

COPYRIGHT, TRANSLATIONS, AND RELATIONS BETWEEN  
BRITAIN AND INDIA IN THE NINETEENTH AND EARLY  
TWENTIETH CENTURIES

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In 1914, the Government of India (“GoI”) enacted a copyright law to vary the application of British imperial law to India. Among several variations adopted, one related to translations. The 1911 British Imperial Act had conferred copyright protection for up to fifty years from the author’s death, and included a right for that period to control the translation of the work.<sup>1</sup> In contrast, section 4 of the Indian Act of 1914 stated that

[i]n the case of works first published in British India, copyright shall be subject to the limitation that the sole right to produce, reproduce, perform or publish a translation of the work shall subsist only for a period of ten years from the date of first publication of the work; provided that if within the said period the author, or any person to whom he has granted permission to do so, publishes a translation of any such work in any language, copyright in such work as regards the sole right to produce, reproduce, perform or publish a translation in that language shall not be subject to the limitation prescribed in this sub-section.

In short, in India the copyright owner’s power to control translation of a work into any particular language lasted for only ten years, unless an authorized translation was produced in that language during that time. A book published in English in India could thus, in the absence of a translation into Gujarati within ten years, be translated by anyone into Gujarati.

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1. Copyright Act, 1911, 1 & 2 Geo. 5, c. 46, § 1(2). For commentary, see GEORGE STUART ROBERTSON, *THE LAW OF COPYRIGHT* 120–21 (1912).

Even if the work were translated into Gujarati, after ten years if it had not been published in Marathi, any person could translate it into Marathi.<sup>2</sup>

The purpose of this article is to examine the historical background to this derogation from the imperial regime, and to consider it as a precursor to both the general theme of this symposium (the tension between trade and development) and the specific focus of this session (multiple layers of law-making). For the 1914 Act represents an act of national law-making set within a complex field of local,<sup>3</sup> imperial, and international law, and an example of an early attempt to accommodate a claim to local difference in a regime of both international and imperial standards. The problems that the article describes, the tensions between different actors over the formulation of copyright policy, and the kinds of rhetoric deployed by various constituencies in pursuit of their goals (including the language of underdevelopment), have obvious parallels with contemporary discussions of international intellectual property law and policy. Admittedly, the historical specificity of this example may render it of limited value as a case study from which *direct* guidance can be gleaned to help understand the institutional complexity we encounter in intellectual property law-making today. However, this specificity is itself instructive. For it reminds us how important context is to the meaning and effect of what might otherwise seem like abstract legal norms. Copyright laws developed in particular social and economic circumstances might have very different meaning and impact in a different context. As we will see, and as much recent experience also suggests, such differences can come to be overlooked and neglected in the process of internalization. Indeed, as this article will indicate, in the period under review internalization operated in association with colonization and as a justification for the imposition of a regime which accommodated “British” interests much more than those of India.

2. A linguistic survey of India carried out under government auspices by G.A. Grierson between 1903 and 1927 identified 179 languages and 544 dialects. See Suniti Kumar Chatterji, *Linguistic Survey of India: Languages and Scripts*, in 1 RAMAKRISHNA MISSION INST. OF CULTURE, THE CULTURAL HERITAGE OF INDIA 53, 53 (Suniti Kumar Chatterji et al. eds., 2d ed. 1958). Chatterji argued that there were fifteen “great literary languages”: Hindu, Urdu, Bengali, Assamese, Oriya, Marathi, Gujarati, Sindhi, Punjabi, Kashmiri, Nepali, Telugu, Kannada, Tamil, and Malayalam. *Id.* at 53–54.

3. Under the India Councils Act, 1861, 24 & 25 Vict., the power to legislate was divided between the “national” level (rather confusingly called the “Imperial Legislative Council”) and provincial governments in the Presidencies of Bombay and Fort St. George. Significantly, section 43 of the Act prohibited the provincial legislatures from passing laws “regulating patents or copyright.” *Id.* It should also be noted that the formal jurisdiction of the Governor General did not extend to the territories in the geographical area of India still governed by Princes, the so-called “Princely” or “Native” states. In the early twentieth century, many such states would be induced to adopt copyright laws corresponding to those in the rest of India.

## I. THE NARRATIVE

### A. Overview of Legal Developments

The 1914 Act can be placed within a complex set of law-making arrangements: laws made by the imperial Parliament for the British Empire, laws made by the Indian Governor General in Council applicable domestically,<sup>4</sup> and emerging international arrangements. Reflecting these three sources India, like many British colonies,<sup>5</sup> was the beneficiary of three copyright regimes.<sup>6</sup> Firstly, there was the “imperial regime” embodied in the 1842 Literary Copyright Act. Under this Act, if a book was first published in the United Kingdom by an author who was a resident in one of the British possessions, the book would benefit from copyright throughout the British dominions, defined as “all parts of the United Kingdom of Great Britain and Ireland, the islands of Jersey and Guernsey, all part of the East and West Indies, and all the colonies, settlements and possessions of the Crown which are now or hereafter may be acquired.”<sup>7</sup> Secondly, there was the national Indian law, passed by the Governor General in Council in 1847.<sup>8</sup> The effect of this was to confer Indian copyright on books first pub-

4. After 1858, the Governor General was also known as the Viceroy. In this article, the terms are used interchangeably.

5. By 1880, New Zealand, Canada, and some of the South African and Australian states had their own copyright laws: New Zealand, Copyright Ordinance of Mar. 15, 1842, 5 Vict. No. 18, *reprinted in Laws and Ordinances Passed by Governor General and Council of Colony of New Zealand*, 1844, 34 BRITISH PARL. PAPERS 783, 833; Canada, An Act Respecting Copyrights, 1875, 38 & 39 Vict. c. 53; Cape of Good Hope, Act to Protect and Regulate the Rights of Authors in respect of their Works, No. 2 of 1873; Victoria, Copyright Act 1869, 33 Vict. No. 350; South Australia, Copyright Act 1878, 41 & 42 Vict. No. 95; and New South Wales, Copyright Act, 1878, 42 Vict., No. 20.

6. Actually, there was a fourth: common law copyright in unpublished works. For further discussion in the Australian context, see Lionel Bently, *Copyright and the Victorian Internet: Telegraphic Property Laws in Colonial Australia*, 38 LOY. L.A. L. REV. 71, 88–106 (2004).

7. Literary Copyright Act, 1842, 5 & 6 Vict., c. 45. The reference to “East Indies” would have been understood not in the narrow sense of the territories in the Malay archipelago, but as including the whole of British India (in 1842, formally still in the hands of the “East India” Company). Section 4 of the British Act to Amend the Several Acts for the Encouragement of Learning, 1814, 54 Geo. 3, c. 156, had clarified that copyright was infringed where

any Bookseller or Printer, or other Person whatsoever, in any Part of the United Kingdom of Great Britain and Ireland, in the Isles of Man, Jersey or Guernsey, or in any other part of the British Dominions, shall . . . print, reprint, or import . . . any such Book or Books . . .

(emphasis added). The 1842 Act was closely followed by the Customs Act, 1842, 5 & 6 Vict., c. 24, which reinforced the prohibition on importation of books into the U.K. The customs authority in India struggled both to understand and implement the duties imposed on it. See India Office Library, located in the British Library, St. Pancras, London, [hereinafter IOL] (F4/2064 Board’s Collections 94616–94687 (1843–44), PC 4549, Collection No. 23).

8. An act for the encouragement of learning in the territories subject to the government of the East India Company, Act XX of 1847. The preamble to the 1847 Act explained that

it is doubtful whether the [1842 Imperial] Act . . . has made appropriate and sufficient protection for the enforcement in every part of the said territories subject to the Government of the

lished in India.<sup>9</sup> The third tier of copyright law was the “international copyright” regime, under which Britain recognized the right to print and reprint within the British dominions books published in specified foreign countries.<sup>10</sup>

The three regimes brought with them considerable complexity, but on the whole operated with tolerable substantive consistency in the middle part of the nineteenth century. This was because, rather than reflecting different policy agendas, the three mechanisms operated as alternative (or in the case of the imperial and domestic regimes, potentially cumulative) ways by which particular constituencies of authors or publishers could avail themselves of the benefits of copyright. A British publisher, for example, could publish in the U.K. and in principle was protected in India (as

East India Company of the said right by proprietors thereof, and whether the said Act of Parliament has made provision for the enforcement of the said right by or against any persons not being subject to the jurisdiction of the courts established by Her Majesty's Charter.

Documents explaining the background to the Act can be found in the India Office Library. IOL, *supra* note 7 (F4/2256 Board's Collections (1847–48), Vol. 2256, 113858–114023, at No. 113864). It seems the initiative was taken by the Bengal British India Society, which had doubts over the enforceability of the 1842 Act, and wanted to avoid the inconvenience and expense of registering works in London. The Society may also have seen the Act as a possible vehicle to help establish a reference library, which was one of its goals. The Society was founded on April 20, 1843, with George Thompson (1804–78) as its first president. Thompson was succeeded by William Theobald, president from January 6, 1844 to December 9, 1845, and Baboo Ramgopaul Ghose (a.k.a. Ram Gopal Ghosh) (1814–1868), president of the Society from 1845 onward. It was Ghose who had petitioned the Government of Bengal on August 8, 1846. On the Society, see SCOTT & CO.'S BENGAL DIRECTORY AND REGISTER 198–99 (1846); SPEECHES BY GEORGE THOMPSON 157 (Raj Jogeshur Mitter ed., New Town Press, 1895); I BIMANBEHARI MAJUMDAR, HISTORY OF POLITICAL THOUGHT FROM RAMMOHUN TO DAYANANDA (1821–1884), at 163–64, 172–73 (1934); BIMANBEHARI MAJUMDAR, INDIAN POLITICAL ASSOCIATIONS AND REFORM OF LEGISLATURES (1818–1917), at 26–32 (1965) [hereinafter MAJUMDAR, INDIAN POLITICAL ASSOCIATIONS]; RAJAT SANYAL, VOLUNTARY ASSOCIATIONS AND THE URBAN PUBLIC LIFE IN BENGAL (1815–1876), at 77–79 (1980); Pulak Naranyan Dhar, *Bengal Renaissance: A Study in Social Contradictions*, 15 SOC. SCIENTIST 26, 32–33 (1987). Ghose, a business magnate of Calcutta and a leader of the so-called “Young Bengal” group, was heavily involved in various societies of the time: he was leader of the Society for the Acquisition of General Knowledge (1838), a founder of the British India Society in 1851, member of the Chamber of Commerce (1853–1858), vice-president of the Agricultural and Horticultural Society (until 1850), a member of Committee for “Relief fund for sufferers by present disturbances” (1858), as well as a member of the Asiatic Society and one of the original fellows of the University of Calcutta—and ultimately was included as one of the second set of Indian members on the Bengal Legislative Council. See 2 DICTIONARY OF NATIONAL BIOGRAPHY 55–57 (S.P. Sen ed., 1973) [hereinafter NATIONAL BIOGRAPHY]; MAJUMDAR, INDIAN POLITICAL ASSOCIATIONS, *supra*, at 23, 29, 61, 339; SANYAL, *supra*, at 80, 81 n.57, 81 & n.59, 82, 110, 122, 142, 164–65; An Act to Establish and Incorporate a University at Calcutta, No. 2 of 1857.

9. In 1862, U.K. law gave copyright in paintings, drawings, and photographs, but through national rather than imperial legislation. In 1864, the GoI was urged to take steps for the improvement and extension of copyright. A bill was drawn up proposing “that facilities be given for the protection of copyright in pictures, engravings, prints and other similar productions” but was not adopted. Statement of Objects and Reasons: Indian Copyright Bill 1885, from the Gov't of India to the Sec'y of State (June 5, 1885) (IOL, *supra* note 7, L/PJ/6/156, file 1137, para. 1).

10. Int'l Copyright Act, 1844, 7 & 8 Vict., c. 12. This Act, which repealed and replaced the 1838 International Copyright Act, covered not merely books but also works of art. Section 2 conferred the same rights that the work would have benefited from had it been published in the U.K.

well as the other colonies). An Indian author or publisher, who was concerned only with the Indian market, could publish and register a book in India and thereby acquire copyright protection for India alone.<sup>11</sup> A foreign author or publisher could only avail themselves of the international regime.<sup>12</sup> For each of these constituencies, the multiple regimes offered different entry points, but for the most part the substance of protection remained the same. The Indian domestic law of 1847 had tracked the 1842 Literary Copyright Act,<sup>13</sup> and international copyright regimes largely enabled foreign authors to benefit from imperial protection.

However, as the nineteenth century was coming to an end, pressure started to be exerted for reform of the substantive standards employed in these different law-making regimes. In India, there were discussions of new copyright laws in the mid-1870s, and again in the mid-1880s, even leading to a draft Bill of 1885. In Britain, the Copyright Commission of 1875–78,<sup>14</sup>

11. Registration under the 1847 Act paralleled that under the 1842 Act, except that in the case of India, registration was not with Stationer's Hall in London but with the Secretary to the GoI, Home Department. The 1847 Act was amended by Act XXV of 1867, An Act for the Regulation of Printing-Presses and Newspapers, for the preservation of copies of books printed in British India, and for the registration of such books. The 1867 Act was directed primarily to government control of published works, a growing concern following the uprising of 1857 (known widely, albeit from a particularly British perspective, as the "Indian Mutiny" or "Sepoy uprising" and from an Indian one as the "war of independence" or "great revolt"). The Act required submission of printed works to the local government within one month, failing which the printer could be subject to severe fines and imprisonment. Three copies were to be deposited, one with the Secretary of State, one at the direction of the Governor General/Viceroy, and one at the direction of the local government. These deposits were deemed to satisfy the Copyright Act.

On the basis of these laws, the local governments created annual reports on the "native press." For background and discussion of the reports, see Tapti Roy, *Disciplining the Printed Text: Colonial and Nationalist Surveillance of Bengali Literature*, in *TEXTS OF POWER: EMERGING DISCIPLINES IN COLONIAL BENGAL* 30, 32–35 (Partha Chatterjee ed., 1995); Robert Darnton, *Book Production in British India, 1850–1900*, 5 *BOOK HIST.* 239 (2002); Robert Darnton, *Literary Surveillance in the British Raj: The Contradictions of Liberal Imperialism*, 4 *BOOK HIST.* 133 (2001). The 1898 Report suggests that roughly a third of the books registered were protected by copyright. Report on Publications Issued and Registered in the Several Provinces of British India in 1898, at 10 (1898) (IOL, *supra* note 7, V/23/76, MF.1/708-10) (334 of 1057 works published in Madras); *id.* at 31 (316 out of 1135 in Bombay); *id.* at 91 (235 out of 1320 in North West Frontier Province).

12. On the changing case law, see CATHERINE SEVILLE, *THE INTERNATIONALISATION OF COPYRIGHT: BOOKS, BUCCANEERS AND THE BLACK FLAG IN THE NINETEENTH CENTURY* 174–80 (2006).

13. A minute of Charles Hay Cameron, Legal Member of the Council (1843–48) and President of the Council of Education, dated July 5, 1847, noted that even if the Colony had the power to enact a different substantive law from that contained in the Literary Copyright Act of 1842, 5 & 6 Vict., c. 45, it would be "improper in a subordinate legislature" to deviate from the imperial regime. Minute of Charles Hay Cameron (July 5, 1847) (IOL, *supra* note 7, F4/2256 Board's Collections (1847–48) Vol. 2256 113858–114023, at No. 113864). Cameron had been President in the Council of Education in Bengal and, more famously, presented a memorial to Parliament in favor of the funding of universities. See F.W. THOMAS, *THE HISTORY AND PROSPECTS OF BRITISH EDUCATION IN INDIA* 58 (Cambridge, Deighton Bell and Co. 1891); JOHN F. RIDDICK, *WHO WAS WHO IN BRITISH INDIA* 60 (1998).

14. COPYRIGHT COMMISSION, REP. OF THE COMMISSIONERS APPOINTED TO MAKE INQUIRY WITH REGARD TO THE LAWS AND REGULATIONS RELATING TO HOME, COLONIAL AND INT'L COPYRIGHT,

fraught and inconclusive as its discussions were in many respects, prompted several immediate attempts at codification, and there were renewed attempts at the turn of the century. Moreover, in the third arena—that of international law—the mid-1880s saw the emergence of a new multilateral model following the signing of the Berne Convention in 1886.

For the majority of this period, the three regimes exerted a conservative influence upon one another. British copyright reform was regarded as urgent, but was proving impossible, largely because of the difficulties agreeing and coordinating British and colonial law reform. This problem was most stark in relation to Canada: when Canada had attempted to produce domestic reforms, the British had refused to give approval, claiming that the new law was in conflict with the imperial regime.<sup>15</sup> When India sought to amend its copyright, first in 1876 and then in 1885, the negotiations were more polite, but the effect was the same: even though the GoI had modeled its proposal on a Bill drafted in Britain (by Lord John Manners), India was asked not to take action until the British had been able to produce their reforms lest divergences emerge.<sup>16</sup> The British influence on the Berne negotiations were similarly limiting: the British representatives were instructed not to agree to anything that would require reform of the domestic law.<sup>17</sup> The other participants felt British involvement was so significant that they were prepared to pare down the treaty from a full code to a document that addressed only key issues. This pragmatism enabled Britain to accede to Berne and the 1896 revision.

Nevertheless, the pressures for reform in India, in Britain, and in the other colonies—as well as the efforts of those ambitious to increase the substantive standards within the Berne Convention—put the various regimes in increasing tension. This was particularly so in the field of translation rights.

### B. *Divergence Between the United Kingdom and India*

Whether the Indian Act of 1847, or the Imperial Copyright Act of 1842, which in this respect were substantially the same, conferred on the

1878, c. 2036, 24 BRITISH PARL. PAPERS 163 (1878); MINUTES OF EVIDENCE, WITH APPENDIX, 1878, c. 2036-1, 24 BRITISH PARL. PAPERS 253 (1878).

15. SEVILLE, *supra* note 12, at 103–06.

16. Sec'y of State, Lord Salisbury, to Gov't of India (July 5, 1877) (IOL, *supra* note 7, No. 19 in file for Oct 22, 1883, L/PJ/6/110); Statement of Objects and Reasons: Indian Copyright Bill 1885, from the Gov't of India to Sec'y of State (June 5, 1885) (IOL, *supra* note 7, L/PJ/6/156, file 1137, para. 2).

17. See Lionel Bently & Brad Sherman, *Great Britain and the Signing of the Berne Convention in 1886*, 48 J. COPYRIGHT SOC'Y U.S.A. 311 (2001) [hereinafter Bently, *Berne Convention*]; SEVILLE, *supra* note 122, at 60–69.

copyright owner the right to control translations was anything but clear. The 1842 Act defined copyright as “the sole and exclusive liberty of printing or otherwise multiplying copies” of any “book,” and section 15 made it unlawful to “print or cause to be printed any book in which there shall be subsisting copyright . . . .” Section 7 of the 1847 Act likewise defined liability in terms of “printing” a “book.” Eighteenth century case law, particularly *Burnett v. Chetwood*<sup>18</sup> and *Millar v. Taylor*,<sup>19</sup> suggested that the right to “print” a “book” did not cover the right to translate a book or to print a translation of the book, but the situation was contested (as we will see), with most British commentators advocating recognition or introduction of such a right.<sup>20</sup>

### 1. “Indian” Views and Interests

In India, during the 1870s and 1880s, policy-makers had been coming to the view that translation rights might not be desirable, or that such rights should be very limited. Commenting on a proposal to adopt a three year translation right in 1876, one respondent said he considered “that any law which prevented free translations would be detrimental to the progress of the country.”<sup>21</sup> Another advised that

the authors whose works would be prohibited under the proposed legislation are much more numerous in Bengal than those who would receive protection from it. If the authors of England complain, then the question in justice would have to be raised and protected, but if they do not, then

18. (1720) 2 Mer. 441, 35 Eng. Rep. 1008, 1008–09 (Ch.). In that case the plaintiff, Dr. Thomas Burnett, had published his work *Archaeologiae Philosophicae* in Latin in 1692. Under the Statute of Anne (1710), Burnett received copyright protection for twenty-one years, i.e., until 1731. In 1720 the defendant threatened to publish an English translation. The defendant argued that the Statute of Anne concerned the mechanical art of printing and that a translation, “in some respects may be called a different book, and the translator may be said to be the author, in as much as some skill in language is requisite thereto, and not barely a mechanic art, as in the case of reprinting in the same language . . . .” Lord Macclesfield found that argument persuasive, saying “a translation might not be the same with the reprinting the original, on account that the translator has bestowed his care and pains upon it . . . .” *Id.*

19. (1769) 4 Burr. 2303, 98 Eng. Rep. 201 (K.B.), *rev’d*, *Donaldson v. Becket*, (1774) 4 Burr. 2408, 98 Eng. Rep. 257 (K.B.); see 17 WILLIAM COBBETT, THE PARLIAMENTARY HISTORY OF ENGLAND, FROM THE EARLIEST PERIOD TO THE YEAR 1803, at 990–91 (London, 1813). Accepting that there was a perpetual common law right over literary property, Aston, J., acknowledged that a purchaser of a book might “improve upon it, imitate it, translate it; oppose its sentiments: but he buys no rights to publish the identical work.” *Millar*, 98 Eng. Rep. at 226. Similarly, Willes, J., exempted translations from the rights conferred on the author of a work, which was confined to the printing of copies, declaring that “[c]ertainly bona fide imitations, translations, and abridgments are different [from copies]; and, in respect of the property, may be considered new works: but colourable and fraudulent variations will not do.” *Id.* at 205.

20. See *infra* text accompanying notes 46–53. Section 4 of the Canadian Act Respecting Copyrights, 1875, 38 & 39 Vict. c. 53, included a translation right for works printed and published, or reprinted or republished, in Canada.

21. W.C. Capper, Comm’r, Fyzabad Division, to Chief Comm’r of Oudh (May 17, 1876) (IOL, *supra* note 7, No. 2483, in L/PJ/6/110, file 2015).

in the interests of Bengal, his Honour would strongly recommend that the question be not raised.<sup>22</sup>

Although the reforms proposed in 1876 were not proceeded with (for other reasons),<sup>23</sup> the GoI seemed to have taken these representations to heart. For example, Courtenay Ilbert, the legal member of the Viceroy's Council, voiced concern that an 1885 proposal to give a translation right to the copyright owner "might stand in the way of translations being made [from English into the vernacular], and might thus interfere with the diffusion of knowledge."<sup>24</sup>

*a. Translation Rights and the Perceived Need for European Knowledge*

The majority of arguments deployed to justify special treatment of copyright in India emphasized an Indian "need" for European knowledge. India "needed" European knowledge for its "advancement" and "progress." Consequently, in purely economic terms, as "net importers" of works, granting translation rights did not seem to be in India's interests as the costs imposed on Indian translators, publishers, and consumers would be significantly more than the gains to Indian authors and publishers. More significantly, there was a fear that translation rights would impede access to this knowledge. Giving foreign authors and publishers the exclusive right to prevent such translations, at the very least, would have imposed transaction costs on would-be translators—costs which would inhibit this important activity. More significant, probably, was the fear that such rights could be used to prevent access to European culture other than in its original language.

To understand these latter sentiments we need to venture away from law and into some of the broader dimensions of Indian history. Certainly, the idea that India was in need of European knowledge was commonplace amongst both the colonists and many Indians for much of the nineteenth century.<sup>25</sup> The colonists presented themselves as "advanced" and "civilized" in terms of all aspects of technology and culture. While it was rec-

22. H.S. Risely, Assistant Sec'y to the Gov't of Bengal, to the Gov't of India, (June 7, 1876) (IOL, *supra* note 7, No.1626, L/PJ/6/110, file 2015).

23. The 1876 proposals were not pursued because a Royal Commission was considering the issue of imperial and colonial copyright. See Internal Memorandum of Jud. Dep't, India Office (Oct. 22, 1883) (IOL, *supra* note 7, L/PJ/6/110).

24. Statement of Objects and Reasons: Indian Copyright Bill 1885, from the Gov't of India to the Sec'y of State (June 5, 1885) (IOL, *supra* note 7, L/PJ/6/156, file 1137, para. 15).

25. VEENA NAREGAL, LANGUAGE POLITICS, ELITES, AND THE PUBLIC SPHERE: WESTERN INDIA UNDER COLONIALISM 61 (Permanent Black 2001) ("[A] dominant concern of the discourses in colonial public arenas was the superiority of Western 'useful' learning and the possibility of its vernacularisation in order to effect a 'general improvement' of native society.").



ognized that, in previous times, India had produced some important cultural works, the India of the nineteenth century was regarded as backward and stagnant. In Macaulay's "infamous" minute on Indian education, written in 1835, he dismissed "the whole native literature in India and Arabia" as less valuable than "a single shelf of a good European library."<sup>26</sup> Moreover, "the dialects commonly spoken among the natives of this part of India, contain neither literary nor scientific information, and are moreover so poor and rude that, until they are enriched from some other quarter, it will not be easy to translate any valuable work into them."

European knowledge was therefore thought to be "needed" both for practical reasons, to improve the physical well-being and economic prosperity of "India," as well as to enrich the linguistic, ethical, and cultural resources on which "India" could draw in its efforts to develop into a civilized nation. Colonization engendered an environment in which this view of India as "in need" was accepted and articulated even by many Indians. For example, Rammohun Roy wrote in 1823 to the Governor General, Lord Amherst, calling on the Government to use the education grant provided under the 1813 Charter Act to "instruct the natives of India in Mathematics, Natural Philosophy, Chemistry, Anatomy and other useful Sciences, which the nations of Europe have carried to a degree of perfection that has raised them above the inhabitants of other parts of the world."<sup>27</sup>

Although education of some indigenous people was a matter of colonial self-interest, in particular so as to create an administration with which to govern India,<sup>28</sup> many liberal colonists, and indeed the missionaries, saw

26. T.B. Macaulay, *Minute by the Hon'ble T.B. Macaulay, dated the 2nd February 1835* (Feb. 2, 1835), reprinted in INDIA BUREAU OF EDUC., SELECTIONS FROM EDUCATIONAL RECORDS 107, 109 (1965). The speech was made in the context of allocation of the measly education budget, and Macaulay advocated spending it on English rather than Arabic or Sanskrit education. For background, see Elmer H. Cutts, *The Background of Macaulay's Minute*, 58 AM. HIST. REV. 824 (1953); SUBRATA DASGUPTA, THE BENGAL RENAISSANCE: IDENTITY AND CREATIVITY FROM RAMMOHUN ROY TO RABINDRANATH TAGORE 82–83 (2007).

27. Address from Rammohun Roy to the Governor General protesting against the establishment of the Calcutta Sanscrit College, Dec. 11, 1823, cited in J. LOURDUSAMY, SCIENCE AND NATIONAL CONSCIOUSNESS IN BENGAL (1870–1930), at 10 (2004). Naregal argues that native concerns with improving society should not be dismissed as "an artless internalisation of colonial ideology . . . naïve or obsequious," but also involved subtle political maneuvering against the colonizers and between various groups (religious, caste, class) of Indians. NAREGAL, *supra* note 25, at 124–29.

28. One of the goals of the GoI at this stage was to generate an elite class amongst the Indian population who would be linguistically, and "hence" intellectually and culturally European, and thus could participate in the governmental machinery. Robin J. Moore, *Imperial India, 1858–1914*, in 3 THE OXFORD HISTORY OF THE BRITISH EMPIRE: THE NINETEENTH CENTURY 422 (Andrew Porter ed., 1999).

A largely service class of mainly high-caste Hindus fulfilled the intention of the westernizing reformers of the 1830s to create "interpreters" between the British rulers and Indian society. Though attempts were made subsequently to reinforce vernacular education for practical ends, the Raj's dominant concern remained higher and professional learning in English,

their role as facilitating the cultural and moral improvement of the Indian people.<sup>29</sup> For some, this was the justification for colonization; for others, an opportunity provided by it. “Education,” perceived in part in terms of the transfer of knowledge, technology, culture, learning, and morals, was Britain’s “gift” to India—or at least, some sort of fig-leaf that could justify territorial expansion, political oppression, military atrocities, and economic opportunism.<sup>30</sup> Of course, well-intentioned as these colonists may have been, as Veena Naregal explains, the insinuation of the idea that European knowledge was superior amongst the English-educated Indian elites, itself constituted a less obvious but possibly more insidious form of colonialism.<sup>31</sup> Colonial education “managed an internalisation of adverse judgments against indigenous intellectual traditions and social practices,”<sup>32</sup> establishing ideas of the superiority of the colonizers that sustained their authority, reinforced their sense of self-righteousness, and perpetuated their rule.

Even before the 1830s, when, following Macaulay’s Minute, Lord Bentinck decreed that the funds available for education should be employed on English education alone,<sup>33</sup> educational agencies (such as the

which was the basis for the recruitment of relatively inexpensive collaborators with the Imperial bureaucracy.

*Id.* at 431. For criticism of views of Colonial education as concerned merely with the production of clerks, see KRISHNA KUMAR, *POLITICAL AGENDA OF EDUCATION: A STUDY OF COLONIALIST AND NATIONALIST IDEAS* 25–26 (2d ed. 2005).

29. Hodgson Pratt, Inspector of Schools in Bengal, and founder of the Vernacular Literature Society argued that

[t]o make the acquisition of the English language the sole condition upon which twenty-five millions of people shall obtain access to the stores of valuable information which are in the possession of their rulers is a gross injustice: that such a system must deprive the great mass of the native population of all means of improvement or progress; and perpetuate the great evils which have ever been present in the East—that of making learning a class distinction.

James Long, *Returns Relating to Publications in the Bengali Language, in 1857*, 32 *SELECTIONS FROM THE RECORDS OF THE BENGAL GOVERNMENT* 55 (1859); also cited in PRIYA JOSHI, *IN ANOTHER COUNTRY: COLONIALISM, CULTURE, AND THE ENGLISH NOVEL IN INDIA* 69 (2003).

30. NAREGAL, *supra* note 25, at 112 (The “renaissance” trope “allowed the ‘benevolent’ conferment of modern knowledges on non-Western peoples to be presented as a counterweight to the radical disruptions of metropolitan capitalist interests.”); Dagmar Engels, *Modes of Knowledge, Modes of Power: Universities in 19th-Century India*, in *CONTESTING COLONIAL HEGEMONY: STATE AND SOCIETY IN AFRICA AND INDIA* 87, 89 (Dagmar Engels & Shula Marks eds., 1994) (“Colonial education was an aspect of the colonial state’s self-representation as a transmitter of modernity, civilization and order. . . . [T]he development of the system of education underlined the British claim to be a progressive force in India.”).

31. NAREGAL, *supra* note 25, at 55–59.

32. *Id.* at 58.

33. Once British dominance in India was established, even before English was made the language of government, many Indians saw the value of education in English. For some, such as Ram Mohan Roy, and later Syed Ahmed Khan, English was an important means for the acquisition of European knowledge. For a defense of Macaulay’s position as “in line with the enlightened Indian approach to Oriental learning,” see R.K. Das Gupta, *Macaulay’s Writings on India*, in *HISTORIANS OF INDIA, PAKISTAN AND CEYLON* 230, 237 (C.H. Phillips ed., 1961). For others, English was important as a

Bombay Native School Book and School Society (a branch of the Bombay Education Society), the Society for Translating European Sciences and School Society, and the Calcutta School Book Society) had begun programs aimed at transferring the benefits of European knowledge to Indians through the creation of texts in, and translation of texts into, some of the many vernaculars.<sup>34</sup> While these programs continued even after 1835,<sup>35</sup> the initiatives received a considerable boost when, in 1854, a famous Educational Despatch highlighted the need for European learning to be diffused to the population more widely and stated that for this to occur, the vernacular languages were likely to be the best medium of instruction.<sup>36</sup> In part, the despatch envisaged that this would be done through the education of teachers in English who could convey knowledge into the many regional languages.<sup>37</sup> But the despatch also looked forward to the enrichment of the

language through which to engage with, or express dissent from, British policy or administrative practice. See STUART BLACKBURN, *PRINT, FOLKLORE, AND NATIONALISM IN COLONIAL SOUTH INDIA* 122 (2003) (“Public protest, even when speaking on behalf of ordinary Tamils, was apparently more effective when published in the language of the colonial state.”).

34. NAREGAL, *supra* note 25, at 66–68 (on Bombay); J.G. COVERNTON, *VERNACULAR READING BOOKS IN THE BOMBAY PRESIDENCY 23-29* (1906) (also on Bombay); BLACKBURN, *supra* note 33, at 131 (explaining that Governor Munro envisaged widespread vernacular education in Madras in the 1820s, and in attempting to implement his plans, highlighted the need for, and generated many, textbooks in translation); LOURDUSAMY, *supra* note 27, at 44–45; John D. Windhausen, *The Vernaculars, 1835–1839: A Third Medium for Indian Education*, 37 SOC. EDUC. 254, 262 (1964) (referring to Colonel Jervis’s translations of various books into Gujarati and Marathi).

35. The Vernacular Literature Society of Bengal was established in 1851, its goal being “to publish readable Bengali translations of popular English books and to ensure their availability.” JOSHI, *supra* note 29, at 68. Its founders included H. Pratt, James Long (an Irish missionary), and Jaykrishna Mukherjee. *Id.* at 68–69. By May of 1857 the Society had arranged for the translation of seventeen works “pre-eminently popular and amusing; as it was evident that, among translations at any rate, books of any other character could not be expected to attain any extensive circulation.” Long, *supra* note 29, at 55. The Society eventually merged with the Calcutta School Book Society in 1862–63. See SANYAL, *supra* note 8, at 244; *Programme of the Bengal Vernacular Translation Society 1851*, 15 CALCUTTA REV. 5 (1851).

36. EAST INDIA COMPANY, *DESPATCH FROM THE COURT OF DIRECTORS OF THE EAST INDIA COMPANY, TO THE GOVERNOR GENERAL OF INDIA IN COUNCIL ON THE SUBJECT OF THE EDUCATION OF THE PEOPLE OF INDIA* (NO. 49, DATED 19TH JULY 1854) (Simla, G.M. Press 1854). In fact, a campaign to educate in the vernacular can be traced to soon after Macaulay’s Minute of 1835 or earlier. See, e.g., THOMAS, *supra* note 13, at 38 (“Lord Bentinck’s Minute put to sleep one controversy only to arouse a second. This was the controversy between the vernacularists and the Anglicists. It was not decided until the year 1854.”); Windhausen, *supra* note 34 (highlighting the arguments of Rev. William Adam, Brian Houghton Hodgson, Frederick Shore, and Rev. William Campbell).

37. The process of producing textbooks for regional use required and produced standardization of many of the languages. In one Bombay report on education it is stated that “[i]n Sind an important step in the interests of education has recently been undertaken by the drawing up of a Hindu-Sindhi alphabet in which school-books may be printed. Hitherto the Hindu community of almost each separate village in Sind has had its own conventional alphabet.” See *Bombay Educational Report for 1867–88*, in *REPORT SHOWING THE PROGRESS OF EDUCATION IN INDIA SINCE THE YEAR 1866 AND CORRESPONDENCE BETWEEN THE GOVERNMENT OF INDIA AND THE SECRETARY OF STATE THEREON, 1870*, 52 BRITISH PARL. PAPERS 374, 397. There is now a substantial academic literature discussing the standardization of the vernacular languages themselves. See, e.g., CHRISTOPHER R. KING, *ONE LANGUAGE, TWO SCRIPTS: THE HINDI MOVEMENT IN NINETEENTH CENTURY NORTH INDIA* (1994)

vernacular literature “by the translations of European books or by the original compositions of men whose minds have been imbued with the spirit of European advancement.”<sup>38</sup>

By the 1870s, when the question of extending the scope of copyright came to be seriously considered, translations were perceived by many, both colonists and colonized, to be a necessary mechanism in the bid to ensure “civilization” and progress amongst the indigenous people of British India.<sup>39</sup> To contemporaries, translation rights were largely seen as an extra impediment to carrying out the enormous task of making available the benefits of European culture and science to the local population. Denzil Ibbetson, Director of Public Instruction in the Punjab, in 1885 argued that “one of the greatest educational needs of the country is wholesome literature in the vernacular; and this can at present only be hoped for from translation.” He took the view that any translation right would be “a serious hindrance to progress in India; and under the peculiar circumstances of the country I would impose no restriction upon the publication of translations. . . . I am strongly in favor of perfect freedom of translation.”<sup>40</sup>

(charting the development of the association of Hindi with Hindus, and Urdu with Muslims in United Provinces after 1860, with Nagari (rather than the cursive variant Kaithi) becoming the dominant Hindi script, and Khari Boli (as opposed to Braj Bhasha, Avadhi, Bhojpuri) becoming the dominant regional standard)); FRANCESCA ORSINI, *THE HINDI PUBLIC SPHERE 1920–1940: LANGUAGE AND LITERATURE IN THE AGE OF NATIONALISM 18–30* (2002); Anindita Ghosh, *Literature, Language and Print in Bengal, 1780–1905* (1998) (unpublished Ph.D. dissertation, Univ. of Cambridge); ANINDITA GHOSH, *POWER IN PRINT, POPULAR PUBLISHING AND THE POLITICS OF LANGUAGE AND CULTURE IN A COLONIAL SOCIETY, 1778–1905* (2006) (on Bengali); Ellen E. MacDonald, *The Modernizing of Communication: Vernacular Publishing in Nineteenth Century Maharashtra*, 8 *ASIAN SURV.* 589 (1968) (standardization of Marathi); NAREGAL, *supra* note 25, at 160–68 (on standardization of Marathi); BLACKBURN, *supra* note 33, at 125 (describing various influences on standardization of Tamil before 1862).

38. EAST INDIA COMPANY, *supra* note 36, para. 14; *see also id.* paras. 70–71. In *Print, Folklore, and Nationalism in Colonial South India*, Stuart Blackburn lucidly explains “downward filtration theory”:

Translations from English into regional Indian languages, it was thought, would modernise those literatures. Once this new serum had entered the bloodstream of Tamil, for example, it would, by its very excellence, inspire imitation and thus the language and literature would evolve slowly but steadily out of primitive superstition into a medium of educational instruction capable of producing a reasonable approximation of Western civilization.

BLACKBURN, *supra* note 3333, at 132.

39. Denzil Ibbetson, Director of Public Instruction in the Punjab, said that “one of the greatest educational needs of the country is wholesome literature in the vernacular; and this can at present only be hoped for from translation.” Letter from Denzil Ibbetson to Undersec’y to Gov’t, Punjab (Aug. 20, 1885) Dispatch No. 6, Home Dep’t Proceedings Oct. 1885, Judicial, Nos. 3–7 app., *Opinions on the Bill to Amend the Law Relating to Copyright*, in *PROCEEDINGS OF THE GOVERNMENT OF THE PUNJAB IN THE HOME DEPARTMENT FOR THE MONTH OF OCTOBER 1885* (Lahore, Punjab Gov’t Secretariat Press 1885).

40. *Id.*

*b. Other Reasons for Vernacularization*

As the century wore on, the desire for education in the vernacular which underpinned some of the GoI's opposition to translation rights was informed by more sinister political motives: vernacular education was viewed as a potential antidote to some of the consequences of the Anglicist policies which the colonizers increasingly regarded as problematic. One of the goals of Anglicization had been to generate an English-educated India elite to work in the Indian governmental machinery, particularly the Indian Civil Service. However, by the last quarter of the nineteenth century it was becoming clear that the numbers of qualified Indians far exceeded the available positions, giving rise to an educated but unemployed and disgruntled body of potential agitators.<sup>41</sup> A further problem with the policy of Anglicization was that the educated elite, whether of Bengal, Bombay, Madras, or Lahore, possessed a common tongue in which to vent its grievances and call for change. Perhaps the most obvious example of this was the establishment of the Indian National Congress in 1885 as a *national* forum, operating in English.<sup>42</sup> From that moment, many of the colonizing Europeans started to express doubts about the policy of educating in English and thereby exposing educated Indians to British and European ideas of liberty and equality.<sup>43</sup> As the liberal attitudes gave way to imperialist and racist ones, so the idea that education should be focused at the elementary level and provided in the vernacular gained ground. Education in the vernacular rather than English would, for some imperialists, assist in the maintenance of regional differences as part of a policy of "divide and rule."

This change in attitudes prompted significant changes in policy, particularly under Lord Curzon (who was Viceroy from 1898–1905). As Aparna Basu has described, Curzon first sought to limit numbers in higher education by adopting a policy that emphasized quality rather than quantity; and second, directed investment at elementary education in the vernacular languages. While Curzon had sought to disguise the political aims of the educational policies he adopted,<sup>44</sup> the link between education and growing political nationalism prompted the creation in 1910 of a separate

41. See Shanti S. Tangri, *Intellectuals and Society in Nineteenth-Century India*, 3 COMP. STUD. SOC'Y & HIST. 368, 390 (1961); ANIL SEAL, THE EMERGENCE OF INDIAN NATIONALISM: COMPETITION AND COLLABORATION IN THE LATER NINETEENTH CENTURY 23 (1968).

42. For a description of earlier nationalist movements, see SEAL, *supra* note 41, at 245–297.

43. APARNA BASU, THE GROWTH OF EDUCATION AND POLITICAL DEVELOPMENT IN INDIA, 1898–1920, at 8 (1974) ("It was in the time of Lord Dufferin that higher education came to be regarded as the root cause of the growing unrest in the country.").

44. See *id.* at 11.

ministry of education in the GoI.<sup>45</sup> Not insignificantly, it was this ministry, headed by Harcourt Butler, that came to be charged with copyright reform.

## 2. British Views and Interests

### a. *Legal Commentators*

While the Indian polity was increasingly skeptical about translation rights, in Britain, commentators and policy-makers were coming to a very different conclusion. Some commentators took the view that copyright already provided a right to control translations, while others argued that, to the extent that the law did not already confer a translation right, it should be amended.<sup>46</sup> For example in 1899 Augustine Birrell, while recognizing that the legal position was not clear, argued that “if the original book is entitled to protection, it would seem unreasonable to permit it to be translated without the consent of the owner of the copyright.”<sup>47</sup> Similarly, copyright expert T.E. Scrutton expressed the view that “[o]n principle . . . such a translation would seem to be an infringement of copyright in the original,”<sup>48</sup> an opinion echoed by another British commentator, Ernest MacGil-

45. Carey A. Watt, *Education for National Efficiency: Constructive Nationalism in North India, 1909–1916*, 31 *MODERN ASIAN STUD.* 339, 351 (1997).

46. Arguing for legislative amendment, various spokesmen for authors and publishers conceded there was no such right. See FREDERICK DALDY, SELECT COMM. OF THE H. OF LORDS, REP. ON THE COPYRIGHT AMENDMENT BILL, 1897, H.L., at 5–6, Qs. 45–50, 10 *BRITISH PARL. PAPERS* 233 [hereinafter 1897 COPYRIGHT BILL REPORT]; FREDERICK DALDY, SELECT COMM. OF THE H. OF LORDS, REP. ON THE COPYRIGHT BILL AND COPYRIGHT (AMENDMENT) BILL, 1898, H.L., at 36, Q. 536, 9 *BRITISH PARL. PAPERS* 231, 276 [hereinafter 1898 COPYRIGHT BILL REPORT]. Lord Monkswell, chairing the 1897 Select Committee, observed that “the trend of public opinion for a great many years past has been steadily in favour of giving authors greater and greater power to stop unauthorised translations.” See 1897 COPYRIGHT BILL REPORT, *supra*, at 3; see also Lord Monkswell, *Copyright Reform*, 23 *L. MAG. & REV.* 195, 208 (1897–98) (asserting that there had been a “drift of opinion” in favor of a full translation right). It is interesting that Daldy saw full translation rights as desirable in order to harmonize U.K. law with the laws of Germany, the U.S., France, Italy, Spain, and Austria: 1897 COPYRIGHT BILL REPORT, at Qs. 8, 22. On the various laws in operation in the late nineteenth century, see 1 SAM RICKETSON & JANE C. GINSBURG, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND* 13–15 (2d ed. 2006).

47. AUGUSTINE BIRRELL, SEVEN LECTURES ON THE LAW AND HISTORY OF COPYRIGHT IN BOOKS, 32–33, 154–55 (1899); see also Thomas Edwards Scrutton, *Report to the Board of Trade on the Copyright Bills*, in 1898 COPYRIGHT BILL REPORT, *supra* note 46, at app. (“At present so far as English law is concerned, translation is probably not an infringement of copyright. There are Indian decisions to that effect, and the question is there of some practical importance, owing to the variety of Indian languages; in the U.K. the question might arise as between English, Welsh and Gaelic.”).

48. THOMAS EDWARDS SCRUTTON, *THE LAW OF COPYRIGHT* 142 (4th ed. 1903).

On principle however such a translation would seem to be an infringement of copyright in the original, but it may be that the Courts would draw a distinction between translations of poetry or prose, having a literary merit and style, and translations merely mechanical, as of educational or scientific works.

livray.<sup>49</sup> *The Daily News* in 1897 commented that “if there is to be any copyright at law,” it “is obviously just” that this confers a right over translations.<sup>50</sup> U.S. commentator, Eaton S. Drone, argued that Justice Grier’s decision in *Stowe v. Thomas* (holding a translation of *Uncle Tom’s Cabin* to be non-infringing),<sup>51</sup> was “contrary to justice, recognized principles, and the copyright statutes of the United States as judicially construed.<sup>52</sup> . . . Of the reported decisions of England and America, there is none which is more clearly wrong, unjust, and absurd than that in *Stowe v. Thomas*.”<sup>53</sup>

*Id.* The idea that translation of prose was infringing, but translation of verse was not was suggested by Daldy in 1897 COPYRIGHT BILL REPORT, *supra* note 46, at 5–6, Q. 51. See also WILLIAM WILLIAMSON KERR, A TREATISE ON THE LAW AND PRACTICE OF INJUNCTIONS 369 (3d ed., London, Maxwell 1888).

49. E. J. MACGILLIVRAY, A TREATISE UPON THE LAW OF COPYRIGHT 116–17 (1902) (stating that on general copyright principles, Indian cases finding translations to be non-infringing are wrong). Sir William Markby of OUP remarked in a letter of 1902 that “Until the case at Bombay . . . it was very generally supposed that there was some law by which translations were an infringement of copyright—and even now this notion is not dispelled.” Letter of William Markby (Feb. 19, 1902) (Oxford University Press Archive, housed at Oxford University Press Headquarters, Great Clarendon Street, Oxford [hereinafter OUP Archive]) (“Copyright India,” file CG 59).

50. *The New Copyright Bill*, 8 AUTHOR 61, 62 (1897) (an extract from the *Daily News* (London)).

51. 23 F. Cas 201 (C.C.E.D. Pa. 1853) (No. 13,514); 2 Am. L. Reg. 210 (1854). In this case the plaintiff, Mrs. Stowe, copyrighted both the English original and a German translation of her work *Uncle Tom’s Cabin*. The defendant later translated the English original into German and Mrs. Stowe sought protection. Mr. Justice Grier rejected her claim, stating,

By the publication of her book, the creations of the genius and imagination of the author have become as much the public property as those of Homer or Cervantes. Uncle Tom and Topsy are as much *publici juris* as Don Quixote and Sancho Panza. All her conceptions and inventions may be used and abused by imitators, playwrights and poetasters. They are no longer her own—those who have purchased her book, may clothe them in English doggerel, in German or Chinese prose. Her absolute dominion and property in the creations of her genius and imagination have been voluntarily relinquished; and all that now remains is the copyright of her book, the exclusive right to print, reprint and vend it; and those only can be called infringers of her rights, or pirates of her property, who are guilty of printing, publishing, importing, or vending without her license “copies of her book.” In tropical, but not very precise phraseology, a translation may be called a transcript or copy of her thoughts or conceptions; but in no correct sense can it be called a copy of her book.

*Id.* at 208, 2 Am. L. Reg. at 231

A copy of a book must, therefore, be a transcript of the *language* in which the conceptions of the author are clothed; of something printed and embodied in tangible shape. The same conceptions clothed in another language cannot constitute the same composition; nor can it be called a transcript or “copy” of the same “book.”

*Id.* at 207; 2 Am. L. Reg. at 229.

52. EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES 454 (Boston, Little Brown & Co. 1879). These criticisms are echoed by SCRUTTON, *supra* note 48, at 143.

53. DRONE, *supra* note 52, at 455 n.4. In fact, by the time Drone was writing, the question was of much less significance in the U.S. since the 1870 Copyright Act recognized that “authors may reserve the right . . . to translate their own works.” 1870 Copyright Act, ch. 230, § 86, 16 Stat. 198, 212. Nevertheless, Drone argued that an author should have a right of translation irrespective of that provision and without specifically reserving such a right. DRONE, *supra* note 52, at 455–56 n.4.

*b. Publishing Interests*

While British commentators were starting to advocate the grant of a translation right to authors (and publishers) as a matter of “justice” or “principle,” British publishing interests saw the potential financial value of the Indian markets. For much of the nineteenth century, India had been a (not insignificant) export market for books produced in Britain and targeted primarily at British readership.<sup>54</sup> For example, Priya Joshi’s research reveals that there was a significant expansion in the importation into India of British books,<sup>55</sup> and establishes that a high proportion of the English books circulating were novels. However, while spill-over from British markets continued throughout the century, some publishers perceived India as a significant potential market in its own right, and saw that publishing practices needed to be adapted to take advantage of this market. The first attempt to do so was by the Murray Publishing House, with its colonial editions of the 1840s, but the series was widely recognized as a failure. More significant, however, were forays into educational markets, and the later “colonial library” series of works published by Macmillan.

Education in India underwent a remarkable expansion between 1854 and 1902.<sup>56</sup> The period witnessed the establishment of five universities (Calcutta, Madras, Bombay (all 1857), Allahabad (1887) and Lahore (1882, Punjab University)) and an expansion of colleges (where the students were taught) from 28 to 191. Although the quality of the education provided by the colleges was variable (so that Nurullah and Naik concluded that by 1901–02 “university and collegiate education in India presented a motley picture,”<sup>57</sup>) this expansion inevitably resulted in a large body of students in need of educational texts (something like 23,000 students in 1902). Moreover, a corresponding expansion of secondary education meant that by the turn of the century there were over 5,000 secondary schools in British India (up from 3,916 in 1881–82) and some 590,129 scholars in 1901–02 (up

54. Rimi B. Chatterjee, *Macmillan in India: A Short Account of the Company’s Trade with the Sub-Continent*, in *MACMILLAN: A PUBLISHING TRADITION* 153, 154 (Elizabeth James ed., 2002) [hereinafter Chatterjee, *Macmillan in India*] (“Alexander Macmillan was selling to India long before he ever thought of actually publishing works especially for it.”).

55. British books constituted ninety-five percent of book imports into India between 1850 and 1900. JOSHI, *supra* note 29, at 18. Drawing on the Annual Statement of the Trade, Joshi states that the value of exports to India was £313,772 in 1864. *Id.* at 39.

56. SYED NURULLAH & J.P. NAIK, *A HISTORY OF EDUCATION IN INDIA* 272 (1951).

57. *Id.* at 295. Nurullah and Naik argue that while there had been considerable expansion of collegiate education, the colleges were not very effective; there was too much emphasis on liberal education as well as neglect of modern Indian languages.



from 214,077 in 1881–82).<sup>58</sup> This expansion accelerated over the twenty years from 1902, the numbers of pupils and students doubling in primary and secondary schools.<sup>59</sup> For “publishers in India . . . this was the beginning of a boom time.”<sup>60</sup>

The vast majority of the university education was delivered and examined in English—and thus there was a market for educational texts in English.<sup>61</sup> Moreover, as the university matriculation exams were in English, regional languages fell to be neglected even in secondary education.<sup>62</sup> In the high school stage, as of 1882, “English was invariably used as the medium of instruction.”<sup>63</sup> Most universities prescribed set textbooks not just for the courses, but also for the matriculation exam, and these were guaranteed to provide decent sales.<sup>64</sup> The British publishers—Macmillan, Longman, Oxford University Press (“OUP”), Nelson, Chambers, and Blackie—therefore saw ready markets, if they could get their works prescribed.

58. While education expanded, as a proportion of the population, the figures were miniscule: in 1911, only 1.9% of India’s total population was attending elementary schools. KUMAR, *supra* note 28, at 38; see also NURULLAH & NAIK, *supra* note 56, at 441 (quoting 2 LORD CURZON IN INDIA 68–71 (1906), as stating that four out of every five Indian villages had no school, three out of every four boys grow up without any education, and only one Indian girl in forty attended any kind of school).

59. NURULLAH & NAIK, *supra* note 56, at 444 (from 622,768 secondary students in 1901–02 to 1,106,803 in 1921–22; and from 3,204,336 primary school pupils in 1901–02 to 6,109,752 in 1921–22).

60. RIMI B. CHATTERJEE, *EMPIRES OF THE MIND: A HISTORY OF THE OXFORD UNIVERSITY PRESS IN INDIA UNDER THE RAJ* 64 (2006) [hereinafter CHATTERJEE, *EMPIRES OF THE MIND*]. Domestic publishers benefited too, though there is less material available on the history of Indian publishing. For a useful exception, see Ulrike Stark, *Hindi Publishing in the Heart of an Indo-Persian Cultural Metropolis: Lucknow’s Newal Kishore Press (1858–1895)*, in *INDIA’S LITERARY HISTORY: ESSAYS ON THE NINETEENTH CENTURY* 251, 258 (Stuart Blackburn & Vasudha Dalmia eds., 2004) (describing Newal Kishore as having a near-monopoly on textbook publishing in the North-Western Provinces).

61. One exception was the examinations at Punjab University, which awarded degrees to candidates who had studied and been examined in Urdu. Another related to the medical courses at Bombay and Bengal where instruction was provided in Marathi (and later Gujerathi) and Bangla, respectively, through about 1880. NURULLAH & NAIK, *supra* note 56, at 293–94. However, it was reported of Punjab University that “[t]his system has not so far borne encouraging fruit, partly through neglect and partly through the absence of proper text-books and the inherent difficulty of obtaining the services of lecturers competent to convey western learning to their pupils in the vernacular.” *Id.* at 291 (quoting the Report of the Indian Universities Commission of 1902). On the rise and fall of the vernacular in higher education in Punjab, see KING, *supra* note 37, at 92–93 (citing Jeffrey Price Perrill, *Punjab Orientalism: The Anjuman-I-Punjab and Punjab University, 1865–1888* (1976) (unpublished Ph.D. dissertation, University of Missouri)). King tells us that only two institutions of higher learning in the North Western Province used vernaculars as a medium of instruction or subject of study: the Anglo-Oriental College of Aligarh, which used Urdu, and Central Hindu College at Banaras in 1898 which included Hindi in the curriculum. *Id.* at 93.

62. NURULLAH & NAIK, *supra* note 56, at 301.

63. *Id.* at 303.

64. INDIA DEPT. OF EDUC., *PROGRESS OF EDUCATION IN INDIA, 1902–1907, FIFTH QUINQUENNIAL REVIEW*, 1909, Cd. 4635, para. 194, 63 BRITISH PARL. PAPERS 72 [hereinafter *FIFTH QUINQUENNIAL REV.*] (Calcutta recommends a list of fifteen books; Allahabad prescribes a textbook; Madras, having declined to prescribe textbooks for fifteen years, had reverted to doing so).

Macmillan recognized the potential of this market as early as the 1860s.<sup>65</sup> In 1870, Longman's market in India for Macaulay's *Lord Clive* was sufficiently large to justify it contemplating bringing an action against a Bombay bookseller who was planning to bring out an unauthorized edition.<sup>66</sup>

The systems of creation and approval of texts varied from one province to another.<sup>67</sup> In some provinces, for certain periods, the governments involved themselves deeply in arranging the translation, production, and distribution of textbooks. In fact, in the first half of the nineteenth century, government production, or at least sponsorship of missionary action, lay behind much of the creation and distribution of translations.<sup>68</sup> This was particularly so for vernacular texts, and the provincial bodies often had close links with private bodies—the Calcutta School Book Society,<sup>69</sup> the Bombay Native School Book and School Society, the Deccan Vernacular Translation Society, the Gujarat Vernacular Society, and so on.<sup>70</sup> At the

65. Secondary and particularly university education was the preserve of the higher classes, so higher prices could be charged. Macmillan recognized the potential of this market as early as the 1860s. Letter from Alexander Macmillan to G.O. Trevelyan (Apr. 14, 1863), in *LETTERS OF ALEXANDER MACMILLAN* 136, 138 (George A. Macmillan ed., 1908) [hereinafter *MACMILLAN LETTERS*] (“We are increasing our business with India both in school books and in the supply of Libraries and Book Clubs and private persons, and we could do more if it came in our way. What strides education must be making among the natives! We sell considerable numbers of our mathematical books, even high ones, every year to India. I should be glad to know something about these same scientific natives.”).

66. The House of Longman, Publishers Archives, 1794–1914 (1978), *microformed on* Reel 65 N132 (Chadwyck-Healey Ltd.).

67. There seems to have been the greatest emphasis on private enterprise in Bengal, but in contrast, considerable government involvement in the Punjab and Burma. By the beginning of the 20th century, the Bombay Department of Public Instruction was involved in the production only of vernacular texts. The Department of Public Instruction in Madras prepared and published its own textbooks until 1889. For a description of the different approaches to textbook production in the 1890s and 1900s, see the various “quinquennial reviews.” INDIA DEPT. OF EDUC., *PROGRESS OF EDUCATION IN INDIA, 1892–93 TO 1896–97, THIRD QUINQUENNIAL REVIEW, 1898*, C. 9190, 65 BRITISH PARL. PAPERS 501 [hereinafter *THIRD QUINQUENNIAL REV.*] (*see especially* pages 392–98 of the Report); INDIA DEPT. OF EDUC., *PROGRESS OF EDUCATION IN INDIA, 1897–98 TO 1901–02, FOURTH QUINQUENNIAL REVIEW, 1904*, Cd. 2181, 65 BRITISH PARL. PAPERS 428 [hereinafter *FOURTH QUINQUENNIAL REV.*]; FIFTH QUINQUENNIAL REV., *supra* note 64, at 72–75, 128–32 (stating that in Bombay, the United Provinces, and the Punjab, the government had taken an active part in the production of textbooks); INDIA DEPT. OF EDUC., *PROGRESS OF EDUCATION IN INDIA, 1907 TO 1912, SIXTH QUINQUENNIAL REVIEW, 1914*, Cd. 7485, 62 BRITISH PARL. PAPERS 279 [hereinafter *SIXTH QUINQUENNIAL REV.*] (stating “the provinces in which text-books have mainly been left to private enterprise are Madras, Bengal, the United Provinces and Eastern Bengal and Assam”).

68. REPORT SHOWING THE PROGRESS OF EDUCATION IN INDIA SINCE THE YEAR 1866 AND CORRESPONDENCE BETWEEN THE GOVERNMENT OF INDIA AND THE SECRETARY OF STATE THEREON, 1870, 52 BRITISH PARL. PAPERS 374 (*see especially* the Bombay Educational Report for 1867–88, at 396–97).

69. The society was founded in 1817 “with the view of the preparing, publication and cheap or gratuitous supply of works useful in Schools” and received 500 Rupees a month from the Bengal government. *See Rules of the Calcutta School Book Society*, in *THE BENGAL ALMANAC AND ANNUAL DIRECTORY FOR 1820* 86 app. (Calcutta, Mirror Press 1820); Long, *supra* note 29, at 57.

70. FIFTH QUINQUENNIAL REV., *supra* note 64, at 128–29; COVERNTON, *supra* note 34, at 23–34 (explaining the history of the Bombay government's involvement in production of vernacular readers).

end of the nineteenth century, and in the early twentieth century, this kind of activity became much less common, and the initiative for production of textbooks was left increasingly to private enterprise.<sup>71</sup> In some cases the provincial governments did deals with specific publishers, as with a series of mathematical texts in Burmese which were to be published by Messrs. George Bell and Sons.<sup>72</sup> But as regards English texts, certainly, private effort was by the turn of the century producing a flood of texts.<sup>73</sup>

Rather than producing the textbooks, the various provincial governments (and, at the higher level, the universities) were required to inspect books published by private bodies and determine which should be adopted, or to create lists from which suitable books could be selected. In 1900, these lists were made applicable not just to government-run schools, but also to government-aided schools.<sup>74</sup> Some textbook committees found this to be an onerous and time-consuming task, as the number of publications increased.<sup>75</sup> In Madras, for example, 1,197 books were examined over the five years from 1887 to 1902; the Punjab Committee examined 2,258 texts in the period from 1907–12. Despairing, the Director of Public Instruction in Bombay reported that “[i]nnumerable textbooks on all kinds of subjects are sent into the country now-a-days by English publishers. Copies of almost every one are sent to me with a request that it may be included in the sanctioned list. . . . It is impossible either for the Committee or myself to examine and report on them all.”<sup>76</sup>

71. Naregal argues that as regards translation into Marathi, by the 1860s, the state had already relinquished its interests in the vernacular sphere. . . . From then on, vernacular production was the responsibility of native private initiative, though the government continued to exercise its authority to determine the size and the quality of the vernacular public by regulating the content and allocations to vernacular education.

NAREGAL, *supra* note 25, at 118. Government sponsorship remained necessary for some of the less-widely spoken languages.

72. THIRD QUINQUENNIAL REV., *supra* note 67, at 397; SIXTH QUINQUENNIAL REV., *supra* note 67, at 280, para. 678 (defending the grant of a textbook monopoly to one firm).

73. SIXTH QUINQUENNIAL REV., *supra* note 67, at 279, para. 677 (“[W]orks of universal acceptance are adopted and suitable editions are produced by private firms in sufficient numbers.”).

74. FOURTH QUINQUENNIAL REV., *supra* note 67, at 429–30 (attempting to extend the effect of the approval system even to unaided schools by specifying that students from unaided schools were liable to exclusion from public examinations if the school in question used textbooks of which the government disapproved).

75. See, e.g., THIRD QUINQUENNIAL REV., *supra* note 67, at 392 (“Almost every mail from Europe brings specimens of educational works from the leading publishing firms in Great Britain, not to speak of books published in India which are constantly coming in for the Director’s approval and patronage.”); FOURTH QUINQUENNIAL REV., *supra* note 67, at 429 (referring to one case where a committee was “overwhelmed with applications for the examination of books which they [found] themselves incapable of properly examining”); SIXTH QUINQUENNIAL REV., *supra* note 67, at 280, para. 679 (noting an increased strain on these bodies as a result of competition amongst publishers to have their works approved).

76. FOURTH QUINQUENNIAL REV., *supra* note 67, at 432.

As with the production of textbooks, the twilight of the nineteenth and dawn of the twentieth century witnessed less and less government intervention in the distribution of educational texts. In the middle of the nineteenth century, educational books were often purchased and distributed by governmentally controlled or approved book depots, such as those run by the Calcutta School Book Society.<sup>77</sup> In the early twentieth century, these mechanisms were gradually abandoned: the government book depot in the Central Provinces was abolished in 1893,<sup>78</sup> the Calcutta School Book Society was dissolved in 1912,<sup>79</sup> and the Department of Public Instruction in the United Provinces reported that

it has been found more convenient, in districts where sufficient provision already exists in cities for the sale of books, to leave the matter entirely to private enterprise. The closing of the book depots in these districts has relieved the Deputy Inspectors of a troublesome task, and the District Boards of the upkeep of a somewhat expensive staff.<sup>80</sup>

The diminution in government involvement in textbook production was both informed by and inaugurated increasing private initiatives. At the higher levels, the key to success for publishers was the adoption of a textbook by universities for their courses or matriculation exams. For elementary and secondary teaching, at the very least the publisher required approval of the books for use in schools by the provincial textbook committees.<sup>81</sup> Consequently, publishers spent considerable time and effort cultivating links with Indian educators—those who were responsible for adopting particular course texts in the universities and the Departments of Public Instruction.<sup>82</sup> The archives for Macmillan are full of correspondence

77. REPORT RELATIVE TO THE STATE OF EDUCATION IN INDIA, 1865–66, 1867–88, 50 BRITISH PARL. PAPERS 1, 105–09. In 1855 the Society was selling 7,000 to 8,000 volumes in English per year. BASU, *supra* note 43, at 73 (citing 1 BUREAU OF EDUC., INDIA, SELECTIONS FROM EDUCATIONAL RECORDS 1781–1839, at 112 (Henry Sharp ed., 1920)). The Society was heavily criticized by Reverend Long in his report on publication in Bengal. Long explained that the books were in fact more expensive than those produced by the “native press” because of the expense of the Baptist Mission Press and that its results constituted “[a] poor return on the whole, when we consider the patronage and funds this society has at its disposal.” Long, *supra* note 29, at 57. However, it was still distributing books through Bengal at the end of the century. THIRD QUINQUENNIAL REV., *supra* note 67, at 394 (stating that the Calcutta School Book Society was the “chief medium for the distribution of school books with numerous agencies in the Mufassil.”).

78. THIRD QUINQUENNIAL REV., *supra* note 67, at 396.

79. SIXTH QUINQUENNIAL REV., *supra* note 67, at 283, para. 682.

80. FOURTH QUINQUENNIAL REV., *supra* note 67, at 433.

81. For a description of publishing practices and the dependence of publishers on educational prescription, see Letter from J. C. Allen to Sir Harcourt Butler, KCSI, CIE, Educ. Dep’t (Nov. 15, 1913) (IOL, *supra* note 7, L/PJ/5/88, No. 3581). J.C. Allen was, *inter alia*, author of *A Narrative of Indian History*, published by Longman and approved by various educational departments.

82. Muntassir Mamoon, Textbooks of East Bengal in the Nineteenth Century 7–8 (Jan. 31, 2006) (paper delivered at Asia-Pacific Regional Conference of “SHARP,” Jadavpur University, Kolkata, on file with author) (describing the networks that developed between writers of textbooks, publishers,

between Macmillan and persons involved in the education system, in which Macmillan seeks to identify those involved in the selection process, present them with texts for approval, or ask their views on existing works. In many cases, the British publishers commissioned writing by those involved in Indian educational provision, thereby giving the author an interest in the adoption of the book as a set text.<sup>83</sup> So important was approval to the success of any text that in one case Macmillan suggested that even though a work had been printed, it would not be worth its while to publish it unless it were adopted by the Calcutta Text Book Committee.<sup>84</sup> Given that success of a text depended upon its adoption or at least approval, it was a business necessity to have agents working on the ground in India,<sup>85</sup> and in due course British publishers started to establish branches in India. Longman, Green & Company established offices in Bombay and Calcutta; Blackie & Son opened a Bombay office in 1901,<sup>86</sup> and later had offices in Calcutta and Madras; by 1914, Macmillan had branches in Bombay, Calcutta, and Madras;<sup>87</sup> and OUP opened a Bombay office in 1912.<sup>88</sup> The activities of

selection authorities, and schools, and elaborating on the example of Dinonath Sen, a writer in East Bengal and a Deputy Inspector of Schools, whose book *Siksha Sadhan Pronali* was recommended by Bengal's Director of Public Instruction, Alfred Woodley Croft, in 1884; see, e.g., Letter from Alexander Macmillan to C.B. Clarke (Dec. 16, 1869), in MACMILLAN LETTERS, *supra* note 65, at 258 (seeking to discover the identity of teachers); Letter from Macmillan to Babu Krishna Bihari Sen (Aug. 19, 1894) (Macmillan Archive, British Library, St. Pancras, London [hereinafter Macmillan Archive], BL Add Ms 55445 (1), at 317) (asking for Sen's views on *A Geographic Reader* by C.B. Clarke and the likelihood of it being set for Calcutta University's entrance exam).

83. The Macmillan archives are replete with examples of situations where the relevant bureaucrat responsible for adopting texts was also a Macmillan author. See, e.g., Letter from Macmillan to J.C. Lewis, Inspector of Schools, Lahore, Punjab (Aug. 31, 1894) (Macmillan Archive, *supra* note 82, BL Add Ms 55445 (2), at 508) (congratulating Lewis, who revised Lock's *Arithmetic for Schools*, on his appointment to the Department of Public Instruction for the Northwestern Provinces and remarking that "no doubt ... your appointment will add to the circulation of the book, of which we will be glad").

84. Letter from Macmillan to Babu Ramenda Sundara Trivedi (Feb. 27, 1895) (Macmillan Archive, *supra* note 82, BL Add Ms 55447(2), at 607) ("[F]rom inquiries there is practically no chance of getting the translation of Professor Balfour Stewart's *Primer of Physics* approved by the Calcutta Text Book Committee and we are inclined not to publish the book at all, although we have gone to great expense in printing it. . . . We published a Bengali translation of Sir Archibald Geikie's *Primer of Physical Geography*, which has not been approved by the Text Book Committee and has in consequence had no sale at all.")

85. Macmillan's first full-time agent, appointed in June 1892, was John A. Stagg. He was paid 500 rupees per month and given one percent commission on all sales. Macmillan Archive, *supra* note 82, BL Add Mss 55843, at 357. E.V. Rieu (1887–1972) joined the OUP in 1910 and in 1912 was appointed manager in India with instructions to open a branch in Bombay. See CHATTERJEE, EMPIRES OF THE MIND, *supra* note 60, at 37, 82.

86. See AGNES A.C. BLACKIE, BLACKIE & SON, 1809–1959: A SHORT HISTORY OF THE FIRM 53 (1959).

87. John Handford, *Macmillan Chronology, 1843–1970*, in MACMILLAN: A PUBLISHING TRADITION xxv, xxvi (Elizabeth James ed., 2002) (noting that the Bombay branch opened in 1901, the Calcutta branch in 1907, and the Madras branch in 1913).

88. CHATTERJEE, EMPIRES OF THE MIND, *supra* note 60, at 37, 82.

Macmillan have been carefully charted by Rimi Chatterjee in an article,<sup>89</sup> and the operations of OUP in India are described and analyzed in her recent book, *Empires of the Mind*. Chatterjee demonstrates that this pattern of cultivation of links remained crucial to publishing success in the early 1900s.

In due course, British publishers extended their repertoires<sup>90</sup> and began publishing works in the regional languages of India (which were the languages of instruction for the most part in primary education and also the early years of secondary education).<sup>91</sup> In a letter from Roper Lethbridge to George Lillie Craik, partner in Macmillan & Co., dated May 23, 1882, Lethbridge explicitly recognized the potential value of translation rights:

My idea about such translations . . . is, that you ought to keep the copyrights in your own hands for future use, as they should at some future time become very valuable, as education extends among the millions of India. At the same time, my own experience (as you know) is that the pioneers of these translations are likely to lose money—so it is just as well to allow government to do the first editions.<sup>92</sup>

Rimi Chatterjee notes that C.B. Clarke (working on behalf of Macmillan) arranged for translation and adaptation of Chamber's *Educational Course* into Bengali as *Bodhodoy*, and that in the 1890s Clarke took on publication of Edmund Marsden's *Geographies*, which had been translated into four different languages.<sup>93</sup> More significant still was Macmillan's 1904 contract with the Bombay government for the exclusive manufacture of the Education Department's vernacular readers.<sup>94</sup> According to Chatterjee, these books (published in Marathi, Gujarati, Kannada, and Sindhi) were compulsory in all district government schools, giving total sales of half a million copies.<sup>95</sup>

89. Chatterjee, *Macmillan in India*, *supra* note 54.

90. One skill some publishers needed to acquire was expertise in printing non-Roman characters. As regards OUP, see Philip Lyttelton Gell's exchange with K. B. Thapar cited in Rimi B. Chatterjee, "Every Line for India": *The Oxford University Press and the Rise and Fall of the Rulers of India Series*, in PRINT AREAS: BOOK HISTORY IN INDIA 65, 85 (Abhijit Gupta & Swapan Chakravorty eds., 2004).

91. Shanti S. Tangri, *Intellectuals and Society in Nineteenth-Century India*, 3 COMP. STUD. SOC'Y & HIST. 368, 370 (1961) (explaining that from 1901–02, only in Madras was any primary education conducted in English). Writing in 1859, Reverend Long noted that the price of books would need to be very low—only an anna—if they were to be purchased by village schools. Long, *supra* note 29, at 12. This would have made it a relatively unattractive proposition to British publishers.

92. Letter from Roper Lethbridge to George Lillie Craik, partner in Macmillan & Co. (May 23, 1882) (Macmillan Archive, *supra* note 82, BL Add MS 55062).

93. Chatterjee, *Macmillan in India*, *supra* note 54, at 158.

94. *Id.* at 159.

95. See Letter from Macmillan to Heath (Aug. 15, 1905) (Macmillan Archive, *supra* note 82, BL Add MS 54789, at f. 81); Letter from Macmillan to Lee Warner (Jan. 24 1913) (Macmillan Archives, *supra* note 82, BL Add Ms 55845, at 547) (describing agreement between Secretary of State for India, Bombay Government, and Macmillan, dated October 23, 1905, for the publication of vernacular reading

Paralleling the expansion of British publishers' involvement in the educational market was a growth of interest in the market for fiction, a topic which has been mapped to some extent by Priya Joshi in her work *In Another Country*.<sup>96</sup> There, Priya Joshi attempts to understand what Indians really read in the second half of the nineteenth century through close analysis of library acquisition and circulation data. She concludes that Indian readers were more interested in the novel—in fiction—than in educational texts. For example, a report created by the Calcutta Public Library stated that “three fourths of the circulation consists of novels and periodicals.”<sup>97</sup> Moreover, Joshi notes that in 1902 a similar percentage—seventy-four percent of lending from the Bagbazar Public Library in Calcutta—was of fiction, and that ninety percent of it circulated in Bengali.<sup>98</sup> She argues that this preference is also reflected in Macmillan's *Colonial Library*, the success of which she largely attributes to careful selection of fiction that would appeal to Indian consumers.<sup>99</sup> According to Joshi, Macmillan

(as well as others including Murray, Routledge, Bentley, and Cassells) was acutely aware of the profits to be made from selling books directly to Indian readers, and it carefully cultivated this marketplace, first with textbooks and educational materials in the 1860s and then with novels through its “Colonial Library” series that was started in 1886.<sup>100</sup>

Joshi argues that the promise of such markets prompted an increase in book publishing in India, the expansion of titles being reflected through the registration of books.<sup>101</sup>

Like Chatterjee, in her work on educational publishing, Joshi emphasizes the wide circulation of English nineteenth-century novels in translation, surveying meticulously those catalogued in various Indian public

books in Bombay but due to terminate on October 1, 1915, and asking Lee Warner to advise on matters relating to retention of deal). For background, see COVERNTON, *supra* note 34, at 92–95 (outlining the terms of the arrangement with Macmillan, and claiming that “[b]etter terms than these could not... have been expected”).

96. JOSHI, *supra* note 29; see also Priya Joshi, *Indian Novel*, in *ENCYCLOPEDIA OF THE NOVEL* 596, 597 (Paul E. Schellinger et al. eds., 1998) (calling the novel “Britain's most valuable cultural export”).

97. JOSHI, *supra* note 29, at 57 (citing FINANCES OF THE CALCUTTA PUBLIC LIBRARY, REPORT OF THE SUBCOMMITTEE APPOINTED ON THE 10TH FEBRUARY 1873).

98. *Id.* at 61.

99. Cf. Shafquat Towheed, ‘An Appreciative and Grateful Author’: *Edith Wharton and the House of Macmillan*, 58 *PUBLISHING HIST.* 43, 62–63 (2005) (indicating that Macmillan automatically offered highly regarded authors inclusion in the series).

100. JOSHI, *supra* note 29, at 30; see also Priya Joshi, *Trading Places: The Novel, the Colonial Library, and India*, in *PRINT AREAS*, *supra* note 90, at 17, 25–36 (comparing Macmillan's Colonial Library with Murray's failed series of the 1840s and Kegan Paul's Indian and Colonial Library series of 1887–89, and explaining why Murray's and Kegan Paul's series failed and Macmillan's series succeeded by reference to selection of works, pricing, and timing of editions).

101. See JOSHI, *supra* note 29, at 143, tbl.4.1.

libraries. According to Joshi, “the historical record is full of British novels translated and adapted into Indian languages.”<sup>102</sup> She found that twelve of Reynolds’s novels, including *Mysteries of London* and *Mysteries of the Court of London*, had been translated into four or more Indian languages, as had Scott’s poems *Lady of the Lake*, *Marmion*, and *Lay of the Last Minstrel*. Other novelists translated included Wilkie Collins’s *Woman in White*, Bulwer-Lytton’s *Last Days of Pompeii*, and Taylor’s *Tara*.<sup>103</sup> In principle then, this market for translations could have provided British fiction publishers with a significant interest in the legal vicissitudes of the translation rights in relation to India.

While Joshi’s work reveals the widespread availability of English novels in translation, none of her published work indicates whether British publishers viewed this as a potentially exploitable market. Clearly, in terms of sheer volume, it may well have been attractive (and a possibility worth reserving legally). However, two factors suggest that it might not have been a market that weighed so heavily on the publishers’ minds in the period under consideration. The first is that the novels that proved popular in India were, as Joshi shows, dominated by melodrama. Many of these were published in Britain as so-called “penny dreadfuls” or “yellow-backs”—*Mysteries of London*, for example, published by John Dicks. Many of these publishers operated on the outer limits of legitimacy, and it is not obvious that either their business models (which appear short-termist), or their bureaucratic and organizational structures, would have been sophisticated enough to support long-term investment in remote and unfamiliar markets and geographically-dispersed distribution of derivative works.<sup>104</sup> Secondly, these markets lacked the regulatory sponsorship (and in some cases regulatory control) that we have observed were present in the educational field. It may be that this made them more prone to piracy too.<sup>105</sup> Whatever the reasons, it is notable that the lobbying efforts of British publishers at various times to secure translation rights in India came from the respectable, educational publishers—Macmillan, Oxford and Cambridge University Presses,

102. *Id.* at 28.

103. *Id.* at 70–71, tbl.2.3.

104. JOSEPH MCALEER, POPULAR READING AND PUBLISHING IN BRITAIN 1914–1950 (1992).

105. It is very difficult to assess levels of “piracy,” even in relation to educational texts. Roper Lethbridge wrote to Craik, a partner at Macmillan, dated October 12, 1880: “Just a line . . . to inform you the enterprising Babus of Calcutta are pirating your Green’s readings like fun! . . . I should strongly recommend you prosecuting.” (Macmillan Archive, *supra* note 82, BL Add Mss 55062). Ulrike Stark states that in the second half of the nineteenth century “copyright had, at least in theory, become an issue that no publisher of repute could ignore.” Ulrike Stark, *Hindi Publishing in the Heart of an Indo-Persian Cultural Metropolis: Lucknow’s Newal Kishore Press (1858–1895)*, in *INDIA’S LITERARY HISTORY: ESSAYS ON THE NINETEENTH CENTURY* 251, 272 (Stuart Blackburn & Vasudha Dalmia eds., 2004).



Longman, and Methuen.<sup>106</sup> In these campaigns, the publishers of novels were represented, if at all, by the Publishers Association and Society of Authors.<sup>107</sup>

### C. Indian Case Law

The British interest in recognition of translation rights, and the GoI's understanding of India as "in need" of European knowledge, set the two sets of law-makers on a collision course. The collision was sparked by two important decisions, one in 1890 and one in 1895, in which the High Court of Bombay decided that translating works was not an infringement of copyright under either Indian or imperial law.

The first case was *Munshi Shaik Abdurruhma'n v. Mirza' Mahomed Shira'zi*,<sup>108</sup> and concerned a technical manual for making and treating various manufactured products—such as dyeing piece goods or preparing sealing wax—entitled "Moontakhebáte Bakiri" (*Selections by Bákir*). The work, written in Urdu, was published first in 1885 and sold about 500 copies per year at one rupee per copy. Copyright was registered in accordance with the Indian Act of 1847 (as amended). The defendant published a book in 1889 entitled "Moontakhebáte Mahomedi," which was almost a complete translation into Persian of the claimant's work (with a few additions and a few omissions), and sold for eight annas a copy. Counsel for the defendant, John Duncan Inverarity,<sup>109</sup> argued that even if the works were in substance identical it "is not an infringement of copy-right, for . . . it is a translation and not a copy. It is made for a wholly different market and

106. In 1912, referring to the "problem" that the 1911 Copyright Act had not been extended to the Native/Princely/Feudatory states (which were not formally governed by the U.K.), Longman saw the chief threat as being that "they will become Alsatis from which pirated vernacular translations of British copyright books will issue and be spread all over British India." Letter from C.J. Longman to Macmillan (Nov. 23, 1912) (Macmillan Archive, *supra* note 82, BL Add Ms 54887, at 49). Methuen wrote to the Publishers Association, concerned at an application made to translate one of its works, *The Survival of Man*, into Marathi. The applicant claimed that since the work had already been published for four years, it would be entitled to issue the translation in a year without permission, and that Methuen should "kindly and generously" grant permission immediately. Letter from Methuen to W. Poulten (Nov. 1, 1913) (Macmillan Archive, *supra* note 82, BL Add Ms 54893).

107. R.J.L. KINGSFORD, *THE PUBLISHERS ASSOCIATION, 1896–1946* (1970). The Association was founded with a view to campaigning for copyright reform, standardizing author–publisher relations, and formalizing a resale price maintenance scheme (the "net book agreement"). For a list of original members, see *id.* at 216. Publishers of penny dreadfuls and yellow backs, such as Lloyd and Dicks, were not represented. Although the Publishers Association did make a number of interventions in relation to translations and copyright in India, the submissions were made by Frederick Macmillan, and it is difficult to ascertain how much interest was shown by other publishers.

108. (1890) 14 I.L.R. (Bombay) 586.

109. "[T]he greatest, ablest and most powerful advocate that ever practised in the High Court of Bombay." P.B. VACHHA, *FAMOUS JUDGES, LAWYERS AND CASES OF BOMBAY* 139 (1962).

class of buyers, and, therefore, is no injury to the plaintiffs.”<sup>110</sup> Mr. Justice Parsons, a judge appointed from the Indian civil service,<sup>111</sup> and highly regarded for his “learning, ability and independence,”<sup>112</sup> agreed. Parsons said that the legislation used the terms “‘print or cause to be printed’ . . . and the omission of the word ‘translate’ appear[s] very important, considering the doubts that the Act was intended to remove.”<sup>113</sup> He referred to the earlier dicta in *Burnett v. Chetwood*<sup>114</sup> and *Millar v. Taylor*,<sup>115</sup> as well as a similar statement by Knight-Bruce V-C in *Prince Albert v. Strange*.<sup>116</sup> For Parsons, a translation was not a copy because “skill and time and labour” were employed in producing such translations and they provided for “a different class or race of readers.”<sup>117</sup>

Five years later, *Munshi Shaik Abdurruhma'n v. Mirza' Maomed Shira'zi* was applied to a case that fell squarely under the Imperial Copyright Act of 1842: *Macmillan v. Shamsul Ulama M. Zaka*.<sup>118</sup> Here, the plaintiffs were the famous London publishers, Macmillan & Co., and owners of copyright under the 1842 Imperial Act in various works, including Isaac Todhunter's *Mensuration and Surveying for Beginners* and Barnard Smith's *Algebra*.<sup>119</sup> The defendant was a Delhi-based publisher, Zaka Ullah<sup>120</sup>—formerly Professor of Vernacular Science and Literature in the

110. *Munshi Shaik Abdurruhma'n*, 14 I.L.R. at 589.

111. The India High Courts Act, 1861, 24 & 25 Vict., c. 104, § 2, specified that one-third of the High Court should be from the Civil service with not less than ten years experience, three of which should have been as a local Zillah judge.

112. VACHHA, *supra* note 109, at 63; *see also id.* at 78–79. Henry James Parsons was made a judge of the Bombay High Court in 1887, and was acting Chief Justice in 1899, before retiring in June 1900.

113. *Munshi Shaik Abdurruhma'n*, 14 I.L.R. at 589.

114. (1720) 2 Mer. 441, 35 Eng. Rep. 1008 (Ch.).

115. (1769) 4 Burr. 2303, 98 Eng. Rep. 201 (K.B.), *rev'd*, *Donaldson v. Becket*, (1774) 4 Burr. 2408, 98 Eng. Rep. 257 (K.B.); *see* COBBETT, *supra* note 19, at 990.

116. (1849) 64 Eng. Rep. 293, 311.

A work lawfully published, in the popular sense of the term, stands in this respect, I conceive, differently from a work which has never been in that situation. The former may be liable to be translated, abridged, analysed, exhibited in morsels, complimented, and otherwise treated, in a manner that the latter is not.

117. *Munshi Shaik Abdurruhma'n*, 14 I.L.R. at 589.

118. (1895) 19 I.L.R. (Bombay) 557. In fact, Parsons J. had held in the earlier case that the translation was neither an infringement “under English(sic) law nor under Act XX of 1847.” *Munshi Shaik Abdurruhma'n*, 14 I.L.R. at 586. Whether the work was protected under the imperial law would have depended on the application of section 8 of the International Copyright Act (49 & 50 Vict. c. 33), which had reversed *Routledge v Low* (1868) LR 3 HL 100.

119. Both were very successful titles for Macmillan: Macmillan Archive, *supra* note 82 (BL Add Ms 55843, at 139) (royalties to Mrs. Todhunter in 1887 of £4,590); *id.* at 255 (royalties in 1890 to Mrs. Barnard Smith of £1,000).

120. For biographical background, albeit a very personal account, see C.F. ANDREWS, ZAKA ULLAH OF DELHI (1929). According to this account, Zaka Ullah had one of his own mathematical treatises published at the age of seventeen (in 1849). *Id.* at 65. He became a Professor in Vernacular Literature at Allahabad, a government appointment involving translation of textbooks in science and mathematics into Urdu. *Id.* at 87. He

Muir Central College at Allahabad<sup>121</sup>—who had been distributing Urdu translations of the works. On discovering this, Macmillan attempted to persuade him to stop, but Zaka Ullah claimed that he was free to do so.<sup>122</sup> The claimant's agent, John Stagg, then ordered copies of the books to be sent to Bombay. On receiving them, Macmillan commenced an action in the Bombay High Court.<sup>123</sup> The defendant claimed that he had the permission of Todhunter (and indeed that he had published fourteen editions of the work since 1870), that the Bombay court had no jurisdiction over an infringement that had taken place in Delhi, and, furthermore, that translation was not an infringement of copyright. On this occasion Inverarity appeared for Macmillan, but as junior to MacPherson. The Advocate General, Basil Lang, appeared for the defendant.<sup>124</sup> The hearing occurred on February 5, and the judgment was handed down—in favor of the defendant—on February 25th.<sup>125</sup>

endeavoured to prove, when nearly everyone was against him, that higher western education could be carried on in the Indian vernacular languages and through Indian vernacular books, without insistence upon the English language and English text books as the only medium of instruction. He believed that the teaching of young children through the medium of a foreign language, imperfectly understood, ruined all true education. . . . It now seems that the unerring process of history will rapidly prove his solution to be the right one after all.

*Id.* at 89; see also Mushirul Hasan, *Maulawi Zaka Ullah: Sharif Culture and Colonial Rule*, in *THE DELHI COLLEGE: TRADITIONAL ELITES, THE COLONIAL STATE, AND EDUCATION BEFORE 1857*, at 261 (Margrit Pernau ed., 2006); S. Irfan Habib, *Munshi Zakaullah and the Vernacularisation of Science in Nineteenth Century India*, in *UNCHARTED TERRAINS: ESSAYS ON SCIENCE POPULARISATION IN PRE-INDEPENDENCE INDIA* 132 (Narender K. Sehgal et al. eds, 2000).

121. Muir College was founded on December 9, 1873, and named after Sir William Muir, Lieutenant Governor of the United Province. It became part of Allahabad University, India's fourth university (after Calcutta, Bombay, and Madras) in 1887.

122. Most of Zaka Ullah's translations were published by the Aligarh Institute. See ANDREWS, *supra* note 120, at 90–91. The Governor General, Lord Northbrook, supported Ullah's work. *Id.* at 91.

123. Letter from Maurice Macmillan to Honorable H. Lee Warner, Secretariat, Bombay (Aug. 2, 1894) (Macmillan Archive, *supra* note 82, BL Add Ms 55445 (1), at 122) (“[I]t is not yet clear whether an Indian book may be translated without permission, or not. Your Bombay courts have given a decision to the effect that no permission is required. We are at present engaged in an action in India to test this verdict.”). It is not clear whether this case was selected by Macmillan as a test case, or whether the action was brought because the rights in Todhunter's works were sufficiently valuable.

124. Appointed by the Queen, the Advocate-General could take proceedings on behalf of the Crown in the same circumstances in which the Attorney-General could bring proceedings in England. East India Company Act, 1813, 53 Geo. 3, c. 155, § 111; Government of India Act, 1858, 21 & 22 Vict., c. 106, § 29. The Advocate-General was also a member of the Legislative Council of the Province. Lang, educated at Trinity College, Dublin, and a member of Middle Temple, was called to the bar in 1869, appointed Advocate-General for Bombay in 1893, and retired as Advocate-General in 1902. *Calls to the Bar—Middle Temple, June 7*, THE TIMES (London), June 8, 1869, at 9f; *India Office, Nov. 11*, THE TIMES (London), Nov. 15, 1893, at 12a; *India Office, Jan. 3*, THE TIMES (London), Jan. 11, 1902, at 12c.

125. *Macmillan v. Shamsul Ulama M. Zaka*, (1895) 19 I.L.R. (Bombay) 557. See *Decision Under the Copyright Act Important to Native Publishers*, TIMES OF INDIA, Mar. 9, 1895, at 5. Charles Fredrick Farran (1840–98) was Acting Judge and Advocate-General from 1886–88, High Court Judge from 1891, and Chief Justice from June 20, 1895. See RIDDICK, *supra* note 13, at 123.

Mr. Justice Farran found as a fact that Todhunter had been approached and had replied to Zaka Ullah that he understood there was no right to control translation, so he had no power to “refuse the permission which you seek,” but he asked that Zaka Ullah send him copies of any translations. Farran held that the Bombay court lacked jurisdiction over the alleged infringements, namely sales of copies which took place in Delhi (the property vesting in the purchaser from the time the books were posted). The judge however went on to decide that translations were not copies. Farran referred to two precedents, *Munshi Shaik Abdurruhma'n* and *Stowe v. Thomas*, both of which suggested there was no right to control translation of a book, but took the view that he ought to come to an independent conclusion on the subject. This, he said, constituted a question of statutory construction rather than one involving the normative issue of “what benefits the author of a work ought or ought not to derive from the creation of his brain and pen.”<sup>126</sup> Looking at the positive law, the judge noted that “[t]ranslations of copyrighted books are not referred to in the Act. It is difficult to understand why they should not be mentioned in the Act if they were intended to be prohibited.” Moreover, the judge stated that, had the legislature intended to cover translations, express reference to translation would be expected, since the International Copyright Act, section 18, referred explicitly to translations only two years after the 1842 Act.<sup>127</sup> Moreover, the inference which Farran drew from the 1844 Act was that different policy considerations were thought to affect translations, as opposed to “mere copies.” To his mind, these were “essentially different productions—one is intellectual, the other mechanical.” In considering whether a translation right was desirable, he commented,

There is here a conflict of rights and interests; a conflict between the intellectual interests of the persons for whom the translations are intended, and the caprice or possible pecuniary interest of the proprietor of the copyright, if he shall not, or shall, intend to translate the work himself, or cause it to be translated. There is no hardship on him; he can always protect himself by being first in the field with a translation.<sup>128</sup>

126. *Macmillan v. Shamsul Ulama M. Zaka*, (1895) 19 I.L.R. (Bombay) 557, 567. Farran claimed that Scrutton, Drone, and Copinger all “argued what the law ought to have been rather than considered what it was.” *Id.* at 571.

127. *Id.* at 568.

128. *Id.* at 570.

#### D. Response of the British Publishers

Macmillan was irritated by the holding to say the least.<sup>129</sup> It sought advice as to whether to initiate proceedings in Delhi to overcome the jurisdiction issue, or to appeal to the Privy Council.<sup>130</sup> Appreciating this latter course would be costly, Frederick Macmillan approached what he thought might be sympathetic publishers, Clarendon and OUP. OUP was not willing to commit itself to support Macmillan's litigation financially, but was prepared to help add pressure for amended legislation.<sup>131</sup> As we will see, lobbying efforts were first directed to the GoI via the India Office, then through the British Parliament, and when this failed, again to the India Office.

##### 1. Lobbying India

OUP asked Sir William Markby, a former High Court judge in Calcutta and Reader in Indian law at Oxford, to consult with various Indian

129. It nevertheless responded to approaches from third parties as if it had a right to control translation in India. See, e.g., Letter from Macmillan to H.P. Ghose, Jessore, Bengal (Apr. 16, 1895) (Macmillan Archive, *supra* note 82, BL Add Ms 55447(3), at 1376) ("We regret to say that we cannot give you permission to translate portions of Tennyson's *Enoch Arden* into Bengali."); Letter from Macmillan to Ghosh, The Indian Press, Allahabad (June 13, 1895) (Macmillan Archive, *supra* note 82, BL Add Ms 55448(2), at 674/879) (indicating that it would consider an Indian Press proposal to publish a Hindi and Urdu translation of Lock and Lewis's *Arithmetic* and asking the Indian Press to propose terms, but stating "it is doubtful whether we shall be able to induce the authors to allow such a translation to be made and published by you"); Letter from Macmillan to G.F. Hallkatti, Dharwar, Bombay Presidency (May 17, 1895) (Macmillan Archive, *supra* note 82, BL Add Ms 55448(1), at 476) ("On receipt of the £10 . . . we are willing to permit you to print and publish a translation in Kanarese of Miss Buckley's *Primer of English History*"); Letter from Macmillan to the Headmaster, English Middle School, Rajnagar, Central Provinces (July 4, 1895) (Macmillan Archive, *supra* note 82, BL Add MS 55448(3), at 1202) (refusing permission to translate *The Life of Alexander* from the *Book of Worthies* or to prepare glossaries to its *Orient Readers* series); Letter from Macmillan to Rup Avain Aligarh (July 11, 1895) (Macmillan Archive, *supra* note 82, BL Add Ms 55448 (3), at 1301) ("[W]e regret that we cannot on any account allow you to print Urdu and Hindi keys and translations of Nesfield's *Readers*. As we are publishing these ourselves, any such publication will be an infringement of our rights.").

130. Letter from Sir William Markby of Oxford Univ. Press to Wright, Cambridge Univ. Press, (Dec. 31, 1895) (OUP Archive, *supra* note 49). This explained that "there is some difference of opinion amongst English lawyers as to whether the decision is correct," and that while an appeal to the Privy Council might resolve the problem, it would be "troublesome and expensive and they might take the same view as the Bombay court."

131. Letter from Macmillan to Lyttelton Gell (May 16, 1895).

This seems to us very serious and we are considering the question of trying the case over again in Delhi, and afterwards, if necessary, appealing to the Privy Council. Whether we shall do so depends to some extent on the opinion we are obtaining from an English barrister. If we do determine to go on, we think we ought to be assisted by other publishers here as the case so far has cost us £300 or £400 and I am afraid that an appeal to the Privy Council would mean another £800 or £1000. Do you think the delegates would be inclined to contribute to the expense necessary for carrying on such a case?

The OUP Delegates "resolved to take no action in the matter for the present." Delegates Minutes (May 17, 1895) (OUP Archive, *supra* note 49).

associates, in particular Courtenay Ilbert, who, as the legal member of the Viceroy's Council, had drafted the 1885 Indian Copyright Bill (and was now back in England).<sup>132</sup> As a result, a letter was drafted making the case for legislative reform, and duly sent to the India Office from the Vice-Chancellor of the University, and copied to Macmillan and Cambridge University Press ("CUP").<sup>133</sup> CUP obligingly agreed to send a letter to similar effect.<sup>134</sup> In these letters, the publishers argued that the decision of the Bombay High Court left British authors under a peculiar disability in that, in contrast with foreign authors who would be protected against such unauthorized translations in India under the 1886 International Copyright Act, British authors had been denied this right. This bizarre result, they contended, could not have been intended. Out of equity, they asked only for protection equivalent to that provided to foreign authors under the International Copyright Act.<sup>135</sup> Not wanting to appear motivated by financial self-interest, they explained that the right was desired in order to be able to control the quality of translations made.<sup>136</sup>

The Secretary of State forwarded the letters to the GoI,<sup>137</sup> and, responding to Markby of OUP, said that he hoped the Viceroy [Elgin] "will

132. From 1882–86, during which time he also introduced the highly controversial "Ilbert Bill" which would have allowed white colonists to be tried by non-white Indian judges, promoting the so-called "white mutiny." While in India, Ilbert was also Vice-Chancellor of Calcutta University (from 1885–86). Having returned to London, Ilbert worked as Parliamentary Assistant Counsel and Counsel to the Treasury, 1886–1901.

133. See Letter from Sir William Markby of Oxford Univ. Press to Wright, Cambridge Univ. Press (Dec. 31, 1895) (OUP Archive, *supra* note 49) (stating that Clarendon would ask for rights equivalent to those benefiting foreign authors under Berne, and had been "strongly advised not to ask for more than this"). The delay in lobbying the Secretary of State was attributed by Courtenay Ilbert to a disagreement between CUP and Clarendon. See Letter from Macmillan to Markby (Dec. 17, 1895) (Macmillan Archive, *supra* note 82, BL Add MS 55844, at 5) (Macmillan reporting that he had met with Ilbert at the Athenaeum and Ilbert "told me that nothing more could be done in the Indian copyright matter until some negotiation or correspondence which was going on between the Delegates of the CP and the Syndics of the Cambridge Press had been concluded and he feared that this might mean the postponement of legislation for another year as the Calcutta session comes to an end in March." Macmillan then told Markby that the Secretary of the Cambridge Press knew nothing of this and called on Markby to attempt to get the issue resolved.)

134. Meeting Minutes of CUP (Jan. 17, 1896), Meeting Minutes of CUP (Feb. 14, 1896) (on file at the University of Cambridge Library, CUP Manuscripts, Pr. V.12, minute books 335, 339). The letter, signed by the Vice-Chancellor, Charles Smith, is contained in IOL, *supra* note 7, L/PJ/6/414, file 213...

135. Letter from Sir William Markby of Oxford Univ. Press to Wright, Cambridge Univ. Press (Dec. 31, 1895) (OUP Archive, *supra* note 49); Letter from Clarendon Press to Secretary of State for India (Jan. 24, 1896) (IOL, *supra* note 7, L/PJ/6/413, file 119).

136. Markby reported that he had explained to Courtenay Ilbert that OUP's main concern was that "we shall, under existing law, be unable to prevent works published in England being translated by incompetent persons." See Letter from Sir William Markby of Oxford Univ. Press to Wright, Cambridge Univ. Press (Dec. 31, 1895) (OUP Archive, *supra* note 49).

137. Draft Letter from George Hamilton, Sec'y of State for India to Viceroy (Feb. 20, 1896) (IOL, *supra* note 7, L/PJ/414, file 235). See also Letter from Board of Trade to India Office (Feb. 7, 1896) (stating there was no prospect at that time of British legislation on the matter of translations).

undertake to legislate regarding translation, even if he shies away from a complete revision of the whole law relating to copyright.”<sup>138</sup> There was good reason for the publishers to think this request would be met sympathetically by the GoI: two of the GoI’s own legislative proposals, the 1876 and 1885 Bills, had included (some form of) translation right. However, to the publishers’ surprise, the GoI declined to alter its law.<sup>139</sup> In a despatch dated December 23, 1896,<sup>140</sup> the GoI now repeated to the Secretary of State the advice the latter had provided to the GoI in 1876 and 1885, namely that India should follow and not precede legislation in Britain. The GoI explained that for this reason, “it would be of somewhat doubtful expediency for us to initiate legislation on the subject in our Council.” Moreover, as if to counter the view expressed by the Secretary of State in 1885 that India’s needs were not “pressing,” the GoI now indicated to the Secretary of State that in its view the needs of English authors to control translations were not “very pressing.” The despatch observed that this was so because “English authors can protect themselves by having their works translated and securing copyright in the translations in India.”<sup>141</sup> The news was forwarded to OUP, to its obvious disappointment.<sup>142</sup> Courtenay Ilbert described the response as “shuttlecocking”: the GoI and the U.K.’s Board of Trade were both, in effect, calling for the other to legislate. The effect was inertia, which seems to have been what the GoI wanted.

## 2. Lobbying the British Parliament

In this “shuttlecocking” the next shot was to be played in the U.K. In May 1897, Lord Monkswell presented a Copyright (Amendment) Bill in the House of Lords.<sup>143</sup> The Bill had been prepared by the Society of Authors, but was supported by the Publishers Association and the Copyright Association.<sup>144</sup> In its original inception, the Bill had nothing to do with

138. Letter from India Office to Clarendon Press (Feb. 26, 1896) (OUP Archive, *supra* note 49, Copyright India,” file CG 59).

139. The uncooperative response of the GoI in this instance can perhaps be understood in the light of London’s insistence on its constitutional superiority in the cotton duties controversy (1894–96) and the divergent views on medical inspection of prostitutes associated with the Cantonment Bill.

140. Legis. Letter No. 46 from Gov’t of India, Legis. Dep’t, to Lord Hamilton, Sec’y of State for India (Dec. 23, 1896) (IOL, *supra* note 7, L/PJ/6/463, file 2317).

141. A point made in the judgment of Farran J.

142. See Letter from India Office to Oxford Univ. Press (Feb. 9, 1897) (OUP Archive, *supra* note 49, J & P 65, “Copyright India,” file CG 59).

143. 49 PARL. DEB. (HANSARD) (4th ser.) (May 13, 1897) 313; see SEVILLE, *supra* note 122, at 281–82. The Memorandum for the Bill is reproduced in *Literary Property: Copyright (Amendment) Bill*, 8 AUTHOR 4 (1897).

144. Lord Monkswell, 49 PARL. DEB. (HANSARD) (4th ser.) (May 31, 1897) 1596–97; George Herbert Thring, *Recent Attempts at Copyright Legislation*, 63 FORT. REV. 461 (1898) [hereinafter Thring, *Recent Attempts*].

translations (being focused on the issues of copyright in lectures and dramatization of novels), and was formulated specifically to avoid raising thorny questions of colonial copyright.<sup>145</sup> However, when the Bill was referred to the Select Committee, the question of translations took centre stage. According to Lord Monkswell, “[i]t was absolutely necessary to amend the law with regard to translation. It was now in a sad state of confusion” and the promoters of the Bill “proposed to deal with it by giving . . . the absolute right during the whole period of copyright to prevent unauthorised translations.”<sup>146</sup> Although this was clearly aimed at reversing the Indian decisions,<sup>147</sup> which had been referred to in the evidence given to the Select Committee, the amending Act would have had a clause providing that it would “not run in any of the British possessions unless they themselves asked either for the whole or part of it.” However, the Colonial Office objected to this, fearing that it would set a precedent in favor of colonial autonomy in copyright matters. Consequently, the clause was struck out and the Bill that passed the House of Lords would thus have created a translation right applicable in British India.<sup>148</sup> Nevertheless, the Bill was passed too late in the session to be considered in the Commons.<sup>149</sup>

Undeterred, Lord Monkswell reintroduced the Bill in the next session.<sup>150</sup> The prospects of the Bill succeeding, which seemed much improved as a result of the drafting efforts of Lord Thring in the Select Committee of the previous session, were dealt a serious blow when the Copyright Association broke ranks with the Society of Authors and induced Lord Herschell to introduce a consolidation bill.<sup>151</sup> This too would

145. As summarized in Hansard’s:

The Bill did not affect any question in which the colonies were specially interested; [Monkswell] could not imagine that any colony or British possession would object to be placed under the Bill; but if they should, there was a provision in it which met the case, for by Order in Council the Government of the day was to have the power of deciding whether or not any particular British possession should or should not come under the Bill.

Lord Monkswell, 49 PARL. DEB. (HANSARD) (4th ser.) (May 31, 1897) 1596.

146. Lord Monkswell, 51 PARL. DEB. (HANSARD) (4th ser.) (July 19, 1897) 387–88.

147. See evidence given by Daldy to the 1897 COPYRIGHT BILL REPORT, *supra* note 46, at 5, para. 47; Lord Monkswell, 51 PARL. DEB. (HANSARD) (4th ser.) (July 19, 1897) 388 (referring to Indian cases); see also Monkswell, *Copyright Reform*, *supra* note 47, at 208 (“The clause in the bill would . . . only have applied to domestic translations within the British Empire—say, into one of the Indian languages.”).

148. 51 PARL. DEB. (HANSARD) (4th ser.) (July 23, 1897) 883.

149. See also *The New Copyright Bill*, *supra* note 50, at 63–67.

150. 52 PARL. DEB. (HANSARD) (4th ser.) (Feb. 14, 1898) 461.

151. 54 PARL. DEB. (HANSARD) (4th ser.) (Mar. 4, 1898) 589 (Lord Herschell’s Bill read for the first time); 54 PARL. DEB. (HANSARD) (4th ser.) (Mar. 15, 1898) 1636 (Lord Herschell’s Bill read for the second time); 57 PARL. DEB. (HANSARD) (4th ser.) (May 5, 1898) 352 (Appointing Comm.); 63 PARL. DEB. (HANSARD) (4th ser.) (July 29, 1898) 461 (Report); 1898 COPYRIGHT BILL REPORT, *supra* note 46. The background to the consolidating Bill is explained by publisher John Murray, by Frederic Daldy, and by Edward Cutler. *Id.* at 3, 27, 81 of the Report, 243, 267, 321 of the volume. The Bill was



have conferred a full translation right,<sup>152</sup> but aiming at consolidation, it raised many other issues, including those of term, artistic copyright, commissions, remedies, and the question of the colonies.<sup>153</sup> Both bills were referred to a Select Committee which, faced with such a breadth of issues, was unable to complete its inquiry. Thenceforth, the translation issue became a minor detail, on which there was substantial unanimity, and efforts were directed at drafting and refining two bills, one on copyright affecting literary, musical, and dramatic work and another on artistic work (the earlier bills being abandoned). In each of the following two parliamentary sessions, 1899 and 1900, Lord Thring introduced two further copyright bills, which on each occasion were referred to Select Committees.<sup>154</sup> In 1899, some progress was made in relation to literary copyright (which granted a full translation right), but there was no time left to scrutinize the Artistic Copyright Bill until the following year. The 1900 Bill fared slightly better, passing through the House of Lords, but, yet again, there was insufficient time for it to be considered by the Commons.<sup>155</sup> Even with the benefit of the headway made by the Select Committees in the House of Lords, neither of the consolidating bills gained the government support necessary.<sup>156</sup> By 1901, the Government, engaged with the South African war, had more pressing concerns.<sup>157</sup> Although by this stage the desirability of the translation right went unquestioned in Britain, all the legislative effort came to nothing.

drafted by Daldy, Edward Cutler, Sharon Turner, and Bulmer Howell. George Herbert Thring of the Society of Authors described the timing as “inopportune and prejudicial to Copyright interests,” arguing that amendment must precede consolidation. Thring, *Recent Attempts*, *supra* note 144, at 466.

152. See 1898 COPYRIGHT BILL REPORT, *supra* note 46, Qs. 539–43, at 37 of the Report, 277 of the volume. Scrutton, in his *Report to the Board of Trade on the Copyright Bills 1898*, said he did not understand why it was desirable to omit the requirement of publication in the U.K. of a translation within ten years. See SCRUTTON, *supra* note 48, at 267 of the Report, 507 of the volume.

153. John Murray, 1898 COPYRIGHT BILL REPORT, *supra* note 46, Qs. 136–40, at 12.

154. For a review of the bills, see Lord (Henry) Thring, *The Copyright Bills, 1900*, 47 NINETEENTH CENTURY 1005 (1900); George Herbert Thring, *Lord Monkswell's Copyright Bill*, 67 FORT. REV. 453 (1900); Warwick H. Draper, *Copyright Legislation*, 17 L.Q. REV. 39 (1901); see also SELECT COMM. OF THE H. OF LORDS, REPORT ON THE COPYRIGHT BILL AND COPYRIGHT ARTISTIC BILL, 1899, H.L., 8 BRITISH PARL. PAPERS 539; SELECT COMM. OF THE H. OF LORDS, REPORT ON THE COPYRIGHT BILL AND COPYRIGHT ARTISTIC BILL, 1900, H.L., 6 BRITISH PARL. PAPERS 621.

155. Copyright Bill, 1900, H.L. Bill [295], brought from the House of Lords and ordered to be printed, July 13, 1900. 1 BRITISH PARL. PAPERS 447 (1900). For the translation right, see *id.* at cl. 3(3).

156. See Monkswell, *Copyright Reform*, *supra* note 46, at 209 (complaining that while “judges, authors, artists, publishers, commissioners and committee” had denounced the state of the law of copyright, nothing was done because the issue was not a vote-catcher, government of the day was not interested, the Board of Trade was obstructive and Commons time was never made available).

157. George Herbert Thring, *The New Copyright*, 10 AUTHOR 231 (1900) (reproduced from the *Daily Chronicle* (London)) (acknowledging that the government was unlikely to deal with copyright at a time “when the trumpet of war is sounding”).

### 3. Back to India

Having failed in the U.K., the publishers sought again to raise the issue of translations with the India Office (and through it, the GoI).<sup>158</sup> In a letter to the India Office in 1901, the Publishers Association drew attention to the “urgent necessity” for amending the copyright law in India.<sup>159</sup> The Publishers Association had two concerns. The first was with obtaining an extension of the copyright law to the “native states” (that is, the territories in India not formally under British rule, but in practice under its influence).<sup>160</sup> The second was the absence of a translation right. The letter recited that “it is not fair to authors or publishers in an empire where many scores of languages are spoken by many millions, the right of translation should not be protected.” The Publishers Association said this factor distinguished U.K. conditions from those in India and thus warranted distinct action by the GoI.<sup>161</sup> In so claiming, the Publishers Association made special reference to the significance of the private sector in giving effect to India’s education policy (especially with the abolition of the central book depots in the various provinces). The India Office considered the matter and, being sympathetic to the Publishers Association’s request, raised the question with Lord Curzon, the Governor General.<sup>162</sup> The Governor General and the Council responded, not as in 1896 with outright refusal to legislate, but instead with a delaying strategy. To this end, the Governor General requested “a list of instances illustrating the hardship in respect of piratical translations of which they complain.”<sup>163</sup>

158. It is interesting that the Publishers Association sensed that domestic efforts had failed, given that the subject was referred to in the King’s speech on the opening of Parliament.

159. Letter from F. Macmillan, President of the Publishers Ass’n, to Sec’y of State for India (July 24, 1901) (IOL, *supra* note 7, JP 1252/01, L/PJ/6/573, file 1252).

160. These 500 princely states comprised one-third of the people of India. BARBARA D. METCALF & THOMAS R. METCALF, A CONCISE HISTORY OF INDIA 103 (2002); JUDITH M. BROWN, MODERN INDIA: THE ORIGINS OF AN ASIAN DEMOCRACY 133–34 (1985).

161. The Publishers’ Association gave an example from the *Kesari* newspaper for April 1, 1901, of activity of the Deccan Vernacular Translation Society inviting tenders for translations of various British works, including Sir Alfred Lyall’s *Rise of British Dominion in India* (which had first been published by John Murray in 1893). Letter from F. Macmillan, President of the Publishers Ass’n, to Sec’y of State for India (July 24, 1901) (IOL, *supra* note 7, JP 1252/01, L/PJ/6/573, file 1252).

162. Referred by C.J. Lyall (Secretary to the Judicial and Public Department) to the Political Secretary on July 29, 1901. IOL, *supra* note 7 (L/PJ/6/573, file 1252). W. Lee Warner, on August 30, 1901, commented that “English legislation may be greatly delayed, and even when it is taken up there will be 2 special points in which India must go its own way. The language difficulty does not arise in the United Kingdom. But in India translations need protection at once.” *Id.* The Secretary of State, Hamilton, wrote to the GGI, suggesting it also consider the “native states” question. *Id.*

163. Letter from Lord Curzon to Lord Hamilton (Jan. 9, 1902) (IOL, *supra* note 7, L/PJ/6/591 file 150); *see also* Sir Horace Walpole to Publishers Ass’n (Feb. 12, 1902) (IOL, *supra* note 7, L/PJ/6/591 file 150); OUP Archive, *supra* note 49 (J & P 150, “Copyright India,” file CG 59).

The tactic may have been more effective than even the GoI had hoped. For the British publishers did not have many examples of damaging translations in hand. In fact, Sir William Markby of OUP admitted that the Press had “not ourselves actually suffered much yet.”<sup>164</sup> In part, this may have been, as Markby speculated, because the position until 1895 was so unclear that permission was usually sought (and granted on a royalty-free basis).<sup>165</sup> Thus he tried to deflect the absence of such cases of damage as irrelevant: “[t]he evil is only beginning and should be stopped.” Whether because their response would have been so feeble, or for some other reason, remains unclear, but the Publishers Association did not respond for some six years.<sup>166</sup> By then, the organization had collected some examples of piratical translations, in particular involving Messrs. Gulab Singh and Sons of Lahore.<sup>167</sup> OUP itself could not locate any examples, and internal documents indicate that its support for Macmillan on this issue was based on grounds

164. Letter of W. Markby (Feb. 19, 1902) (OUP Archive, *supra* note 49, “Copyright India,” file CG 59).

165. The records of OUP do, indeed, indicate a readiness to allow the translation of works into the various vernacular languages of India. For example, the Press had been issuing a series of histories under the title *Rulers of India*, histories of India built around various rulers, particularly the Governor Generals/Viceroy. The Press received a series of approaches to translate the work into Punjabi, Tamil, Urdu, Gujarati, and Marathi. For example, Thapar sent copies of translations of *Lord Hardinge* into Punjabi; in 1893 Icharam S. Desai sought to translate *Rulers of India* into Gujarati; in 1896 Patrika of Madras sought to translate *Rulers of India* into Tamil; Abdul Rafay Khan sought to translate it into Urdu; in 1900 Natekar sought permission to translate the *Earl of Mayo* volume of the *Rulers of India* series into Marathi. In each case, the Delegates agreed to the translation on “the usual terms”: no license fee was asked, but it was stated that the translations should be “accurate and ungarbled,” that permission should be acknowledged on the title pages, and that three copies be sent to OUP on publication. For background, see Chatterjee, *Macmillan in India*, *supra* note 54.

Macmillan’s approach was different, and the firm indicated an intention to publish translations it regarded as worth commissioning.

We have received your letter dated August 1st asking for the exclusive right to translate into Tamil our Orient Readers No. 2 & 3. We regret that we are not able to give you this permission. The question of publishing translations of English readers at all is one about which there is a difference of opinion, but should we find it advisable to encourage such translations we shall certainly undertake the publication ourselves. In that case we shall certainly remember your letter and if it is possible, shall ask you to assist us in this matter . . .

Letter from Macmillan to S. Purnalingam Pillay (Aug. 22, 1894) (Macmillan Archive, *supra* note 82, BL Add Ms 55445(1), at 389).

166. Letter from India Office (C.J. Lyall) to Oxford Univ. Press (June 14, 1907) (OUP Archive, *supra* note 49, “Copyright India,” file CG 59) (enclosing Walpole letter and asking for a reply).

167. Letter from F. Macmillan, Publishers Ass’n, to C.J. Lyall, Sec’y, Jud. and Public Dep’t, India Office (IOL, *supra* note 7, L/PJ/6/868, file 1361). Macmillan had previously considered making Singh its agent for Punjab. Letter from Macmillan to Allnutt (June 20, 1895) (Macmillan Archive, *supra* note 82, BL Add MS 55448 (2), at 981). In 1914, Gulab Singh advertised in the journal *Indian Education* and was publishing the work of H.T. Knowlton, the Principal of Central Training College in Lahore (who made a submission to the consultation of the 1912 Bill). The *Sixth Quinquennial Review of Education* refers to publication by Gulab Singh of an Urdu version of Dinah Mulock’s *John Halifax, Gentleman*, sponsored by the Punjab Religious Book Society. SIXTH QUINQUENNIAL REV., *supra* note 67, at 282, para. 681. This work had been first published in 1856, and Mulock died in 1887, so was by this time out of copyright. As it happened, Mulock had been wife of George Lillie Craik, one of the partners in Macmillan.

of “legal equity.”<sup>168</sup> Although OUP claimed that it wanted a full translation right so that it could ensure the translators were competent and the translations faithful, it is quite possible OUP anticipated that once such a right was granted, it would ask for some level of remuneration.

For a short period, case law developments, lack of interest from the British government in copyright reform, and obstructiveness on the part of the GoI had enabled India to continue without translation rights. However, this was soon to change, as first international norms developed requiring greater recognition of translation rights, and, second, Britain finally faced up to reforming its own copyright laws.

### *E. Divergence Between Indian and International Norms*

In the international arena, translation rights were a key matter. Between 1844 and 1852, the British laws enabling international copyright relations specifically excluded translations, but were then amended to allow for a conditional translation right of up to five years duration.<sup>169</sup> Bilateral treaties, *inter alia*, with France, Prussia, and Spain took advantage of the new power.<sup>170</sup> As between European countries using largely different languages, recognition of each other’s literary copyright was virtually pointless in the absence of translation rights. Not surprisingly therefore, in the context of a potential multilateral treaty, the recognition of translation rights was inevitably significant: it was described as “*la question internationale par excellence*.”<sup>171</sup>

168. See OUP letters dated June 19, 1907 and June 26, 1907 (OUP Archive, *supra* note 49, “Copyright India,” file CG 59).

169. Int’l Copyright Act, 1844, 7 & 8 Vict., c. 12, § 18. “Provided always and be it enacted, That nothing in this act contained shall be construed to prevent the printing, Publication, or Sale of any Translation of any Book the author whereof and his Assigns may be entitled to the Benefit of this Act.” The International Copyright (Amendment) Act, 1852, 15 & 16 Vict., c. 12, repealed § 18 of the 1844 Act “so far as the same is inconsistent” with its provisions. These gave a five-year translation right for books published in foreign countries (specified by Order in Council), applicable in the British dominions. See *id.* § 2. However, the original work must have been deposited in the U.K. in accordance with the Act within three months of first publication in the foreign country; the translation right must have been reserved on the title page; and the translation must have been published, in part, within one year and the whole within three years of its deposit in the U.K.. This was granted to France expressly by § 11. The International Copyright Act, 1875, 38 & 39 Vict, c. 12, made further amendments as to translations of dramatic works.

170. Convention Between Her Majesty and the French Republic, Nov. 3, 1851, 54 BRITISH PARL. PAPERS 103 (1852) (signed at Paris); Convention Between Her Majesty and the King of Prussia, art. 3, June 14, 1855, 61 BRITISH PARL. PAPERS 263 (1856) (signed at London); Convention Between Her Majesty and the Queen of Spain, July 7, 1857, 60 BRITISH PARL. PAPERS 261 (1857–58) (signed at Madrid).

171. RICKETSON & GINSBURG, *supra* note 46, ¶ 3.04, at 88.

Although Britain did not approach negotiations for a multilateral copyright arrangement with much zeal, this did not mean it did not exert a significant influence. The stance the British delegates took was largely informed by instructions not to agree to anything, particularly anything that could not be effected without changing the domestic law. This approach gave the delegates strength to resist the pressures for an international code and to dilute the proposed standards significantly. Ultimately the 1886 Berne Convention settled on a compromise of requiring recognition of a translation right for “Berne works” for ten years.<sup>172</sup>

While the record suggests that Britain sent its envoys to discuss a possible copyright convention without consulting the colonies,<sup>173</sup> the British government was conscious of the potential impact on the colonies of its joining Berne, and had succeeded in negotiating a clause permitting the government to join on behalf of its colonies or not.<sup>174</sup> Moreover, once the possibility of signing arose, discussions with the colonies took place.<sup>175</sup> As regards India, the Foreign Office wrote to the Secretary of State for India on March 4, 1886, stating that the British Government had decided that “it will be desirable for Britain to become one of the signatory parties” and that “many difficulties of detail would be avoided if at the moment of signature of the convention a notification were made to the effect that the accession of Great Britain would comprehend all the colonies and foreign possessions of Her Majesty.” This would not “preclude local Indian legislation where desirable as far as such legislation did not conflict with the terms of the Imperial Acts, or the International Convention.”<sup>176</sup> Lord Rosebery, the British Foreign Secretary, asked for the consent of the Secretary of State for India to this course of action, remarking that he could not “anticipate that objection could arise in India to a proposal so favourable to Indian interests.”<sup>177</sup>

The India Office did, in fact, seek the Viceroy’s agreement, noting that “it seems very desirable that the GoI should be consulted” and that it

172. Berne Convention for the Protection of Literary and Artistic Works, art. 5, Sept. 9, 1886 [hereinafter 1886 Berne Convention]; RICKETSON & GINSBURG, *supra* note 46, at 77.

173. Bently, *Berne Convention*, *supra* note 17.

174. 1886 Berne Convention, *supra* note 172, art. 19.

175. In March 1886, a departmental committee was established and chaired by James Bryce, Parliamentary Undersecretary for Foreign Affairs, and Regius Professor of Civil Law at the University of Oxford. See *The Committee on Copyright*, THE TIMES (London), Mar. 22, 1886, at 7.

176. Letter from Foreign Office to Sec’y of State for India (Mar. 4, 1886) (IOL, *supra* note 7, L/PJ/6/171, file 407).

177. *Id.*

was impossible to say with certainty that India would not object.<sup>178</sup> The Viceroy (Dufferin) telegraphed a positive response on March 18, 1886, even before seeing details of the Convention, but the India Office preferred initially not to act upon it, and instead awaited an informed conclusion. The GoI sent further indication of its assent by telegram on May 27, 1886,<sup>179</sup> albeit with a significant caveat in a message dated June 19, 1886:

[T]here are peculiarities in connection with the copyright in Indian books which may require special treatment. Thus India differs from other British possessions in having an extensive and growing vernacular literature. That literature is at present in the stage of abridgments and translation, and special care will be needed with a view, on the one hand to protect authors from the unauthorized abridging and translating of original works and on the other hand, to avoid all unnecessary checks on the production of such abridgments and translations as, it may be hoped, are destined to be the precursors of original literature.<sup>180</sup>

The Berne Convention was given effect in the U.K. by the International Copyright Act of 1886.<sup>181</sup> The imperial government then sought the consent of the colonies to the proposed International Copyright Act.<sup>182</sup> In June 1886, Lord Herschell L.C. reported that all the colonies (except New South Wales) had replied consenting to the proposed legislation.<sup>183</sup> The legislation conferred a translation right lasting ten years on works first produced in foreign countries, specified by Order in Council.<sup>184</sup> The Act applied to every British possession, as if it were part of the United Kingdom (unless specifically disapplied).<sup>185</sup> However, neither British nor Indian

178. Minute, (IOL, *supra* note 7, L/PJ/6/171, file 407) (commenting that India had declined to join the Paris Convention on Industrial Property and that it could not be assumed that the GoI would necessarily want to commit to Berne).

179. Telegram from Viceroy Dufferin to Earl of Kimberley (May 27, 1886) (IOL, *supra* note 7, L/PJ/6/181, file 1149) (“We desire to enter International copyright union.”).

180. Gov’t of India to Earl of Kimberley, No. 15 of 1886 (June 19, 1886) (IOL, *supra* note 7, L/PJ/6/179, file 989).

181. International Copyright Act, 1886, 49 & 50 Vict., c. 33; see WILLIAM BRIGGS, THE LAW OF INTERNATIONAL COPYRIGHT 503–05 (Rothman & Co., 1986) (1906).

182. See Letter from Foreign Office to Secretary of State for India (July 19, 1886) (IOL, *supra* note 7, L/PJ/6/179, file 989); Letter from Courtenay Ilbert to Godley (May 17, 1886) (IOL, *supra* note 7, Mss Eur F102/30) (recommending consent, but noting peculiar circumstances of Indian literature and asking for retention of power for GoI to legislate separately).

183. Lord Herschell L.C., 307 PARL. DEB. (HANSARD) (3d ser.) (June 21, 1886) 21.

184. International Copyright Act, 1886, 49 & 50 Vict., c. 33, § 5.

185. *Id.* at § 9. For the view that the Act could only be enforced in the U.K., see Advice (Dec. 11, 1912) (IOL, *supra* note 7, L/PJ/6, file 4433/12).

The International Copyright Act of 1886—which gave effect to the Berne Convention—applied to British possessions . . . only as if such possession were part of the U.K., and for the purposes of legal proceedings in the U.K. So that if infringements of copyright took place in India—a foreigner affected thereby could under the Berne Convention take legal proceedings in the U.K., but not, in my opinion, in India. The position in India as regards the Berne Convention is not easy to define—but it would be misleading to say that India was or remains

authors were granted a translation right. Consequently, the translation rights of copyright works first published in India would still be decided under Indian law, and the translation rights of British works in India would be decided under the Imperial Act of 1842.

If the difficulties of Britain's copyright relations with its colonies had enabled the British delegates to dilute the initial text of the Berne agreement, the decision to join Berne introduced an extra layer of law-making, which (as it turned out at least) was underpinned by a logic of expansionism. The discussions in 1885 represented a victory for pragmatism over the idealism of a universal code, but left progress towards such a code as the "unfinished business" of the Union. Numa Droz, the Swiss president of the Berne diplomatic conference, had called the 1886 text the "ground-floor," but the core of European states understood that the Berne Union was not to end there: further floors were to be built. And one of the components of the building was to be translation rights. It followed logically then that the topic should reappear on the agenda of the first revision conference, held at Paris in 1896. There it was agreed that the translation right should subsist for the full period of copyright where an authorized translation occurred within ten years of first publication.<sup>186</sup>

In 1908, Britain sent representatives to Berlin to consider further revision of the Berne Convention.<sup>187</sup> As with the earlier conferences, the British delegates were advised not to agree to any proposition that required amendment of British copyright law. Despite the instructions, the revised version of Berne was considerably stronger than the earlier ones. Amongst a number of important changes, including the adoption of a provision prohibiting the use of formal requirements such as registration, was one assimilating translation rights with other economic rights.<sup>188</sup> More specifically, Article 8 of the Berlin Revision declared that

[t]he authors of unpublished works, being subjects of one of the countries of the Union, and the authors of works first published in one of those countries, shall enjoy, in the other countries of the Union, during

bound by the Berne. It is not directly affected by the convention but indirectly—through as a part of the U.K.

*Id.*

186. The U.K. gave effect to the revision by Order in Council on March 7, 1898. RICKETSON & GINSBURG, *supra* note 46, ¶ 3.04, at 88.

187. See CORRESPONDENCE RESPECTING THE REVISED CONVENTION OF BERNE FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS, SIGNED AT BERLIN, NOV. 13, 1908, 1909, Cd. 4467, SESSIONAL PAPERS, 56 ACCOUNTS AND PAPERS 1 (1909).

188. RICKETSON & GINSBURG, *supra* note 46, ¶ 3.14, at 97–98.

the whole term of the right in the original work, the exclusive right of making or authorizing a translation of their works.<sup>189</sup>

If Britain was to adhere to the new text, domestic copyright reform was going to be required in a range of areas. And domestic copyright reform meant that the thorny problems of colonial copyright would need to be resolved.

#### F. *Britain and the Empire*

Soon after the Berlin revision was concluded, a committee was appointed to consider whether British copyright law should be altered to enable the Government to give effect to the Berlin revision.<sup>190</sup> The Gorell Committee, as it was known, recommended that the U.K. make the relevant modifications of the domestic law so as to be able to ratify Berlin. In some strange way, the alteration in the copyright standards demanded by the Berlin revision provided the impetus for a reformulation of U.K. copyright law which had been regarded as desirable, but impossible to achieve, for virtually half a century. During that time, despite repeated attempts, the domestic legislative processes consistently failed to locate any consensus as to what was desirable as a matter of either form or substance in the field of copyright law. Perhaps “regime-shifting”—removing some of the lobbyists from having direct input into the law-making process—finally enabled a decision as to some of the most controversial matters. Perhaps, too, the international context changed what was at stake and focused attention on ensuring compliance.

If the Berlin revision of Berne finally provided a reason and opportunity to fix domestic copyright law (as well as some standards by which to do so), it did not offer an obvious solution to the question of British-colonial copyright relations (though Gorell did observe that “it seems of the utmost importance that the colonies, as parts of the British Empire, should come into line with Great Britain and that, so far as possible, there should be one law throughout the empire”<sup>191</sup>). However, since arrangements were already in place for a meeting of representatives of the self-governing dominions with the Board of Trade on “certain specific points on which an

189. Berne Convention for the Protection of Literary and Artistic Works, art. 8, Sept. 9, 1886, as revised at Berlin, Nov. 13, 1908.

190. H. OF COMMONS COMM. ON THE LAW OF COPYRIGHT, REP. OF THE COMM. ON THE LAW OF COPYRIGHT, 1910, Cd. 4976, 22 BRITISH PARL. PAPERS 241, 289 (1910); see also SEVILLE, *supra* note 122, at 290–92.

191. *Id.*



amendment of the existing law is urgently needed,”<sup>192</sup> it was decided to take advantage of this opportunity and broaden discussion “in order, if possible, to come to a common decision for the empire as a whole.”<sup>193</sup>

Because India was not a “self-governing dominion,” it was not initially included on the list of invitees. However, in March 1910, the Board of Trade wrote to the India Office to see whether the Secretary of State, Lord Morley, wished to send a representative to the conference, then already scheduled for May 11th. Perhaps surprisingly, Sir Herbert Hope Risley (recently returned from India to the post of Permanent Secretary in the judicial and public department in the India Office) speculated whether it was worthwhile for India to take part in discussions with self-governing colonies. Risley observed that it would be difficult to find a suitable representative and there was no time to bring someone from India, and expressed doubts as to whether there was anything to be gained from sending a representative to the conference given the fact that such a person could not commit the GoI to any particular course of action without its consent.<sup>194</sup> The India Office was well aware that “the provisions as to extending the term of copyright as regards translations . . . may not be favourably received in India.” In the end the India Office asked Sir Thomas Raleigh, former legal member of GoI’s Legislative Council,<sup>195</sup> to attend, and wrote to the GoI explaining that he would hold “a watching brief, and that nothing will be done to commit them.”<sup>196</sup>

The conference, which was chaired by Sydney Buxton, President of the Board of Trade, lasted for six days, spread over the month from May

192. Letter from Sec’y of State Crewe to Governors of Self-Governing Dominions. (Sept. 2, 1908) (National Archive, Kew, London, CO/886/4/3, Correspondence with the Self-Governing Dominions Relating to the Law of Copyright). The Secretary of State for the Colonies, Lord Crewe, wrote to the Governors-General of the self-governing dominions explaining that the idea of an Imperial Act dealing comprehensively with copyright in the Empire was going to be put aside. “It appears clear that there is no prospect of any general agreement on this question being arrived at an early date, and His Majesty’s Government have decided to abandon, at any rate for the present, the proposed legislation.” *Id.* Nevertheless, Lord Crewe proposed a conference, possibly in Ottawa, on specific issues—extension of duration to life plus thirty years, abridgment and translation rights, and possibly mechanical records. *See id.*

193. Letter from Sec’y of State Crewe to Governors of Self-Governing Dominions (Mar. 22, 1910) (National Archive, *supra* note 192, CO/886/4/3 Correspondence with the Self-Governing Dominions Relating to the Law of Copyright).

194. Minute signed by Herbert Hope Risley (Mar./April 1910) (IOL, *supra* note 7, L/PJ/6/993 file 898 with file 4609/11).

195. Raleigh (1850–1920) had been in India between 1899 and 1904, where he had spearheaded Lord Curzon’s reforms of the university system (much to the dislike of the educated Indian constituency). He joined the Council of India in 1909. Prior to his appointment to the Viceroy’s Council, Raleigh had been a Fellow of All Souls College, Oxford, and Reader in English Law. *See Death of Sir Thomas Raleigh*, THE TIMES (London), Feb. 9, 1920, at 18b.

196. Letter from Herbert Hope Risley, India Office, to Gov’t of India (Apr. 22, 1910) (IOL, *supra* note 7, L/PJ/6/993, file 898 with file 4609/11).

18th to June 20th.<sup>197</sup> It began by considering general principles, but after a short time a draft bill was produced as the basis for further discussion. On the first day, Raleigh articulated the special position of India and thus reserved for the GoI the right to modify any legislation to make it suitable for India's particular conditions. Raleigh explained to the Conference that "the difference between India and other parts of the Empire" was that socially and culturally the dominions were similar to Britain whereas

[i]n India we are dealing with a vast population, in the main of men whose customs and habits are not those of Englishmen, and although we have in that country interests of the same nature as those which are protected by copyright laws here, and although we must not leave these interests out of sight, we must also take into account the fact that there are indigenous forms of literature to which it would probably not be expedient to apply the elaborate code of your European law.

While the GoI is "prepared to follow in the line of uniformity as soon and as completely as they can," Raleigh stated he "should like to reserve for them considerable liberty in detail." Consequently, Raleigh asked the conference to add a proviso to any Imperial Act that its extension "to India shall be made in such manner and to such an extent as may be found suitable to the needs and circumstances of the people."<sup>198</sup> The chairman, Sydney Buxton, was later prompted to give an assurance that "the Imperial Act shall not be extended to India until the Secretary of State in consultation with the Government of India has agreed."<sup>199</sup> Thereafter Sir Thomas Raleigh's interventions were limited, and he was not even present on the last day. Almost certainly, he thought he had ensured that India's autonomy was not prejudiced.<sup>200</sup>

197. The conference dates were Thursday, May 19; Monday, May 23; Tuesday, June 14; Thursday, June 16; and Monday, June 20. The various participants were Sir H. Llewellyn Smith; G.R. Askwith; W. Temple Franks (Board of Trade); H.W. Just (Colonial Office); A. Law (Foreign Office); F.F. Lidell (Parl. Counsel); Sydney Fisher and P.E. Ritchie (Dominion of Can.); Tennyson (Commonwealth of Austl.); Sir W. Hall Jones (Dominion of N.Z.); Sir Richard Solomon (Union of S. Afr.); Sir Edward Morris (Nfld.); and Sir Thomas Raleigh (India Office). Secretaries were A.B. Keith (Colonial Office) and T.W. Phillips (Board of Trade). Details can be found in Minutes of the Proceedings of the Imperial Copyright Conf., 1910 (CO 886/4 Dominions No. 24, National Archive, *supra* note 192). Selections were sent from the Gov't of India, India Office to Gov't of India (July 30, 1910) (IOL, *supra* note 7, L/PJ/61020, file 2585 with 4609/11; Results of Conf., Cd. 5272). See generally SEVILLE, *supra* note 12, at 139-45.

198. Minutes of the Proceedings of the Imperial Copyright Conf., 1910, 25-26 (National Archive, *supra* note 192, CO 886/4 Dominions No. 24).

199. *Id.* at 55-56.

200. Raleigh also made a significant concession when he agreed that India's autonomy would be protected sufficiently by clause 29 (which ultimately became section 27 of the 1911 Act). *Id.* at 117. Since this clause provided that, except as regarded procedures and remedies, modifications were only to affect works first published in the British possession, Thomas Raleigh appeared to give his approval to a law which required the GoI to recognize full translation rights for British works. Although Raleigh had an impressive pedigree as a lawyer and legal academic, he certainly failed to be alert to longstanding Indian desires to limit translation rights so as to be able to translate *European* learning.

As Robert Burrell has explained,<sup>201</sup> it was largely as a result of the efforts of the Australian delegate, Tennyson, that the Imperial Copyright Conference resolved in favor of uniformity in the field of copyright throughout the British dominions. While the participants were recognized as possessing autonomy to adhere or not adhere to the British legislation, the representatives of the self-governing dominions agreed in effect to adopt whatever template the British legislature produced. In due course, bills were introduced into the House of Commons in 1910<sup>202</sup> and 1911,<sup>203</sup> and the latter received the Royal Assent on December 16, 1911. The right of a copyright owner to control translation of his works was ultimately recognized in the U.K. by section 1(2)(a) of the 1911 Copyright Act.<sup>204</sup> Importantly, the translation right applied to existing copyright works,<sup>205</sup> and the beneficiaries included those who qualified under Part II, the international section of the Act.<sup>206</sup> The Act came into force in the U.K. on July 1, 1912.

Ratification of the Berlin Revision of Berne by the United Kingdom occurred on June 14, 1912,<sup>207</sup> and was given effect by an Order in Council on June 24, 1912. Henceforth, the U.K. recognized a full translation right for all works first published in the British Empire, as well as works written by authors from, or first published in, Berne countries which had not made reservations regarding the translation right (Belgium, France, Germany, Haiti, Liberia, Luxembourg, Monaco, Norway, Portugal, Spain, Switzer-

201. Burrell says Australia put imperial unity at the center of copyright policy, and explores reasons why Australia should have adopted such a posture in this field. Robert Burrell, *Copyright Reform in the Early Twentieth Century: The View from Australia*, 27 J. LEGAL HIST. 239 (2006).

202. A Bill to Amend and Consolidate the Law Relating to Copyright, 1910, Bill [282]. This was only introduced with a view to consideration. See Mr. Sydney Buxton, 23 PARL. DEB., H.C. (5th ser.) (1911) 2588.

203. A Bill to Amend and Consolidate the Law Relating to Copyright, 1911, Bill [149]; A Bill to Amend and Consolidate the Law Relating to Copyright, As Amended by Standing Comm. A, 1911, Bill [296]; A Bill to Amend and Consolidate the Law Relating to Copyright, H. of Lords Amendments, 1911, H.L. Bill [384].

204. Sir Harcourt Butler described the Act as “the most important Copyright act ever passed in England. It repeals seventeen Acts absolutely, and considerable portions of other acts, and is intended, so far as possible, to form a Code of Copyright Law.” Proceedings of the Imperial Legis. Council, (Sept. 9, 1913) (IOL, *supra* note 7, V/9/38–40, at 19).

205. Copyright Act, 1911, 1 & 2 Geo. 5., c. 46, § 24, sched. 1. Though the Order in Council of 1912, No. 913, specified that there was to be no revival of the translation right as regards works where the right had ceased under section 5 of the International Copyright Act of 1886.

206. Copyright Act, 1911, 1 & 2 Geo. 5., c. 46, § 30 (“An Order in Council under this Part of this Act shall apply to all His Majesty’s dominions to which this Act extends except self-governing dominions and any other possession specified in the Order with respect to which it appears to His Majesty expedient that the Order should not apply.”).

207. Subject only to a reservation as regarded Article 14(4) on retrospective effect.

land, and Tunis).<sup>208</sup> Rather peculiarly, while the ratification of the Berlin revision of Berne had excepted India from its coverage,<sup>209</sup> the Order in Council (it seems mistakenly) included India.<sup>210</sup> Initially, India sought to have the mistake rectified.<sup>211</sup> However, because the 1912 Order revoked all other orders, removal of India from the Order would have deprived foreign authors of any rights in India, and thus it seemed to put India in breach of the two earlier versions of Berne, 1886 and 1896, to which India had been bound. The Viceroy decided not to press for rescission of the Order, and, in fact, in due course India asked to be removed from the exceptions to the British ratification.<sup>212</sup>

### G. *The 1914 Indian Copyright Act*

Sydney Buxton's assurance at the Imperial Copyright Conference might have appeared to recognize that India could determine its own course of action in relation to copyright, but the final form of the Act, and subsequent discussion, revealed that, in fact, there was to be only a very limited scope for "self-determination" in relation to copyright. The 1911 Act applied throughout "the parts of His Majesty's dominions to which this Act extends." Although the Act required the assent of the "self-governing dominions"—that is, Canada, Australia, New Zealand, South Africa, and Newfoundland—and was to come into force on the date set by such dominion, India was not a self-governing dominion.<sup>213</sup> Consequently, as a mere "British possession" the Act extended to India. For the Act to come into

208. Denmark, Italy, Japan, and Sweden had retained the Paris formula. *See* Order in Council, 1912, No. 913, Ord. 2, proviso (i)(c).

209. June 14, 1912. *See* Letter from Board of Trade to India Office (Feb. 8, 1913) (IOL, *supra* note 7, L/PJ/6, file 564 with File 2346/12, R 946). After some discussion the India Office informed the Board of Trade that India was willing to accede. Letter from India Office to Board of Trade (Oct. 17, 1913) (IOL, *supra* note 7, JP 3575/13).

210. Letter from Board of Trade (J.W. Phillips) to India Office (Watson) (Dec. 21, 1912) (IOL, *supra* note 7, L/PJ/6, file 4433/12). A letter from the India Office to the Governor General in Council explains why this was done and asks whether the Governor General wished the India Office to press for rescission of the Order. Letter from the India Office to the Governor General in Council (Mar. 7, 1913) (IOL, *supra* note 7, L/PJ/6, file 564 with file 2346/12, Public No. 67).

211. Letter from India Office to Board of Trade (Jan. 23, 1912) (IOL, *supra* note 7, L/PJ/6, file 4433/12). Elsewhere in the same file a Minute Paper explains that the mistake arose from the "rash" assumption that were India to adopt the 1911 Act it would happily join the Berlin revision. This was "difficult to understand in view of our definitely stated request to be omitted from the Order in Council."

212. Telegram from the Viceroy to Sec'y of State for India (June 2, 1913); Letter from India Office to Board of Trade (June 25, 1913) (IOL, *supra* note 7, L/PJ/6/1243, file 2049 with file 2346/12).

213. Copyright Act 1911, 1 & 2 Geo. 5., c. 46, §§ 25(1), 35(1).

force, the only action required of the GoI was that the Act be proclaimed in India.<sup>214</sup>

Although assent to the operation of the 1911 Act was thus not required, section 27 of the Copyright Act of 1911 provided British possessions a little leeway to vary the operation of that Act in its application to the colony in question. This flexibility was primarily intended to allow for adaptations necessary in the light of differences in matters relating to legal procedure and remedies. Insofar as a colony wished to tamper with the substance, the Act limited such variations to “works the authors whereof were, at the time of the making of the work, resident in the possession, and to works first published in the possession.” The GoI decided to consult various local interests as to exactly what modifications were desirable,<sup>215</sup> and asked therefore that the 1911 Act not be brought into operation for India, and, as we have seen, that India be excluded from any ratification of the Berlin revision of Berne. However, the British Government pressed India to adopt the 1911 Act as soon as possible, emphasizing that India had participated in the Imperial Copyright Conference and effectively assented to the uniformity.<sup>216</sup> Obediently, the 1911 Act was adopted by proclamation on October 31, 1912,<sup>217</sup> the idea being that the GoI would modify the Act as necessary at a later date.<sup>218</sup>

214. *Id.* at 37(2)(d) (stating that for British possessions (such as India), the Act would come into force on the proclamation thereof within the possession).

215. Telegram from Viceroy to India Office (June 14, 1912) and related Minute paper (IOL, *supra* note 7, L/PJ/6, file 2109, located with file 4160/12).

216. Board of Trade to Undersec’y of State for India (Mar. 27, 1912), Telegrams from Sec’y of State to Gov’t of India, (Apr. 20, 1912 and May 22, 1912), and with Viceroy (July 22, 1912) (IOL, *supra* note 7, L/PJ/6, file 1113, with file 4160/12). The Board of Trade was itself responding to lobbying pressure from publishers and other interested parties. *See* Minute Paper (June/July 1912) (IOL, *supra* note 7, L/PJ/6, file 2109, located with file 4160/12) (referring to Mr. Vivian Mansell who claimed he would lose heavily from any delay as regards pictures now being pirated in India of the 1911 Delhi Durbar to celebrate the visit of George V); *see also* Letter from C.J. Longman to Macmillan (Oct. 28, 1912) (Macmillan Archive, *supra* note 82, BL Add Ms 54887, at 46). An additional minute paper in the India Office emphasized a further problem: the 1911 Act abolished the Registry, making it impossible for copyright holders to gain the benefit of the 1842 Act in India thereafter. Minute Paper (July/Aug. 1912) (IOL, *supra* note 7, L/PJ/6/1188, file 3348, located with file 4160/12). Note also the role of the Society of Authors in pressing the British Government. *See* Letter from Herbert Thring to Macmillan (Dec. 5, 1912) (referring to position in Burma) (Macmillan Archive, *supra* note 82, BL Add Ms 54910); Letter from T.W. Holderness to Society of Authors (Nov. 19, 1912) (Macmillan Archive, *supra* note 82, BL Add Ms 54910) (reporting GoI decision to bring the Act into force under section 37(2)(d)).

217. The Viceroy telegraphed on Oct. 31, 1912 that the proclamation was issued immediately “in deference to your Lordships wishes.” Telegram from the Viceroy (Oct. 31, 1912) (IOL, *supra* note 7, L/PJ/6, file 2109, located with file 4160/12). Harcourt Butler later explained that this had been done “in view of the difficulties that were experienced in England through the non-proclamation in India of the Act of 1911, and having regard to the serious hardships and loss which might thereby be inflicted on English authors.” Proceedings of the Imperial Legis. Council (Sept. 9, 1913) (IOL, *supra* note 7, V/9/38–40, at 19).

218. Minute Paper (June/July 1912) (IOL, *supra* note 7, L/PJ/6, file 2109, located with file 4160/12) (explaining that proclamation could precede modification).

Meanwhile, consultations commenced in India. On July 1, 1912, consultation began with all the local governments of Madras, Bombay, Bengal, United Provinces, Punjab, Burma, Orissa, Central Provinces, and North West Frontier Provinces.<sup>219</sup> Amongst the issues raised in the letter was that of the translation right:

The treatment of translations on a similar footing to original works in regard to the term of copyright may be unobjectionable in European countries and the colonies where as a rule there is only one language but in a country such as India with widely differing languages and where vernacular translations of English works are not only common but serve the useful purpose of disseminating knowledge it is possible that some relation should be made in the matter on the lines of clause 8 of the Bill of 1885 or at least that translations should be brought under the provisions of section of the English (sic) copyright act in regard to compulsory licences.

The 1885 Bill had proposed to give the copyright owner a right to control translation for three years.<sup>220</sup>

The 1912 circular, which was addressed to the local governments, was circulated further by those governments, so that the responses also reflected the views of a variety of constituencies including the Chambers of Commerce of Bombay and Bengal, the Bombay and Calcutta Trade Associations, booksellers (Cambray & Co., Lahiri & Co., Newman & Co.), and educational associations (Directors of Public Instruction, the Calcutta Christian Tract and Book Society).<sup>221</sup> Given the diversity of respondents, there was a corresponding range of responses, but most were supportive of the GoI's position that because of the special circumstances some modification of the translation right was necessary.<sup>222</sup> A number of respondents

219. Letter Nos. 1818–27 from the Honorable L.C. Porter, Sec'y Gov't of India, to all different local governments of Madras, Bombay, Bengal, United Provinces, Punjab, Burma, Orissa, Central Provinces, and NW Frontier Provinces (July 1, 1912) (IOL, *supra* note 7, L/PJ/6, file 2882, with file 3331 of 1913).

220. Clause 8 of that Bill provided that

[a] person shall not be deemed to infringe the copyright in a book by reasons of his having, at any time after the expiration of three years from the first publication of book, printed, sold, published, let on hire, exposed for sale or hire, or possessed, or caused to be printed imported and sold, published . . . a translation of the books into any language, unless within the said period of three years the author of the book or some person by his authority has published in British India a translation of the entire book into that language.

The 1885 Bill is included in a dispatch from the GoI to the Earl of Kimberley, the Secretary of State for India (June 5, 1885) (IOL, *supra* note 7, L/PJ/6/156, file 1137).

221. This correspondence is included in the papers sent from the Legislative Council of the GoI to Lord Crewe, Secretary of State for India (July 24, 1913) [hereinafter Correspondence Regarding 1912 Circular] (IOL, *supra* note 7, L/PJ/6, file 3331 of 1913).

222. Correspondence Regarding 1912 Circular, *supra*; see in particular Letter from C.A. Barron, Chief Sec'y to Gov't of Punjab (Sir Louis Dane), to Sec'y of Gov't of India, No. 1363 (Aug. 21, 1912) (approving three year limit); Letter from Richard Burn, Chief Sec'y to Gov't, United Provinces (Aug. 21, 1912); Letter from Lionel Davidson (1868–1944), Acting Sec'y to Gov't of Madras, to Sec'y, Gov't

argued that the term of the 1885 proposal, three years, was too short,<sup>223</sup> and some, such as the Governments of Burma, Assam and the North-West Province opposed any modification of the law at all.<sup>224</sup>

The arguments advanced in favor of the modification of the translation right were little different from those used to justify investment in translation into the vernacular from as early as the 1820s: the primary argument being that India was a country which needed to access European knowledge, that it could only gain access through translation, and that such activity could only be impeded by requiring that translators obtain prior consent. A flavor of the submissions can be gained from the following two examples. The first is from Messrs. S. K. Lahiri and Co., one of the most pre-eminent Indian publishers and booksellers. They reasoned<sup>225</sup>

[t]he provision contained in the section (8) (c) that a translation of a work into another language would constitute an infringement of the copyright, is likely to retard the development of literature in the vernacular languages, and would, in my judgment, thereby interfere with the

of India, No. 546 (Oct. 29, 1912); Letter from John Henry Kerr (1871–1934), Sec’y to the Gov’t of Bengal, No. 2043 (Mar. 18, 1913) (suggesting three year period, but requiring two years notice to be given by person proposing to translate). Of the correspondence from others, letters from the following favored relaxation: R. Cambray & Co. to Gov’t of Bengal (Oct. 8, 1912); S.K. Lahiri & Co. (opposed to translation rights); Stanley Wells Kemp (1882–1945), Honorary Sec’y, Asiatic Soc’y of Bengal (Sept. 21, 1912); J.M.B. Duncan, Calcutta Christian Tract and Book Society (Sept. 14, 1912); Babu Kali Charan Sen, Gov’t Pleader, Guahati, (Aug. 25, 1912); Rai Dulal Chandra Deb Bahadur, Gov’t Pleader, Sylhet, (Aug. 28, 1912).

223. Correspondence Regarding 1912 Circular, *supra* note 222; *see in particular* Sir Arthur Blenherhassett, Sec’y to the Chief Comm’r, Central Provinces (Sir Benjamin Robertson) (Oct. 3, 1912) (favoring four years); Jean Louis Rieu, Sec’y to Gov’t of Bombay, to Sec’y to Gov’t of India, No. 6911 (Oct. 16, 1912) (suggesting five years, but also forwarding views of Solicitor to Government favoring a royalty); J.F. Gruning, Sec’y to the Gov’t of Bihar and Orissa (Oct. 5, 1912) (favoring ten years); Librarian, Bengal Library, to Sec’y to the Gov’t in Bengal (Sept. 11, 1912) (No. 6 L) (suggesting five years); Rai PN Mookerjee Bahadur, Inspector General of Registration to Sec’y to Gov’t of Bengal (Sept. 17, 1912) (Mo 205T) (five years); Sec’y, Calcutta Traders Ass’n to Gov’t of Bengal (Oct. 3, 1912) (five years).

224. Correspondence Regarding 1912 Circular, *supra* note 222; *see in particular* W.M. Kennedy, Second Sec’y to the Chief Comm’r of Assam (Sir Archdale Earle) (Oct. 3, 1912); G.B.H. Fell, Officiating Sec’y to the Gov’t of Burma, to Sec’y of Gov’t of India (Oct. 9, 1912) (No. 1437M/3B-I); Sir George Roos-Keppel, Chief Comm’r NW Frontier Province (Sept. 12, 1912) (preferring some sort of licensing system and referring to views of Sir Aurel Stein in a letter dated Aug. 17, 1912); *see also* W. Newman & Co. to Undersec’y Gov’t of Bengal (Oct. 4, 1912) (preferring compulsory licensing system); Honorable Lieutenant-Colonel, Sir George Roos-Keppel, Chief Comm’r, NW Frontier Provinces, to the Sec’y to the Gov’t of India, Educ. Dep’t (Sept. 12, 1912) (No. 1374N) (“The backwardness of India in the domain of literature does not invest her with a right to prey on countries more fortunate in this respect.”).

225. Lahiri is described by Roper Lethbridge in a letter to Macmillan as “the most influential native publisher and bookseller.” (May 12, 1906) (Macmillan Archive, *supra* note 82, Add Mss 55062). On Lahiri, *see* CHATTERJEE, EMPIRES OF THE MIND, *supra* note 60, at 75 (describing contact in 1908 between Milford of OUP and five Calcutta booksellers: Dasgupta, Cambray, Banerjee, Halder, and Lahiri); *id.* at 213 (describing relations with OUP over first *Rulers of India* series); *id.* at 279 (explaining Lahiri’s attempts to keep an OUP book, Hunter’s *Brief History of the Indian Peoples*, on the set reading list of Calcutta University).

growth of education in this country. It is well known that the vernaculars in India are very poor in original stock, and have to depend mainly on translations from English. Even those few original thinkers who can write in the vernacular, are unwilling to do so, and not unnaturally prefer to appear before wider and more highly cultured public through the medium of English. In this state of things, if translations from English are interdicted, it would leave the native tongues in a state of arrested progress, and it is therefore desirable that the right of translating should be left unfettered.<sup>226</sup>

The second example comes from Rai Dulal Chandra Deb Bahadur, a Government Pleader in Sylhet:

[W]hile the provision of the [1911] act are intended to apply to India it is a matter for consideration whether these two countries are equally advanced in civilization, so that a law which may be good for England shall also be good for India. India stands no comparison to England in material and intellectual advancement. England is a country where intellectual attainment has reached its highest pitch and fine art its highest degree of development, whereas India is a country which is still in a period of transition. Its fine arts had all died out and it is simply that a revival thereof has lately taken a start. The best thoughts of its best writers were couched in Sanskrit language which has now become a dead language consequently the literary treasure of the ancient hindus is shut up to the general public. Under the British rule, the high education in India is imparted through the medium of English language and the best products of the Indian universities express their ideas and thoughts through the medium of English language. The fact is that the English literature is pre-eminently a literature for the purpose of high education, but is not enough to meet the education demands of this country. Side by side with the English literature there should grow another literature, I mean the vernacular literature in India for the education of the mass, and it should be the aim of the legislature and the Indian public to make these literature grow, to a healthy growth and before it is done we may not be in a position to assert that India has reached its proper stage of civilization. Vidyasagar, Akshay Kumar Datta, Bankim Chandra Chatterjee, Michael Madhusudan Datta and other distinguished Bengali writers have simply laid the skeleton of the Bengali literature and it requires flesh and muscles to make it a complete body. It does not as yet contain any historical scientific, medical, legal, mathematical and engineering works worth the name and every effort should be made to do away with these defects and to enrich the Bengali language by contributions from some other sources. Every author of a literary work, whether indigenous or foreign, should make a sacrifice to enrich the vernacular literature in India.<sup>227</sup>

226. Letter from Messrs. S.K. Lahiri & Co. to Sec'y to the Gov't of Bengal, included in Letter No. 2043 from J.H. Kerr, Sec'y to Gov't of Bengal, to Sec'y to the Gov't of India (Mar. 18, 1913) (IOL, *supra* note 7, L/PJ/6, file 2882 with file 3331 of 1913).

227. Letter from Rai Dulal Chandra Deb Bahadur, Gov't Pleader, Sylhet (Aug. 28, 1912) (IOL, *supra* note 7, L/PJ/6, file 2882 with file 3331 of 1913).



The Indian Government considered the responses and drafted legislation proposing a five year period of exclusivity and two years notice required from anyone wishing to translate the work after that period. The records suggest that this idea had been prompted from the response of the Government of Bengal, which had observed that there were so many languages in India “that an author cannot be expected to know whether a translation of his work into any particular language is demanded by the public, and he should be given every reasonable opportunity of translating the book himself, on learning that such a translation would meet a genuine want.”<sup>228</sup>

On July 24, 1913, the Legislative Council wrote to Crewe, Secretary of State for India, explaining the proposal and seeking the Office’s approval. This was soon followed by a draft Bill.<sup>229</sup> The legal adviser thought the modifications “quite unexceptionable” and that they would not “interfere with the preservation of substantial uniformity in the law of copyright in the Empire.”<sup>230</sup> The India Office therefore authorized the GoI to go ahead with the Bill, while simultaneously forwarding it to the Board of Trade. The Board of Trade responded with less enthusiasm, explaining that although it did not want to dissent from the conclusion arrived at by the GoI, it considered in general that limitation of translation rights to the extent proposed “would not tend to be permanently in the public interest.”<sup>231</sup>

Soon after, the India Office was subjected directly to lobbying from British publishers, particularly Macmillan<sup>232</sup> and the Publishers Association,<sup>233</sup> as well as from authors via the Society of Authors.<sup>234</sup> The publish-

228. Letter No. 2043 from J.H. Kerr, Sec’y to Gov’t of Bengal to Sec’y to the Gov’t of India (Mar. 18, 1913) (IOL, *supra* note 7, L/PJ/6, file 2882 with file 3331 of 1913).

229. Gov’t of India to Sir T.W. Holderness (July 31, 1913) (IOL, *supra* note 7, L/PJ/6, file 2970 with file 3331 of 1913).

230. Opinion of Legal Adviser (Aug. 13, 1913) (IOL, *supra* note 7, L/PJ/6, file 2970 with file 3331 of 1913).

231. Letter from W.F. Marwood, Sec’y, Board of Trade, to Undersec’y of State for India (Sept. 17, 1913) (IOL, *supra* note 7, L/PJ/6, file 3331 of 1913).

232. See Letters from George Macmillan to Frank Lucas, India Office (Oct. 8, 1913); Macmillan & Co., on behalf of the Council of Publishers, to Sec’y of State, (Oct. 17, 1913); C.J. Longman to Holderness (Oct. 22, 1913) (IOL, *supra* note 7, L/PJ/6, all with file 3331 of 1913). On hearing from its Bombay office of the 1912 circular proposing to limit the translation right, Longman had written to Macmillan that it was “a most monstrous proposal.” Letter from C.J. Longman to Macmillan (Oct. 28, 1912) (Macmillan Archive, *supra* note 82, BL Add Ms 54887, at 46).

233. Letter from Messrs. Macmillan and Co. to Sec’y of State for India, (Oct. 17, 1913) (Macmillan Archive, *supra* note 82, BL Add Mss 55518(1), at 483)) (writing on behalf of the Council of the Publishers Association of Great Britain and Ireland to call attention to the Indian Copyright Bill, 1913).

234. Letter from George Herbert Thring, Sec’y, Inc. Soc’y of Authors, to Sec’y of State for India, Whitehall (Nov. 4, 1913) (IOL, *supra* note 7, L/PJ/6, file 4014, with File 3331 of 1913) (writing “hope it will be possible to alter this clause in order to bring it, at any rate, into conformity with the rights granted to authors in translations, under the Berne Convention”). The essence of this communication was reported by Thring to Macmillan in a letter of the same date. Letter from George Herbert Thring to

ers also tried to influence the India Office indirectly, as a result of submissions made to the Board of Trade by Frederick Macmillan.<sup>235</sup> Macmillan was now concerned not only with the rights of British authors in India, but also with those of Indian authors in India and beyond. Most significantly, by 1913, the Company published the writings of Rabindranath Tagore, the famous Bengali poet, in Britain (translated into English by Tagore himself), and had also undertaken to negotiate terms for translation of his works elsewhere. That year, following publication of *Gitanjali* or *Song Offerings*, Tagore was awarded the Nobel Prize for Literature.<sup>236</sup> Macmillan used the example of Tagore to protest against the abbreviated translation right that was being proposed. Macmillan asserted that were the 1913 Bill to be made law, then after five years anyone could translate Tagore “into any kind of pigeon English. . . . I cannot but think that the possibility of the appearance of such a version in competition with the author’s own beautiful English translation would be nothing but an outrage on a poet of Tagore’s standing.”<sup>237</sup>

Meanwhile, the Bill was introduced to the Legislative Council in India by the Secretary for Education, Sir Harcourt Butler, on September 9, 1913.<sup>238</sup> The Bill was widely circulated within India and produced a new

Macmillan (Nov. 4, 1913) (Macmillan Archive, *supra* note 82, BL Add Ms 54910) (“[W]e are suggesting that translation rights should rest as under the Berne Convention, with the additional safeguards mentioned in the Bill itself—that is, the 2 years notice in case the rights have fallen into the public domain.”).

235. Letter from H. Llewellyn Smith (Board of Trade) to Sir Frederick Macmillan (Nov. 25, 1913) (Macmillan Archive, *supra* note 82, BL Add mss 55005); Letter from Sir Fredrick Macmillan of Messrs. Macmillan and Company to Sir Llewellyn Smith, Permanent Sec’y to the Board of Trade, (Nov. 28, 1913) (IOL, *supra* note 7, L/PJ/5/88) (“[C]lause 4 of the Bill . . . certainly ought to be modified in the direction I have suggested—that is to say, the right of translation should only be lost when an author has deliberately refused to exercise it himself.”); Letter from H. Llewellyn Smith (Board of Trade) to Sir Frederick Macmillan (Dec. 12, 1913) (Macmillan Archive, *supra* note 82, BL Add mss 55005) (letter of November 28th to be brought informally to notice of India Office); Letter from Sir Frederick Macmillan of Messrs. Macmillan and Company to Sir Llewellyn Smith, Permanent Sec’y to the Board of Trade (Dec. 19, 1913) (IOL, *supra* note 7, L/PJ/5/88; L/PJ/6, file 4839 with file 3331 of 1913) (in the opinion of the Publishers Association, if it is thought advisable to fix a period during which the translations of books from the vernacular should be protected, the period out to be ten years, and not five years.).

236. Rabindranath Tagore’s *The Gardener* was also published in 1913. Tagore’s *Chitra* and *The King of the Dark Chamber* were published in 1914.

237. Letter from Macmillan to H. Llewellyn Smith (Board of Trade) (Nov. 28, 1913) (Macmillan Archive, *supra* note 82, BL Add Ms 55519(2), at 656).

238. Sir Harcourt Butler advocated that the GoI “propose as few modifications as are possible in view of the desirability of securing that uniformity throughout the Empire, which was advocated by the Imperial Copyright Conference of 1910.” Proceedings of the Imperial Legis. Council, (Sept. 9, 1913) (IOL, *supra* note 7, V/9/38–40, at 19). This “material relaxation” of the 1911 Code was “necessary in view of the special linguistic conditions of India, of the variety of languages spoken, and of the useful part played by translations in disseminating knowledge.” *Id.* At this stage, the Bill permitted translation after five years so long as the author had been given two years notice. “By this means we hope adequately to safeguard the rights of the author and those of the public.” *Id.*

wave of responses.<sup>239</sup> Some proposed replacing the limited exclusive right with a right to a royalty or subjecting a full exclusive right to compulsory licensing,<sup>240</sup> but the drafters of the Bill had already considered and rejected these options.<sup>241</sup> Some of the respondents argued that the version of the translation right was too restrictive in terms of time.<sup>242</sup> Some pointed to difficulties in applying the idea of translation, observing that some language versions were only “transliterations”—transfers into different scripts rather than different languages—and others noted that in India it was not always easy to tell one language from another.<sup>243</sup> Others called for the limitation on the translation right to be extended beyond works first published

239. The Rules for the Conduct of the Legislative Business of the Council of the Governor General (1897) are reproduced in SIR COURTENAY ILBERT, *THE GOVERNMENT OF INDIA* 327–37 (Oxford 1898).

240. Letter from the Comm’r of the Surma Valley and Hill Districts to Chief Sec’y to the Honorable Comm’r of Assam (Oct. 28, 1913) (IOL, *supra* note 7, L/PJ/5/88, No. 1604T); Letter from Honorable Walter Francis, Acting Sec’y to the Gov’t of Madras, Educ. Dep’t, to the Sec’y to the Gov’t of India, Legis. Dep’t (Dec. 4, 1913) (IOL, *supra* note 7, L/PJ/5/88); Letter from Messrs. Higginbotham & Co. (Ltd.), to the Sec’y to Gov’t, Educ. Dep’t (Nov. 10, 1913) (IOL, *supra* note 7, L/PJ/5/88) (from Madras and Bangalore, publishers, *inter alia*, of some criminal law books); Letter from O.F. Lumsden, ICS, Deputy Comm’r, Jhang, to Comm’r, Multan Division (Nov. 11, 1913) (IOL, *supra* note 7, L/PJ/5/88) (“If it is not considered desirable to extend the period, one of two alternatives might be adopted. It should be either incumbent on the would-be translator to obtain the author’s permission in writing prior to publication, or a royalty payable to the author should be prescribed.”); Letter from Sir Ramkrishna Gopal Bhandarkar, KCIE (formerly of the Bombay Educ. Dept., 1864–93), to the Sec’y to Gov’t, Bombay, General Dep’t: Memorandum on the Copyright Bill (Dec. 1913) (IOL, *supra* note 7, L/PJ/5/88) (proposing ten percent royalty); Letter from Honorable Mr. Lalibhai Samaldas Mehta to J. L. Rieu, Sec’y to Gov’t, Bombay, General Dep’t (Nov. 27, 1913) (also favoring ten percent royalty).

241. The July 1, 1912 circular had made a proposal of this sort, but response to the compulsory license idea was at that stage lukewarm. *See* correspondence included in the papers sent from the Legislative Council of the GoI to Lord Crewe, Secretary of State for India (July 24, 1913) (IOL, *supra* note 7, L/PJ/6, file 3331 of 1913).

242. Letter from W.M. Hailey, Chief Comm’r Delhi, to Sec’y to Gov’t of India, Legis. Dep’t. (Nov. 22, 1913) (IOL, *supra* note 7, L/PJ/5/88, No. 8691) (proposing fifteen years); Kali Charan Sen, Gov’t Pleader, Opinion on the draft Bill of copyright to modify and add the provision of the 1911 Act (Oct. 28, 1913) (IOL, *supra* note 7, L/PJ/5/88, No. 8691) (ten years); Letter from Honorable John Fuller Graham, ICS, Judge Assam Valley Districts, to Undersec’y to Chief Comm’r, Assam (Nov. 14, 1913) (IOL, *supra* note 7, L/PJ/5/88, No. 724T) (reporting that Gauhati Bar Association would prefer ten years, but supporting five year term himself); Letter from J. T. Marten, Second Sec’y to the Chief Comm’r, Central Provinces, to Sec’y to the Gov’t of India, Legis. Dep’t, Nagpur, (Dec. 5, 1913) (IOL, *supra* note 7, L/PJ/5/88) (reporting that the “legal remembrancer with this department has expressed a strong opinion that the period of protection fixed . . . in respect of translations, is too short”); Letter from T. P. Ellis, MA, ICS, Divisional Judge, Shahpur Division, to Registrar Chief Court, Punjab, (Nov. 7, 1913) (IOL, *supra* note 7, L/PJ/5/88, No. 1927G) (period unnecessarily low); Letter from H.A. Casson, ICS, Comm’r, Lahore Division to the Senior Sec’y to the Financial Comm’r, Punjab (Nov. 15, 1913) (IOL, *supra* note 7, L/PJ/5/88, No. 835) (fifteen years).

243. For a call for the provision to cover “transliterations,” see Letter from Rai Bahadur Pandit Sheo Narain, Advocate, Chief Court, Punjab, to the Registrar, Chief Court, Punjab Kapilavastu, Lahore (Nov. 7, 1913) (IOL, *supra* note 7, L/PJ/5/88); *see also* Letter from H.H. Harrison, ICS, Divisional Judge, Delhi, to the Personal Assistant to Chief Comm’r, Delhi Province (Nov. 1, 1913) (IOL, *supra* note 7, L/PJ/5/88, No. 1099) (anticipating difficulties with fixing boundaries between different vernaculars, such as Eastern and Western Punjabi, or the Hindi spoken in the Gurgaon district from Urdu); Oswald Farquhar Lumsden to Comm’r, Multan Division (Nov. 11, 1913) (IOL, *supra* note 7, L/PJ/5/88) (noting problem with similar languages such as Urdu and Punjabi).

in India to include works from outside India. A dramatic example came from Abdul Aziz, Editor of *The Observer*:<sup>244</sup>

The special conditions of India imperatively demand that no restrictions whatsoever should be placed on the dissemination of knowledge through translations in the Indian vernacular. Such translations have already played a very important part in the educational progress in India, and no small share of the credit for the existing intellectual awakening in this ancient land can be rightfully claimed by the translation in the Indian vernaculars of modern European works in different branches of science and literature. . . . Any restrictions on translations of English works into Indian vernacular would constitute a . . . step which will push a stumbling block in the way of India's progress.

These responses—as well as the criticisms of the proposal made by the publishers and authors to the Board of Trade and India Office—fell to be considered by a Select Committee.<sup>245</sup> Clearly influenced by the advice received, the Select Committee modified the Bill, extending the period of monopoly to ten years and adding the proviso dealing with the situation where an authorized translation had been produced within the ten year period. It seems likely that Tagore's position was not an insignificant factor in this shift. His friend Charles Freer Andrews wrote confidently to Macmillan, claiming, "I could get through any alteration, if I could make out a good claim,"<sup>246</sup> a statement which suggests that he saw the Select Committee's modifications as a response to the objections put by Macmillan (which had focused on Tagore). However, Macmillan did not demand any further alterations. The 1914 Act was passed accordingly.<sup>247</sup>

244. Letter from Abdul Aziz, Editor, *The Observer*, (Nov. 20, 1913) (IOL, *supra* note 7, L/PJ/5/88).

245. Letter from Gov't of India to Sec'y of State for India (Dec. 18, 1913) (IOL, *supra* note 7, file 4664: L/PJ/6 with file 3331 of 1913). For Select Committee, see IOL, *supra* note 7 (v/9/40-1, 104-05 (Jan. 6, 1914)). The Committee reported on February 4, 1914. At this stage it was observed that "Clause 4, limiting the duration of copyright of translations, has met with some criticism." More details of the Committee's views can be found in IOL, *supra* note 7 (L/PJ/5/88).

246. Letter from C.F. Andrews to Macmillan, Delhi (May 31, 1914) (Macmillan Archive, *supra* note 82, BL Add mss 55005) (adding "I am inclined however to get simply a ruling from government that no-one *during the next 10 years* will be allowed to translate any of the works which Rabindranath has up till now published.").

247. Its passage is noted in *From Our Own Correspondent, The Copyright Bill*, THE TIMES OF INDIA (Bombay), Feb. 25, 1914, at 7; *The Imperial Legislative Council, Legislative Business: Copyright Bill Passed*, THE TRIBUNE (Lahore), Feb. 25, 1914, at 4; *Imperial Legislative Council: Agenda for Tuesday*, AMRITA BAZAR PATRIKA (Calcutta), Feb. 23, 1914, at 5; Associated Press of India (Telegram), *Imperial Legislative Council: Select Committees' Reports on Several Bills, Some Bills Passed, Copyright Bill*, AMRITA BAZAR PATRIKA (Calcutta), Feb. 25, 1914, at 5.

## II. DIFFERENT LAYERS OF LAW-MAKING

Modern commentators are apt to complain about the complexity of copyright policy-making that results from different levels of law-making. The Indian history puts this into perspective. Indian policy-making was constrained by the international conventions (various versions of Berne), and by India's status as a British colony in the face of British desire for as much imperial uniformity as possible. At both levels of policy-making, India's wishes found limited expression, as we saw in relation particularly to the Imperial Copyright Conference. Yet, while India was given little or no say in the formulation of the standards to be applied to Great Britain, the Empire, or the substance of the international treaty, it is important to observe that the consent of the GoI was sought to their adoption. Indeed, the governmental records (such as the statement of the President of the Board of Trade at the Imperial Copyright Convention of 1910) suggest that the GoI was left room to exclude itself from both the imperial deal and the international conventions. Indeed, India took advantage of the possibility of excluding itself from the British ratification of Berlin for a short time. What is more difficult to assess is how far this apparent freedom could have been used on a long-term basis.<sup>248</sup>

While the room for maneuver left to the GoI under the 1911 Act was limited, in the application of the residual freedom to modify the law granted under section 27, considerable respect was shown by the British Government (that is, the India Office and Board of Trade) to the GoI's view that it was desirable to curtail the translation right. While the Board of Trade expressed its opinion that the conclusions of the GoI were mistaken, and, when forwarding the objections of the British publishers, stated that it hoped the GoI would amend its proposals accordingly,<sup>249</sup> the India Office

248. "At the core of Imperial administration . . . lay a continuous interplay between mother country and colonial communities, between centre and periphery, a series of essentially bilateral relationships which entailed constant negotiation rather than the imposition of rule and the acceptance of subjection." Peter Burroughs, *Imperial Institutions and the Government of Empire*, in 3 OXFORD HISTORY OF THE BRITISH EMPIRE: THE NINETEENTH CENTURY 170, 170 (Andrew Porter ed., 1999).

249. When the GoI was debating the 1913 Bill, W.F. Marwood, Secretary to the Board of Trade, wrote several times to the Undersecretary of State for India.

With regard to this proposal, while not desiring to dissent from the conclusion arrived at by the Government of India, having regard to the special conditions applying in that country, consider that in general a limitation of translating right to the extent proposed would not tend to be permanently in the public interest.

Letter No. 9659 from W.F. Marwood to the Undersec'y of State for India (Sept. 17, 1913) (IOL, *supra* note 7, L/PJ/5/88). Llewellyn Smith (Board of Trade), writing to Macmillan stated that "in general" the Board of Trade adhered "to the principle that translating rights ought to be co-extensive with copyright." Letter from Llewellyn Smith, Board of Trade, to Macmillan (Nov. 25, 1913) (Macmillan Archive, *supra* note 82, BL Add mss 55005).

seems to have been content to see this as a matter for the GoI itself.<sup>250</sup> This may seem somewhat surprising, particularly given those close (literary) connections between the India Office and many of the British publishers,<sup>251</sup> some of whom claimed they would use the translation right to secure imperial interests (as opposed to their own).<sup>252</sup>

Such respect for the views of those governing locally may surprise those who assume that the British Empire was a mere mapping of British domestic interests over vast swathes of territory. In practice, however, there was a much more complex and subtle division of power. While ultimate decision-making rested with the India Office in Whitehall,<sup>253</sup> deference to

250. Letter from Sir Thomas W. Holderness (India Office) to Llewellyn Smith (Board of Trade) (Dec. 18, 1913) (Macmillan Archive, *supra* note 82, BL Add mss 55005).

I am sending your letter . . . to the Member of the GoI in charge of the department which is concerned with the legislation in question. I am quite sure that the point to which attention is directed in the correspondence will receive his careful, and I might also be bold enough to say his sympathetic, consideration.

*Id.*; see also Letter from Llewellyn Smith (Board of Trade) to Sir T. W. Holderness (India Office) (Dec. 12, 1913) (IOL, *supra* note 7, File 4664: L/PJ/6 with file 3331 of 1913; also in L/PJ/5/88) (“[I]n our reply on September 17th we noted the limitation of translating rights proposed by clause 4, without however making any criticism of such a limitation in the special circumstances of India.”); Letter from Sir Llewellyn Smith, Permanent Sec’y to the Board of Trade, to Sir Fredrick Macmillan of Messrs. Macmillan and Company (Nov. 26, 1913) (IOL, *supra* note 7, File 4664: L/PJ/6 with file 3331 of 1913; also in L/PJ/5/88) (also in Macmillan Archive, *supra* note 82, BL Add mss 55005) (“[T]he proposed limitation of these rights is, I understand, regarded as necessary owing to the peculiar conditions obtaining in India, and . . . we are hardly in a position to criticise the considered decision of the GoI on this point.”); Letter No. 9659 from W.F. Marwood, Sec’y, Board of Trade, to Undersec’y of State for India (Sept. 17, 1913) (IOL, *supra* note 7, L/PJ/5/88).

251. Some of the publishers, particularly OUP, had close relations with the India Office. The India Office was both an important customer of OUP as well as a source of authors (Ilbert, Raleigh). In turn the presses frequently sought to promote the books they published to the Office, and through it to the GoI. Rimi Chatterjee, in her study of OUP, explains how the Press’s decisions were often motivated by imperial political goals, and how in return it called upon the India Office to help secure a market. In an attempt to promote John Strachey’s *Hastings and the Rohilla War*, Phillip Lyttelton Gell, Secretary to the Delegates at OUP wrote to the India Office explaining that the main purpose of the volume was “to correct, as far as possible, the exceedingly erroneous and even dangerous conceptions as to the actions of the English.” For this service, the Indian government purchased a hundred copies. See CHATTERJEE, *EMPIRES OF THE MIND*, *supra* note 60, at 233–34 (citing letter from Phillip Gell to India Office (May 7, 1892) (OUP Archive, *supra* note 49, 55 Secretary’s Letterbooks, folio 410)); *id.* (citing letter from Phillip Gell to Undersec’y of State for India (Apr. 13, 1892) (OUP Archive, *supra* note 49, 55 Secretary’s Letterbooks, folio 310, at 13)).

252. See Letter from Hirtzel to Sir Horace Walpole (1898) (IOL, *supra* note 7, L/PJ/6/491, file 1965). Hirtzel wrote:

[S]ome native firm has just applied to them for permission to translate Ilbert’s ‘Government of India’ into Marathi, not knowing that such permission is unnecessary. Press are afraid that such a book as Ilbert’s if it fell into the hands of an unscrupulous person might be used as a means of spreading disaffection. E.g. a little judicious mistranslation of the parts relating to the laws of sedition (such as proclamation of 1858) might be used by the disaffected. . . . The press are playing with their present applicant and are going to require him to get his translation revised by the official translator before they permit its publication; which they have no legal power to do.

253. The ultimate power was exercised in relation to various other proposals by the Education Department of the GoI at this time, with the rejection of free primary education in 1911–12, and rejec-

the views of the GoI was not uncommon.<sup>254</sup> One factor influencing decisions of the India Office to follow the recommendations of the GoI was the belief that those operating locally had the best information and thus would make the best decisions. Another factor was gradual recognition of colonial autonomy. A third was simply the trust that the colonial administrators, still dominated by those of British origin, would inevitably reflect British values and pay regard to British interests.<sup>255</sup> In the context of copyright reform, for example, British publishers might have assumed that they had little to fear from policy-making at the local level, given their excellent contacts in the GoI.<sup>256</sup>

The latter observation reminds us, of course, that the stance of the GoI should not be equated with the general interests of the people or peoples of

tion of Hardinge's proposal to grant one crore of rupees for technical education. See BASU, *supra* note 43, at 95.

254. JUDITH M. BROWN, *MODERN INDIA: THE ORIGINS OF AN ASIAN DEMOCRACY* 93 (1985).

255. Courtenay Ilbert's starting point, when explaining the translation provision of the 1885 Bill was that "[p]rimâ facie it seems clear that an author should have the exclusive right of translating his work." See also extract from the Civil and Military Gazette (Lahore), July 21, 1885, stating that it was "absurd" to limit the translation right to three years as Ilbert's 1885 Bill proposed (appended to Letter No. 4 from Stephen Wheeler, Editor, the Civil and Military Gazette, to Under-Sec'y to Gov't, Punjab, (Aug. 5, 1885) (Home Dep't Proceedings Oct. 1885, Judicial, Nos. 3-7 app., *Opinions on the Bill to Amend the Law Relating to Copyright*, in PROCEEDINGS OF THE GOVERNMENT OF THE PUNJAB IN THE HOME DEPARTMENT FOR THE MONTH OF OCTOBER 1885)). See also Letter from H.H. Harrison, ICS, Divisional Judge, Delhi, to the Personal Assistant to Chief Comm'r, Delhi Province (Nov. 1, 1913) (IOL, *supra* note 7, L/PJ/5/88, No. 1099).

I entirely fail to understand the principle on which this clause is based. . . . Are we to understand that it is in India alone that translation serve the useful purpose of disseminating knowledge, and is it not somewhat cold comfort to the author, who sees himself deprived of the fruit of his labours, to be told that his loss is in the public gain and that the translation which deprives him of the royalties is serving the useful purpose of disseminating knowledge. . . . I can see no reason why a Canarese translator reproducing an original Persian work should be given greater licenses than a Spaniard translating from Russian, nor why the author of a Persian work should be less generously treated than the author of a Russian.

*Id.*; see also Letter from Herbert Alexander Casson, ICS, Comm'r, Lahore Division, to the Senior Sec'y to the Financial Comm'r, Punjab (Nov. 15, 1913) (IOL, *supra* note 7, L/PJ/5/88, No. 835) (the provisions regarding translation do not sufficiently safeguard the interests of authors).

256. The Macmillan Archives suggest that the publishers had at least one member of the Legislative Council working directly in their interests:

I have gone very carefully into the Copyright question with the Education Department. . . . They have made an alteration viz to give 10 years as the limit instead of 5 and they give 2 years notice also making 12 years. Further the Legal member tells me he himself should regard it as not retrospective. That is all Rabindranath's work published before the passing of the Bill will have 10 years full run from now, not from the date of its publication. . . . I think with these terms there will not be much difficulty: but will you tell me your own opinion. If any alteration were needed it might reach me before September when the Council meets again. I could get through any alteration, if I could make out a good claim. . . . I am inclined however to get simply a ruling from government that no-one *during the next 10 years* will be allowed to translate any of the works which Rabindranath has up till now published.

Letter from C.F. Andrews to Macmillan, Delhi (May 31, 1914) (Macmillan Archive, *supra* note 82, BL Add mss 55005).

India. The government machinery was, after all, comprised largely of Europeans, though there was increased representation from Indians, particularly after the India Councils Act of 1909 considerably expanded the size of the Legislative Council.<sup>257</sup> Nevertheless, as we have already noted, the government consulted widely on the issue of copyright, and responses both to the 1912 circular and the 1913 draft legislation came from a wide range of interests,<sup>258</sup> including persons involved in education and the libraries.<sup>259</sup> On the issue of copyright, at least, the GoI sought out and seems to have valued local opinion.

In coming to the conclusion that it did, namely to modify the 1911 Act as regards translations, the GoI must have been painfully aware that it was not achieving the result that was sought by many of those who responded to the consultations: because the 1914 Act had no impact on works first published in Europe, the limitation of the translation right did not apply to many of the works to which, it was said, India “needed” access.<sup>260</sup> The Indian Legislature did not see itself as being in a position to plot its own course in relation to copyright, ignoring the goal of imperial unity and international standardization. To have done so would have been a significant act of dissent and the GoI had more serious issues to fight with Britain than that of copyright. Moreover, by 1913, some doubts may have existed as to whether deviating from the 1911 Act was as desirable for India as it may previously have seemed. In particular, some Indian authors, such as the

257. The 1909 Act provided for the election of members as well as their nomination. The aggregate size of the Governor General’s Legislative Council was not to exceed sixty. Regulations made under the Act provided for twenty-seven elected members, up to thirty-three nominated members, of whom no more than twenty-eight could be officials, and three were to be non-official persons selected from the Indian commercial community, the Mahomedan community in the Punjab, and the Landholders of Punjab. Thirteen of the elected members were elected by the provincial councils, six or seven by provincial communities of landholders, five or six by provincial communities of Mahomedans, and one each from the Chambers of Commerce of Bombay and Bengal. Women could neither vote nor be elected. For a succinct overview of the growth of consultation and expansion of representation, see BROWN, *supra* note 256, 140–44.

258. Indeed, one respondent observed that “the provisions in the Act which extend the copyright to translations have been subjected to a good deal of adverse criticism in the Indian Papers.” Letter from Rai Bahadur Kunj Behari Thapar, Sec’y, Punjab Public Library, Lahore, to the Comm’r, Lahore Division (Nov. 1913) (IOL, *supra* note 7, L/PJ/5/88).

259. Amongst various such commentators were the Director of Public Instructions, Assam. See Letter from John Richard Cunningham (1876–1942), Director of Public Instructions, Assam, to the Second Sec’y to the Chief Comm’r of Assam (Sept. 7, 1912) (IOL, *supra* note 7, L/PJ/5/88, File 2882/1912, No. 188) (curiously, though, he was not opposed to the translation right); Letter from H.T. Knowlton, Sec’y, Punjab Text Book Committee, to Director of Public Instruction, Punjab (Nov. 11, 1913) (IOL, *supra* note 7, L/PJ/5/88, file 2383); Letter from Rai Bahadur Kunj Behari Thapar, Sec’y, Punjab Public Library, Lahore, to the Comm’r, Lahore Division (Nov. 1913) (IOL, *supra* note 7, L/PJ/6, file 2882 with file 3331 of 1913); Letter from Librarian, Bengal Library, to Sec’y of Gov’t of Bengal (Sept. 11, 1912) (IOL, *supra* note 7, L/PJ/6 file 2882 with file 3331 of 1913).

260. The point was made on a number of occasions. See, e.g., Letter from J.L. Rieu, Sec’y to Gov’t of Bombay, to Sec’y of Gov’t of India (Jan. 22, 1914) (IOL, *supra* note 7, L/PJ/5/88).



Nobel Prize winner, Rabindranath Tagore, stood to gain from recognition of a right to control translation of his works in European markets.<sup>261</sup>

Given that the modification of the translation right could only apply to Indian works, rather than works emerging from elsewhere, the question arises as to what the point was in making the modification. The argument that India needed to minimize any impediment to translation of European works could hardly justify a modification that applied only to Indian works. There seem to be two possible answers to this conundrum.<sup>262</sup>

The first is that the 1914 modification is to be seen as symbolic, a gesture by the GoI indicating that it really wanted to limit the translation right for all works, wherever they were published. As such, it was simultaneously an expression of its limited autonomy and a form of speech: a proclamation of what it would have done had its position been different. The GoI had passed the provision to keep its desired law so far as it could, and to register publicly and indelibly its view of the law most suited to it.

A second interpretation is that limiting the translation right as regards Indian works represented a genuine attempt to improve dissemination of learning in India, by maximizing the translation of *Indian* works within India. Had this been done in the first half of the nineteenth century, it would likely have been regarded by many as a worthless exercise. But the second half of the century witnessed what Abduz Aziz, quoted earlier, referred to as “an intellectual awakening.” Many of the respondents to the consultations of 1912–14 recognized the significant intellectual contributions to science and literature that had been made by Indians (despite the failure of the colonizers to invest significant sums in education). Dulal Chandra Deb, also quoted already, refers to the “skeleton” of Bengali literature created by the likes of Ishwar Chandra Vidyasagar (1820–91),<sup>263</sup> Akshay Kumar Datta (1820–86), poet Bankim Chandra Chatterjee, and the poet and playwright Michael Madhusudan Datta (1824–73), but might as

261. Material in the Macmillan Archive indicates that translation rights were exploited in relation to, *inter alia*, Italian, Polish, Spanish, French, German, Italian. See Letters relating to translation of Tagore (Macmillan Archive, *supra* note 82, BL Add mss 55005). It is evident from Tagore's Correspondence with Macmillan, which acted as both publisher and “agent,” that he left decisions on the grant of translation rights to Macmillan. Macmillan Archive, *supra* note 82 (BL Add MS 55004). On occasions Tagore even complained about unauthorized translations in India. See Rabindranath Tagore to Manager, Macmillan & Co. (Apr. 12, 1914) (informing Macmillan of unauthorized translation of *Gitanjali* published in Punjabi); Rabindranath Tagore to Macmillan & Co. (Apr. 16 1914) (asking the publisher “to instruct [its] agents in India to take steps against publications of unauthorised translation of my English works in Indian vernaculars, the cases of which have not been rare.”).

262. It may be that the 1914 Act cannot be accounted for other than as the illogical outcome of an unsatisfactory compromise or product of bureaucratic momentum.

263. Rimi Chatterjee describes Vidyasagar's *Bornoporichoy* as “probably the most successful Bengali textbook of all time.” Chatterjee, *Macmillan in India*, *supra* note 54, at 156.

well have alluded to equivalent contributions by Swami Viveananda (born Narendranath Datta) (1863–1902), physicist Jagadis Chandra Bose (1858–1937), the chemist Acharya Prafulla Chandra Ray (1861–1944), mathematician and lawyer Asutosh Mookerjee (1864–1924), and Mahendral Sircar (1833–1904), as well as Rabindranath Tagore.<sup>264</sup> Outside Bengal, the last third of the nineteenth century saw the first significant novels being written in the vernaculars.<sup>265</sup> Limiting the scope of a translation right for Indian works would, at the very least, facilitate the production of translations of these valuable works throughout India.

For a number of the supporters of a limited translation right, the dissemination of Indian works throughout India was to be promoted not just because of its effects in terms of disseminating knowledge and learning. As we have already noted, the debates over education in India, though often articulated in “neutral” terms of the spread of objective knowledge, were vehicles by which (sometimes unconscious) political agendas were being effected. The limitation of the translation right as regards Indian works may be seen, in part, as a mechanism for a nationalist agenda. The nationalists had long been promoting the spread of education in the vernaculars and in 1912 Gopal Krishna Gokhale had made a failed attempt to induce the GoI to introduce compulsory elementary education. However, the nationalists were equally conscious that emphasis on the vernaculars had the potential to promote division between different geographical and religious groups. One option was to try and supplant the diversity of vernaculars with a single language, and there were many who were starting to see the potential of Hindi.<sup>266</sup> An alternative, or at least a transitional, policy was to promote translation from one vernacular to another. Widespread translation of Bengali works—particularly fiction—into Urdu, and Marathi works into Tamil, had the potential to create or promote a national consciousness—a national identity and national sentiment.<sup>267</sup> As Rukmini Bhaya Nair has much more

264. See LOURDUSAMY, *supra* note 27; DASGUPTA, *supra* note 26.

265. The earliest major writer of modern Hindi literature was Bharatendu Harischandra. See MOHAMMED SADIQ, *A HISTORY OF URDU LITERATURE* (1964). Sadiq says the first Urdu novelist was Nazir Ahmad (1836–1912). The first good Tamil novel is said to be B.R. Rajam Aiyar's, *Āpattukkittamāna Apavātam allatu Kamalāmbāl Carittiram*, translated in *THE FATAL RUMOUR: A NINETEENTH-CENTURY INDIAN NOVEL* (Stuart Blackburn trans., 1998). Blackburn denies that the Tamil novel can be seen as forging a national identity. *Afterword: Rajam Aiyar and The Fatal Rumour: Making the Novel Familiar*, in *THE FATAL RUMOUR*, *supra*, at 158.

266. See ORSINI, *supra* note 37, at 125–74.

267. Only five years after the Copyright Act, in an article in the *Calcutta Review*, Thakorelal Desai speculated on the significant potential of literature in uniting the disparate cultures of India into a single nation:

[I]n a big country like India, with its immense diversity of race, religion, common habits, language, politics, where innumerable artificial and natural barriers exist between man and man, a more effective means for the spread of common culture and common sympathy than popu-

recently argued, “‘India’ itself is a concept that *presupposes* the act of translation. How does a common ‘idea of India’ make itself available to a Bengali, a Kannadiga or a speaker of Metei? Only through translation.”<sup>268</sup>

Limitation of the translation right as regards Indian works alone can thus be understood positively as part of a nationalist attempt to create the conditions for the generation of a specifically *Indian* culture in a country divided by many languages, not to say religions and traditions.<sup>269</sup> India had already experienced the benefit of the free translation of “national” authors in the dissemination of “national” literature. Sisir Kumar Das describes the period between 1885 and 1911 as one in which the translation of works from one Indian vernacular into another proliferated, stating that “[t]he greatest singular contribution of translators in Indian languages was the creation of an awareness of the variety and richness of Indian literature itself.”<sup>270</sup> For example, *Anandamath*, the 1882 work of Bankim Chandra Chatterjee,<sup>271</sup> India’s first famous novelist, “was widely translated into virtually every major Indian language.”<sup>272</sup> Not insignificantly, the novel contained the song *Bande Mataram* which by 1908 was already regarded virtually as a national anthem for “Mother India”—having been sung by Rabindranath Tagore at a meeting of the Indian National Congress in the 1890s and in protests over the partition of Bengal in 1905.

#### CONCLUSION

In 1914, the Indian government took advantage of the little flexibility it had available to it to try to establish a copyright law suited to its specific linguistic, cultural, and educational needs. The legal norms it really would have wished to adopt were precluded by developments on the imperial and

larising the study of fiction cannot be imagined . . . to hope for an India united by a common bond of sympathy and culture, to hope to make a real nation even out of these materials is not an impossible task. . . . If an extensive use be made of the common human fondness for a story and also of the stage, the task will be accomplished all the sooner.

*Study of Fiction*, 297 CALCUTTA REV. 331 (1919); see also JOSHI, *supra* note 29, at 136.

268. Rukmini Bhaya Nair, *Introduction* to TRANSLATION, TEXT AND THEORY: THE PARADIGM OF INDIA 7, 7 (Rukmini Bhaya Nair ed., 2002).

269. Proprietors and Acting Editor, Ghaffoor Khan, Baluchistan Gazette, to Lieutenant-Colonel C. Archer, Judicial Comm’r in Baluchistan (Nov. 8, 1913) (IOL, *supra* note 7, L/PJ/5/88) (arguing that limitation “will play a great part in giving a wider publicity to the works first published in India.”).

270. 8 SISIR KUMAR DAS, A HISTORY OF INDIAN LITERATURE: 1800–1910, WESTERN IMPACT: INDIAN RESPONSE 231 (reprint 2000).

271. For consideration of whether Bankim Chandra Chatterjee provided a “national” or a “Hindu” consciousness, see Pankaj Rag, *Indian Nationalism 1885–1905: An Overview*, 23 SOC. SCIENTIST 69, 88–91 (1995).

272. JOSHI, *supra* note 29, at 49. Joshi indicates Chatterjee was translated into Marathi, Tamil, Gujarati, Hindi, Urdu, Kannada, Telugu and English. *Id.* at 17; see also DAS, *supra* note 270, at 230 (noting Chatterjee was translated into all major Indian languages except Oriya and Assamese).

international stage in which it had been given only a marginal voice. The Europeans had developed, in the various versions of Berne, a set of international norms well-suited to their own cultural and moral values (particularly romantic authorship and natural law), and which met the demands of their own cultural industries, particularly those of established and reputable book publishers. The decision of Britain to join the Berne regime, while attempting to maintain as much uniformity of law amongst its colonies, inevitably meant that the policy options available to the colonies in general, and the GoI in particular, would be limited. After forty years of governmental and judicial resistance to imperial pressures to recognize a strong translation right, the colony's capacity to act was heavily circumscribed.

There are obvious similarities between the influence of the big British publishers—Macmillan, Longmans, OUP, and their representative the Publishers' Association—and the way in which today's cultural industries have skillfully lobbied for the extension of national, regional, and international copyright standards. Moreover, the parallels between the story told here and the ways in which international obligations circumscribe the freedom of developing nations to tailor their intellectual property laws to their own particular circumstances are so apparent as to need no further elaboration. There has been so much already written particularly about the restrictive effect of TRIPs, ranging from concern over the ways the three-step test in Article 13 limits the ability of (even developed) countries to give effect to their own cultural policies through exceptions to copyright, to downright outrage over the potential impact of western-originating norms governing pharmaceutical patents on access to medicines. The history regarding the development of copyright in India demonstrates, at the very least, that there is nothing new about norms developed in Europe and the west being imposed *globally*, without any great attention being paid to the needs of many of the countries which then have to implement those norms. The history of the translation right in India equally shows there is nothing new about the limiting effects of internationalization on a country's ability to pay appropriate regard to its own circumstances. Countries like India have encountered this disempowerment for a long time. Perhaps most importantly, the history of the translation right in India—even with all its subtlety and complexity—prompts the question whether there is much substantive difference, as far as intellectual property norms are concerned, between a world dominated by colonialism, and the contemporary world of Berne, Paris, WIPO, and the WTO.