H.R. 9, 28<sup>th</sup> Cong. (1844) (as amended Jan. 18, 1844) (hereinafter Ingersoll Copyright Bill).

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

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

<sup>7</sup> THORVALD SOLBERG, COPYRIGHT IN CONGRESS 1789-1904 (1905).

<sup>8</sup> Irwin F. Greenberg, *Charles Ingersoll: The Aristocrat as Copperhead*, 93 PENN. MAGAZINE OF HISTORY AND BIOGRAPHY 190 (1969).

Attorney for the District.<sup>9</sup> His father was also offered (but refused) a nomination as one of the “midnight judges” nominated during the tail end of John Adams’ presidency to fill a vacancy created by the Judiciary act of 1800.<sup>10</sup> His brother Jared Ingersoll III served in Congress at the same time,<sup>11</sup> but even by the high standards of family, Charles Jared Ingersoll was uniquely accomplished. He served in Congress from 1812-1814 and 1837-1849, wrote several works of both history and drama, and was an accomplished orator. However, his reputation waned quickly after his death in 1862, owing in part to his association with pro-slavery factions prior to the civil war, and partially because he was confused with his son, who had notoriously supported the confederacy.<sup>12</sup> His fall from the public memory can also be explained as a result of a degree of dilettantism – that he was simply “a gentleman first, and a writer and politician second.”<sup>13</sup>

Ingersoll’s experience as the author of dramatic productions helps to explain why he would author his copyright bill and its amendments. In 1801, when he was but 18 years of age, his play *Edwy and Elgiva* was performed at the New Theatre in Philadelphia.<sup>14</sup> The play starred the actress Anne Brunton Merry as Elgiva,<sup>15</sup> and had some success,<sup>16</sup> along with some positive notices.<sup>17</sup> Three decades later he would write another verse tragedy, *Julian*, although there is no

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<sup>9</sup> *Id.*

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

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

<sup>12</sup> Greenberg, *supra* note 8; *The Arrest of Charles J. Ingersoll*, NEW YORK TIMES, Aug. 26, 1862 at 8; *The Arrest of Charles Ingersoll*, NEW YORK TIMES, Aug. 28, 1862 at 1 (“Some of the New York papers have mistaken this Ingersoll for his father Charles Jared Ingersoll, the veteran statesman, who died a few months ago.”)

<sup>13</sup> NATHANIEL BURT, THE PERENNIAL PHILADELPHIANS: THE ANATOMY OF AN AMERICAN ARISTOCRACY 371 (1963).

<sup>14</sup> Meigs, *supra* note 5 at 31. The New Theatre was one of the leading theaters in Philadelphia. *Id.*

<sup>15</sup> GRESDNA A DOTY, THE CAREER OF MRS. ANNE BRUNTON MERRY IN THE AMERICAN THEATRE 85-86.

<sup>16</sup> Burt, *supra* note 13 at 370.

<sup>17</sup> See *E.G. Theatrical*, THE GAZETTE OF THE UNITED STATES, Apr. 6, 1801 at 3; *Dramatic Authors of America*, THE DRAMATIC MIRROR, AND LITERARY COMPANION. DEVOTED TO THE STAGE AND FINE ARTS, Sep. 18, 1841 at 47 (“was performed with flattering success upon the Philadelphia boards”); *Contra* THE TICKLER, Sep. 1, 1812 at 4 (According to this source, Ingersoll’s *Edwy and Elgiva* lasted but two performances in Philadelphia, and had one disastrous performance in London).

record of it having been produced.<sup>18</sup> Ingersoll's ardent nationalism was closely related to his artistic interests, and also plays an important role in understanding why he would advance a bill on musical copyright. In his famous *Discourse Concerning the Influence of America on the Mind*, Ingersoll made clear that he viewed copyright protections as an integral part of the advancement of the American arts, and that the current copyright statute (at the time, the original 1790 statute with some amendments) was "an inefficient act of Congress, the impotent offspring of an obsolete English Statute."<sup>19</sup> To his mind, while American arts had not yet matched those of Europe, there seemed to be no reason to his mind why they should not. Indeed, he felt that the influence of America on the mind gave American artists a unique advantage.<sup>20</sup> Such an advantage would need legal protections to lead to a blossoming of American artistic expression.

#### A. *The Original Bill*

On January 3<sup>rd</sup>, 1844, the Ingersoll Copyright Bill was introduced as H.R. 9, and referred to a preexisting select committee on copyright.<sup>21</sup> This select committee dated from December 16<sup>th</sup>, 1843, when John Quincy Adams had introduced a memorial for international copyright from publishers and booksellers of New York and Massachusetts.<sup>22</sup> At that point, a select committee chaired by Robert C. Winthrop was suggested to handle this petition.<sup>23</sup> Rep. Holmes

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<sup>18</sup> Burt, *supra* note 13 at 371.

<sup>19</sup> CHARLES JARED INGERSOLL, A DISCOURSE CONCERNING THE INFLUENCE OF AMERICA ON THE MIND 17-18 (1823). Ingersoll is presumably referring to the Statute of Anne, which formed the basis for America's first copyright statute. 8 Anne Ch. 19 (1710); HARRY RANSOM, THE FIRST COPYRIGHT STATUTE (1956). Given his own substantial proposed revisions discussed here, it is unlikely he felt that the 1831 revisions were sufficient. 4 STAT. 436 (1831) (hereinafter "1831 Revision").

<sup>20</sup> See generally Ingersoll, *Id.*

<sup>21</sup> 28<sup>th</sup> Cong., 1<sup>st</sup> Sess., HOUSE J. 150 (1844)

<sup>22</sup> 28<sup>th</sup> Cong., 1<sup>st</sup> Sess., HOUSE J. 58 (1843); Memorial of Citizens of the United States for an International Copyright Law, 28<sup>th</sup> Cong., 1<sup>st</sup> Session, H.R. Doc. 10 (December 16, 1843). A memorial is a request that congress take (or refrain from) a certain action. Paul S. Rundquist, *Messages, Petitions, Communications, and Memorials to Congress*, CRS Report 98-839 GOV (2003), available at <http://www.rules.house.gov/archives/98-839.pdf>.

<sup>23</sup> The members of the select committee were:

- Robert C. Winthrop (Chair W-MA)
- John Quincy Adams (W-MA)

then moved to refer the petition to the library committee instead, and Rep. Ingersoll reminded the House that he had already given notice of his intent to present a bill on copyright, referenced in the House Journals.<sup>24</sup> Ingersoll then made some suggestions on where his bill should be referred, but the reporter for the Congressional Globe (at a minimum) could not hear him.<sup>25</sup> A vote was held whether to refer the copyright materials to the library committee or to the select committee, and it was decided that the select committee would remain to deal with these questions.<sup>26</sup> The petition introduced by Adams dealt with utterly different subject matter from the Ingersoll bill, but it is unclear that anyone was fully aware of what the content of the Ingersoll copyright bill would be until its introduction.<sup>27</sup>

Although this paper's focus is on the exclusive right of public performance of musical compositions, it would be unfortunate to not mention briefly the other extraordinary features in whose context the right of public performance exists. The Ingersoll Copyright Bill was a revolutionary bill for its day, a good deal more progressive than the 1870 revision.<sup>28</sup> Its view on copyright law was more settled in the 20<sup>th</sup> century than the 19<sup>th</sup> – an impressive feat considering that its author was born at roughly the same time as the Battle of Yorktown. And this likely played a role in its downfall – it was simply too much too fast.

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- Edward Junius Black (D-GA)
  - James B. Bowlin (D-MO)
  - Reuben Chapman (D-AL)
  - Joshua Herrick (D-ME)
  - Charles J. Ingersoll (D-PA)
  - Moses G. Leonard (D-NY)
  - Emery D. Potter (D-OH)

<sup>28</sup> 28<sup>th</sup> Cong., 1<sup>st</sup> Session, JOURNAL OF THE HOUSE OF REPRESENTATIVES 58 (Dec. 16, 1843).

<sup>24</sup> 28<sup>th</sup> Cong., 1<sup>st</sup> Session, CONG. GLOBE 40 (Dec. 16, 1844).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Certainly the Congressional Globe and House Journal both give no details as to its content. 28<sup>th</sup> Cong., 1<sup>st</sup> Session, CONG. GLOBE 18. House Journal at 30. Even on January 3, when it was read twice and formally referred, it is unknown how many members were on the floor of the house at the moment. *Id.* at 150 (Jan. 3, 1844); 28<sup>th</sup> Cong., 1<sup>st</sup> Session, Cong. Globe 98.

<sup>28</sup> 16 Stat. 198 (1870). (hereinafter “1870 Revision”)

The bill was not a mere amendatory act; it was a complete revision, aimed at erasing the 1831 revision, only a decade old, from the books.<sup>29</sup> Especially in technical areas the bill followed the outlines of the 1831 revision fairly precisely. The provision requiring that materials to be copyrighted be deposited in the district court was substantially unchanged from the 1831 law,<sup>30</sup> in contrast to the bill passed two years later establishing national depositories at the Smithsonian and Library of Congress.<sup>31</sup> The term of copyright was modified somewhat. Whereas in the 1831 Revision the term of copyright was 28 years with a 14 year extension if the author or heirs were alive,<sup>32</sup> The Ingersoll Bill set a flat 42 year period, with the alternative of life of the author plus seven years, whichever was longer.<sup>33</sup> One particularly interesting section of the bill asserted that copyright in a work was a property right, and not a mere government-granted privilege.<sup>34</sup> The subject matter of copyright was not seriously changed in its scope.<sup>35</sup>

The original bill seems to have intended to establish a right of public performance for musical compositions, but it was not spelled out fully. The bill's definitions assert that "the words 'dramatic piece' shall be construed to mean and include every tragedy, comedy, play, opera, farce, or other scenic, musical, or dramatic entertainment," but does not assert what additional protections this class of intellectual property should have.<sup>36</sup> Also, the bill noted that a listing in the register of the District Court would be "in the case of dramatic or music pieces, prima facie proof of the right of representation or performance, subject to be rebutted as

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<sup>29</sup> Ingersoll Copyright Bill § 1

<sup>30</sup> Ingersoll Copyright Bill § 4; 1831 Revision § 4.

<sup>31</sup> 9 Stat. 106 (1846).

<sup>32</sup> 1831 Revision § 1-2

<sup>33</sup> Ingersoll Copyright Bill § 3.

<sup>34</sup> Ingersoll Copyright Bill § 15. Essentially, this This may have had much to do with disagreements between Adams and Ingersoll over the role of copyright more generally, discussed below. For a discussion of the right/privilege debate over copyright in American history, see Gillian K. Hadfield, *The Economics of Copyright: An Historical Perspective*, 38 COPYRIGHT L. SYMP. 1 (1992).

<sup>35</sup> Ingersoll Copyright Bill § 2; 1831 Revision § 1.

<sup>36</sup> Ingersoll Copyright Bill § 2.

aforesaid.”<sup>37</sup> A firm statement of the performance right and an enforcement mechanism would wait until the amendments.

With barely a quorum, the select committee on copyright “internal and external” met for the first time on January 5<sup>th</sup>, 1844, in the chamber of the Committee on Foreign Affairs.<sup>38</sup> At this meeting the conversation was more about general copyright than the specific measures, and John Quincy Adams “offered some suggestions as to the natural right of literary property, to the principles of which, as entertained by me, Ingersoll immediately declared his dissent.”<sup>39</sup> Adams then opined that Ingersoll’s “principles are radically depraved, and never can harmonize with mine.”<sup>40</sup> Winthrop asked Adams to write the report, and Leonard concurred, but Adams seems to have felt that for anyone but Winthrop to write the report, even at Winthrop’s request, would smack of presumption, and the committee adjourned for two weeks.<sup>41</sup>

### *B. The Amended Bill*

At the meeting on the 19<sup>th</sup> of January, 1844, the committee had trouble getting a quorum,<sup>42</sup> owing in part to Ingersoll’s late arrival.<sup>43</sup> While waiting for a quorum, a second memorial was read to this committee by the chair, this one from Nahum Capen of Boston for international copyright, which had been referred to the committee on the 15<sup>th</sup>.<sup>44</sup> The only other event of note at the committee meeting did not bode well for the bill. Rep. Black, who had not

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<sup>37</sup> Ingersoll Copyright Bill § 6.

<sup>38</sup> Diaries of John Quincy Adams, January 5, 1844. The committee’s three principals were there (The Chair Winthrop and the two sponsors of measures Adams and Ingersoll), along with two others (Herrick and Leonard). *Id.* This location was also doubtless comfortable for Ingersoll, since he was the Chair of the Committee on Foreign Affairs.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* It is unclear if Adams was referring to principles related specifically to the bill or Ingersoll more generally.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*, January 19, 1844. A quorum was not reached until 11, with Herrick, Chapman, and Potter absent; Ingersoll didn’t arrive until after the committee adjourned. *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*; 28<sup>th</sup> Cong., 1<sup>st</sup> Session, Memorial of Nahum Capen of Boston, MA, on the Subject of International Copyright, H.Doc. 61 (Jan. 15, 1844).

been at the first meeting of the committee, announced his intent to write a report opposing the bill.<sup>45</sup> Prior to adjourning, the committee agreed to print the Capen Memorial, as well as the amendments offered by Ingersoll to his bill.<sup>46</sup> It is unknown if the committee had actually read the amendments to the Ingersoll bill (and even if the amendments were read at the meeting, only half the committee members were there), which would have established a right of public performance for musical compositions.

The amendments to the Ingersoll Copyright Bill are of special interest to this paper, since these would have established the right of public performance, both for musical compositions as well as dramatic productions and everything in between (such as operas).<sup>47</sup> The relevant part of this section is worth quoting:

...the author of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, song, or musical composition, composed and not printed and published by the author thereof, or his assignee, shall have, as his own property, the sole liberty of representing, or causing to be represented or performed, at anyplace or places in the United States, any such production as aforesaid.<sup>48</sup>

Interestingly, this may not have strictly speaking created a new right, since it only applied to works that had not been “printed and published by the author” – the same right already existed at common law.<sup>49</sup> Pursuant to this, a provision was set forth to allow manuscript works to be copyrighted solely by their title, author, and date of first performance – and be kept in manuscript.<sup>50</sup> As such, works that were not published in the outside world would have been protected by a statute instead of the weaker common law, but this was not an unrestricted public performance right as we think of it nowadays. If someone would illicitly produce or perform a

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<sup>45</sup> Diaries of John Quincy Adams, January 19, 1844. This report was never presented or printed, and it is unclear that it was ever even written. Nor is there any record of his reasons.

<sup>46</sup> *Id.*

<sup>47</sup> Ingersoll Copyright Bill § 19.

<sup>48</sup> *Id.*

<sup>49</sup> *See infra* at II.

<sup>50</sup> Ingersoll Copyright Bill at § 20.

copyrighted musical or dramatic work pursuant to these provisions, the fee would be \$200 per performance, or all profits, or compensatory damages, whichever would be greatest, while also specifically reserving the right to injunctive relief.<sup>51</sup> This is rather high for the time, certainly when compared to the dramatic performance bill of a dozen years later, which set damages at \$100 for the first performance and \$50 for each additional one, while not setting forth injunctive relief.<sup>52</sup>

Ironically, the insufficiency of the 1856 act would be the impetus for the 1897 bill which would finally pass the public performance right for music into law.<sup>53</sup> The amendments also would have expanded the scope of copyright, including sculptures of all types well before this protection was incorporated into law in the 1870 Revision.<sup>54</sup> Industrial Design (when an item had both functional and aesthetic qualities) and ownership of a work for hire were also included in the coverage of the amendments to the Ingersoll Copyright Bill.<sup>55</sup> In short, the Ingersoll Copyright Bill was tremendously ambitious, bringing together reforms of the next half-century. Its doom would be quick.

The Select Committee on Copyrights, Internal and External, was scheduled to meet on Feb. 2, 1844, but this was postponed by a week to Feb. 9, 1844.<sup>56</sup> This meeting would be both the first and the last debate on the amended Ingersoll Copyright Bill. At that meeting Bowlin and Potter were absent, as they had been at every meeting, and Herrick was missing also.<sup>57</sup> The Chair read the Ingersoll copyright bill with amendments at this point,<sup>58</sup> and this may well have been the first time some members of the committee actually knew the contents of the bill, since it

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<sup>51</sup> Ingersoll Copyright Bill at § 20.

<sup>52</sup> 11 Stat. 138 (1856).

<sup>53</sup> *See infra*.

<sup>54</sup> *Id* at § 21.

<sup>55</sup> *Id* at § 24, § 27.

<sup>56</sup> Diaries of John Quincy Adams, Feb. 2, 1844.

<sup>57</sup> Diaries of John Quincy Adams, Feb. 9, 1844.

<sup>58</sup> *Id*.

had been printed after the last meeting of the committee.<sup>59</sup> John Quincy Adams was unequivocal in his opprobrium for the bill. He felt that it consisted “of an entire but most incongruous system of copyright property, fit for nothing but to multiply litigation, and not even touching upon the subject first referred to the committee – a memorial for international copyright law.”<sup>60</sup> Adams then took the time to read the bill, and was left questioning the necessity of a revision to the domestic copyright laws in the first place.<sup>61</sup> The committee adjourned until a later date, to be set by the Chair.<sup>62</sup> There is no record of it ever meeting again.<sup>63</sup>

Ten days later Charles Jared Ingersoll introduced a memorial from the authors of New York,<sup>64</sup> arguing that the lack of international copyright hurt American authors because they could not compete with cheap editions of foreign authors.<sup>65</sup> It is quite possible that Ingersoll’s introduction of this memorial was an acceptance of Adams’ point – that the committee’s original purpose was international copyright. Larger issues were on the national horizon for Ingersoll to deal with as chair of the foreign relations committee, most notably the annexation of Texas as a slave state, which Adams was vociferously against. Even though Adams was sure to still oppose the Democratic efforts, perhaps Ingersoll felt that Adams’ visceral dislike of him could be tempered.

As the diaries of John Quincy Adams are the only extant source on the proceedings of this committee, the bile expressed above is unavoidable. Nor was it unique to the goings on of this committee. On New Year’s Day 1844, Charles Jared Ingersoll came to call, and Adams

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> The diaries of John Quincy Adams do not discuss and further meetings, and neither the House Journal nor the Congressional Globe report anything being sent back from the committee to the congress.

<sup>64</sup> 28<sup>th</sup> Cong., 1<sup>st</sup> Session, House Journal 427 (Feb. 19, 1844).

<sup>65</sup> Petition of Albert Gallatin, *et al* for a law of International Copyright (“Author’s Memorial”), Dec. 28, 1843, presented to Congress by Rep. Charles Jared Ingersoll Feb. 19, 1844. Copy on file with author.

noted in his diary that Ingersoll was the “cunningest and most treacherous cat of them all.”<sup>66</sup>

Adams’ dislike of Ingersoll is a current throughout much of his diary in his later years.<sup>67</sup>

Relations between the two men were once at least cordial,<sup>68</sup> but Ingersoll became one of Adams’ greatest foes on such issues as the gag rule on the discussion of slavery, and the enmity between the two men grew to the point of infamy.<sup>69</sup> In the case of the Ingersoll Copyright Bill, a somewhat revolutionary measure sprung on the Congress without anything more than passing warning, this enmity would seem to seal the bill’s fate. Ingersoll’s own Democratic Party was not united behind him, with several not showing up to any meetings and Black opposing the bill. Meanwhile Adams opposed the bill, and the chair was a Massachusetts Whig allied with Adams. There is no record of any support for the bill in the committee, although it is unclear it would be recorded in Adams’ diary if there were. Furthermore, Ingersoll was not noted as a particularly skilled legislator,<sup>70</sup> and was well known for a unique and somewhat rambling style of address.<sup>71</sup> Doubtless, all of these factors contributed to the demise of this ambitious bill.

After this incident, the committee on copyright passed out of practical existence. The Congress continued to refer petitions and memorials to it, but none were ever reported back to be printed – they were simply filed away.<sup>72</sup> There is no record in Adams’ Diaries of the committee

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<sup>66</sup> Diaries of John Quincy Adams, January 1, 1844.

<sup>67</sup> Meigs, *Supra* note 5 at 252 (“many pages of [Adams’] diary are disfigured by the secret outpouring of his venom upon Mr. Ingersoll.”).

<sup>68</sup> *Landing of Penn*, NILES’ WEEKLY REGISTER, Nov 12, 1825 at 161 (description of oration by C.J. Ingersoll that then-president Adams attended and was warmly received at).

<sup>69</sup> Meigs, *Supra* note 5 at 251.

<sup>70</sup> *Id.*, at 89 (“He had not that cool calculation and self-restraint that are needed, and his correspondence shows that his friends found him rather lacking in the sort of judgment necessary for such matters.”).

<sup>71</sup> *Lecture on Europe by C.J. Ingersoll, Esq.* ATKINSON’S SATURDAY EVENING POST Nov. 24, 1838 Pg. 3.

<sup>72</sup> The House Journal lists the following petitions and memorials (aside from the three previously mentioned) as being referred to the committee after Feb. 19, 1844:

- A memorial of citizens of the State of New York, praying the passage of an international copyright law, Presented by Rep. Fish Mar. 21, 1844.
- A remonstrance of citizens of the State of Massachusetts, against the passage of an international copyright law (Mar. 20, 1844), Presented by Rep. Rockwell Mar. 26, 1844.

meeting again, and in any case Congress recognized that the committee was no longer considering issues of domestic copyright, and referred to it for the first time as the Select Committee on International Copyright roughly a month later.<sup>73</sup> It would not be until the passage of the International Copyright Bill of 1891 that Congress would reconsider a bill for an exclusive right of public performance for musical compositions.<sup>74</sup>

## II. THE MIKADO LITIGATION AND ITS ANTECEDENTS

In the late nineteenth century, the winds of change began to blow towards a reform of the statutes governing public performance, to increase penalties and to expand their coverage to music and opera. In order to understand the bills which sought to change the laws related to the public performance of music, it is useful to understand where the laws stood in the latter nineteenth century, and why a full legislative revision of the laws was needed in the face of developments in the theater. That there was no statutory right to exclusive public performance was fairly clear, albeit not always entirely so. However, whether there existed a common-law right was less clear. The most important early case on this matter was *Wheaton v. Peters*, which stated that:

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

It is clear, there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent states, each of which may have its local usages, customs and common law. There is no principle which pervades the union, and has the authority of law, that is not embodied in

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- A remonstrance of citizens of Bellows Falls, in the State of Vermont, against the passage of an international copyright law, Presented by Rep. Foot Apr. 4, 1844.
  - A remonstrance of citizens of Lee, Berkshire county, State of Massachusetts, against an international copyright law (Apr. 5, 1844), Presented by Rep. Rockwell Apr. 9, 1844.
  - A petition of men of letters and citizens of the United States residing in Jackson, State of Tennessee, for the passage of a law for the proper regulation of the copyright of books, Presented by Rep. M. Brown May 10, 1844 (Copy of Feb. 19 Petition).

<sup>73</sup> 28<sup>th</sup> Cong., 1<sup>st</sup> Session, House Journal 623 (Mar. 21, 1844).

<sup>74</sup> 26 Stat. 1106 (1891).

the constitution or laws of the union. The common law could be made a part of our system by legislative adoption.<sup>75</sup>

Pursuant to this, common law copyrights tracked along property lines. As long as a work remained in manuscript form, and thus private property, the creator retained all rights in the work, including the right of public performance.<sup>76</sup> However, as soon as a work was published, and thus public property, the work lost all rights except those saved by statute.<sup>77</sup> When the work in question was printed, publication was easy to determine, but the law regarding publication of other works, most notably dramatic and musical works, was deeply unsettled.<sup>78</sup> Furthermore, a line of cases set forth a general understanding that one could not take notes on or transcribe a performance and thus create a reconstruction for performance, but one could memorize a piece and transcribe it as best as could be recalled later.<sup>79</sup>

In a line of cases mostly involving the operettas written by Gilbert and Sullivan these questions would be debated, leading up to the litigation surrounding Gilbert and Sullivan's *The Mikado, or The Town of Titipu*<sup>80</sup>, which finally ended most hopes of protecting the right of public performance via common law. The cases at the time mostly involved foreign composers, which was an additional wrinkle since this was before the International Copyright Act was passed in 1891.<sup>81</sup> However, even if the composers had been American (and indeed the litigation surrounding the *Mikado* included a valid American copyright), the lack of statutory protection would have doomed their chances. The litigation in the 1880s led directly to the legislation of

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<sup>75</sup> *Wheaton v. Peters*, 33 U.S. 591, 594 (1834). The English cases from 70 years earlier regarding whether a common law of copyright existed after publication are not relevant here.

<sup>76</sup> *Authors' Rights Before Publication*, 9 AMERICAN L. REV. 236 (Jan. 1875).

<sup>77</sup> *Id.* at 239.

<sup>78</sup> *Id.*

<sup>79</sup> See *E.G. Keene v. Kimball*, 82 Mass. (16 Gray) 545 (Mass. 1860); *Keene v. Wheatley*, 14 F.Cas. 180 (C.C.Pa. 1861); *Keene v. Clark*, 2 Abb.Pr.N.S. 341 (N.Y.Super., 1867); *Crowe v. Aiken*, 6 F.Cas. 904 (C.C.Ill. 1870). 1861

<sup>80</sup> *The Mikado*, Wikipedia, at [http://en.wikipedia.org/wiki/The\\_Mikado](http://en.wikipedia.org/wiki/The_Mikado). The libretto (text) was by Sir William S. Gilbert, the music was by Sir Arthur Sullivan, and the promoter behind Gilbert and Sullivan was D'oyly Carte. *Id.*

<sup>81</sup> 26 Stat. 1106 (1891).

the 1890s, once the struggle for international copyright was at an end and the lobbying resources of the copyright advocates were free. Important theater lawyers from the 1880s found themselves drafting or assisting the major bills of the 1890s, be it on behalf of the playwrights of the music publishers. Even more so though, this litigation showed those parties who most wanted a right of public performance that the road to protection led not through the courts, but through Congress.

### *A. Pre-Mikado Litigation*

In 1879 Gilbert and Sullivan (and their producer) had their first great success, *H.M.S. Pinafore*, and signs in England advertised that it was being “performed simultaneously in over one hundred theatres all across America.”<sup>82</sup> This opened up new opportunities not just for continental composers and dramatists, but also for American copyright pirates and lawyers.<sup>83</sup> The first major copyright skirmish after the relatively uncontested American piracy of *Pinafore* was the follow-up, *The Pirates of Penzance*, for which more intricate plans for protection were laid.<sup>84</sup>

The orchestral score for *Pirates* was kept in manuscript form, never published or revealed to the outside world.<sup>85</sup> As such, copying was extremely difficult, since it needed to be entirely by ear.<sup>86</sup> As may have been expected though, in 1880 a music publishing firm of White, Smith, & Co. distributed a sheet-music collection entitled “Memories of the Pirates of Penzance,” which

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<sup>82</sup> Alexander P. Browne, *Sir Arthur Sullivan and Piracy*, 148 THE NORTH AMERICAN REVIEW 750 (No. 391, Jun. 1889).

<sup>83</sup> *Id.* Interestingly, one of the leading pirate orchestrations of *H.M.S. Pinafore* was prepared by none other than the eminent wind band composer John Philip Sousa. EDWARD SAMUELS, THE ILLUSTRATED STORY OF COPYRIGHT 235 (2000).

<sup>84</sup> *Id.* at 751 (“Appeals to ‘public opinion,’ ‘the self respecting American art-loving community,’ and similar phantasms having been tried in vain with ‘Pinafore,’ Carte decided to adopt different methods with the ‘Pirates.’”); See also “*The Pirates*” in London, THE NEW YORK TIMES, Apr. 20, 1880 at 2 (discussing copyright precautions made for America).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

did well, and litigation commenced.<sup>87</sup> When the case went to the Circuit Judge for the Massachusetts Circuit, he expressed his dissent from the earlier precedents and allowed an injunction on the sale of the book.<sup>88</sup> While there is no record of the reasoning involved, it seems likely that he was not swayed by the aforesaid machination – he simply felt that publication had not occurred by the performance in a foreign nation (as he would rule later in the *Redemption* case). The ruling in this case would not be uniformly applied though. In a case involving the comic opera *Billee Taylor* case a year later, a Judge for the Maryland Circuit reaffirmed the line of cases that held that one could perform one’s aural recollection of another’s manuscript performance piece.<sup>89</sup> This opera was also a Carte production, although it was not written by Gilbert and Sullivan, and had a strong impact on Carte’s legal team and strategies.<sup>90</sup> This conflict of unpublished opinions between the Massachusetts and Maryland Circuit Courts would soon resolve themselves into published opinions. Even though the Massachusetts Circuit Court carried more prestige, these splits made the law more unsettled than ever.<sup>91</sup>

The next case to come down would be a bit different from other cases in this line, involving pure music, specifically the “Redemption” Cantata of Charles Gounod, a noted French composer.<sup>92</sup> In this case the defendant, Mr. Lennon, sought to perform the piece from his own

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<sup>87</sup> Browne, *supra* note 82, at 752; *The Pirates of Penzance in Court*, THE BOSTON GLOBE, Apr 24, 1880 at 4. Browne says that this version was called “Recollections” rather than “Memories,” but a contemporaneous article in the *Albany Law Journal* calls it “Memories,” and Browne was writing nine years later. *Current Topics*, 22 ALBANY L.J. 12:221 (Sep 18, 1880). Interestingly, the Boston licensee of Gilbert and Sullivan had put together an intricate scheme by copyrighting the title page, but this was something of a folly, since it only gave him the right to write his own *Pirates of Penzance*, not any more protection to Gilbert and Sullivan’s. *Music*, THE NEW YORK TRIBUNE, Mar. 12, 1880 at 4.

<sup>88</sup> Sullivan, *et al v. White, et al*, Equity Case No. 1391 (C.C.Ma. 1879) & Sullivan, *et al v. Goulland*, Equity Case No. 1392 (C.C.Ma. 1879); Browne, *supra* note 82. The Judge was Judge Lowell, the only full-time circuit judge (this being before the creation of the circuit courts of appeal, there was one full-time circuit judge, along with district and Supreme Court judges riding circuit). *Id.* The case was not reported as no written decision was published. *Id.*

<sup>89</sup> *Id.* at 753. See “*Billee Taylor*” *In Court*, THE WASHINGTON POST, Apr. 16, 1881 at 1 (An identical article appeared in the New York Times on the same day).

<sup>90</sup> Browne, *supra* note 82 at 753.

<sup>91</sup> Edward Marston, *Copyright in Music*, THE NEW YORK TRIBUNE, Jan. 25, 1883 at 5.

<sup>92</sup> Thomas v. Lennon, 14 F. 849 (C.C.Mass. 1883).

reconstruction of a piano score sold in England, which had markings indicating which orchestral elements were used at certain points.<sup>93</sup> This was something of a case of first impression, since no-one had before attempted to pirate works of this “abstract and exalted” type before.<sup>94</sup> The full score had never been printed anywhere (thus there was no foreign copyright), and it was assigned to Mr. Theodore Thomas in Boston for a period of two years at least, with which he planned to perform it with the Handel and Haydn Society of that city.<sup>95</sup> Mr. Lennon had meanwhile engaged someone “intimately acquainted with Gounod and his style” to reconstruct a full score of the cantata.<sup>96</sup>

The court’s decision in this case was a bit of a surprise to those unaware of the *Pirates of Penzance* decision, since no shift in the caselaw had been published. The court held that the unpublished full score was not published, and remained private property, despite having been performed internationally.<sup>97</sup> Also interesting was Judge Lowell’s second holding, that:

[the theory that one can create orchestrations freely] has a logical and consistent appearance, but, as applied to a musical work of this kind, the practical objections are very great. Such a work is a single creation, of which the orchestration is an essential part; every reproduction of it from something else is necessarily an imperfect imitation, which, nevertheless, occupies the same field, and may ruin the original. In this respect an opera is more like a patented invention than like a common book; he who shall obtain similar results, better or worse, by similar means, though the opportunity is furnished by an unprotected book, should be held to infringe the rights of the composer.<sup>98</sup>

It is not unreasonable to take this doctrine only a slight bit farther, and hold that performance of an exact reproduction of the score is equally damaging to the opera, since there is still no artistic

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<sup>93</sup> *Id.*

<sup>94</sup> Browne, *supra* note 82, at 753-4.

<sup>95</sup> *The “Redemption” Difficulty*, 12 THE MUSICAL VISITOR, A MAGAZINE OF MUSICAL LITERATURE AND MUSIC 39 (Feb. 1883). This litigation may have influenced the decision of the Handel and Haydn Society to submit a petition in favor of international copyright law (a copy of the petition of the Music Teachers Association of America) a few years later. Petition of Handel and Haydn Society of Boston on behalf of an International Copyright Law (1886).

<sup>96</sup> *The Redemption Difficulty*, *Id.* Mr. Lennon did try to acquire the American rights legitimately, but negotiations were already on with Mr. Thomas. *Thomas v. Lennon*, 14 F. at 851.

<sup>97</sup> *Id.* at 852.

<sup>98</sup> *Id.* at 853

control over the production values of a pirated opera production.<sup>99</sup> This could still lead to the cheapening of the opera and the same negative effects Judge Lowell observed in the above case. This holding can be read further still, to be read not just as an extension of the copyright law, but as an early affirmation of the artist's moral rights. Composers and their lawyers would eye this case with great interest, and yet its central doctrine would not hold in the courts for long.

It was just as well that a new paradigm was found for protecting orchestrations, since shortly thereafter the *Iolanthe* case (involving another Gilbert and Sullivan operetta) would be brought in the US Circuit Court in Baltimore and decided in favor of the pirate, casting doubt on the usefulness of the *Pirates of Penzance* and *Redemption* cases.<sup>100</sup> The *Iolanthe* case raised near-identical issues to the *Pirates of Penzance* case, but the circuit court judge disagreed completely with that holding:

[I]t is a proposition now so well settled as to be almost axiomatic, that, except so far as preserved to him by statute, when the composer of any work, literary, musical, or dramatic, has authorized its publication in print, his control over so much as he has so published, and of the use which others may make of it, is at an end. And in the present case it could not be and it is not denied that it is the right of any one to publicly perform all that the book contains, which would in fact be the whole opera as composed by the authors, substituting the piano-forte accompaniment for the orchestra.<sup>101</sup>

The court then reached the holding that the score is not an integral part of the dramatic work, ironically because of the success of pirates of *Pinafore* with knockoff scores which did not accurately copy the music.<sup>102</sup> This holding was critical, because the libretto to an opera was usually published, and quite profitably. As such, simply publishing a piano score and the libretto would constitute publication of the full-orchestra opera. This would seem to lead to the

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<sup>99</sup> Ultimately Mr. Lennon decided to follow the principle everyone agreed on, that the European-published piano-score could be freely performed, and thus performed *The Redemption* with two pianos and an organ, "to the eternal disgrace of musical art." Browne, *supra* note 82, at 754.

<sup>100</sup> The "Iolanthe Case", 15 F. 439 (C.C.Md. 1883).

<sup>101</sup> *Id* at 442.

<sup>102</sup> *Id* at 444-445.

conclusion that (at least in the Maryland Circuit) in order to retain common-law copyright one could not publish *any part* of an opera in order to retain any rights under common law.

Needless to say, that was not encouraging, and for the next works, the lawyers for Gilbert and Sullivan would try one last legal scheme to achieve remuneration and justice for their clients, using a combination of common law and statutory protections. Pursuant to the *Redemption* decision, a plan was developed to protect the works of Gilbert and Sullivan from pirated performance, following the outlines of that holding.<sup>103</sup> A Boston musician and composer, Mr. George L. Tracey, was engaged and sent over to London, to create a piano score of the next Gilbert and Sullivan Operetta, *Princess Ida*.<sup>104</sup> He would then copyright the piano arrangement in America legally (being an American citizen), and thus Gilbert and Sullivan would have protection against any unauthorized performance whatsoever.<sup>105</sup> Meanwhile, the actual orchestral score was kept in manuscript, under lock, key, and guard.<sup>106</sup> Through a slight quirk in the copyright laws, the score could be copyrighted in both England and America, provided the author was an American citizen, and present in England on the day of publication, and that publication occurred in both nations on the same day.<sup>107</sup> This being done properly, the lawyers for Gilbert and Sullivan waited for the battle which never came – *Princess Ida* was a flop, and not pirated.<sup>108</sup> However, having hit on this scheme, it was repeated with *The Mikado*, and thus the battle commenced.

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<sup>103</sup> Browne, *supra* note 82 at 755.

<sup>104</sup> *Id* at 756.

<sup>105</sup> *Id*.

<sup>106</sup> *Id* at 756-757.

<sup>107</sup> *Id* at 756.

<sup>108</sup> *Id*. For a dramatization of the failure of *Princess Ida* and subsequent success of *The Mikado*, see *Topsy-Turvy*, USA Films (2000).

## B. *The Mikado* Litigation

*The Mikado* was first performed in London on March 14, 1885, to great success and acclaim.<sup>109</sup> While perhaps many had hoped otherwise, it was no surprise that the first American production would indeed be a pirated one, opening at the Museum in Chicago on June 29 of that same year, competing with a 21-inch tall Mexican woman and a two-headed cow for the public's affections at that theater.<sup>110</sup> This did not attract much legal notice, perhaps because the theater's other acts gave the production a distinct air of disrepute, and also because it was the common consensus that "the people on the stage could neither sing nor act."<sup>111</sup> Indeed, the performance was of such poor quality that the Tribune listed as among the aggrieved parties of the piracy the "intelligent public."<sup>112</sup> A second performance, also in Chicago, opened at Chicago's Grand Opera House on July 6, using some cast members from the Museum production.<sup>113</sup> The players were badly under-rehearsed, but reviewers thought the show had some potential given proper rehearsal.<sup>114</sup> This performance was produced by one Sydney Rosenfeld, who had brought much of his company (and himself) from New York, perhaps to test out the pirated show before bringing it back to New York.<sup>115</sup> This company was then brought to New York, and performed

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<sup>109</sup> *Stage History of "The Mikado,"* THE NEW YORK TIMES, May 29, 1910 at X7.

<sup>110</sup> *Id.* "There were three attractions on at the Museum at the same time: Lucia Zarete, the Mexican Dwarf, 21 inches in height, a two-headed cow, and The Mikado."... "The manager of the double-headed cow became upset with the amount of business being done by the Mikado... and tried to claim a breach of contract. He used to take the cow to the door of the theatre, and then claimed that it was the cow and not The Mikado which drew the crowds to the theatre. Finally, there had to be a compromise with the cow manager." *Id.*

<sup>111</sup> *Notes of The Stage,* THE NEW YORK TIMES, Jul 1, 1885.

<sup>112</sup> *The Museum – "The Mikado,"* CHICAGO DAILY TRIBUNE, Jul 2, 1885 at 5. From the review, it sounds like an outright butchering of the work. Amusingly, later on the production there would come to be regarded decently. "The Mikado," CHICAGO DAILY TRIBUNE, Oct 6, 1885 at 5.

<sup>113</sup> *Stage History,* *supra* note 109. Sir Arthur Sullivan apparently passed through Chicago at this time, and considered the subpar performance "very annoying." *Sir Arthur Very Wroth,* THE NEW YORK TIMES, Jul 14, 1885 at 1.

<sup>114</sup> *Mr. Hamlin and The Production of "The Mikado" at The Grand,* Chicago Daily Tribune, Jul 7, 1885 at 5. Apparently the show opened an hour and a half late because Mr. Rosenfeld had to scrounge to pay the theater-operator. *Id.*

<sup>115</sup> *Amusements in Chicago,* THE NEW YORK TIMES, Jul 7, 1885 at 2 ("The performance itself was more like a rehearsal than anything else"). The intent to bring the show to New York was announced the next day. *Amusements Notes,* THE NEW YORK TIMES, Jul 8, 1885 at 4. Interestingly, Mr. Rosenfeld claimed a moral obligation to which he

the first production of *The Mikado* in New York on July 20, 1885. Apparently Sir Arthur Sullivan (and his associates) cared not at all about these Chicago shenanigans.<sup>116</sup> Pirate productions in New York and its environs, however, would be a different question entirely.<sup>117</sup>

The first Mikado litigation was commenced as soon as plans for Rosenfeld's New York performance were announced. While some felt it would be "Japanese Burlesque and nothing more,"<sup>118</sup> D'oyly Carte and Mr. Albert Stetson (the American licensee of Mr. Carte) sued to enjoin the production, arguing not only the expected arguments, but also that the orchestral parts had been stolen by bribing a musician at the Savoy Theatre in London.<sup>119</sup> Represented by Alexander P. Browne and the eminent Joseph H. Choate, they were given a temporary injunction on the afternoon of July 20<sup>th</sup>.<sup>120</sup> However, it was thought that "no power on earth" could prevent the performance of the Mikado, and indeed none did.<sup>121</sup> Mr. Rosenfeld simply assigned his interest to one E.J. Abrahams, and the show went ahead as planned.<sup>122</sup> The atmosphere in the theater was "intense," with the players wondering if any arrests would be made that night.<sup>123</sup> While there were no arrests that night, the arrests were not long in coming for contempt of court, and the production would not be repeated.<sup>124</sup> Mr. Abrahams, the putative producer of this

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planned to pay a royalty, even if there was no legal obligation. "*The Mikado*," BOSTON DAILY GLOBE, Jul 2, 1885 at 5. There is no record of any such payment being made.

<sup>116</sup> *Sir Arthur Sullivan and "The Mikado"*, Chicago Daily Tribune, Jul 11, 1885 at 5.

<sup>117</sup> *Id.* There were many smaller legal tussles in America over *The Mikado*, but they pale both in scale and historical impact. Since the focus of this paper is not *per se* on the history of this operetta in America, only the New York litigation is discussed.

<sup>118</sup> *Gossip Of The Theatres*, THE NEW YORK TIMES, Jul 12, 1885 at 3.

<sup>119</sup> *Actor, Manager, and Play*, THE NEW YORK TIMES, Jul 19, 1885 at 3.

<sup>120</sup> "*The Mikado*" *Enjoined*, THE NEW YORK TIMES, Jul 21, 1885 at 1 (giving a full account of the court proceedings).

<sup>121</sup> *Gossip of The Theatres*, THE NEW YORK TIMES, Jul 16, 1885 at 3.

<sup>122</sup> Stage History, *supra* note 109. This tactic was one of the common ways of avoiding injunctions the Cummings Bill meant to stop. *Infra* at IV.

<sup>123</sup> Stage History, *supra* note 109.

<sup>124</sup> *Id.* It most likely didn't help the producers of this production that the judge who issued the injunction had to be called back from Vermont to hold the producers in contempt. Stephen Fiske, *Dramatic Feuilleton*, 13 THE ART AMATEUR; A MONTHLY JOURNAL DEVOTED TO ART IN THE HOUSEHOLD 4:68 (Sep 1885).

performance was arrested on July 29<sup>th</sup>,<sup>125</sup> and Mr. Rosenfeld was arrested shortly thereafter.<sup>126</sup> At the trial Rosenfeld was accused of using Abrahams as a pawn;<sup>127</sup> Mr. Rosenfeld was fined \$750, with Mr. Abrahams being fined \$250.<sup>128</sup> Rosenfeld was unable to pay, and thus spent a short period (4 days) in jail.<sup>129</sup> This production was not permanently forestalled, as it was picked up by Mr. Harry Miner,<sup>130</sup> who paid the bond to lift the injunction and presented *The Mikado* at his People's Theater.<sup>131</sup> Meanwhile, Mr. Rosenfeld languished in the Ludlow Street Jail for his short sentence, where he was tormented by street organ players playing the music from the *Mikado* outside his window.<sup>132</sup>

A second line of litigation, while perhaps less packed with incident, would ultimately be more important to the development of the law. While all of this was going on, a more reputable pirate production of *The Mikado* was being prepared by the Duffs, to be performed shortly before the Oct. 1 production of the official version, produced in America by Mr. Stetson.<sup>133</sup> The Duffs had been almost set to do the official production,<sup>134</sup> and because of this lacked anything else to put on their stage when the deal fell through.<sup>135</sup> The Duffs had previously produced the official production of *Iolanthe* – it is quite possible that they only turned to piracy out of desperation over an empty theater, after they failed to reach an agreement on the terms of a license. Mr. Duff

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<sup>125</sup> *Learning a Little About Law*, THE NEW YORK TIMES, Jul 30, 1885 at 5.

<sup>126</sup> He turned himself in on Aug. 1. *Actor, Manager, And Play*, The New York Times, Aug 2, 1885 at 3; *Very Cheap Contempt*, THE NEW YORK TIMES, Aug 2, 1885 at 4.

<sup>127</sup> *Ignorance as a Defense*, THE NEW YORK TIMES, Aug 6, 1885 at 8. Abrahams claimed that he did not know of the injunction, and would have never let the show go if he had.

<sup>128</sup> *Guilty of Contempt of Court*, THE NEW YORK TIMES, Aug 8, 1885 at 8.

<sup>129</sup> *Sydney Rosenfeld In Jail*, THE NEW YORK TIMES, Aug 9, 1885 at 5.

<sup>130</sup> Later Rep. Miner, denouncer of the play pirates. *Infra*.

<sup>131</sup> *Id.*; Stage History, *supra* note 109.

<sup>132</sup> *Id.* By this time Mr. Rosenfeld was “head over ears in debt,” and indeed had been for some time. *Music*, CHICAGO DAILY TRIBUNE; Aug 2, 1885 at 20.

<sup>133</sup> *The Gossip of The Stage*, THE NEW YORK TIMES, Jun 18, 1885 at 3.

<sup>134</sup> In fact, it seems that it was almost a done deal at once point. *Mr. Duff and “The Mikado,”* THE NEW YORK TIMES, Apr 23, 1885 at 4.

<sup>135</sup> *The Gossip of The Stage*, THE NEW YORK TIMES, May 28, 1885 at 3.

said that Carte insisted on impossible terms,<sup>136</sup> while Carte said that the Duffs had walked away from a very reasonable offer after extensive negotiation.<sup>137</sup> Whatever the case, the younger Mr. Duff simply went to several performances of *The Mikado* and made arrangements to ship costumes back to New York, while his father made arrangements to prepare an orchestration of the published piano score.<sup>138</sup> As was commonly noted, Mr. Gilbert's book for *The Mikado* was published in Britain,<sup>139</sup> and in any case anyone could use it since it was the work of a foreigner.<sup>140</sup> Since the piano score was copyrighted by an American, the question was thus freed from the international copyright frame and presented simply – could one legally prepare a performing orchestration (and perform it) of a copyrighted piece of American music?

The Duffs were represented by ex-Judge Dittenhoefer, of whom we shall hear more later.<sup>141</sup> While he was ordinarily the attorney for Stetson, he was strongly of the opinion that copyright law did not protect public performance of music, and gave that opinion to Duff.<sup>142</sup> Mr. Rosenfeld acted as a distraction from the Duffs for some time, as they had thought he would,<sup>143</sup> and it was not until August 21 that the application for an injunction by Carte and Stetson was argued.<sup>144</sup> The attorneys for Carte and Stetson set forth the expected arguments, to which Dittenhoefer and his co-counsel A.J. Vanderpoel replied that the copyright was technically invalid, that the scheme of involving Tracey was “subterfuge” of American copyright law, that the copy was made from an English printing of the piano score, and that anyone could make an

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<sup>136</sup> *Id* (60% of the gross receipts, that they provide the orchestra and theater, and that there be a right of cancellation for Mr. Carte upon notice if proceeds were below a certain level.)

<sup>137</sup> *D'oyly Carte Excited*, BOSTON DAILY GLOBE, Jun 29, 1885 at 4.

<sup>138</sup> *Id*. Amusingly, the senior Mr. Duff claimed that he was doing this with no thought for the profit, and simply to survey the public's attitude towards theatrical copyright, leading to the sarcastic comment “thoughtful Mr. Duff!” *Notes and News*, CHICAGO DAILY TRIBUNE, Jul 5, 1885 at 6.

<sup>139</sup> *Echoes from the Stage*, CHICAGO DAILY TRIBUNE, Jun 7, 1885 at 9 (noting that the publication of the libretto in England meant that Carte and Stetson meant to stand on the *Redemption* case alone for their copyright).

<sup>140</sup> *The Threatened “Mikado” Litigation*, THE NEW YORK TIMES, Jun 28, 1885 at 1.

<sup>141</sup> *Infra* at [Cumings Section].

<sup>142</sup> *Actor, Manager, And Play*, THE NEW YORK TIMES, Jul 26, 1885 at 3.

<sup>143</sup> Gossip, *supra* note 118.

<sup>144</sup> “*The Mikado*,” THE NEW YORK TIMES, Aug 22, 1885 at 5.

orchestration if they wanted to anyway – “the only right secured was the right to multiply copies of the copyrighted work.”<sup>145</sup>

The opinion of Judge Wallace of the Circuit Court came back in favor of Duff on September 16, 1885.<sup>146</sup> The Judge noted that:

They were well advised that, until publication of their manuscript, their exclusive right to multiply copies of their work and control its production upon the stage would be intact, but that after publication this right would become public property unless saved by statutory protection. Common-law rights of authors run only to the time of the publication of their manuscripts with their consent. After that the right of multiplying copies, and, in the case of a dramatic work, of representation on the stage, by the rule of the common law is abandoned to the public. It is immaterial whether the publication be made in one country or another. Such rights of authors as are saved by statute are not recognized extraterritorially. They can only be enforced in the sovereignty of their origin.<sup>147</sup>

The court continued, having noted that since *The Mikado* had been performed in London, it was thus only protected by statutory protections, which do not grant a right beyond mere copying of the book.<sup>148</sup> Despite all the constructs seen in the *Redemption* and *Pirates of Penzance* cases, the court realized that American law contained no protection for the public performance of a musical composition:

[T]he complainant falls short of a case for the relief asked, because representing the arrangement on the stage is not the representation of a dramatic composition, but of a musical composition, as to which complainant's statutory title consists in the sole right of printing, copying, etc., and not of public representation.<sup>149</sup>

With that, the door was closed on attempts by composers to recover for unauthorized performances of their works. The court had clearly stated the law, and the case would not be

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<sup>145</sup> *Id.*

<sup>146</sup> *Carte v. Duff* (“The Mikado Case”), 25 F. 183, 23 Blatchf. 347 (C.C.N.Y. 1885).

<sup>147</sup> *Id.* at 184. These last three sentences have been questioned by Elihu Inselbuch, *First Publication Abroad – Investiture, Divestiture, or Inoperative? A Territorial View of Copyright*, 35 *FORDHAM L. REV.* 477, 492 (1965). In that piece the author notes that this dicta was unsupported, and quite possibly incorrect. However, he does not dispute the case’s actual holding, since the statutes were as they were at the time. *Id.* at 493.

<sup>148</sup> *The Mikado Case* at 185 (“Strictly, the only invasion of a copyright consists in the multiplication of copies of the author's production without his consent. Any other use of it, such as for the purpose of public reading or recitation, is not piracy.”)

<sup>149</sup> *Id.* at 187.

questioned judicially from this point forward. Immediately after this decision, Sydney Rosenfeld brought an action against Carte and Stetson for \$50,000, for restraining him from performing *The Mikado*.<sup>150</sup> The Duffs also got an injunction against Carte and others from any further suit against them.<sup>151</sup> To drive the point home that the problem in this case had been the lack of statutory protection for public performances of musical compositions, the circuit court would later decide that Tracy's copyright on his piano score was valid.<sup>152</sup>

Despite his victory in the courts, the Duffs lost the larger struggle. Carte pulled out all the stops to upstage the Duffs' performance at the Standard Theatre, bringing in a British touring company to play at the Fifth Avenue Theatre,<sup>153</sup> to be led by Sir Arthur Sullivan himself, and several days before the Duffs' production of *The Mikado* would open.<sup>154</sup> Mr. Duffs' production could only pale in comparison,<sup>155</sup> and the Carte/Stetson production was a rousing success.<sup>156</sup>

Sullivan gave a speech before the performance, against his custom, remarking that:

It may be some day that the legislators of this magnificent country...may see fit to afford the same protection to a man who employs his brains in literature as [a mechanical inventor]...but even when that day comes, as I hope and believe it will come...we shall still trust, mainly, in the unerring good instinct of the great public for the good, right, and honest.<sup>157</sup>

During this litigation, there was a brief glimmer of hope that international copyright could be established through something similar to the device used by Gilbert and Sullivan.<sup>158</sup>

This hope was extinguished by the decision in *The Mikado Case*. Seeing that the statutes as they

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<sup>150</sup> *Rosenfeld Wants Damages*, THE NEW YORK TIMES, Sep 19, 1885 at 2. Ex-Judge Dittenhoefer gave his suit a decent hope of success. *Actor, Manager, and Play*, THE NEW YORK TIMES, Sep 20, 1885 at 4.

<sup>151</sup> *D'oyly Carte Enjoined*, THE NEW YORK TIMES, Sep 30, 1885 at 4.

<sup>152</sup> *Carte v. Evans*, 27 F. 861 (C.C.Mass. 1886).

<sup>153</sup> *D'oyly Carte and His Company*, CHICAGO DAILY TRIBUNE Aug. 23, 1885 at 19 (discussing how the company was brought over in near-complete secrecy).

<sup>154</sup> *Amusements*, THE NEW YORK TIMES, Sep 25, 1885 at 5.

<sup>155</sup> *John Duff's Mikado*, BOSTON DAILY GLOBE, Aug 25, 1885 at 2; "*The Mikado*," CHICAGO DAILY TRIBUNE, Aug 30, 1885 at 19 ("The result [of the Duff production] was disappointing in everything save the scenery.").

<sup>156</sup> *The "Mikado" a Success*, BOSTON DAILY GLOBE, Aug 20, 1885 at 4.

<sup>157</sup> *Amusements*, *supra* note 154.

<sup>158</sup> *Foreign Copyright*, CHICAGO DAILY TRIBUNE, Aug 2, 1885 at 20.

stood could only foil them, those on the side of a liberal copyright law joined in the lobbying, first for an international copyright law,<sup>159</sup> and then for protection of the exclusive right of public performance for musical compositions. Many individuals from the above litigation would return to the stage of Congress to press for this right.

### III. THE TRELOAR COPYRIGHT BILL

Tensions from the successful battle for international copyright died down several years after March 1891, and the creators of performing works made an effort to have the copyright statutes better protect performances of their works. As a result of this, the 54<sup>th</sup> Congress would see two bills which would have protected the right of public performance for musical compositions. One, the Cummings Copyright Bill,<sup>160</sup> was comparatively limited, dealing solely with issues of performance of copyrighted works, and will be dealt with in the next section. The other, the Treloar Copyright Bill, was a proposal for a full revision of the copyright code.<sup>161</sup> It was introduced by Rep. William M. Treloar, a composer, music teacher, and music publisher from Missouri.<sup>162</sup>

William Treloar only served one term in Congress,<sup>163</sup> and his very election was something of a fluke. The Democratic incumbent in the Missouri 9<sup>th</sup> District, one Champ Clark, while variously described as an “orator”<sup>164</sup> and “weird,”<sup>165</sup> was popular, and considered fairly

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<sup>159</sup> Browne, *supra* note 82, at 761.

<sup>160</sup> 54<sup>th</sup> Cong., S. 2306 (1896) (hereinafter “Cummings Copyright Bill”)

<sup>161</sup> 54<sup>th</sup> Cong., H.R. 5976 (Feb. 13, 1896) (Hereinafter “Treloar Copyright Bill”), *as amended* H.R. 8211 (Apr. 15, 1896) (Hereinafter “Amended Treloar Copyright Bill”)

<sup>162</sup> *Treloar, William Mitchellson, (1850 - 1935)*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, Available at <http://bioguide.Congress.gov/scripts/biodisplay.pl?index=T000363> (2006).

<sup>163</sup> *Id.*

<sup>164</sup> *From Missouri*, THE ROLLA NEW ERA, Mar. 16, 1895 at 2. *From the Gallery*, THE WASHINGTON POST, Apr. 12 1896 at 21 (Under “A Missouri Music Teacher”) (Champ Clark was “undoubtedly one of the best extemporaneous speakers Congress has known in many a day”).

<sup>165</sup> *Pike County Copyright*, THE NEW YORK TIMES, Mar. 5, 1896 at 4 (Hereinafter “Pike County Copyright 1”).

safe. Mr. Treloar was the fifth person offered the Republican nomination,<sup>166</sup> lending credence to the notion that no-one else wanted to run when they would lose for sure. Treloar's own family gave him little chance of winning, and his friends felt that he was being taken advantage of by the Republican Party.<sup>167</sup> The man himself was so sure of losing that he did not make contingency plans for his teaching duties in case he won.<sup>168</sup> The Missouri Democrats were so sure of winning that they stayed home, and, in unusual numbers, didn't bother to vote.<sup>169</sup> A man who was condescendingly regarded by many as a simple piano-tuner was now a member of Congress by 132 votes,<sup>170</sup> as a part of the "Republican Landslide" of 1894.<sup>171</sup> The Cincinnati Tribune noted his background with amusement, commenting that "Mr. Treloar ought to be a great favorite in Washington society...he has been a director of amateur comic operas."<sup>172</sup>

Mr. Treloar was in fact somewhat more reputed than some suggested before coming to Congress. While not a composer who is well-remembered today, he was a fairly popular one, claiming to sell over 50,000 copies of his "Sleigh Ride" in 1890 alone,<sup>173</sup> and more than 250,000 sold by 1908.<sup>174</sup> His pieces may have been gimmicky, calling for all sorts of extraneous implements to complement the piano, but they were not ignored.<sup>175</sup> He was also a professor of music at Hardin College ("the Vassar of the west") and several other colleges, as well as the

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<sup>166</sup> From Missouri, *supra* note 164.

<sup>167</sup> *Good Stories For All*, BOSTON GLOBE, Nov 29, 1894 at 4 (Fairly detailed discussion of Treloar and his campaign).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* This is the statement of the loser of the election, Champ Clark, but there is no reason to disbelieve it given the above.

<sup>170</sup> *Id.* Champ Clark was magnanimous in defeat, noting that Mr. Treloar was in fact a well-respected professor of music and composer. *Id.* Treloar was likewise generous after Clark replaced him in the next election. WILLIAM LARKIN WEBB, CHAMP CLARK 83 (1912).

<sup>171</sup> *Faces Will be Missed*, THE WASHINGTON POST, Nov. 9, 1896 at 1 (Under the heading "Champ Clark's Revenge").

<sup>172</sup> *People in General*, THE WASHINGTON POST, Dec. 6, 1894 at 4 (quoting THE CINCINNATI ENQUIRER). This is of course more a comment on Washington than Mr. Treloar.

<sup>173</sup> *Advertisement*, THE CHAUTAUQUAN; A WEEKLY NEWSMAGAZINE, Mar 1891 at 857.

<sup>174</sup> Peter A. Munstedt, Kansas City Music Publishing: The First Fifty Years, 9 *American Music* 353, 371 (Winter, 1991). These figures should probably be taken with several truckloads of salt though.

<sup>175</sup> *Id.*

public schools.<sup>176</sup> Given this background, his interest in a copyright bill for composers is rather obvious. And yet to assume that his motivations were purely self-serving in introducing his copyright bill is perhaps overly cynical. As he explained in a letter to Robert Underwood Johnson:

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

I have no axe to grind whatever, and am only endeavoring to enact such a law as will be the Copyright Department on a firm basis, and one that will protect all concerned.<sup>177</sup>

With these good intentions the Treloar Bill was introduced in its first form on February 13, 1896, a little over 2 months after the start of the session.<sup>178</sup> It seems likely that introducing this copyright bill was one of his primary objectives in Congress, explaining his appointment to the Patents Committee, presumably on his request.<sup>179</sup> It also seems likely that the bill was written in a hurry after the election, judging by the many drafting errors and problems. Whatever the case, the Treloar Copyright Bill was referred to the Committee on Patents, as expected.<sup>180</sup> From that

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<sup>176</sup> *Id* at 370. Nor did he only teach music. *Coming to Congress*, THE WASHINGTON POST, Nov. 10, 1895 at 11 (“He also taught English, and his knowledge in this respect may give him an advantage over his fellow Congressmen.”).

<sup>177</sup> Letter from Rep. William M. Treloar to Robert Underwood Johnson, Feb. 20, 1896, (Available in Robert Underwood Johnson Papers, New York Public Library, New York, NY). Letters to Mr. Johnson are all from this collection, unless otherwise indicated. The letter is addressed to “J.N. Johnson,” a rather startling bit of ignorance (given the importance of Mr. Johnson, discussed *infra*), suggesting that Rep. Treloar was wading into currents he was not even dimly aware of.

<sup>178</sup> Treloar Copyright Bill

<sup>179</sup> Notice of the Clerk of the House of Representatives, December 21, 1895 (in The National Archives).

<sup>180</sup> Copyright bills had once usually been referred to the Library Committee, but this had changed during the international copyright struggle.

point the bill was referred to a subcommittee for two weeks, to be followed by a hearing before the full committee.<sup>181</sup>

### *A. Opposition from the Copyright Leagues*

Robert Underwood Johnson and George Haven Putnam were at the time the leading proponents of liberalization of copyright law, the guiding forces behind the American Authors and American Publishers Copyright Leagues, respectively, as well as major figures in the New York literary world. The Leagues had originally been formed to advocate for international copyright law, and after they triumphed in congress in 1891 they did not dissolve, but rather established themselves as protectors of international copyright law, and indeed copyright law generally.<sup>182</sup> Without question the road to copyright reform lay through them. Senator Orville Platt, the Chair of the Senate Committee on Patents, wrote that “I take my inspiration in regard to copyright from the league, and indeed from you.”<sup>183</sup> Representative Draper, the Chair of the House Committee on Patents, was similarly solicitous of their opinions and advice on copyright matters.<sup>184</sup>

These men received their first notice of the Treloar Bill from the French Embassy,<sup>185</sup> and shortly thereafter were sent a copy of the bill by Chairman Draper.<sup>186</sup> They were not enthused

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<sup>181</sup> Letter from Rep. William Draper to Robert Underwood Johnson (Feb. 20, 1896).

<sup>182</sup> Arthur Stedman, *New York Topics*, 18 THE DIAL 207:91 (Jan. 26, 1895) (discussing the nature, purpose, and recent activities of the league). For a history of the American Copyright League more generally, see Carol Ellen Cutler, *A History of the American Copyright League* (Unpublished Master’s Thesis, University of Chicago, 1973).

<sup>183</sup> Letter from Sen. Orville H. Platt to Robert Underwood Johnson, Nov. 12, 1894, in Robert Underwood Johnson Papers. He continued: “If you lead me wrong I shall find it out sometime and stop being led.”

<sup>184</sup> See *E.G.* Letter from Rep. William F. Draper to Robert Underwood Johnson, Feb. 20, 1896, in Robert Underwood Johnson Papers (“I have not yet studied the [Treloar] Bill, but would be glad to have your views upon it, and it may be you would like to be heard by the committee”).

<sup>185</sup> Letter from Jules Boenefine to Robert Underwood Johnson (Feb. 15, 1896) (He wrote that it was “intended to revise the copyright law of March 3, 1891,” which would lead to confusion down the road).

<sup>186</sup> Letter from Rep. William Draper to Robert Underwood Johnson (Feb. 20, 1896); See also Letter from George Haven Putnam to Robert Underwood Johnson (Feb. 20, 1896). The letter reads:

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

with the Treloar Copyright Bill, despite not completely being familiar with it at first, fearing it would undo the international copyright legislation they had fought so hard over several years to pass. Putnam especially was unequivocal, stating that “I judge that we shall be quite unanimous in our prompt and cheerful opposition to the absurd Treloar Bill. I should like to know who is behind this wild Missourian in his troublesome undertaking.”<sup>187</sup> While Johnson was less critical in private, he was equally vociferous in his public opposition to the bill.<sup>188</sup> This opposition, at times both reasonable and unreasonable, would doom the Treloar Bill.

The bill was in a subcommittee for two weeks,<sup>189</sup> and controversy brewed. Shortly after the bill was introduced, both leagues adopted a formal resolution against the Treloar Copyright Bill. It was first adopted by the Authors Copyright League, and then the Publishers Copyright League.<sup>190</sup> Reprinted in *Scientific American*, the resolution sets forth simply the objections of these leagues to the bill.<sup>191</sup>

The first objection was that the bill limited copyright solely to citizens of the United States, effectively a repeal of the 1891 International Copyright Bill.<sup>192</sup> This objection was based in that certain sections referred specifically to “citizen(s) of the United States” only receiving copyrights based on certain conditions.<sup>193</sup> It seems likely that “ambiguity” regarding the bill’s treatment of international copyright emanated from a drafting error, and abrogation of the 1891

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I do not imagine, however, that there is any serious risk of its passage during the present Congress. The enlargement of the term of copyright to 40 years is probably in itself enough to make the bill unacceptable to the “Granger” side of the House. It will, however, be desirable to give consideration to the matter in our joint Committee.

<sup>187</sup> Letter from George Haven Putnam to Robert Underwood Johnson (Feb. 28, 1896).

<sup>188</sup> Letter from Robert Underwood Johnson to Edward Clarence Stedman (Mar. 8, 1896) (Available in The Columbia University Library, Edward Clarence Stedman Papers) (“[I]t is really not a bad measure though (as we ‘resolved’) a clumsy one.”).

<sup>189</sup> Letter from Rep. William Draper to Robert Underwood Johnson (Feb. 20, 1896).

<sup>190</sup> *The Copyright Situation*, THE CRITIC: A WEEKLY REVIEW OF LITERATURE AND THE ARTS, Mar. 14, 1896 at 188; See also Letter from George Haven Putnam to Robert Underwood Johnson, Feb. 29, 1896.

<sup>191</sup> *A New Copyright Bill*, SCIENTIFIC AMERICAN, Mar. 21, 1896 at 179.

<sup>192</sup> *Id.*

<sup>193</sup> See *E.G. Treloar Copyright Bill* §13.

Act was not part of the substantive intent of the bill.<sup>194</sup> For starters, a manufacturing clause would make little sense if foreign copyrights generally were outlawed – it would merely prohibit American authors from having their works printed overseas.<sup>195</sup> It also makes little sense looking at the textual treatment of foreign copyright in past laws and bills. Both the 1870 and 1831 revisions had specific clauses denying copyright to foreign authors. Especially in light of the passage of the 1891 copyright bill, an explicit revocation of the 1891 act would seem necessary, but none is found in the Treloar bill. In any case, Section 32 of the Treloar Bill was very quickly amended, so that by the time of the hearings a little more than a month after it was introduced, it included the reciprocity provisions for international copyright in the 1891 Act.<sup>196</sup>

The second objection of the resolution would come to be the main concern of those who opposed the Treloar Copyright Bill as it became clear the first objection was based on a drafting error – that the bill extended the manufacturing clause of the copyright laws to include periodicals, maps, charts, dramatic or musical compositions, engraving, cuts, or prints.<sup>197</sup> The 1891 International Copyright Act contained a clause requiring that all books, chromographs, photographs, or lithographs be printed from type set in the US or from plates or negatives or drawings made in the US.<sup>198</sup> Whether that clause should be broadly construed to include music, or narrowly construed to specifically exclude music, was debated for several years. Shortly before the Treloar Bill was introduced, the First Circuit Court of Appeals upheld the Decision of the Circuit Court of Massachusetts, firmly establishing that this provision should be read

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<sup>194</sup> *Copyright Law Revision*, BOSTON GLOBE, Apr. 30, 1896 at 6 (calling the treatment of international copyright in the original bill only ambiguous).

<sup>195</sup> While this may seem an attractive option nowadays, in the era of cheap shipping and cheap third world labor, neither existed at that time, making the option most unattractive.

<sup>196</sup> 54<sup>th</sup> Cong., 1<sup>st</sup> Session, Hearing before the House Committee on Patents on the Treloar Copyright Bill, Feb. 19-20 1896 (Hereinafter “Treloar Hearing”).

<sup>197</sup> Letter from Albert Smith to Robert Underwood Johnson, Feb. 19, 1896 (calling the manufacturing clause the most troubling part of the bill).

<sup>198</sup> 26 Stat. 1106 § 4956 (1891).

narrowly to exclude music.<sup>199</sup> The Circuit Court decision which was upheld explained the rationale in greater detail, noting that the specificity with which lithographs are included implicitly excludes music from the manufacturing clause.<sup>200</sup> Indeed, those who had proposed the manufacturing clause amendment (the typesetters) to the 1891 act “had no interest in including the printing of music in [the] amendment. The music people took no steps to help themselves, nor to help [those who pushed for the manufacturing clause more generally].”<sup>201</sup> Furthermore, musical compositions and other items were included in the draft of the Frye amendment which put the manufacturing clause into the bill, but that line was crossed out before it was submitted.<sup>202</sup>

The larger publishers (exemplified by G.H. Putnam) were against any manufacturing clause, either in 1891 or 1897.<sup>203</sup> Putnam had “accepted the manufacturing condition at the time only because we were all agreed that there was no other way in which a beginning of International Copyright could be arrived at.”<sup>204</sup> However, he also recognized that the existence of a manufacturing clause for books significantly weakened the hand of the members of the book industry in debate, since the members of the music or other industries could simply retort that the book industry already had a manufacturing clause – why should the music publishers not enjoy the same?<sup>205</sup> Recognizing that opposing the right of the Music Publishers to seek a similar right could backfire, Putnam instead argued that “[the music publishers] can do what you choose with

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<sup>199</sup> *Oliver Ditson Co. v. Littleton*, 67 F. 905 (1st Cir. 1895). This was before Circuit Court came to only refer to the circuit court of appeals, even though the Circuit Courts of Appeal had already been established earlier that decade. *Evarts Act*, 26 Stat. 826 (1891).

<sup>200</sup> *Littleton v. Oliver Ditson Co.*, 62 F. 597 (C.C.Mass. 1894). The Circuit Courts were still a trial court even after the creation of the Circuit Courts of Appeals in 1891, until they were subsumed into the District Court with the *Judicial Code of 1911*. 36 Stat. 1087 (1911).

<sup>201</sup> Letter from G.H. Donaldson to Robert Underwood Johnson, Apr. 18, 1891.

<sup>202</sup> Robert Underwood Johnson, *The Status of Music Under The New Law*, 15 THE CRITIC: A WEEKLY REVIEW OF LITERATURE AND THE ARTS 256 (May 9, 1891).

<sup>203</sup> Letter from George Haven Putnam to Robert Underwood Johnson, Mar. 26, 1896.

<sup>204</sup> *Id.*

<sup>205</sup> Letter from George Haven Putnam to Robert Underwood Johnson, Apr. 16, 1896.

your own amendment, but you have no right to assume for yourselves the responsibility of ‘revising’ our whole copyright law.”<sup>206</sup> This had the additional advantage of not antagonizing protectionists (like Rep. Draper) who might ordinarily support extending the manufacturing clause.<sup>207</sup>

The third objection in the Resolution was to the clause setting forth a maximum of \$5,000 in damages for the infringement of a literary copyright.<sup>208</sup> This section did not in fact implicate “literary productions,” as was argued in the resolution,<sup>209</sup> since books were not included in its coverage.<sup>210</sup> Furthermore, these terms were not substantially different than those in a copyright bill which had been enacted the previous year, the Covert Copyright Act.<sup>211</sup> What was happening here was that both sides were in fact arguing against the already enacted Covert Bill, since the Printers and Authors Copyright Leagues had not been happy with the compromise it represented.

The fourth objection to the bill was that the proposal to create a Commissioner of Copyrights and staff would be better implemented by the independent bills separately in the House and Senate.<sup>212</sup> Incidentally, at the same meeting of the Publishers Copyright League, they adopted a separate resolution endorsing the separate bills to create a Commissioner.<sup>213</sup>

The fifth objection was the sometimes competing and sometimes complementary Cummings Copyright Bill would better protect public performance rights, since it came

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<sup>206</sup> Letter from George Haven Putnam to Robert Underwood Johnson, Mar. 26, 1896.

<sup>207</sup> *Id.*

<sup>208</sup> A New Copyright Bill, *Supra* note 191.

<sup>209</sup> A New Copyright Bill, *Supra* note 191.

<sup>210</sup> Treloar Copyright Bill, § 27

<sup>211</sup> 28 Stat. 965 (1895). This Act capped damages from individual infringements and total liability lower than they had been before, in part to protect newspapers from photographers who would extort funds on the difficult-to-disprove charge that the photograph printed in the newspaper was copyrighted by the photographer.

<sup>212</sup> A New Copyright Bill, *Supra* note 191. The bills were 54<sup>th</sup> Cong., 1<sup>st</sup> Session, S. 425 (Dec. 5, 1895) and H.R. 1243 (Dec. 10, 1895)

<sup>213</sup> *Id.*

unburdened with the other provisions.<sup>214</sup> When this resolution was passed this may have been true, since both bills as introduced contained identical provisions for public performances.<sup>215</sup> However, the Treloar copyright bill would evolve so as to provide for a time somewhat different language protecting public performances, giving that section a broader scope to include public performances of literary works, even by mechanical means.<sup>216</sup> The Treloar bill would be brought back into lockstep with the Cummings Bill by the end, negating this advantage.

### *B. Pike County Copyright*

Manufacturing clauses were generally popular in the age of nationalism and protectionism, and an opposition of reasoned dialogue would have shown that the bill was aligned with broad national sentiments, even if it was opposed to the more elite sentiments.<sup>217</sup> Seeing this, the bills antagonists adopted a course of loud and not always fair editorial assaults on the Treloar Copyright Bill.

Two of the nastiest editorials came in the *New York Times*, both condescendingly entitled *Pike County Copyright*.<sup>218</sup> The first appeared on Mar. 3, and it seemed to know little or nothing at all about Mr. Treloar, much like the Authors and Publishers Copyright Leagues.<sup>219</sup> The simple argument of the letter was that the Missouri 9<sup>th</sup> District was a remote and unc cosmopolitan place, and that the representative from that district must be ignorant of the will of his constituents to introduce a bill relevant to cosmopolitan concerns, and stood equally ignorant the law of

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<sup>214</sup> A New Copyright Bill, *Supra* note 191. For discussion of this bill, *see infra* at IV.

<sup>215</sup> Treloar Copyright Bill § 28; Cummings Copyright Bill § 4966.

<sup>216</sup> Amended Treloar Copyright Bill § 16.

<sup>217</sup> This was because they were seen as protecting American printers and typesetters from market pressures that could be brought by printers abroad. However, some of the bill's opponents, including Rep. Draper, were ordinarily fairly ardent protectionists.

<sup>218</sup> Pike County Copyright 1, *Pike County Copyright*, THE NEW YORK TIMES, Mar. 10, 1896 at 4 (Hereinafter "Pike County Copyright 2"). Pike County was associated Mark Twain's stories of backwoods Missouri. MARK TWAIN, THE ADVENTURES OF HUCKLEBERRY FINN (Explanatory Preface).

<sup>219</sup> Pike County Copyright 1; Letter from George Haven Putnam to Robert Underwood Johnson, Feb. 28, 1896.

copyright as it stood.<sup>220</sup> The editorial then pointed out, in what was probably not a coincidence, the flaws set out in the resolution of the copyright leagues.<sup>221</sup>

By the second editorial the authors had bothered to consult the Congressional Directory, and discovered Mr. Treloar's background in music.<sup>222</sup> Following some more desultory discussion of the Missouri 9<sup>th</sup> District, the editorialist accused Treloar of wanting to steal the works of foreign composers:

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

...

That he has added [the uncontroversial parts of the bills already pending before Congress] to his own measure for the protection of Treloar constitutes no reason whatever why Treloar should be allowed to pillage the musicians of Europe in order to promote the culture of Audrain County.<sup>223</sup>

These editorials were written more or less simultaneously with a series of hearings on the Treloar Copyright Bill, with the first one arriving on the pages of the Times the day after the first hearing on the Treloar Bill.<sup>224</sup> Attending that hearing were Robert Underwood Johnson, Charles A. Bolles and Mr. Bernard Lewinson of the Photographers League, Charles B. Bayly of the Music Publishers Association of America, and Ainsworth Spofford, the Librarian of Congress.<sup>225</sup> Despite his clout, Mr. Johnson was the only voice against the bill in the hearing, as was noted by Mr. Lewinson:

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<sup>220</sup> Pike County Copyright 1.

<sup>221</sup> *Id.*

<sup>222</sup> Pike County Copyright 2.

<sup>223</sup> *Id.* Audrain is the county in Missouri Treloar hailed from, bordering Pike County.

<sup>224</sup> *Hearing On The Treloar Bill*, THE WASHINGTON POST, Mar 5, 1896 at 4. As was the case with most hearings at the time, there exists no print of the content of the hearing.

<sup>225</sup> *Id.*

Mr. Robert U. Johnson was the only one who opposed that measure, all other interests were united in the support of the bill, and urged its passage as the most complete and satisfactory remedy for present copyright ills. One and all, however, demanded, with Mr. Johnson, that those portions of the bill which seek to alter the present provisions of international copyright be stricken out, and the law as it is now be allowed to stand. And I may say that we had such assurances from individual members of the Patent Committee, and especially from Mr. Treloar himself, as lead us to believe that that demand will be respected, and that the bill when reported will make no change in the present none too liberal provisions for international copyright.<sup>226</sup>

Nonetheless, Mr. Johnson presented the resolutions of the copyright leagues, and especially noted the concerns regarding the possible revocation of the 1891 Act and opposition to extending the manufacturing clause.<sup>227</sup> Despite the support for the Treloar Bill, he remained of the opinion that there was “not very much chance” of the Treloar Bill getting out of committee.<sup>228</sup>

### *C. The Second Hearing*

The Treloar Bill at this time was undergoing a radical process of revision, in large part through a second hearing on March 18-20, 1896.<sup>229</sup> Unlike all other hearings on this matter, this hearing was recorded and published, not by the Government, but most likely by the advocates of the Treloar Bill.<sup>230</sup> Included in the print is a copy of the Treloar copyright bill clearly in transition between the original bill as introduced, and the revised bill that would be re-introduced after the hearing. Given the comments made about the bill at the hearing, this version represents

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<sup>226</sup> *Letter from B. Lewinson*, THE EVENING MAIL AND EXPRESS, Mar. 5, 1896.

<sup>227</sup> Hearings on the Treloar Bill, *supra* note 224.

<sup>228</sup> Letter from Albert Smith to Robert Underwood Johnson, Mar. 17, 1896 (saying he was glad Mr. Johnson felt this way).

<sup>229</sup> Treloar Hearing. The hearing started a day earlier than indicated on the print though. Letter from George Haven Putnam to Robert Underwood Johnson, Mar. 19, 1896.

<sup>230</sup> The reasons for this belief are several. Firstly, the hearing in general was rather favorable to the bill, especially the first two thirds containing a lengthy explanation of the bill by Alexander P. Browne. Secondly, the hearing was published by Alfred Mudge & Son, Printers, who printed music among other items, including in the past works of European Composers, and thus had a specific interest in seeing the manufacturing clause applied to music. Finally, the testimony of George Haven Putnam, which would have been easily available since it was submitted as a written précis to the committee, was not only not included, but his presence was not even recorded. *Id.*; Letter from George Haven Putnam to Robert Underwood Johnson, Mar. 19, 1896.

either the bill as it was at the hearing, or immediately thereafter, in response to Mr. Browne's comments.

The revised bill included specific recognition of the international copyright system that had been established.<sup>231</sup> However, the most notable fact of the revised bill is that the Treloar Copyright Bill now seemed to revoke the Covert Copyright Act which had been passed at the end of the previous Congress.<sup>232</sup> This law had protected Newspapers from blackmail owing to immense liabilities from improperly using copyrighted photographs and other media by capping damages at \$1 per copy printed.<sup>233</sup> Unlike some other features of this bill, Mr. Treloar did not have the idea for this change – the Chicago Tribune was not being unreasonable to suggest that “some one has evidently imposed on Mr. Treloar.”<sup>234</sup> Shortly after the Treloar Copyright Bill was introduced, the Photographer's Copyright League suggested amendments to this effect in a lengthy memorandum written to Mr. Treloar, and sent as a copy to notables including Robert Underwood Johnson.<sup>235</sup> The Photographer's Copyright League wanted the approval of the other copyright leagues,<sup>236</sup> and while this change did resolve their third concern, it did not ameliorate their concerns with the bill sufficiently to change their stance with regard to the overall bill. Perhaps Treloar was honestly convinced of the rightness of their position, but whatever the case, the Photographers got behind the Treloar Copyright Bill, and the bill incorporated a reverse of its position on the Covert Copyright Act at the same time. It is hard to imagine why else the

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<sup>231</sup> Treloar Hearing at 11§ 32.

<sup>232</sup> 28 Stat. 965 (1895).

<sup>233</sup> *Bad Feature Of Copyright Bill*, CHICAGO DAILY TRIBUNE, Mar. 6, 1896 at 3.

<sup>234</sup> *Id.*

<sup>235</sup> Letter of Charles E. Bolles (Sec'y, Photographer's Copyright League) to Robert Underwood Johnson (Feb. 27, 1896) (Attached Memorandum by Bernard Lewinson, General Counsel, Photographer's Copyright League).

<sup>236</sup> Letter of Charles E. Bolles to Robert Underwood Johnson (Feb. 27, 1896). The letter reads:

In the event of my not being able to see you hereafter, will you kindly let me have a line from you as to the wishes of your committee on section 27 of the Treloar Bill on Copyright? I shall go to Washington on Tuesday P.M. and would be relieved to learn that your interests are not apart from ours in desiring the change as made in that section should the bill become a law.

photographers would have supported the Treloar bill, since they were certainly not angling to be covered by a manufacturing clause.<sup>237</sup> This change would be printed into the second edition of the bill,<sup>238</sup> and receive further scrutiny then.<sup>239</sup>

The effect of the revisions to the Treloar Copyright Bill regarding music, on the other hand, was extremely positive. The bill's public performance section was no longer a replica of the Cummings Bill, but was substantially more liberal in its scope than that bill's final version, even if the drafting of this section was still clearly incomplete and includes remnants of the section's earlier version.<sup>240</sup> The public performance section now included protection for "any literary composition, including any musical composition."<sup>241</sup> The breadth of this section is impressive, as is the prescience of the revised bill in including a section covering mechanical reproduction of musical and other works.<sup>242</sup> Had this section been passed into law, a dozen years of controversy that led to the Supreme Court decision in *White-Smith*,<sup>243</sup> and that decision's overruling with the 1909 Copyright Revision,<sup>244</sup> could have been avoided.

On March 18<sup>th</sup> 1897, the hearing began, with George Haven Putnam testifying against the bill, a lone figure in opposition facing Alexander P. Browne and a cohort of other proponents of the bill.<sup>245</sup> This day's testimony was not included in the hearing print, and Dr. Putnam's recollection of it are a bit hazy (he recalled it being in 1894) and a bit suspect (saying that the chair of the committee, was ignorant as to the bill's content a month after it had been introduced,

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<sup>237</sup> They were already covered by the manufacturing clause of the 1891 act.

<sup>238</sup> Amended Treloar Copyright Bill

<sup>239</sup> *Copyright Law Revision*, BOSTON DAILY GLOBE, Apr 30, 1896 at 6

<sup>240</sup> Treloar Hearing at 8-9 § 24. This reflected the suggestions of Mr. Browne, below.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 10-11 § 31.

<sup>243</sup> *White-Smith Pub. Co. v. Apollo Co.*, 209 U.S. 1 (1908).

<sup>244</sup> 35 Stat. 1075 (1909).

<sup>245</sup> GEORGE HAVEN PUTNAM, MEMORIES OF A PUBLISHER 390 (1915).

and 2 weeks after having had a hearing on it).<sup>246</sup> Putnam asked to speak first, and Rep. Draper extended this privilege to a fellow veteran.<sup>247</sup> However, after Putnam spoke for 20 minutes there was an urgent matter on the floor, and the committee adjourned for the day.<sup>248</sup> As Putnam left the room, Chairman Draper whispered that the bill would not be reported,<sup>249</sup> but that it would “be desirable to have all legitimate influence that can be worked up through the press brought to bear upon the committee as promptly as practicable.”<sup>250</sup>

For the second two days of the hearing, the clear star was Alexander P. Browne, a copyright and patent lawyer from Boston, representing music and art publishers, and also the American counsel to Gilbert and Sullivan.<sup>251</sup> He went on at great length, expounding the virtues of the Treloar Copyright Bill, and his comments regarding the section for public performance of music merit particular repetition:

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

And with that discussion of the public performance right more or less ended. He went on to extol the virtues of the bill’s other features, most notably the manufacturing clause, and the stage was set for amendment and resubmission of the Treloar Bill. The public performance section of the bill was meant to track exactly with the Cummings Bill, so as not to interfere with

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<sup>246</sup> *Id* at 390-391. Putnam freely admitted that these were memories and nothing more, since he had not kept a diary. *Id* at v-vi. However, the recollections that follow are not necessarily all tainted as a result, and indeed help explain why the day was not included in the hearing print.

<sup>247</sup> *Id* at 391.

<sup>248</sup> *Id*. It seems likely that Ainsworth Spofford, the Librarian of Congress, also spoke that day of the necessity of amending the copyright laws to establish a commissioner for copyrights, but did not give a specific opinion on the Treloar Bill. *The Copyright Laws*, THE WASHINGTON POST, Mar. 19, 1896 at 4. As noted above, Putnam’s recollections of the day were distinctly hazy 20 years later.

<sup>249</sup> Putnam, *supra* note 245 at 392.

<sup>250</sup> Letter from George Haven Putnam to Robert Underwood Johnson, Mar. 19, 1896.

<sup>251</sup> Treloar Hearing 12, 22. He has already been encountered in the last section.

the law one way or another once passed.<sup>252</sup> This was especially important since the chair of the House Committee on Patents, Mr. Draper, felt the Cummings Bill “quite likely to pass.”<sup>253</sup> What is even more interesting about this section of the discussion is that Mr. Browne spoke as if he had written the Treloar Bill himself, or at least helped shape this part of it even before the hearing. Mr. Browne then concluded his lengthy testimony with an explanation of what mechanical reproduction was, and why it should be protected.<sup>254</sup>

Following Mr. Browne, Mr. John P. Rechten of Edward Schuberth & Co. (a music publisher), gave a rebuttal, explaining why he felt that a manufacturing clause was not necessary for music.<sup>255</sup> Mr Rechten was the only real opponent of the bill at the hearing’s final two days, and even he thought it was a good bill as amended, save for the manufacturing clause.<sup>256</sup>

Following him a representative of an art publisher spoke in favor of the Treloar bill,<sup>257</sup> and the hearing was concluded by Mr. Furniss from the Music Publisher’s Association.<sup>258</sup> The print closes with a copy of the petition of many of the music and art publishers, urging the passage of the Treloar Bill, so long as it did not revoke the 1891 International Copyright Act.<sup>259</sup> In many ways this was the high point for the Treloar Copyright Bill. Meanwhile, Representative Treloar had taken the suggestions of Mr. Browne and others to heart without a second thought, and revisions to his bill for resubmission with a new number were underway. And yet those opposing the bill had power that had not yet truly flexed. Not only did Messrs. Johnson and Putnam oppose the Treloar Copyright Bill, but the Chair of the Committee, Rep. Draper, did as

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<sup>252</sup> *Id* at 64-65. “The Treloar Bill is the Cummings Bill.” *Id* at 65.

<sup>253</sup> *Id* at 64.

<sup>254</sup> *Id* at 70-73.

<sup>255</sup> *Id* at 73.

<sup>256</sup> Letter from John P. Rechten to Robert Underwood Johnson, Mar.21, 1891.

<sup>257</sup> *Id* at 77.

<sup>258</sup> *Id* at 86.

<sup>259</sup> *Id* at 88-89.

well. The press and the Chair would work in concert to at once delay the bill and change the public opinion of it, and would ultimately succeed in keeping the bill in committee.

#### *D. Further Opposition*

An additional method of attacking the Treloar Copyright Bill made itself known in the Treloar Hearing, and would be a potent ally to the more traditional forces opposed to the bill – a faction of the music publishers and composers.<sup>260</sup> Led by John P. Rechten of the Schubert's, they prepared a petition for composers and their friends to sign:

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

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

Such is Mr. Treloar's incredible proposition.<sup>261</sup>

This original argument closely reflected Mr. Rechten's testimony at the Treloar Hearing,<sup>262</sup> but the actual protest would be even simpler, and hew closer to the argument of the Copyright Leagues:<sup>263</sup>

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

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<sup>260</sup> Letter from George Haven Putnam to Robert Underwood Johnson, Mar. 25, 1895.

<sup>261</sup> Letter from John P. Rechten to Robert Underwood Johnson, Mar. 24, 1896.

<sup>262</sup> Treloar Hearing at 73.

<sup>263</sup> This was by no accident. Letter from John P. Rechten to Robert Underwood Johnson, Mar. 24, 1896. ("I leave of course, the finishing touch to be put on that petition, to you.").

as a return to the lamentable condition of musical piracy which existed before the Act of 1891.<sup>264</sup>

Perhaps one or even ten of these petitions would have been ignored by the House Committee on Patents. It was much less likely that the 202 that the committee received would be ignored.<sup>265</sup> Nor were the form protests necessarily uniform, with several petitioners pinning additional notices to their protests.<sup>266</sup> These petitions were presented to Rep. Draper on the 12<sup>th</sup> of May,<sup>267</sup> and were then introduced in the House and referred to the Committee on Patents a day later.<sup>268</sup> There would be tensions, but ultimately this alliance against the Treloar Bill would be highly productive, the cracks only visible to a few on the inside.<sup>269</sup> Meanwhile, the split between composers and the music publishers was obvious, and would widen further shortly.

While those in the music business lobbied through petitions, those in the literary trade were working to influence the committee and the public through the press. In April 1887, the *Century Illustrated Magazine* had solicited letters from many composers of the era, asking their

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<sup>264</sup> See *E.G.* Petition of Ferdinand Dunkley to the House Committee on Patents, Apr. 16, 1896, in *The National Archives* (form protest).

<sup>265</sup> Cover Sheet for Petitions of Composers of Music and Professional Musicians to the House Committee on Patents (May 13, 1896) (Available in *The National Archives*).

<sup>266</sup> For instance, one individual pinned a note to Robert Underwood Johnson, suggesting in jest that the weight of the accumulated petitions be used to crush whoever had introduced this bill. Letter from E.J. Fitzhugh to Robert Underwood Johnson (Apr. 17, 1896) (Available in *The National Archives*). By contrast, one Caryl Florio simply noted that “Knowing what I do of American Politics, I imagine this protest to be entirely useless.” Letter of Caryl Florio (No date or addressee, pinned to petition dated Apr. 17, 1896) (Available in *The National Archives*).

<sup>267</sup> Petition of Composers *et al* to the Senate and House of Representatives (May 12, 1896) (Printed copy listing individual petitions which were included under separate cover. This information is on the last page, after the petition text and list of signatories) (Available in *The National Archives*).

<sup>268</sup> 54<sup>th</sup> Cong., 1<sup>st</sup> Sess. HOUSE J. 489 (1896).

<sup>269</sup> Letter from George Haven Putnam to Robert Underwood Johnson, Mar. 25, 1896. To his mind:

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

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

(favorable) opinion on international copyright protection.<sup>270</sup> In light of the controversy over the Treloar Bill, Robert Underwood Johnson (who was also the Associate Editor of the *Century*) felt it wise to revisit the tactic and solicit comments from composers of music on the Treloar Bill.<sup>271</sup> He had reason to believe that this tactic would be successful, since American Composers had done well since the passage of the international copyright act, and would presumably not want to rock the boat.<sup>272</sup> The resulting letters from professors of music at major universities in America were strongly critical of the Treloar bill, as might be expected.<sup>273</sup> The questions of the professors were somewhat rhetorical, and meant to clearly elicit a certain response while characterizing the bill in a certain way:

1. Are you in favor of amending our present international copyright law by providing that copies of the musical compositions of American composers can be copyrighted only when the type is set up, or the plates made, or the copies manufactured, in the United States and prohibiting the owner of the copyright from having the composition printed in England, Germany, or elsewhere and importing the copies for sale in the United States upon payment of duties?
2. Are you in favor of a copyright law which will compel the foreign composer to have his works printed in the United States in order to obtain copyright here, although the country of such foreign composer permits copyright there, without any such restrictions, of the compositions of an American?
3. Are you in favor of a copyright law which will compel a foreign publisher, who arranges with an American composer to publish the latter's work, to print the work in the United States and sell here duly such copies as are printed here?
4. In your opinion will it promote the progress of the art of music, will it promote the quality of music, and the use and enjoyment of music by the public, to require, as a condition of copyright in the United States, that the copies must be printed and manufactured in the United States?
5. Is such a requirement in your opinion beneficial or injurious to the interests of the composer?<sup>274</sup>

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<sup>270</sup> *Open Letters: International Copyright on Music*, 33 THE CENTURY ILLUSTRATED MAGAZINE 969 (Apr. 1887).

<sup>271</sup> Letter from Robert Underwood Johnson to Edward Clarence Stedman (Mar. 26, 1896) (Available in the Columbia University Library, E.C. Stedman Papers).

<sup>272</sup> *Id.*

<sup>273</sup> *Open Letters: American Musical Authorities Against the Treloar Bill*, 52 THE CENTURY ILLUSTRATED MAGAZINE 474 (Jul. 1896).

<sup>274</sup> *Id.*

The responses, from composers and professors of music at Harvard (John K. Paine), Yale (Horatio Parker), and Columbia (E.A. McDowell), were all in the negative as to all five points, as might be expected.<sup>275</sup> The questions and erudite responses in a popular magazine helped present the opposition to the bill as at once practical and high-minded, which was undoubtedly the goal of Mr. Johnson. And yet ultimately the battle itself, or rather the lack thereof, would be fought in the committee.

### *E. The Committee's Inaction*

Chairman Draper was personally in favor of a more liberal copyright law, and as such opposed the Treloar Bill.<sup>276</sup> However, after the Mar. 18-20 hearing, he felt that a majority of the committee supported it.<sup>277</sup> To counteract this, he adopted a simple policy: delay.<sup>278</sup> The first delay was not entirely of his doing (although he had suggested it at the Mar. 18-20 Treloar hearings) – the resubmission and reprinting of the amended Treloar Bill. However, he simultaneously kept the committee from meeting by visiting his home state of Massachusetts for ten days.<sup>279</sup> On April 15, before the revised Treloar Bill was available in printed form, the Chair proposed that the committee not meet again before the recess scheduled for May.<sup>280</sup> However, this was not to be, and a hearing on the revised Treloar Bill was held on May 13, 1896.<sup>281</sup>

What was discussed at the hearing has been lost to posterity, but it is safe to assume that the object of discussion was the revised Treloar bill, whose content was not overly different than

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<sup>275</sup> *Id.*

<sup>276</sup> Letter from Jules Bonfine (?) to Robert Underwood Johnson, Mar. 26, 1896.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> Letter from Rep. William F. Draper to Robert Underwood Johnson, Apr. 15, 1896.

<sup>281</sup> *Copyright Bill Delayed*, NEW YORK TIMES, May 14, 1896 at 2; Letter from Clerk of Committee on Patents to Robert Underwood Johnson, May 5, 1896 (announcing the hearing). The 202 form petitions of composers and musicians were delivered on the 13<sup>th</sup> also, probably not a coincidence.

the bill discussed at the previous hearing.<sup>282</sup> Perhaps most notably for our purposes, its clause dealing with public performances was brought back into lockstep with the Cummings Bill.<sup>283</sup> This was unsurprising given Rep. Draper’s suggestion of this at the hearing,<sup>284</sup> but it deprived the bill of some of its most progressive features regarding public performance. Protection for mechanical reproductions remained, but not for the public performances thereof, and in a different section.<sup>285</sup> The more sweeping language regarding the coverage of the public performance clause was likewise swept out.<sup>286</sup>

This hearing would prove to be the last meeting of the Committee on Patents for the session, but Treloar requested that a subcommittee be appointed on the bill, and this request was granted.<sup>287</sup> Over the summer, then, the bill was given over to the “tender mercies”<sup>288</sup> of a subcommittee chaired by Ben. L. Fairchild of New York and also comprising of Mr. Treloar and W.S. Kerr of Ohio.<sup>289</sup> This apparently led Rep. Draper to believe that the Treloar Bill would now have a definite action by the committee the next session, but this was not to be.<sup>290</sup> Others were of a different opinion – Robert Underwood Johnson was of the opinion that “most of Mr. Treloar’s powder has been set off” by early May.<sup>291</sup>

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<sup>282</sup> Revised Treloar Copyright Bill

<sup>283</sup> *Id* at § 25.

<sup>284</sup> Treloar Hearing at 64-65.

<sup>285</sup> Revised Treloar Copyright Bill at § 16.

<sup>286</sup> *Id* at § 25.

<sup>287</sup> Letter from Rep. William F. Draper to Robert Underwood Johnson, May 14, 1896 (“It is probable, however, that a sub-committee will be appointed to consider the bill during the interim between the two sessions. Mr. Treloar desires this and courtesy to him requires it.”)

<sup>288</sup> *Editorial Points*, BOSTON DAILY GLOBE, May 15, 1896 at 6.

<sup>289</sup> Letter from R.R. Bowker to Robert Underwood Johnson, May 21, 1896.

<sup>290</sup> *Id*.

<sup>291</sup> Letter from Robert Underwood Johnson to Richard Rogers Bowker (May 23, 1896).

The actions on the bill over the summer are unknown, but the following fall the Music Publishers Association dropped their support of the Treloar Copyright Bill.<sup>292</sup> It is quite likely that the campaign of petitions and articles had an important effect on the constituents of the Music Publishers Association. With this development and the shortness of the session, Chairman Draper no longer thought any more action would be taken on the Treloar Bill.<sup>293</sup> A few months later, Mr. Treloar seems to have accepted that his bill would never make it out of committee:

We have had two meetings of the committee, [Mr. Treloar] being present each time, and no business was transacted for want of a quorum. At the last meeting I announced that owing to the lack of interest, I should not call another meeting unless some special emergency should arise, in my opinion, or unless I should be requested to do so by some member. No objection was made to this, and it is probably that there will be no more meetings of the committee this session.<sup>294</sup>

The image is something of a sad one – Rep. Treloar, already a lame duck, showing up to every committee meeting in hope of moving his bill forward, and yet there was not even a quorum, let alone actual activity. A small consolation must have been that part of his proposed system had already been enacted as the Cummings Bill a week earlier. Upon leaving Congress, William M. Treloar returned to Mexico, MO, taking a position as Assistant Postmaster.<sup>295</sup> He would then relocate to Kansas City, and then St. Louis, continuing to compose and sell music, passing away on July 3, 1935.<sup>296</sup> He never again held elected office.<sup>297</sup>

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<sup>292</sup> Letter from George W. Furniss (of the Oliver Ditson music-publishing house) to Robert Underwood Johnson (Apr. 12, 1897) (recounting events a few months earlier). *See also* Letter from Rep. William F. Draper to Robert Underwood Johnson (Nov. 30, 1896).

<sup>293</sup> Letter from Rep. William F. Draper to Robert Underwood Johnson, Nov. 30, 1896 (“I don’t believe that the committee will do very much this winter, as the season is short and several important bills are now on the calendar, having passed the committee, are not certain of consideration.”).

<sup>294</sup> Letter from Rep. William F. Draper to Robert Underwood Johnson, Jan. 18, 1897.

<sup>295</sup> Treloar, William Mitchellson, *Biographical Directory of the United States Congress* (2006). He was one of many representatives from Missouri seeking political appointments after their terms. *Missouri Has Many Wants*, THE WASHINGTON POST, Mar 9, 1897 at 3.

<sup>296</sup> Kansas City Music Publishing, *supra* note 174.

<sup>297</sup> Treloar, *supra* note 295

### *F. The Music Publishers*

The dust having settled, it is worth asking what the Treloar Bill really was. One interpretation is that it was the bill of an idealistic musician from Missouri, who came to Congress on a fluke and saw a chance to help a cause he believed in. This would explain why he never had an ally in the Senate to introduce the bill concurrently there, to the confusion of Sen. Platt.<sup>298</sup> While this explanation seems correct on the surface, the details of the bill's story give it less credence. As noted above, the support of the Photographers League was suspicious – why would Mr. Treloar want to overrule the Covert Copyright Bill save to get their support? Perhaps even more important, though, was a new group that had been formed less than a year before the bill's introduction, the Music Publishers Association of the United States.<sup>299</sup> The group was formed in June 1895 in part to lobby for changes to the copyright law favorable to music publishers;<sup>300</sup> they were among the bill's most ardent supporters, and when they removed their support the bill lost all steam.

In the later Nineteenth century, the American music industry was expanding in size, scope, and importance.<sup>301</sup> As longtime musical copyright advocate Leonard Feist noted:

By the 1880s, America, though still predominantly rural, was becoming increasingly urbanized. The growth of manufacturing, new technologies, the transcontinental passenger and freight railroad, installment buying, and other innovations stemming from the era of free enterprise, established the piano and its cheaper brother, the harmonium, as a standard item of furniture in most middle-class, and many poorer, homes. The business community had discovered advertising and supersalesmanship, taught it by the medicine show and the American phenomenon, the traveling salesman-the drummer. Improved printing presses and lithography, the ready availability of less expensive paper, and access

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<sup>298</sup> Letter from Orville H. Platt to Robert Underwood Johnson (Feb. 28, 1896).

<sup>299</sup> Music Publishers Association | About the MPA, <http://www.mpa.org/about/>.

<sup>300</sup> *Music Publishers Association of the United States*, 65 AMERICAN ART JOURNAL 11:171 (June 22, 1895) (Noting that one of the purposes of the new organization was “[t]he necessary action looking toward a revision and improvement of the administration of the present copyright system, with the view of making it an adjunct of greater value to the publishing interests of this country than it now is. “).

<sup>301</sup> LEONARD FEIST, POPULAR MUSIC PUBLISHING IN AMERICA 28-29 (1980).

to cheaper transportation made mass circulation of printed materials, including music, and national commonplace by the end of the century.

During the inflationary period following the Civil War, American vaudeville sprung almost full grown out of the variety halls, wine rooms, and saloons of New York City and then expanded nationally in the creation of performing circuits and construction of ever larger theaters to house the new art form. All things were in place for the breakthrough about to occur, the birth of the American songpublishing business.<sup>302</sup>

In the 1890s this breakthrough in music publishing would occur in earnest. The first million-selling song in America was “After the Ball” in 1893, and it would hardly be the last.<sup>303</sup> At the same time, an industry locus was coalescing around 28th Street between Broadway and Sixth Avenue in Manhattan, which what would come to be known as Tin Pan Alley.<sup>304</sup>

At the International Copyright battles of 1891 and earlier the music publishers were of no importance.<sup>305</sup> They lost their chance to be covered under the manufacturing clause because they were not there to plead their case or to help those other industries which were fighting for the manufacturing clause.<sup>306</sup> Given the expansion and consolidation of the industry, and the negative effects of their past disarray, the formation of an entity to represent their interests was an obvious move, and one that was taken with the formation of the Music Publishers Association. While it did not maintain a high profile, its influence is apparent over the history of both bills quite clearly, even if firmer evidence is absent.

Evidence for the Music Publishers being behind the Treloar Bill’s manufacturing clause is fairly apparent. In the hearing on the Treloar Bill, Alexander P. Browne often sounded like he knew the bill better than Mr. Treloar himself, and at times his tone implied that he had wrote it. Rep. Draper noted during the hearing that the interests encouraging passage of the Cummings

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<sup>302</sup> *Id.*

<sup>303</sup> *Id.* at 22-23.

<sup>304</sup> *Id.* at 31.

<sup>305</sup> Letter from G.H. Donaldson to Robert Underwood Johnson, Apr. 18, 1891.

<sup>306</sup> *Id.*

Bill included music publishers as well as the much more visible dramatists.<sup>307</sup> And as soon as the Music Publishers dropped their support for the Treloar Bill, the Bill was done.

Viewed in this way, the conflict between the newspapers and photographers recedes to the side, and the obscure Missouri Congressman fades into the background – the battle over the Treloar Copyright Bill was ultimately a battle between the established New York publishing houses and the much newer music publishing industry centered at Tin Pan Alley over who would set the agenda for the nation’s copyright reform. It is impossible to ignore the ethnic nature of this battle – the old-line New York publishers were largely Protestant, while the Tin Pan Alley publishers had a Jewish complexion.<sup>308</sup> In this context Putnam’s repeated comments that the music publishers could not be trusted with copyright revision can take on a sharply different tone.

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

#### IV. THE CUMMINGS COPYRIGHT BILL

The story of the march towards the exclusive right of public performance is replete with ironies, and yet none is quite as recurrent and curious as the fact that in all these bills the inclusion of musical compositions was not only an afterthought, but an afterthought not included until amendment. The Cummings Copyright Bill which was signed into law on January 6<sup>th</sup>, 1897 would finally establish this right just under 53 years after the amendments to the Ingersoll

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<sup>307</sup> Treloar Hearing at 67 (Discussed further *infra* at 59).

<sup>308</sup> ISAAC GOLDBERG, TIN PAN ALLEY A CHRONICLE OF THE AMERICAN POPULAR MUSIC RACKET 108-109 (1930) (noting that until the 1890s music publishing was not notably Jewish, but “[o]f a sudden, it seemed, the business took on a Jewish complexion).

Copyright Bill first proposed this right, and yet the bill's genesis was in problems of dramatic piracy, not musical piracy.<sup>309</sup>

*A. Problems with the Existing Dramatic Law*

The 1856 dramatic copyright bill had been passed without an excess of controversy,<sup>310</sup> the debates suggesting that Congress would pass most any copyright bill, so long as it did not involve international copyright.<sup>311</sup> That act contained a fairly simple provision for relief – the play pirate would pay \$100 for the first illicit performance, and \$50 for each additional one.<sup>312</sup> Although injunctions would be come to be issued, they were not provided for in the statute.<sup>313</sup> As time went on, this remedy would come to be deeply insufficient, and the pirates would simply pay the fine and still have plenty of proceeds left over. Injunctions would likewise fail, as the play pirate would simply take his production to a different circuit and perform it there, or simply sign over his interest to a puppet party who had not been enjoined.<sup>314</sup> Indeed, this remedy would be so insufficient that Bronson Howard, perhaps the leading playwright of the day, had not copyrighted a play since 1878.<sup>315</sup>

With lobbying towards a superior law in mind, as well as for motives purely social, the American Dramatists Club was formed as a dinner club in New York.<sup>316</sup> Bronson Howard was made president, and Charles Barnard secretary of the organization.<sup>317</sup> Sometime thereafter Mr.

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<sup>309</sup> 29 Stat. 694 (1897).

<sup>310</sup> 11 Stat. 138 (1856).

<sup>311</sup> 32 Cong. Globe 1643 (July 16, 1856) (Statement of Sen. Hunter).

<sup>312</sup> 11 Stat. at 139. This is strikingly similar in structure to the Ingersoll Copyright Bill, but provided less potent remedies. *Supra* at 8.

<sup>313</sup> *Id.*

<sup>314</sup> *Congressman Covert's Dramatists Bill*, THE BROOKLYN EAGLE, Jul. 2, 1894; Pg. 2.

<sup>315</sup> *The Stage*, THE LOS ANGELES TIMES, May 27, 1894 at 17.

<sup>316</sup> *Notes*, 17 THE CRITIC 519 (Jan 30, 1892); *The Dining Clubs of New York*, 17 THE CHAUTAUQUAN 2:217 (May 1893).

<sup>317</sup> *Notes, Id.*

Howard asked his longtime attorney, Judge Abraham Jesse Dittenhoefer, to draft a federal bill to better protect dramatists.<sup>318</sup>

Abram Jesse Dittenhoefer was at the time one of the leading theater-lawyers in the country.<sup>319</sup> Early in his life he was active in the Republican Party, becoming friendly with Lincoln and voting for him as an elector from New York.<sup>320</sup> He served as a local judge during the civil war, filling out the remainder of the term of a judge who had died on the bench, and carried the title of “Judge” for over a half-century more.<sup>321</sup> A recognized “authority in laws relating to the drama and the stage,” he made sense as the man chosen to draft the bill.<sup>322</sup> His advocacy in favor of protection against piracy of operas is a bit puzzling in light of his involvement in the *Mikado* litigation on behalf of the Duff’s pirate production, but it is worth noting that throughout that incident he was adamant about what he felt the laws were, and not whether these laws were particularly wise.<sup>323</sup>

The first draft of this bill set forward a fairly punitive view of copyright law. The bill covered dramatic and operatic compositions, but not musical compositions. Thus, it would have saved Gilbert and Sullivan, but Gounod would still be out of luck. The same money damages as the 1856 Act were included, but producing a pirate production was now also a misdemeanor which carried up to a year of jail time, and now these productions could also be enjoined by the circuit courts, with such injunctions being national in scope. Such injunctions could be both *ex*

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<sup>318</sup> *Protects Playwrights from Piracy*, THE WASHINGTON POST, Dec 15, 1896 at 4; *Current Topics*, 55 ALBANY L. J. 1, 4 (Jan 2, 1897).

<sup>319</sup> *A.J. Dittenhoefer*, 5 THE AMERICAN LAWYER 7:363 (Jul. 1897).

<sup>320</sup> ABRAM J. DITTENHOEFER, HOW WE ELECTED LINCOLN (1916).

<sup>321</sup> *A.J. Dittenhoefer*, 12 BANKING L. J. 165 (1895). He was also offered the post of U.S. District Judge for the District of South Carolina by President Lincoln, but declined the nomination. *Judge Abram J. Dittenhoefer*, 10 MEDICO-LEGAL JOURNAL 338 (Cambridge, England, 1894).

<sup>322</sup> *A.J. Dittenhoefer*, 2 NEW YORK STATE’S PROMINENT AND PROGRESSIVE MEN 104 (New York Tribune 1900).

<sup>323</sup> *Actor, Manager, And Play*, THE NEW YORK TIMES, Jul 26, 1885 at 3. Dittenhoefer had declined to represent Stetson and Carte, despite being Stetson’s longtime attorney, since his “long opinion would be flaunted in [his] face,” since he had already expressed his opinion in the case “irrevocably.” *Id.*

*parte* or on hearing. A producer could sue to have the injunction lifted, but only on notice to the copyright holder.

### *B. The 53<sup>rd</sup> Congress*

The bill was introduced by Rep. Amos J. Cummings on April 24, 1894,<sup>324</sup> and (by request) by Senator David Bennett Hill on May 3, 1894.<sup>325</sup> Both men had colorful careers before coming to Congress, but neither were particularly influential once there. Cummings was a former journalist – the father of the human interest story, according to some.<sup>326</sup> David B. Hill, by contrast, was a former governor of New York, and a consummate machine politician.<sup>327</sup> However, he was past his prime after having a dramatic fall from grace when he ran for president in 1892 and overplayed his hand, manipulating the New York Primary to go for him with an unusual degree of chicanery.<sup>328</sup> In the resulting outrage the New York Primary was done over and any chance of the presidency was lost.<sup>329</sup> However, both men would champion these bills to varying degrees until the end. The committee chairs would also champion these bills successfully. Rep. James W. Covert was the chair of the House Committee on Patents in the 53<sup>rd</sup> Congress, and would guide the bill through its first rough stages.<sup>330</sup> Rep. William F. Draper, who we have already encountered in the Treloar Bill controversy, was the chair of the committee for the 54<sup>th</sup> Congress, and was vital in pushing the bill through. The chair of the Senate Committee for the 54th Congress was Sen. Orville Platt, one of the most powerful men in the

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<sup>324</sup> H.R. 6835, 53<sup>rd</sup> Cong. (1895)

<sup>325</sup> S. 1991, 53<sup>rd</sup> Cong. (1895). Introducing a bill “By Request” rather than by standard sponsorship indicates that the bill is being introduced as a courtesy. See Richard C. Sachs, CRS Report: Sponsorship and Cosponsorship of Senate Bills, Order Code 98-279 GOV (Apr. 21, 2003), available at [http://lugar.senate.gov/CRS%20reports/Sponsorship\\_and\\_Cosponsorship\\_of\\_Senate\\_Bills.pdf](http://lugar.senate.gov/CRS%20reports/Sponsorship_and_Cosponsorship_of_Senate_Bills.pdf).

<sup>326</sup> FRANK MICHAEL O'BRIEN, *THE STORY OF THE SUN*, NEW YORK, 1833-1918 363 (1918)

<sup>327</sup> HERBERT J. BASS, “I AM A DEMOCRAT”: THE POLITICAL CAREER OF DAVID BENNETT HILL (1961).

<sup>328</sup> *Id.*

<sup>329</sup> *Id.*

<sup>330</sup> *Covert, James Way*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS (2006).

Senate,<sup>331</sup> and a veteran of the International Copyright Fight.<sup>332</sup> He would prove instrumental in this fight as well.<sup>333</sup>

These bills were then sent to the House and Senate Committees on Patents.<sup>334</sup> On the 7<sup>th</sup> of May a hearing was held in the House Committee on Patents, with the witnesses being various famous dramatists culled from the American Dramatists Club including Mr. Howard, Mr. Bayard, David Belasco, as well as several journalists.<sup>335</sup> Although no members of the committee gave the measure their immediate support, they promised to support the bill unless a reason not to support it was presented.<sup>336</sup> The dramatists and their allies then called on the Speaker and other powerful representatives, and a few days later repeated this in the Senate.<sup>337</sup> The American Dramatists Club also circulated a petition signed by many noted playwrights and other respected theater-people urging the passage of this bill.<sup>338</sup> Having set forward the practical reasons for the bill, another hearing was held on June 20, with Judge Dittenhoefer discussing the legal aspects of the bill with the committee for some two hours.<sup>339</sup>

The Senate Committee on Patents reported their bill without amendment on May 24,<sup>340</sup> but the House Committee reported the bill with amendments later, on June 29.<sup>341</sup> The House amendments were twofold, first requiring that the performance be for profit in order to trigger sanctions, and second requiring the clerk of the court from which the injunction was issued to

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<sup>331</sup> Edwina Carol Smith, *Conservatism in the Gilded Age: The Senatorial Career of Orville H. Platt 1-3* (1976) (Unpublished Ph.D. Dissertation, University of North Carolina).

<sup>332</sup> Indeed, the final International Copyright Bill would be the Platt-Simonds Bill. AUBERT J. CLARK, *THE MOVEMENT FOR INTERNATIONAL COPYRIGHT IN NINETEENTH CENTURY AMERICA* (1960).

<sup>333</sup> LOUIS A. COOLIDGE, *AN OLD FASHIONED SENATOR: ORVILLE H. PLATT OF CONNECTICUT* 106-107 (1912).

<sup>334</sup> 54<sup>th</sup> Cong., 1<sup>st</sup> Session, House Journal 354 (1894); 54<sup>th</sup> Cong., 1<sup>st</sup> Session, Senate Journal 175 (1894); ..

<sup>335</sup> *Capitol Chat*, THE WASHINGTON POST, May 8, 1894 at 4.

<sup>336</sup> *Id.*

<sup>337</sup> *Id.*

<sup>338</sup> *Notes*, 21 THE CRITIC: A WEEKLY REVIEW OF LITERATURE AND THE ARTS 380 (Jun 2, 1894); It is not known whether this was the same petition was was circulated a year later. *Infra* note 375.

<sup>339</sup> *Protection Against Play Pirates*, THE NEW YORK TIMES, Jun 21, 1894 at 8.

<sup>340</sup> 53<sup>rd</sup> Cong., 1<sup>st</sup> Session, Senate Journal 206 (1894)

<sup>341</sup> 53<sup>rd</sup> Cong., 1<sup>st</sup> Session, House Journal 458 (1894). A report was also sent up with the amended bill. 53<sup>rd</sup> Cong., 1<sup>st</sup> Session, H.Rep.1191 (1894).

transmit documents related to the injunction upon request.<sup>342</sup> A day later Scientific American published an editorial sharply critical of the Senate version of the bill,<sup>343</sup> but the Chair of the House Patents Committee, Mr. Covert, felt it would pass easily.<sup>344</sup> To his mind the most likely argument would be that more criminal offenses should not be created, and that it would sway few.<sup>345</sup> He was mistaken.

On July 28, 1895, rather than debating the amended bill, Rep. Covert asked that they debate a substitute bill from the committee that he had not formally introduced, the substitute bill containing similar provisions but being differently organized and being less protective of plays.<sup>346</sup> The bill was read, and he requested unanimous consent to have the substitute bill replace the amended Cummings Bill, but Rep. Albert J. Hopkins of Illinois objected.<sup>347</sup> After some arguments over whether the substitute needed to be printed, the original bill was reported with amendments due to the lack of unanimous consent.<sup>348</sup> Rep. Hopkins then entered into a debate with Mr. Covert over the substance of the bill, questioning whether it was necessary to change the structure of injunctive relief in the federal courts.<sup>349</sup> He persisted in this line, and then other members of the house joined in his concerns.<sup>350</sup> Rep. Covert attempted to defend this bill with a detailed statement of why it was needed, noting that nationwide injunctive relief was particularly important in this case since many play pirates traveled the country easily with their product and had few if any attachable means with which they could ordinarily be restrained.<sup>351</sup>

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<sup>342</sup> *Supra* note 324.

<sup>343</sup> *Proposed Criminal Enactment for the Protection of Dramatic Copyrights*, 70 SCIENTIFIC AMERICAN 26:402 (Jun. 30, 1896) (calling the bill “very absurd”).

<sup>344</sup> *Covert's Dramatic Copyright Bill*, THE WASHINGTON POST, Jun 27, 1894 at 7.

<sup>345</sup> *Id.*

<sup>346</sup> 53<sup>rd</sup> Cong., 2<sup>nd</sup> Sess., Cong. Rec. 7974 (Jul. 28, 1894). The text of the substitute bill is available here also.

<sup>347</sup> *Id* at 7974-7975.

<sup>348</sup> *Id* at 7975.

<sup>349</sup> *Id* at 7975.

<sup>350</sup> *Id* at 7975-7976.

<sup>351</sup> *Id* at 7976.

He then went on to explain the substitute version and why it was milder in its terms, which mollified the critics some.<sup>352</sup> However, they remained concerned about the precedent it would make in terms of jurisdiction – giving a federal court national reach, even into other federal circuits.<sup>353</sup> After some more discussion, the house adjourned, not to reconsider the bill in the 53<sup>rd</sup> Congress,<sup>354</sup> although Rep. Covert did meet with the Speaker of the House to request another day for discussion.<sup>355</sup>

Especially in light of the previous optimism over the bill's fate, such intense opposition must have been a shock.<sup>356</sup> Opposition in the committee had been either from those who did not believe that performance works were copyrightable at all, or those who felt that imprisonment was an excessive remedy for stealing from “clever men's brains.”<sup>357</sup> Whatever the case, a new version of the bill was prepared, reflecting the comments and changes of the house and Committee on Patents. With the Republican Landslide in the elections in 1894, the American Dramatists Club asked Rep. Covert to take no more action on the bill, planning to reintroduce it for the new 54<sup>th</sup> Congress, where the Republicans would more firmly deal with the objectors to the bill.<sup>358</sup> Thus no activity was taken for a little less than a year at the federal level. During the intervening time the American Dramatists Club turned to convincing states to add complementary provisions to their own criminal code making unauthorized public performances

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<sup>352</sup> *Id.*

<sup>353</sup> *Id.*

<sup>354</sup> *Id.* at 7977. Rep. Hopkins apparently had more to say on this matter, and asked that his comments at the end of this debate be included in the appendix after revision rather than in the Record, but the appendix does not contain any remarks by Mr. Hopkins. *Id.* This was not the first time that Rep. Hopkins was strongly against expansion of the copyright laws; he had also strenuously objected to the 1891 International Copyright Act. *See* Albert Jarvis Hopkins, *Memoirs of Albert Jarvis Hopkins 183-202* (Unpublished Manuscript, on file with the Abraham Lincoln Presidential Library).

<sup>355</sup> *The Copyright of Plays*, THE WASHINGTON POST, Jul 29, 1894 at 2.

<sup>356</sup> *Dramatic Piracy Bill Opposed*, THE NEW YORK TIMES, Jul 29, 1894 at 4.

<sup>357</sup> *Protection Against Play Pirates*, *supra* note 339.

<sup>358</sup> *Capitol Chat*, THE WASHINGTON POST, Jan 27, 1895 at 4.

of unpublished manuscript works a crime.<sup>359</sup> In 1895 New Hampshire became the first state to pass into law statutory protection for the public performance of dramatic and musical compositions.<sup>360</sup> While no other states would follow until 1899,<sup>361</sup> the club had achieved its first success, and the inclusion of music in the New Hampshire statute would signal the movement towards including music in the federal dramatists' bill.

### C. *The 54<sup>th</sup> Congress, 1<sup>st</sup> Session*

A group of theatrical managers and dramatists met at the office of A.M. Palmer on 29 W. 30<sup>th</sup> Street in Manhattan on December 18, 1895, to discuss how to effectuate the passage of the dramatic copyright bill in the 54<sup>th</sup> Congress.<sup>362</sup> Present were Bronson Howard, David Belasco, and an assortment of other managers and playwrights, ironically including Sydney Rosenfeld.<sup>363</sup> They agreed to ask other managers and dramatists for funds to help defray the cost of introducing

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<sup>359</sup> RICHARD ROGERS BOWKER, *COPYRIGHT: ITS HISTORY AND ITS LAW 194-195* (1912). The state statutes were:

- New Hampshire: 1895 N.H. Laws ch. 42 § 1, N.H. Rev. Stat. § 352:1 (1895)
- New York: 1899 N.Y. Laws ch. 475, N.Y. Arts and Cultural Affairs Law § 31.03 (1899)
- Louisiana: 1900 La. Laws no. 75, LSA-R.S. 14:208 (1900)
- Oregon: Or. H.B. 144 (1901) (Not mentioned in current code)
- Pennsylvania: 1901 Pa. Laws no. 209, 18 Pa.C.S.A. § 3931 (1901)
- Ohio: Oh. S.B. 20, R.C. § 2911.17 (1902) (Repealed 1972)
- New Jersey: 1902 N.J. Laws ch. 249 (1902) (Not mentioned in current code)
- Massachusetts: 1904 Ma. Laws ch. 183, M.G.L.A. 110 § 16 (1904)
- Minnesota: 1904 Mn. Laws ch. 40, M.S.A. § 620.66 (1905) (Repealed 1963)
- California: 1905 Ca. Laws ch. 276, Cal.Penal Code § 367a (1905) (Repealed 1941)
- Wisconsin: 1905 Wi. Laws ch. 281, W.S.A. 134.21 (1905)
- Connecticut: 1905 Ct. Laws ch. 130, C.G.S.A. § 53-139 (1905) (Repealed 1969)
- Michigan: 1905 Mi. laws ch. 268, M.C.L.A. 750.463 (1905)

The subject matter of these statutes did not expand on the existing state (common-law) protection of public performance rights – none included published works. Their primary purpose was thus to act as a complement to the proposed federal law, since uncopyrighted works were not included in the federal statute. The full text of all these statutes as originally enacted is available at Library of Congress, *Copyright Office Bulletin No. 3, Copyright Enactments of the United States, 1783-1906* 105-112 (1906). Finally, the question of whether those statutes that remain in force are preempted by federal law remains open. 17 U.S.C. § 301 (2006).

<sup>360</sup> *Id.*

<sup>361</sup> *Id.*

<sup>362</sup> *To Prevent the Piracy of Plays*, THE NEW YORK TIMES, Dec 19, 1895 at 16; *The Copyright Of Plays*, THE HARTFORD COURANT, Dec 21, 1895 at 8.

<sup>363</sup> Times, *Id.*

the bill, which had been introduced in the House the previous day by Rep. Cummings.<sup>364</sup> Sen. Hill once again introduced the bill in the Senate later than it was introduced in the house, once again by request and not as a sponsor.<sup>365</sup>

The subject matter of these bills was similar to the original bill, including dramatic and operatic works, but not musical ones, in spite of the New Hampshire statute passed a few months earlier.<sup>366</sup> There was language to allow for leniency, saying that the monetary penalty be applied “as just,” rather than being purely mechanical, and criminal sanctions were only available against for-profit productions.<sup>367</sup> The text of the bill also makes it seem that all that was being established was nationwide service of process for these injunctions.<sup>368</sup>

In the 53rd Congress the Cummings bill had not received much attention from the copyright leagues. While public performance rights would never be a top priority to the leagues as a whole, for the 54<sup>th</sup> congress the Leagues brought the bill under their tent by naming Bronson Howard the first vice-president of the American Authors Copyright League in early 1896.<sup>369</sup> Nonetheless, the other members of the copyright leagues were often quite unaware of the progress of the Cummings bill, often being unable to even get a copy easily of the latest draft.<sup>370</sup> It is likely that they were distracted by fighting the Treloar bill, but the fact that the copyright leagues were now officially behind the bill certainly would not have hurt the bill’s reception.

The first hearing was held in the House Committee on Patents, now under the Chairmanship of Rep. William F. Draper, on February 19, 1896. Bronson Howard was the first

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<sup>364</sup> H.R. 1978, 54<sup>th</sup> Cong. (1895).

<sup>365</sup> S. 2306, 54<sup>th</sup> Cong. (1896).

<sup>366</sup> *Id.* The New Hampshire law was signed on March 13, 1895. COPYRIGHT ENACTMENTS, *supra* note 359 at 105.

<sup>367</sup> S. 2306, 54<sup>th</sup> Cong. (1896).

<sup>368</sup> *Id.*

<sup>369</sup> *Notes*, 25 THE CRITIC 154 (Feb 29, 1896).

<sup>370</sup> *See E.G.* Letter from Robert Underwood Johnson to Edward Clarence Stedman, Mar. 8, 1896 (Available in the Edward Clarence Stedman Papers, Columbia University Library) (“I learn that my associates have been hunting for the Cummings Dramatic Copyright Bill for you in vain.”).

to speak, describing the necessity of nationwide enforcement of injunctions against pirate productions.<sup>371</sup> Harrison Gray Fiske followed, explaining the many attempts that had been made so far to fight play piracy.<sup>372</sup> Rep. H.C. “Harry” Miner was next, in the capacity of a former theater-manager, issuing a stirring and damning condemnation of play pirates and their methods.<sup>373</sup> Mr. A.M. Palmer then made comments along a similar line, and Judge Dittenhoefer concluded, giving a thorough explanation of the legal issues raised by the bill. A petition was also prepared and given, describing the size and scope of the American theater industry, and how this protection was needed for it to thrive,<sup>374</sup> reading:

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

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

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

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

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<sup>371</sup> *To Protect Dramatists*, The New York Times, Feb 20, 1896 at 5.

<sup>372</sup> *Id.*

<sup>373</sup> *Id.* This is the same Harry Miner who a decade earlier had appropriated Rosenfeld’s pirate production of *The Mikado* for his own theater when Rosenfeld lost his contempt case.

<sup>374</sup> *For the Protection of Plays*, THE NEW YORK TIMES, Feb 19, 1896 at 5.

These stolen plays are performed by irresponsible parties without means, local habitation or reputation. An injunction obtained in one Federal District is inoperative in any other, and by crossing an imaginary line the person conducting the unlawful performance may defy the United States law and continue to perform the play until its commercial value is completely destroyed. Entire sections of the country, East, West, North and South, are now so overrun with these unlawful producers of plays that reputable companies are completely debarred from entering them.

The local managers and owners of theatres are nowhere in sympathy with these unlawful producers of plays, but it has now become almost impossible for them to detect a fraudulent production when contracting for performances in their houses.<sup>375</sup>

The list of dramatists signing the petition took up a full page, with Bronson Howard's name prominently at the top, and the list of other theater-people took up more than 20 more.<sup>376</sup>

At the hearing there was only one member who raised any qualms, Mr. J.C. Hutcheson of Texas.<sup>377</sup>

The Cummings Copyright Bill was favorably reported by the House Committee on Patents on March 12, 1896, with one significant amendment.<sup>378</sup> Rather than protecting “dramatic or operatic” works, it covered “dramatic or musical” works.<sup>379</sup> The Cummings Bill was finally in its form to protect the right of public performance for musical compositions. In the report on the amended bill, the committee explained:

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

This amendment in no way affects the purpose of the proposed measure, which is twofold: First, to secure to musical compositions the same measure of protection under the copyright law as is now afforded to productions of a strictly dramatic character. There can be no reason why the same protection should not be

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<sup>375</sup> Petition to the Senate and House of Representatives of The United States, for the Amendment of the Copyright Law, Relating to the Fraudulent Production of Plays, from the Dramatists, Theatrical Managers and Other Members of the Dramatic Profession of The United States (1895 – Exact Date not Given) (Editorial Copy Available in the Rutherford B. Hayes Presidential Library).

<sup>376</sup> *Id.*

<sup>377</sup> To Protect Dramatists, *supra* note 371.

<sup>378</sup> 54<sup>th</sup> Cong., 1<sup>st</sup> Sess. House J. 301-302 (1896).

<sup>379</sup> H.R. 1978, 54th Cong. (As amended Mar. 12, 1896).

extended to one species of literary property of this general character as to the other, and the omission to include protective provisions for musical compositions in the law sought to be amended was doubtless the result of oversight. The committee is of the opinion that the existing law should be so amended as to provide adequate protection to this species of literary production.

The bill provides, secondly, for added means for the protection of authors of dramatic and operatic works.<sup>380</sup>

A week later, at the hearings on the Treloar Bill, Chairman Draper was extremely upbeat about the prospects for the Cummings Bill,<sup>381</sup> stating what while it was not certain, what he heard led him to believe that it was “quite likely to become law.” He also noted (in a manner curious for a public hearing):

I can say privately that there is a good deal of pressure being brought to bear by the musical, dramatic, and operatic profession, and dramatic authors, upon various gentlemen to get that bill up, but whether it will pass when before the house I do not know.<sup>382</sup>

This serves to explain the amendment to the bill a bit better, and reinforces the reasonable suspicion that amendments expanding the scope of a law rarely happen of their own accord. At the same time, the influence of the Music Publishers Association is not as clear in this case. The Dramatists club had already pushed through a public performance bill in New Hampshire that covered music in March 1895, prior to the formation of the Music Publishers Association in June of 1895. As such, there may not have been the coordinated effort of music publishers for this amendment that there was for the Treloar bill.

The next month would be fairly quiet, with the Executive Council of the American Copyright League passing a resolution in favor of the Cummings bill, but not much else of note happening.<sup>383</sup> During this time the Senate Committee on Patents deliberated the amended

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<sup>380</sup> H.Rep. 741, 54th Cong. (Mar. 12, 1896).

<sup>381</sup> Treloar Bill 64.

<sup>382</sup> *Id* at 67.

<sup>383</sup> *Activity in the Copyright League*, 25 THE CRITIC: A WEEKLY REVIEW OF LITERATURE AND THE ARTS 298 (Apr 25, 1896).

Cummings Bill, and the bill's advocates remained vigilant, with Abram J. Dittenhoefer asking Senator Hill if a hearing could be set up on the Cummings Bill while he was in Washington for a case.<sup>384</sup>

On April 24, 1896, the Senate Committee on Patents reported back their version of the Cummings Bill with amendments.<sup>385</sup> In substance it was a copy of the house version, but it changed the text some to smooth over some rough patches of verbiage.<sup>386</sup> With this revision, the path of H.R. 1978 would end, being subsumed into S. 2306. On May 20, 1896 Senator Hill asked the Senate to consider the bill, to which there was no objection.<sup>387</sup> He read the amendments to the bill, and it passed without objection, or even comment.<sup>388</sup> Two days later the bill was sent to the House.<sup>389</sup> Shortly thereafter, Rep. Draper moved to suspend the rules and pass S. 2306 in the House as well.<sup>390</sup> Victory was now in sight, so close that it could almost be tasted. The bill was read "at length."<sup>391</sup> The Speaker *pro tempore* said that the bill was not at the table, and changed the subject.<sup>392</sup> The First Session of the 54<sup>th</sup> Congress ended almost immediately thereafter.

Why this happened is not entirely clear. What most likely happened, though, was simply that the Speaker (Rep. Thomas B. Reed) wanted the session to end as soon as possible,<sup>393</sup> and instructed the Speaker *pro tempore* not to allow any more bills to be argued. He would nearly

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<sup>384</sup> Letter of Abram J. Dittenhoefer to Sen. David B. Hill (Mar. 20, 1896), in the David Bennett Hill Papers, Syracuse University Library, Department of Special Collections. There is no indication that such a hearing occurred.

<sup>385</sup> 54<sup>th</sup> Cong., 1<sup>st</sup> Sess., Senate J. 261 (1896).

<sup>386</sup> S. 2306, 54<sup>th</sup> Cong. (As amended Apr. 24, 1896).

<sup>387</sup> 27 CONG. REC. 5464 (May 20, 1896).

<sup>388</sup> *Id.*

<sup>389</sup> *Id.* at 5564 (May 22, 1896).

<sup>390</sup> *Id.* at 6292 (June 8, 1896).

<sup>391</sup> *Id.*

<sup>392</sup> *Id.*

<sup>393</sup> WILLIAM F. DRAPER, RECOLLECTIONS OF A VARIED CAREER 261 (1908) ("still, he would not give me time, as he wanted a short session").

finish off another copyright bill by trying the same trick at the end of the Second Session.<sup>394</sup> As a result of these and other tactics, Rep. Draper chafed under the speaker's "despotic" control,<sup>395</sup> and felt that his committee work was going to waste.<sup>396</sup> This was doubtless particularly vexing since the chairmanship of the Committee on Parents was a gift in exchange for not pushing for a seat on the Ways and Means committee, for which some had been advocating.<sup>397</sup> Even after the bill was passed, bitterness over this incident had not, with Rep. Draper noting that:

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

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

The House of Representatives is not a Democracy, but is absolutely under the control of half a dozen men, if not of one man – The Speaker; - and legislation, outside of revenue and appropriation bills, must appeal to this one of half a dozen men or fail to be considered.<sup>398</sup>

Whatever the case, despite having been "lost in the shuffle at the wind-up of the last Congress," another session was coming in the fall, and the American Dramatists Club kept up their efforts.<sup>399</sup> In addition their usual efforts, they published a list of copyrighted plays and operas, and distributed it for free to managers and theaters in the US and Canada, hoping to "stand off the play pirates until the passage of a law to punish them."<sup>400</sup> One enterprising manager also invited a good number of House members from New York to his theater for a free

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<sup>394</sup> *Id* at 270.

<sup>395</sup> *Id* at 261.

<sup>396</sup> *Id* at 262.

<sup>397</sup> *Id* at 255.

<sup>398</sup> Letter of Rep. William Draper to Robert Underwood Johnson (Jan. 18, 1897).

<sup>399</sup> *Robbers of The Stage*, *The Washington Post*, Jul 19, 1896 at 18.

<sup>400</sup> *Id*; THE AMERICAN DRAMATISTS CLUB, THE AMERICAN DRAMATISTS CLUB LIST: A STANDARD OF REFERENCE FOR THE PROTECTION OF DRAMATIC PROPERTY (1896).

show, and in between acts discussed the bill with them.<sup>401</sup> By the end most of them were on board.<sup>402</sup>

#### *D. The 54<sup>th</sup> Congress, 2<sup>nd</sup> Session – Victory*

Rep. Draper entered the second (and final) session of the 54<sup>th</sup> Congress determined to pass the Cummings Bill, seeing it as “a matter of simple justice, needed to complete our copyright system.”<sup>403</sup> On the very first day of the Second Session, December 7, 1896, the Cummings Bill was sent up to the full House from the House Committee on Patents.<sup>404</sup> Rep. Draper’s concerns that the dramatists’ bill would not even be considered<sup>405</sup> were mollified when, on December 10, the debate on the bill on the floor of the House was finally joined.<sup>406</sup>

First Rep. Draper read the bill, along with a new report which followed fairly closely in the lines of the previous one.<sup>407</sup> Then the debate commenced, with Rep. Hopkins once again acting as the antagonist.<sup>408</sup> His objections to the bill were to its feature of nationwide injunctions, which he had raised two years earlier, and also that the \$100 minimum damages were extended from dramatic works to musical ones also.<sup>409</sup> This time though, anticipating trouble, Rep. Draper had sent Rep. Hopkins a personal copy of the bill in advance, and this managed to effectively neutralize the procedural complaints Hopkins had made in the 53<sup>rd</sup> Congress.<sup>410</sup> Without these, Rep. Hopkins did not play a major role in the debates. Rep. John F. Lacey then addressed Draper, questioning the need for such harsh punishment as incarceration,

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<sup>401</sup> *Dramatic Piracy Stopped*, THE NEW YORK TIMES Dec 12, 1896 at 10.

<sup>402</sup> *Id.*

<sup>403</sup> Draper, *supra* note 393 at 266.

<sup>404</sup> 54<sup>th</sup> Cong., 2<sup>nd</sup> Sess., House J. 14 (1896).

<sup>405</sup> Letter from William F. Draper to Robert Underwood Johnson (Nov. 30, 1896).

<sup>406</sup> 28 CONG. REC. 85 (Dec. 10, 1896);

<sup>407</sup> H. Rep. 2290, 54<sup>th</sup> Cong. (Dec. 7, 1896)

<sup>408</sup> 28 Cong. Rec. at 85.

<sup>409</sup> *Id.*

<sup>410</sup> *Id.*

and even if there was a need for a change at all in the dramatic copyright laws.<sup>411</sup> Rep. Draper responded to these charges ably, but was not as successful with the questions of Rep. James A. Connolly, who took issue with the bill’s provisions for an *ex parte* injunction – that is, an injunction that could be granted even prior to a hearing on the matter.<sup>412</sup> Then a string of amendments would be proposed. First an amendment was proposed to take out the criminal liability clause of the bill was put forward, leading to a strong reaction from Rep. Cummings.<sup>413</sup> Rep. George W. Hulick next offered an amendment that “if said performance and representation shall be for charitable or benevolent purposes, it shall be a good defense to any prosecution under this act,”<sup>414</sup> leading Rep. Covert to respond that such a performance was even worse, as it added hypocrisy to theft (since it would be doing wrong under the banner of doing right), and the amendment failed.<sup>415</sup> From there followed some general debate over whether pirating a play was theft or something less sinister, to some reaction from the gallery.<sup>416</sup> After this another amendment was suggested by Rep. Lacey, to gut the entire bill and the 1856 Act, and to make the “printing, publication, or sale” of a dramatic or musical work “sufficient consent to the public performance or representation thereof.”<sup>417</sup> This failed as well, and with all other amendments having been disposed of, and the bill seeming poised for a vote, Rep. Connolly suggested one more amendment in line with his previous objections – to remove the provisions for an *ex parte* injunction.<sup>418</sup> This at first failed, but then he asked for a division, noting that Rep. Draper was content with this amendment, and the amendment passed.<sup>419</sup> Without further debate, the bill

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<sup>411</sup> *Id.*

<sup>412</sup> *Id.* at 86.

<sup>413</sup> *Id.* at 87.

<sup>414</sup> *Id.* at 88.

<sup>415</sup> *Id.*

<sup>416</sup> *Id.*

<sup>417</sup> *Id.* at 89.

<sup>418</sup> *Id.* at 91.

<sup>419</sup> *Id.*

passed the House with the Connolly Amendment.<sup>420</sup> Strikingly, these debates were the only time it seems to have been honestly debated in Congress whether a right of public performance for published works was really a good idea.<sup>421</sup> These debates also addressed the question of what exactly a copyright is, whether it is a natural right or a government-granted privilege, which had been a question raised implicitly or explicitly by all public performance bills since the Ingersoll Copyright Bill.<sup>422</sup>

Rep. Draper's attitude towards the Connolly amendment was that of pleased acquiescence, noting in his autobiography that he was forced to accept it, but that it was "perhaps a real improvement to the bill."<sup>423</sup> The bill's backers did not share this attitude, and suggested that the Senate consider non-concurrence in the amendments.<sup>424</sup> However, they also recognized that it was more important to get the bill passed than to worry about a minor feature of the bill, and urged that if there was a chance of losing the bill, that the Senate concur in the amendments.<sup>425</sup> Rep. Draper wrote to the bill's proponents, also urging concurrence.<sup>426</sup> Although Dittenhoefer still wished to keep that feature of the bill, he acknowledged that "we are only anxious to pass this bill as quickly as possible."<sup>427</sup>

Despite this intrigue behind the scenes, to most individuals the bill was now a done deal.<sup>428</sup> The dramatists unsurprisingly thought it was the best thing Congress had done in

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<sup>420</sup> *Id.*; *Passed The Copyright Bill*, THE WASHINGTON POST, Dec 11, 1896 at 3 (also describes the actions on the floor).

<sup>421</sup> Up to this point, at least.

<sup>422</sup> *Supra* at 5. For a general discussion and history of this conflict up to this point, see Brander Matthews, *The Evolution of Copyright*, 5 POLITICAL SCI. Q. 583 (Dec. 1890).

<sup>423</sup> Draper, *supra* note 393 at 267.

<sup>424</sup> Letter from Abram J. Dittenhoefer to David B. Hill (Dec. 11, 1896).

<sup>425</sup> *Id.*

<sup>426</sup> Letter from Abram J. Dittenhoefer to David B. Hill (Dec. 12, 1896) (discussing letter from Rep. Draper).

<sup>427</sup> *Id.*

<sup>428</sup> *Dramatic Piracy Stopped*, *supra* note 401.

years.<sup>429</sup> The Washington Post was similarly ecstatic,<sup>430</sup> and from this point on, things moved quickly. On December 14<sup>th</sup> the amended bill was reported to the Senate for concurrence.<sup>431</sup> On the same day, the Vice President laid the amendment before the Senate, and Sen. Platt moved that the Senate concur.<sup>432</sup> Sen. Platt was asked what the effect of the amendment was, to which he explained the change, and commented that he thought the amendment was proper.<sup>433</sup> The Amendment was concurred in without further debate.<sup>434</sup>

With the bill finally through Congress, the bill's advocates were a bit confused as to how to the next step worked – getting the President to sign it.<sup>435</sup> Bronson Howard shortly thereafter went on a visit to Washington, and had an interview with the President's private secretary, who took “a lively interest in the bill.”<sup>436</sup> The President's secretary also informed them that the bill would not be signed into law until after the holiday,<sup>437</sup> and thus it was, on January 6, 1897.<sup>438</sup>

The law's passage reverberated among the play pirates across the country almost immediately:

[I]n the South and West, where such thieving has been common, a panic exists among the small, second-rate companies which have depended for their repertory upon stolen plays. The managers of these companies are now ready and eager to pay moderate royalties to the owners of plays already on the [American Dramatists Club] list.<sup>439</sup>

It was clear that the new law was an immediate and ringing success for the dramatists.<sup>440</sup>

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<sup>429</sup> *Id.*

<sup>430</sup> *The Stage: Law Upon The Drama*, THE WASHINGTON POST, Dec 20, 1896 at 23.

<sup>431</sup> 28 CONG. REC. S129 (1896).

<sup>432</sup> *Id.* at 132.

<sup>433</sup> *Id.*

<sup>434</sup> *Id.*

<sup>435</sup> Letter from Abram J. Dittenhoefer to David B. Hill (Dec. 14, 1896); Letter from Abram J. Dittenhoefer to David B. Hill (Dec. 14, 1896) (second on the same day).

<sup>436</sup> Letter from Bronson Howard to Robert Underwood Johnson (Dec. 23, 1893).

<sup>437</sup> *Id.*

<sup>438</sup> 29 Stat. 694 (1897); *Musical Copyright Act Signed*, THE WASHINGTON POST, Jan 7, 1897 at 4.

<sup>439</sup> *Pirates of Plays*, THE HARTFORD COURANT, Jan 20, 1897 at 8.

<sup>440</sup> Charles Barnard, *Dramatic Copyright*, 27 THE CRITIC 784:154 (Feb 27, 1897) (“The most remarkable result of the amendments is the immediate and apparently universal willingness...to conform to their requirements”).

On March 20, 1897, a celebratory dinner was held at Delmonico's in New York.<sup>441</sup> In attendance were essentially all the major personages behind the new law, and all the major newspapers in the city covered what was said in detail.<sup>442</sup> Invited to this affair were many luminaries, with Bronson Howard writing many of the letters of invitation himself.<sup>443</sup> Mr. Howard was in the chair for this dinner, and gave the first speech toasting President Cleveland.<sup>444</sup> Congress was then toasted. Senator Platt had apparently come on the condition that he not have to speak,<sup>445</sup> but he did say a few words about drama and Congress.<sup>446</sup> William F. Draper followed him, speaking about play and property, and then explained the bill's progress through Congress.<sup>447</sup> Harry Miner also responded to this toast, as did James W. Covert, who commented that much of the opposition came from members from the west who did not understand the concept of intangible property.<sup>448</sup> Judge Dittenhoefer then gave a toast to the Judiciary, describing how this stood as the next stage in the evolution of the understanding of intellectual property.<sup>449</sup> There were other speakers also, the party not ending until after midnight,<sup>450</sup> and with this, the battle for protection for the right of public performance for musical compositions had drawn to a close with victory. Not one speaker had mentioned this once.

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<sup>441</sup> *Copyright Act Welcomed*, THE NEW YORK TIMES, Mar 21, 1897 at 5.

<sup>442</sup> *Id*; *A Feast After Victory*, THE NEW YORK TRIBUNE, Mar. 21, 1897 at 7; *Dramatists Dinner*, THE BROOKLYN EAGLE, Mar. 21, 1897 at 32.

<sup>443</sup> See *E.G.* Letter of Bronson Howard to Richard Watson Gilder (Feb. 27, 1897) (in the New York Public Library, Richard Watson Gilder Papers); Letter of Bronson Howard to Richard Rogers Bowker (Mar. 17, 1897) (in the New York Public Library, Richard Rogers Bowker Papers).

<sup>444</sup> *Copyright Act Welcomed*, *supra* note 441. Interestingly, he said that the law was signed by the president on the 5<sup>th</sup> of January, not the 6<sup>th</sup>, before 11 AM. *Id.*

<sup>445</sup> *Feast After Victory*, *supra* note 442.

<sup>446</sup> *Copyright Act Welcomed*, *supra* note 441.

<sup>447</sup> *Feast After Victory*, *supra* note 442.

<sup>448</sup> *Copyright Act Welcomed*, *supra* note 441.

<sup>449</sup> *Feast After Victory*, *supra* note 442.

<sup>450</sup> *Copyright Act Welcomed*, *supra* note 441.

## V. CONCLUSION – THE ROAD SINCE 1897

Reaction to the bill's passage was mostly positive, as had been expressed after it passed the house. Negative reaction mostly came later, especially as regarded the bill's inclusion of music, for which less stringent protection may have been desirable, since having music played is perhaps the primary engine for demand in that business.<sup>451</sup> Others in the music field went further, saying that "it would be highly desirable that this absurd law be amended as quickly as possible."<sup>452</sup> These criticisms were minor and rare though, and the bill was soon firmly ensconced into American law. The omnibus copyright revision of 1909 kept this right, while adding to it mechanical reproductions (as contemplated by the Treloar Bill), and introducing an exception for nonprofit performances.<sup>453</sup> However, the right would go relatively unexercised until the formation of ASCAP and other performing rights societies.<sup>454</sup>

The American Society of Composers, Authors and Publishers was formed on February 14, 1914 by a group of composers to "assure that music creators are fairly compensated for the public performance of their works, and that their rights are properly protected."<sup>455</sup> Fairly shortly thereafter, the Supreme Court decided that all public playing of music was included under this clause of the copyright act, even such things as background music played in restaurants.<sup>456</sup>

Justice Holmes, in a short opinion, famously held that:

If the rights under the copyright are infringed only by a performance where money is taken at the door, they are very imperfectly protected. Performances not different in kind from those of the defendants could be given that might compete with and even destroy the success of the monopoly that the law intends the plaintiffs to have. It is enough to say that there is no need to construe the statute

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<sup>451</sup> *Amendments to The Copyright Law*, 76 SCIENTIFIC AMERICAN 15:226 (Apr 10, 1897).

<sup>452</sup> *Queer Copyright Law*, 14 MUSIC 91-92 (W.S.B. Mathews, Chicago, May/Oct. 1898).

<sup>453</sup> 35 Stat. 1075 § 1(e) (1909). The question of whether to include a not-for-profit exception had been decided in the negative in 1897 after some debate, but apparently Congress felt it would be a good idea after all. *See supra* Part 4.

<sup>454</sup> FEIST, *supra* note 301 at 52.

<sup>455</sup> The Birth of ASCAP, ASCAP, <http://www.ascap.com/about/history/>.

<sup>456</sup> *Herbert v. Shanley Co.*, 242 U.S. 591 (1916).

so narrowly. The defendants' performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers of conversation, or disliking the rival noise, give a luxurious pleasure not to be had from eating a silent meal. If music did not pay, it would be given up. If it pays, it pays out of the public's pocket. Whether it pays or not, the purpose of employing it is profit, and that is enough.<sup>457</sup>

With this doctrine in hand, ASCAP and other performance rights were able to make the public performance right much more than a stage right, and a very profitable one at that, with revenues for ASCAP alone totaling over \$749 million in 2005, up \$50 million from the previous year.<sup>458</sup> Clearly this right has been of substantial benefit to composers and writers of music.

The effect of this right has not been universally positive though. In the classical music sphere, the negative impact of the right of public performance is much more visible. With a wide array of works in the public domain to perform, orchestras often shy away from performing works which will necessitate royalty payments.<sup>459</sup> A similarly negative effect has been noticed in Jazz, where improvisatory works often include variations on an existing copyright work.<sup>460</sup>

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

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<sup>457</sup> *Id* at 594-595.

<sup>458</sup> Press Release, Ascaph Adapts to Rapidly Changing Music Marketplace and Reports Record Revenues, Royalty Payments for Year 2005, American Society of Composers, Authors, and Publishers (Mar. 13, 2006), available at [http://www.ascap.com/press/2006/031306\\_financial.html](http://www.ascap.com/press/2006/031306_financial.html).

<sup>459</sup> Amanda Scales, Note, *Sola, Perduta, Abbandonata: Are the Copyright Act and Performing Rights Organizations Killing Classical Music?*, 7 VAND. J. ENT. L. & PRAC. 281 (2005).

<sup>460</sup> J.K. Givens, Note, *Jazz Has Got Copyright Law And That Ain't Good*, 118 HARV. L. REV. 1940 (2005).