The Twilight of the Opera Pirates: A Prehistory of the Exclusive Right of Public Performance for Musical Compositions

Zvi S Rosen

Available at: https://works.bepress.com/zvi_rosen/1/
THE TWILIGHT OF THE OPERA PIRATES:
A PREHISTORY OF THE EXCLUSIVE RIGHT OF PUBLIC
PERFORMANCE FOR MUSICAL COMPOSITIONS

ZVI S. ROSEN*

I.  THE INGERSOLL COPYRIGHT BILL ......................... 1159
   A.  The Original Bill....................................... 1161
   B.  The Amended Bill.................................... 1163
II. THE MIKADO LITIGATION AND ITS ANTECEDENTS ......... 1167
    A.  Pre-Mikado Litigation.............................. 1169
    B.  The Mikado Litigation.............................. 1173
III. THE TRELOAR COPYRIGHT BILL ......................... 1178
     A.  Opposition from the Copyright Leagues.......... 1181
     B.  Pike County Copyright............................ 1186
     C.  The Second Hearing................................ 1188
     D.  Further Opposition................................ 1191
     E.  The Committee’s Inaction........................ 1195
     F.  The Music Publishers.............................. 1197
IV. THE CUMMINGS COPYRIGHT BILL ......................... 1200
    A.  Problems with the Existing Dramatic Law...... 1200
    B.  The 53rd Congress.................................. 1202
    C.  The 54th Congress, 1st Session................... 1206
    D.  The 54th Congress, 2nd Session—Victory......... 1212
V. CONCLUSION—THE ROAD SINCE 1897 .................. 1216

* Law clerk to the Hon. Thomas B. Bennett of the United States Bankruptcy Court
  for the Northern District of Alabama; LL.M. in intellectual property law, George
  Washington University; J.D., Northwestern University School of Law. An earlier version
  of this paper won first prize in the Marcus B. Finnegan Competition for best paper in
  intellectual property law at the George Washington University. The author would like
to thank Prof. Robert Brauneis, who acted as an advisor on this project, as well as the staff
at the George Washington University Law and Gelman Libraries. Thanks are likewise due
to Judge Bennett, Chiwen Kiew, and several others who read through this piece and gave
suggestions and comments. The author would also like to thank, in no particular order,
The National Archives (especially William Davis of the Legislative Archives Division),
Library of the Eastman School of Music, Syracuse University Library, Columbia University
Library, Rutherford B. Hayes Presidential Library, and the other libraries and repositories
that rendered assistance. Last, but certainly not least, the author would like to thank his
parents for all the support they have given his intellectual endeavors. ©2007 Zvi S. Rosen.
The “main source of income” for modern-day songwriters, as well as more traditional musical composers, is the exclusive right to publicly perform their works.\(^1\) This right can be a right of control or simply a right of royalty, depending on how the creator wishes to use it, allowing the work’s creator to judge the best balance of the two. And yet few are aware that this right’s genesis is comparatively recent compared to most copyright protections in America—the right of public performance was not established until over a century after the first copyright statute in 1790.\(^2\) In the intervening century there were several attempts to institute a right of public performance for musical compositions, and the right was finally established in 1897.\(^3\) The story of how that law came to be has not been told until now. This article will trace the history of the development of the right of public performance, and, in doing so, shed light on the currents in the law that led to today’s laws pertaining to public performance, pointing out the central irony of the trajectory of these laws—that in none of the bills granting rights of public performance was the creation of this right for music anything but a secondary concern to the drafters of the bills. Even when the right to exclusive public performance of a musical composition was established by statute in 1897, it went largely without comment. As such, this article ultimately tells more than the tale of the creation of the right, it tells the story of the two failed revisions of the copyright code that would have established the right, along with the amendatory act to the copyright laws which finally did.

Part I of this article describes the path of the Ingersoll Copyright Bill, a somewhat radical (for its day) copyright revision that died in committee in the early days of 1844. While the Ingersoll Copyright Bill was something of an outlier to the primary movement for a right of public performance in music, it represents a first attempt to create any type of statutory right of public performance for musical compositions. Part II describes the litigation over musical works in the 1880s which showed that the common law as it stood was insufficient to protect performing works, and that a legislative solution was needed. Part III describes the rancorous response to the Treloar Copyright Bill, a complete revision to the copyright laws which would have protected public performance of all literary works, including but

---


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

\(^3\) Act of Mar. 3, 1897, ch. 392, 29 Stat. 694 (1897). This being well after the same right for dramatic works, which was established in 1856. Act of Aug. 18, 1856, ch. 169, 11 Stat. 138 (1856).
not limited to music or drama. Part IV describes the origins, path, and success of the Cummings Copyright Bill, a narrow measure which simply aimed to expand the remedies for unlawful public performances of performance works, first for operas and dramatic works, and then for music more generally, under the exclusive right of public performance.

I. THE INGERSOLL COPYRIGHT BILL

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

Ingersoll was born to one of America’s oldest and most prominent families.8 His grandfather came to Philadelphia as presiding judge of the King’s vice-admiralty court, and his father stayed there, supporting the Revolution and later becoming the United States Attorney for the District.9 Ingersoll’s father was also offered a nomination as one of the “midnight judges” (a position which he refused) during the tail end of John Adams’ presidency

---

4 H. JOURNAL, 28th Cong., at 30 (1st Sess. 1843); H.R. 9, 28th Cong. (1844) as amended Jan. 18, 1844 [hereinafter Ingersoll Copyright Bill].
5 WILLIAM M. MEIGS, THE LIFE OF CHARLES JARED INGERSOLL 253 (Philadelphia, J.B. Lippincott Co. 1897) (“He also introduced into the next Congress a bill on the subject of copyright, and had it referred to a special committee, but it seems to have never been reported on.”).
6 The first dramatic performance bill was presented in 1841. S. 206, 26th Cong. (1841). That bill, which did not contain an enforcement mechanism but simply asserted the right, was reported without amendment and tabled. Id.; S. JOURNAL, 26th Cong., at 235 (2d Sess. 1841). After the failure of the Ingersoll Copyright Bill in 1844, a dozen years would pass before the next dramatic copyright bill would be presented. That bill would eventually pass and be enacted into law. H.R. 500, 33rd Cong. (1856), as enacted 11 Stat. 138 (1856).
7 See THORVALD SOLBERG, LIBRARY OF CONGRESS: COPYRIGHT IN CONGRESS 1789-1904, COPYRIGHT OFFICE BULLETIN NO. 8 163-64 (Government Printing Office 1905).
9 Id.
to fill a vacancy created by the Judiciary Act of 1801. Ingersoll’s brother also served in Congress, and the two brothers served together in the 28th Congress. Even by the high standards of his immediate family, however, Ingersoll was uniquely accomplished. He served in Congress from 1812-1814 and 1837-1849, wrote several works of both history and drama, and was an accomplished orator. However, Ingersoll’s reputation waned quickly after his death in 1862, owing in part to his association with pro-slavery factions prior to the Civil War, and partially because he was confused with his son, who had notoriously supported the confederacy. Ingersoll’s fall from the public memory can also be explained as a result of a degree of dilettantism—that he was simply “a gentleman first and a writer and politician second.”

Ingersoll’s experience as an author of dramatic productions helps to explain why he would later author a copyright bill. In 1801, when he was but eighteen years old, Ingersoll’s play Edwy and Elgiva was performed at the New Theatre in Philadelphia. Three decades later he wrote another verse tragedy, Julian, although there is no record of it having been produced. Ingersoll’s ardent nationalism was closely related to his artistic interests, and also plays an important role in understanding why he would advance a bill on musical copyright. In his famous Discourse Concerning the Influence of America on the Mind, Ingersoll made clear that he viewed copyright protections as an integral part of the advancement of the American arts, and that the current copyright statute (at the time, the original 1790 statute with some amendments) was “an inefficient act of Congress, the impotent offspring of an obsolete English Statute.”

10 Robert J. Lukens, Jared Ingersoll’s Rejection of Appointment as One of the “Midnight Judges” of 1801: Foolhardy or Farsighted?, 70 TEMP. L. REV. 189, 199 (1997).
11 Interestingly, the brothers were of different parties. Ingersoll stood opposed to most of Philadelphia society by becoming a Democrat, while his brother followed in the family tradition as a member of the Whig party.
12 See Greenberg, supra note 8; The Arrest of Charles J. Ingersoll, N.Y. TIMES, Aug. 26, 1862, at 8 (stating mistakenly that Charles J. Ingersoll was arrested); The Arrest of Charles Ingersoll, N.Y. TIMES, Aug. 28, 1862, at 1 (“Some of the New-York papers have mistaken this Ingersoll for his father, Charles Jared Ingersoll, the veteran statesman, who died a few months ago.”).
14 MEIGS, supra note 5, at 31-32. The New Theatre was one of the leading theaters in Philadelphia. Id. at 32.
15 BURT, supra note 13, at 371.
arts had not yet matched the greatness of those of Europe, and Ingersoll seemed to feel that there was no reason for that disparity. Indeed, Ingersoll felt that the influence of America on the mind gave American artists a unique advantage, and that such an advantage would need legal protections to lead to the blossoming of American artistic expression.

A. The Original Bill

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

---

17 See generally INGERSOLL, supra note 16.
18 H. JOURNAL, 28th Cong., at 150 (1st Sess. 1844).
20 The members of the select committee were: Robert C. Winthrop (Chair W-MA); John Quincy Adams (W-MA); Edward Junius Black (D-GA); James B. Bowlin (D-MO); Reuben Chapman (D-AL); Joshua Herrick (D-ME); Charles J. Ingersoll (D-PA); Moses G. Leonard (D-NY); Emery D. Potter (D-OH). H. JOURNAL, 28th Cong., at 58 (1st Sess. 1844).
21 CONG. GLOBE, 28th Cong., 1st Sess. 40 (1844).
22 Id.
23 Id.
24 Certainly the Congressional Globe and House Journal give no details as to the content of the Ingersoll Copyright Bill. See id. at 18; H. JOURNAL, 28th Cong., at 30 (1st Sess. 1844). Even on January 3, when the bill was read twice and formally referred, it is unknown how many members were on the floor of the House at the time. H. JOURNAL, 28th Cong., at
Although this article’s focus is on the exclusive right of public performance of musical compositions, it would be unfortunate to not mention briefly the other extraordinary features of the bill in the context of the time in which it arose. The Ingersoll Copyright Bill was a revolutionary bill for its day, a good deal more progressive than the 1870 revision.\(^{25}\) Its view on copyright law was more settled in twentieth century norms than those of the nineteenth century. This progressiveness likely played a role in the bill’s downfall—it was simply ahead of its time.

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

The original bill seems to have intended to establish a right of public performance for musical compositions, but this right was not fully spelled out. The bill’s definitions asserted “that the words ‘dramatic piece’ shall be construed to mean and include every tragedy, comedy, play, opera, farce, or other scenic, musical, or dramatic entertainment,” but did not assert what additional

\(^{150}\) (1st Sess. 1844); CONG. GLOBE, 28th Cong., 1st Sess. 98 (1844).
\(^{25}\) An Act to Revise, Consolidate, and Amend the Statutes Relating to Patents and Copyrights, ch. 230, 16 Stat. 198 (1870) [hereinafter 1870 Revision].
\(^{26}\) Ingersoll Copyright Bill, supra note 4, § 1.
\(^{27}\) Compare id. § 4 with 1831 Revision, supra note 16, § 4.
\(^{29}\) An Act to Amend the Several Acts Respecting Copy Rights, ch. 16, §§ 1-2, 4 Stat. 436 (1831).
\(^{30}\) Ingersoll Copyright Bill, supra note 4, § 3.
\(^{31}\) Id. § 15. Essentially, this may have had much to do with disagreements between Adams and Ingersoll over the role of copyright more generally, discussed below. For a discussion of the right/privilege debate over copyright in American history, see Gillian K. Hadfield, The Economics of Copyright: An Historical Perspective, 38 COPYRIGHT L. SYMP. 1 (1992).
\(^{32}\) Ingersoll Copyright Bill, supra note 4, § 2; 1831 Revision, supra note 16, § 1.
protections this class of intellectual property should have.\textsuperscript{33} Also, the bill noted that a listing in the register of the district court would be “in the case of dramatic or music pieces . . . \textit{prima facie} proof of the right of representation or performance, subject to be rebutted as aforesaid.”\textsuperscript{34} A firm statement of the performance right and an enforcement mechanism would wait until the amendments.

With barely a quorum, the select committee on copyright “internal and external” met on January 5, 1844, in the chamber of the Committee on Foreign Affairs.\textsuperscript{35} At this meeting, the conversation was more about copyright in general than the specific measures mentioned in the Ingersoll Bill, and John Quincy Adams “offered some suggestions as to the natural right of literary property to the principles of which, as entertained by [Adams], Ingersoll immediately declared his dissent.”\textsuperscript{36} Adams then opined apropos of this that Ingersoll’s “principles are radically depraved, and never can harmonize with mine.”\textsuperscript{37} The committee then adjourned for two weeks.\textsuperscript{38}

\textbf{B. The Amended Bill}

At the select committee’s next meeting on January, 19, 1844, the committee had trouble getting a quorum,\textsuperscript{39} owing in part to Ingersoll’s late arrival.\textsuperscript{40} While waiting for a quorum, a second memorial for international copyright was read to the committee by Chairman Winthrop, this one from Nahum Capen of Boston.\textsuperscript{41} The only other event of note at the committee meeting did not bode well for the bill. Representative Black, who had not been at the first meeting of the committee, announced his intent to write a report opposing the bill.\textsuperscript{42} Prior to adjourning, the committee

\begin{flushright}
\textsuperscript{33} Ingersoll Copyright Bill, \textit{supra} note 4, § 2.
\textsuperscript{34} Id. § 6.
\textsuperscript{35} John Quincy Adams, \textit{The Diaries of John Quincy Adams: A Digital Collection} (Jan. 5, 1844), http://www.masshist.org/jqadiaries/doc.cfm?id=jqad44_190. Among the members present were Chairman Winthrop, Adams, Ingersoll, Herrick, and Leonard. \textit{Id}. This location was also doubtless comfortable for Ingersoll, since he was the Chair of the Committee on Foreign Affairs.
\textsuperscript{36} Id.
\textsuperscript{37} Id. It is unclear if Adams was referring to principles related specifically to the bill, or to Ingersoll more generally.
\textsuperscript{38} Id.
\textsuperscript{39} John Quincy Adams, \textit{The Diaries of John Quincy Adams: A Digital Collection} (Jan. 19, 1844), http://www.masshist.org/jqadiaries/doc.cfm?id=jqad44_207 (“It was near 11 before there was a quorum.”).
\textsuperscript{40} Id. Herrick, Chapman, and Potter were absent; Ingersoll did not arrive until after the committee adjourned. \textit{Id}.
\textsuperscript{41} Id.; \textit{NAHUM CAPEN, MEMORIAL OF NAHUM CAPEN, OF BOSTON, MASSACHUSETTS, ON THE SUBJECT OF INTERNATIONAL COPYRIGHT, H.R. DOC. 61 (1844).}
\textsuperscript{42} John Quincy Adams, \textit{The Diaries of John Quincy Adams: A Digital Collection} (Jan. 19, 1844), http://www.masshist.org/jqadiaries/doc.cfm?id=jqad44_207. This report was
agreed to print the Capen Memorial, as well as the amendments offered by Ingersoll to his bill. It is unknown if the committee had actually read the amendments to the Ingersoll Bill (and even if the amendments were read at the meeting, only half the committee members were there).

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

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

Interestingly, this amendment may not have created a new right, strictly speaking, since it only applied to works that had not been “printed and published by the author”—the same right that already existed at common law. Pursuant to this, a provision was set forth to allow manuscript works to be copyrighted solely by their title, “name and place of abode of the author or composer,” and “the time and place” of first performance—while still being kept in manuscript form. As such, unpublished works would have been protected by a statute instead of the weaker common law, but this was not an unrestricted public performance right for published works as we think of it today. Damages for the illicit production or performance of a copyrighted musical or dramatic work pursuant to these provisions would cost two hundred dollars per performance, all profits, or compensatory damages, whichever would be the greatest of the three, with the possibility of injunctive relief. These damages rates were rather high for the time, certainly when compared to the dramatic performance bill of 1856, which set damages at one hundred dollars for the first performance and fifty dollars for each additional one, and did not provide for injunctive relief.
Ironically, the insufficiency of the 1856 Act would be the impetus for the 1897 bill which would finally pass the public performance right for music into law. The amendments also would have expanded the scope of copyright to include works such as sculptures, well before this protection was incorporated into law in the 1870 Revision. Industrial Design (when an item has both functional and aesthetic qualities) and ownership of a work for hire were also included in the coverage of the amendments to the Ingersoll Copyright Bill. In short, the Ingersoll Copyright Bill was tremendously ambitious, bringing together reforms of the next half-century. Its doom would be quick.

At a meeting on February 9, 1844, the select committee was read the Ingersoll Bill with amendments—this may well have been the first time some members of the committee actually knew the contents of the bill, since it had been printed after the last meeting of the committee. John Quincy Adams was unequivocal in his opprobrium for the bill. He felt that it consisted “of an entire but most incongruous system of copyright property; fit for nothing but to multiply litigation, and not even touching upon the subject first referred to the committee, a memorial for international copyright law.” Adams then took the time to read the bill, and was left questioning the necessity of a revision to the domestic copyright laws in the first place. The committee adjourned until a later date, to be set by the Chair. There is no record of the committee ever meeting again.

Ten days later, Ingersoll introduced a memorial from the authors of New York, arguing that the lack of international copyright hurt American authors because they could not compete with cheap editions of foreign authors. It is possible that...


50 See infra Part III.

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

52 Id. §§ 24, 27.


54 Id.

55 Id.

56 Id.

57 Id.

58 Id.

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

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

61 Albert Gallatin et al., Author’s Memorial to the Senate and House of Representatives of the United States (Dec. 28, 1843) (hereinafter Author’s Memorial) (on file with author).
Ingersoll’s introduction of this memorial was an acceptance of Adams’ point—that the committee’s original purpose was international copyright. Larger issues were on the national horizon for Ingersoll to deal with as chair of the Foreign Relations Committee, most notably the annexation of Texas as a slave state, to which Adams was vociferously opposed. Even though Adams was sure to still oppose the Democratic efforts, perhaps Ingersoll felt that Adams’ visceral dislike of him could be tempered.

On New Year’s Day 1844, Ingersoll called on Adams, who noted in his diary that Ingersoll was the “cunningest and most treacherous cat of them all.” Adams’ dislike of Ingersoll is a current that runs throughout much of his diary in his later years. Relations between the two men were once at least cordial, but Ingersoll became one of Adams’ greatest foes on such issues as the gag rule on the discussion of slavery and the enmity between the two men grew to the point of infamy. In the case of the Ingersoll Copyright Bill, a somewhat revolutionary measure sprung on Congress without anything more than passing warning, Adams’ enmity seemed to seal the bill’s fate. Ingersoll’s own Democratic Party was not united behind him, with several representatives not showing up to any meetings, and Representative Black opposing the bill. Meanwhile, Adams opposed the bill, and the chair of the committee was a Massachusetts Whig allied with Adams. There is no record of any support for the bill in the committee; although it is unclear whether it would be recorded in Adams’ diary if there were. Furthermore, Ingersoll was not noted as a particularly skilled legislator, and was well known for a unique and somewhat rambling style of address. Doubtless, all of these factors contributed to the demise of this ambitious bill.

After the failure of the Ingersoll Copyright Bill, the committee on copyright passed out of practical existence. Congress continued to refer petitions and memorials to the committee, but none were ever reported back to be printed—they were simply filed away.

63 MEIGS, supra note 5, at 252 (“[M]any pages of [Adams’] diary are disfigured by the secret outpouring of his venom upon Mr. Ingersoll.”).
64 Landing of Penn, NILES’ WKLY REG., Nov. 12, 1825, at 161 (describing an oration by Ingersoll attended by then President Adams, who was warmly received).
65 MEIGS, supra note 5, at 251.
66 Id. at 89 (“He had not that cool calculation and self-restraint [that] are needed, and his correspondence shows that his friends [found] him rather lacking in the sort of judgment necessary [for] such matters.”).
67 Public Ledger, Lecture on Europe, ATKINSON’S SATURDAY EVENING POST, Nov. 24, 1838, at 3.
68 The House Journal lists the following petitions and memorials (aside from the three
the committee meeting again, and in any case, Congress
recognized that the committee was no longer considering issues of
domestic copyright, and referred to it for the first time as the
select committee on international copyright roughly a month
later. It was not until after the passage of the International
Copyright Bill of 1891 that Congress would reconsider a bill for an
exclusive right of public performance for musical compositions.

II. THE MIKADO LITIGATION AND ITS ANTECEDENTS

In the late nineteenth century the winds of change began to
blow towards a reform of the statutes governing public
performance by increasing penalties for infringing public
performances and by expanding the coverage of the public
performance right to music and opera. In order to understand
the bills which sought to change the laws related to the public
performance of music, it is useful to understand where the laws
stood in the latter nineteenth century, and why a full legislative
revision of the laws was needed in the face of developments in the
theater. That there was no statutory right to exclusive public
performance was fairly clear. However, whether there existed a
common law right was less clear. The most important early case
on this matter was Wheaton v. Peters, which stated:

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

It is clear, there can be no common law of the United
States. The federal government is composed of twenty-four
sovereign and independent states; each of which may have its
local usages, customs and common law. There is no principle
which pervades the union and has the authority of law, that is

---

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

69 Id. at 623.

70 An Act to Amend Title Sixty, Chapter Three, of the Revised Statutes of the United
not embodied in the constitution or laws of the union. The
common law could be made a part of our federal system only by
legislative adoption.\footnote{71}

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

In a line of cases mostly involving the operettas written by
Gilbert and Sullivan, these questions were debated, leading up to
the litigation surrounding Gilbert and Sullivan’s \textit{The Mikado, or The
Town of Titipu},\footnote{76} which finally ended most hopes of protecting
the right of public performance via common law. The cases at the
time mostly involved foreign composers, which was an additional
wrinkle since this was before the International Copyright Act was
passed in 1891.\footnote{77} However, even if the composers had been
American (and indeed the litigation surrounding \textit{The Mikado}
including a valid American copyright), the lack of statutory
protection would have doomed their chances. The litigation in
the 1880s led directly to the legislation of the 1890s, as the
lobbying resources of the copyright advocates were free once the
struggle for international copyright was at an end. Important
theater lawyers from the 1880s found themselves drafting or
assisting the major bills of the 1890s, be it on behalf of the
playwrights of the music publishers. Even more so, this litigation

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

\footnotetext{72}{See generally Authors’ Rights Before Publication—The Representation of Manuscript Plays, 9
AM. L. REV. 236 (1875).}

\footnotetext{73}{Id. at 237.}

\footnotetext{74}{Id. at 239.}

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

4, 2006).} The libretto (text) was by Sir William S. Gilbert, the music was by Sir Arthur
Sullivan, and the promoter behind Gilbert and Sullivan was Richard D’Oyly Carte. \textit{Id.}

\footnotetext{77}{An Act to Amend Title Sixty, Chapter Three, of the Revised Statutes of the United
States, Relating to Copyrights, ch. 565, 26 Stat. 1106 (1891).}
showed those parties who most wanted a right of public performance that the road to protection led not through the courts, but through Congress.

A. Pre-Mikado Litigation

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

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

When the case went to the Massachusetts Circuit Court, the judge expressed his dissent from the earlier precedents and allowed an injunction on the sale of the book. While there is no record of

---

79 Id. Interestingly, one of the leading pirate orchestrations of H.M.S. Pinafore was prepared by none other than the eminent wind band composer, John Philip Sousa. EDWARD SAMUELS, THE ILLUSTRATED STORY OF COPYRIGHT 235 (2000).
80 Browne, supra note 78, at 751 (“Appeals to ‘public opinion,’ ‘the self-respect of the American art-loving community,’ and similar phantasms having been tried in vain with ‘Pinafore,’ Carte decided to adopt different methods with the ‘Pirates.’”; see also “The Pirates” in London, N.Y. TIMES, Apr. 20, 1880, at 2 (stating that “no books of words [were] printed ... [as] a precaution in the interest of the American copyright.”).
81 Browne, supra note 78, at 751.
82 Id.
85 Browne, supra note 78, at 752; The Pirates of Penzance in Court, BOSTON DAILY GLOBE, Apr. 24, 1880, at 2; Current Topics, 22 ALB. L.J. 222 (1880). Interestingly, the Boston licensee of Gilbert and Sullivan had put together an intricate scheme by copyrighting the title page, but this was something of a folly, since it only gave him the right to write his own Pirates of Penzance, not any more protection to Gilbert and Sullivan’s Pirates of Penzance. Music, N.Y. TRIB., Mar. 12, 1880, at 4.
86 White, Equity Case No. 1391 (Final Decree); Goulland, Equity Case No. 1392 (Final Decree); Browne, supra note 78, at 752-53. The judge was Judge Lowell, the only full-time circuit judge (this being before the creation of the circuit courts of appeal, there was one full-time circuit judge, along with district and Supreme Court judges riding circuit). Id. The case was unreported as no written decision was published, but case files have survived.
the reasoning involved, it seems likely that the judge was not swayed by the aforesaid machination—he simply felt that publication had not occurred by the performance in a foreign nation. The ruling in this case would not, however, be uniformly applied. In a case involving the comic opera *Billee Taylor* a year later,87 Judge Thomas J. Morris of the Maryland Circuit Court reaffirmed the line of cases that held that one could perform one’s aural recollection of another’s manuscript performance piece.88 *Billee Taylor* was also a Carte production, although it was not written by Gilbert and Sullivan, and had a strong impact on Carte’s legal team and strategies.89 This conflict of unpublished opinions between the Massachusetts and Maryland Circuit Courts would soon resolve themselves in published opinions. Even though the Massachusetts Circuit Court carried more prestige, these splits made the law more unsettled than ever.90

The next case to be decided on this issue, *Thomas v. Lennon*, would be a bit different from other cases in this line, in that it involved pure music, specifically the “Redemption” cantata of the noted French composer Charles Gounod.91 In this case the defendant, Lennon, sought to perform the piece from his own reconstruction of a piano score sold in England, which had markings indicating which orchestral elements were used at certain points.92 This was a case of first impression, because pirating a work of this abstract and “exalted” type had not been attempted before.93 The orchestral score of the Redemption had never been printed anywhere (thus there was no foreign copyright issue), and was assigned to Theodore Thomas in Boston for a period of “two years at least,” who planned to perform it with the Handel and Haydn Society of Boston.94 Lennon had meanwhile engaged someone “intimately acquainted with Gounod and his style” to reconstruct a full score of the cantata.95

---

87 “Billee Taylor” in Court, WASH. POST, Apr. 16, 1881, at 1.
88 Ford v. Rice, Equity Case No. 65 (C.C.D. Md. 1881); Browne, supra note 78, at 753; “Billee Taylor” in Court, supra note 87, at 1.
89 Browne, supra note 78, at 753.
90 Edward Marston, Editorial, Copyright in Music, N.Y. TRIB., Jan. 25, 1883, at 5.
92 Id. at 850-51.
93 Browne, supra note 78, at 753-54.
94 *The “Redemption” Difficulty*, MUSICAL VISITOR, A MAGAZINE OF MUSICAL LITERATURE & MUSIC, Feb. 1883, at 39. This litigation may have influenced the decision of the Handel and Haydn Society to submit a petition in favor of international copyright law (a copy of the petition of the Music Teachers Association of America) a few years later. Petition of Handel and Haydn Society of Boston to the Honorable Members of the House of Representatives, in Congress Assembled (July 3, 1884) (on file with author).
95 *The “Redemption” Difficulty*, supra note 94, at 39. Lennon did try to acquire the American rights legitimately, but negotiations were already on with Thomas. *Thomas*, 14 F. at 851.
The *Thomas v. Lennon* decision was a bit of a surprise to those unaware of the *Pirates of Penzance* decision, since no shift in the case law had been published. The Massachusetts court held that since the full score of the *Redemption* was not published, it remained private property, despite having been performed internationally. Additionally, the court held:

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

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

It was just as well that a new paradigm was found for protecting orchestrations, since shortly thereafter the *Carte v. Ford* case (the *Iolanthe* case) involving another Gilbert and Sullivan operetta, would be brought in the Maryland Circuit Court and decided in favor of the pirate, casting doubt on the usefulness of the *Pirates of Penzance* and *Redemption* cases. The *Iolanthe* case raised nearly identical issues to *Pirates of Penzance*, but the court in *Iolanthe* disagreed completely with the holding of both *Pirates of Penzance* and *Redemption*, while siding with its own precedent in the

---

96 *Thomas*, 14 F. at 852.
97 *Id.* at 853.
98 Ultimately, Lennon decided to follow the principle everyone agreed on, that the European-published piano-score could be freely performed, and thus produced *The Redemption* with two pianos and an organ, “to the eternal disgrace of musical art.” Browne, *supra* note 78, at 755.
Billee Taylor case:

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

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

Needless to say, the Iolanthe decision was not encouraging, and for their next works, the lawyers for Gilbert and Sullivan would try one last legal scheme to achieve remuneration and justice for their clients by using a combination of common law and statutory protections. Pursuant to the Redemption decision, a plan was developed to protect the works of Gilbert and Sullivan from pirated performances.102 A Boston musician and composer, “Mr. George Lowell Tracey, was engaged and despatched to London” to create a piano score of the next Gilbert and Sullivan operetta, Princess Ida.103 Tracey would then legally copyright the piano arrangement in the United States as an American citizen, and thus Gilbert and Sullivan would have protection against any unauthorized performance whatsoever.104 Meanwhile, the actual orchestral score was kept in manuscript, under lock, key, and guard.105 Through a slight quirk in the copyright laws, the score could be copyrighted in both England and the United States, provided the author was an American citizen who was present in England on the day of publication, and that publication occurred

100 Id. at 442 (internal citations omitted).
101 Id. at 444-45.
102 Browne, supra note 78, at 755-56.
103 Id. at 756.
104 Id.
105 See id. at 756-57.
in both nations on the same day.\textsuperscript{106} This being done properly, the lawyers for Gilbert and Sullivan waited for a battle which never came—\textit{Princess Ida} was a flop, and was not pirated.\textsuperscript{107} However, the subsequent success of \textit{The Mikado} provided Gilbert and Sullivan’s lawyers with the opportunity to use their newly devised scheme in the battle they had been awaiting.

B. The Mikado Litigation

\textit{The Mikado} was first performed in London on March 14, 1885, to great success and acclaim.\textsuperscript{108} While perhaps many had hoped otherwise, it was no surprise that the first American production was indeed a pirated one, opening at the Museum in Chicago on June 29, 1885, competing with a twenty-one-inch tall Mexican woman and a two-headed cow for the public’s affections at that theater.\textsuperscript{109} The pirated production of \textit{The Mikado} did not attract much legal notice, perhaps because the theater’s other acts gave the production a distinct air of disrepute, and also because it was the common consensus that “the people on the stage could neither sing nor act.”\textsuperscript{110} Indeed, the performance was of such poor quality that the \textit{Chicago Daily Tribune} listed as among the aggrieved parties of the piracy the “intelligent public.”\textsuperscript{111} A second pirated performance of \textit{The Mikado}, also in Chicago, opened at Chicago’s Grand Opera House on July 6, using some cast members from the Museum production.\textsuperscript{112} The players were badly under-rehearsed, but reviewers thought the show had some potential given proper rehearsal.\textsuperscript{113} This performance was produced by Sydney

\textsuperscript{106} See id. at 756.

\textsuperscript{107} Id. For a dramatization of the failure of \textit{Princess Ida} and subsequent success of \textit{The Mikado}, see \textsc{Topsey-TurvY} (USA Home Entertainment, a Division of USA Films, LLC 2000).

\textsuperscript{108} \textit{Stage History of “The Mikado,”} N.Y. \textsc{Times}, May 29, 1910, at X7.

\textsuperscript{109} Id.

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

\textsuperscript{110} \textit{Notes of the Stage}, N.Y. \textsc{Times}, July 1, 1885, at 4.

\textsuperscript{111} \textit{The Museum—“The Mikado,”} CHI. \textsc{Daily Trib.}, July 2, 1885, at 5. From the review, it sounds like an outright butchering of the work. Amusingly, later on the production would come to be regarded decently. See \textit{“The Mikado,”} CHI. \textsc{Daily Trib.}, Oct 6, 1885, at 5.

\textsuperscript{112} \textit{Stage History of “The Mikado,”} supra note 108. Sir Arthur Sullivan apparently passed through Chicago at this time, and considered the sub par performance “extremely annoying.” \textit{Sir Arthur Very Wroth}, N.Y. \textsc{Times}, July 14, 1885, at 1.

\textsuperscript{113} See \textit{Mr. Hamlin and the Production of “The Mikado” at The Grand,} CHI. \textsc{Daily Trib.}, July 7, 1885, at 5. Apparently the show opened an hour and a half late because Rosenfeld had
Rosenfeld, who had brought much of his company from New York to test out the pirated show before bringing it back to New York.114 Apparently, Sir Arthur Sullivan and his associates did not care at all about the shenanigans in Chicago.115 The pirate productions in New York, however, would be a different question entirely.116

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

114 Amusements in Chicago, N.Y. TIMES, July 7, 1885, at 2 (“The performance itself was more like a rehearsal than anything else.”). The intent to bring the show to New York was announced the next day. Amusement Notes, N.Y. TIMES, July 8, 1885, at 4. Interestingly, Rosenfeld claimed a moral obligation to which he planned to pay a royalty, even if there was no legal obligation. “The Mikado,” BOSTON DAILY GLOBE, July 2, 1885, at 5. There is no record of any such payment being made.
116 Id. There were many smaller legal tussles in America over The Mikado, but they pale both in scale and historical impact. Since the focus of this paper is not on the history of this operetta in America, only the New York litigation is discussed.
117 Gossip of the Theatres, N.Y. TIMES, July 12, 1885, at 3.
118 Actor, Manager, and Play, N.Y. TIMES, July 19, 1885, at 3.
119 “The Mikado” Enjoined, N.Y. TIMES, July 21, 1885, at 1 (giving a full account of the court proceedings).
120 Gossip of the Theatres, N.Y. TIMES, July 16, 1885, at 3.
121 Stage History of “The Mikado,” supra note 108. This tactic was one of the common ways of avoiding injunctions which the Cummings Bill meant to stop. See infra Part IV.
123 Id. It most likely did not help the producers of this production that the judge who issued the injunction had to be called back from Vermont to hold the producers in contempt. Stephen Fiske, Dramatic Feuilleton, ART AMATEUR, Sept. 1885, at 68.
124 Learning a Little About Law, N.Y. TIMES, July 30, 1885, at 5.
Abrahams as a pawn;\footnote{Ignorance as a Defense, N.Y. TIMES, Aug. 6, 1885, at 8. Abrahams claimed that he did not know of the injunction, and would have never let the show go ahead if he had.} Rosenfeld was fined $750 and Abrahams was fined $250.\footnote{Guilty of Contempt of Court, N.Y. TIMES, Aug. 8, 1885, at 8.} Rosenfeld was unable to pay, and thus spent a short period in jail.\footnote{Sydney Rosenfeld in Jail, N.Y. TIMES, Aug. 9, 1885, at 5.} This production was not permanently forestalled, as it was picked up by Harry Miner,\footnote{Later, Representative Miner denounced the play pirates. See infra note 376.} who paid the bond to lift the injunction, and subsequently presented \textit{The Mikado} at his People’s Theater.\footnote{Sydney Rosenfeld in Jail, supra note 128; Stage History of “The Mikado,” supra note 108.} Meanwhile, Rosenfeld languished in the Ludlow Street jail for his short sentence, where he was tormented by street organ players playing the music from \textit{The Mikado} outside his window.\footnote{Stage History of “The Mikado,” supra note 108. By this time Rosenfeld was “head over ears in debt,” and indeed had been for some time. \textit{Music, CHI. DAILY TRIB.}, Aug. 2, 1885, at 20.}

A second line of litigation, while perhaps less packed with incident, was ultimately more important to the development of the law. While all the above was going on, a more reputable pirate production of \textit{The Mikado} was being prepared by the Duffs, to be performed shortly before the October 1 production of the official version of \textit{The Mikado}, produced in America by Stetson.\footnote{The Gossip of the Stage, N.Y. TIMES, June 18, 1885, at 3.} The Duffs had been almost set to do the official production,\footnote{In fact, it seems that it was almost a done deal at one point. See Mr. Duff and “The Mikado,” N.Y. TIMES, Apr. 23, 1885, at 4.} and when the deal fell through they lacked any substitute material to put on their stage.\footnote{See the Gossip of the Stage, N.Y. TIMES, May 28, 1885, at 3.} The Duffs had previously produced the official production of \textit{Iolanthe}, and it is quite possible that they only turned to piracy out of desperation over an empty theater, after they failed to reach an agreement on the terms of a license. The Duffs said that Carte insisted on impossible terms,\footnote{Id. These terms included sixty percent of the gross receipts, that they provide the orchestra and theater, and that there be a right of cancellation for Carte upon notice if proceeds were below a certain level.} while Carte said that the Duffs had walked away from a very reasonable offer after extensive negotiation.\footnote{D’oyly Carte Excited, BOSTON DAILY GLOBE, June 29, 1885, at 4.} Whatever the case, the younger Duff simply went to several performances of \textit{The Mikado} in England and made arrangements to ship costumes from there back to New York, while his father made arrangements to prepare an orchestration of the published piano score.\footnote{Id. Amusingly, the senior Duff claimed that he was doing this with “no thought for the profit,” and simply to survey the public’s attitude towards theatrical copyright, leading to the sarcastic comment “thoughtful Manager Duff!” \textit{Notes and News, CHI. DAILY TRIB.}, July 5, 1885, at 6.} As was
commonly noted, Gilbert’s book for The Mikado was published in Britain, and in any case anyone in the United States could copy it since it was the work of a foreigner. Since the piano score was copyrighted by an American, the question was thus freed from the international copyright frame and presented simply: could one legally prepare (and perform) a performing orchestration of a copyrighted piece of American music?

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

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

They were well advised that, until publication of their manuscript, their exclusive right to multiply copies of their work and control its production upon the stage would be intact, but that after publication this right would become public property unless saved by statutory protection. Common-law rights of authors run only to the time of the publication of their manuscripts with their consent. After that the right of multiplying copies, and, in the case of a dramatic work, of representation on the stage, by the rule of the common law is abandoned to the public. It is immaterial whether the publication be made in one country or another. Such rights of

138 Echoes from the Stage, Chi. Daily Trib., June 7, 1885, at 9-10 (noting that the publication of the libretto in England meant that Carte and Stetson had to stand on the Redemption case alone for their copyright).
139 The Threatened “Mikado” Litigation, N.Y. Times, June 28, 1885, at 1.
140 See infra Part IV.
141 Actor, Manager, and Play, N.Y. Times, July 26, 1885, at 3.
142 See Gossip of the Theatres, supra note 117.
144 Id.
authors as are saved by statute are not recognized extraterritorially. They can only be enforced in the sovereignty of their origin.146

The court continued, having noted that since The Mikado had been performed in London, it was thus only protected by statute, which does not grant a right beyond mere copying of the book.147 Despite all the constructs seen in the Redemption and Pirates of Penzance cases, the court realized that American law contained no protection for the public performance of a musical composition:

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

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

Despite their victory in the courts, the Duffs lost the larger struggle. Carte pulled out all the stops to upstage the Duffs’ performance at the Standard Theatre, by bringing in a British touring company to play at the Fifth Avenue Theatre,152 to be led by Sir Arthur Sullivan himself, only several days before the Duffs’

---

146 Id. at 184. These last three sentences have been questioned by Elihu Inselbuch, First Publication Abroad—Intensive, Divestitive, or Inoperative? A Territorial View of Copyright, 35 FORDHAM L. REV. 477, 492 (1965). In this article, Inselbuch notes that this dicta was unsupported, and quite possibly incorrect. However, Inselbuch does not dispute the case’s actual holding, since the statutes were as they were at the time. Id. at 493.
147 Carte, 25 F. at 185 (“Strictly, the only invasion of a copyright consists in the multiplication of copies of the author’s production without his consent. Any other use of it, such as for the purpose of public reading or recitation, is not piracy.”).
148 Id. at 187.
151 Carte, 27 F. at 865.
152 D’oyly Carte and His Company, CHI. DAILY TRIB., Aug. 23, 1885, at 19 (discussing how the company was brought over in near-complete secrecy).
production of *The Mikado* would open. The Duffs’ production could only pale in comparison, and the Carte/Stetson production was a rousing success. Sullivan gave a speech before the performance, against his custom, remarking:

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

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

### III. THE TRELOAR COPYRIGHT BILL

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

---

153 *Amusements*, N.Y. TIMES, Sept. 25, 1885, at 5.
154 *John Duff’s Mikado*, BOSTON DAILY GLOBE, Aug. 23, 1885, at 2; “*The Mikado*,” CHI. DAILY TRIB., Aug. 30, 1885, at 19 ("The result [of the Duff production] was disappointing in everything save the scenery.").
155 “*The Mikado* a Success,” BOSTON DAILY GLOBE, Aug. 20, 1885, at 2.
156 *Amusements*, supra note 153.
157 *Foreign Copyright*, CHI. DAILY TRIB., Aug. 2, 1885, at 20.
158 Browne, supra note 78, at 760.
159 Cummings Copyright Bill, S. 2306, 54th Cong., (1896) [hereinafter Cummings Copyright Bill].
160 Treloar Copyright Bill, H.R. 5976, 54th Cong., (1896) [hereinafter Amended Treloar Copyright Bill].
William M. Treloar, a composer, music teacher, and music publisher from Missouri.\textsuperscript{161} Treloar only served one term in Congress,\textsuperscript{162} and his very election was something of a fluke. The Democratic incumbent in the Ninth District of Missouri, Champ Clark, described both as an “orator”\textsuperscript{163} and “weird,”\textsuperscript{164} was popular, and considered to be a fairly safe bet to maintain his seat in Congress. Treloar was the fifth person offered the Republican nomination,\textsuperscript{165} lending credence to the notion that no one else wanted to run in a race perceived as unwinnable. Treloar’s own family gave him little chance of winning, and his friends felt that he was being taken advantage of by the Republican Party.\textsuperscript{166} Treloar himself was so sure of losing that he did not make contingency plans for his teaching duties in case he won.\textsuperscript{167} The Missouri Democrats were so sure of Clark winning that they stayed home, and, in unusual numbers, didn’t bother to vote.\textsuperscript{168} Yet, in the end, a man who was condescendingly regarded by many as a simple piano-tuner was now a member of Congress by a margin of 132 votes,\textsuperscript{169}—part of the Republican landslide of 1894.\textsuperscript{170} The \textit{Cincinnati Tribune} noted Treloar’s background with amusement, commenting that “Mr. Treloar ought to be a great favorite in Washington society. He has been a director of amateur comic operas.”\textsuperscript{171}

Treloar was in fact somewhat more reputed than some suggested before coming to Congress. While not a composer who is well-remembered today, he was a fairly popular one, claiming to have sold over 50,000 copies of his “Sleigh Ride” in 1890 alone,\textsuperscript{172} and more than 250,000 copies by 1908.\textsuperscript{173} Treloar’s pieces may

\textsuperscript{162} Id.
\textsuperscript{163} From Missouri, ROLLA NEW ERA, Mar. 16, 1895, at 2; see also From the Press Gallery, A Missouri Music Teacher, WASH. POST, Apr. 12, 1896, at 21 (Champ Clark was “undoubtedly one of the best extemporaneous speakers Congress has known in many a day.”).
\textsuperscript{164} Pike County Copyright, N.Y. TIMES, Mar. 5, 1896, at 4 [hereinafter Pike County Copyright I].
\textsuperscript{165} From Missouri, supra note 163.
\textsuperscript{166} Good Stories for All, BOSTON GLOBE, Nov. 29, 1894, at 4 (discussing Treloar and his campaign in detail).
\textsuperscript{167} Id.
\textsuperscript{168} Id.
\textsuperscript{169} Id. Champ Clark was magnanimous in defeat, noting that Treloar was in fact a well-respected professor of music and composer. From Missouri, supra note 163. Treloar was likewise generous after Clark replaced him in the next election. W.L. WEBB, CHAMP CLARK 83 (1912).
\textsuperscript{170} Faces Will Be Missed, Champ Clark’s Revenge, WASH. POST, Nov. 9, 1896, at 1.
\textsuperscript{171} People in General, WASH. POST, Dec. 6, 1894, at 4 (quoting the Cincinnati Tribune). This is of course more a comment on Washington than Treloar.
\textsuperscript{172} The Sleigh Ride, THE CHAUTAUQUAN, Mar. 1891, at 857.
\textsuperscript{173} Peter A. Munstedt, Kansas City Music Publishing: The First Fifty Years, 9 AM. MUSIC 353,
have been gimmicky, calling for all sorts of extraneous implements to complement the piano, but they were not ignored.\textsuperscript{174} Treloar was also a professor of music at Hardin College ("the Vassar of the west") and several other colleges, as well as the public schools.\textsuperscript{175} Given this background, Treloar’s interest in a copyright bill for composers is rather obvious. And yet to assume that his motivations were purely self-serving in introducing his copyright bill is perhaps overly cynical. As he explained in a letter to Robert Underwood Johnson:

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

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

With these good intentions, the Treloar Bill was introduced into Congress in its first form on February 13, 1896, a little over two months after the start of the session.\textsuperscript{177} It seems likely that introducing this copyright bill was one of Treloar’s primary objectives in Congress, explaining his appointment to the Committee on Patents, presumably on his request.\textsuperscript{178} The Treloar

\textsuperscript{171} 371 (1991) (citing advertisement on back cover of sheet music, C.H. MEIERS, MID THE MAPLES NEAR THAT COTTAGE FAR AWAY (Treloar Music Co. 1908)). These figures, however, should probably be taken with several truckloads of salt.
\textsuperscript{174}  Id.
\textsuperscript{175}  Id at 370. Nor did he only teach music. \textit{Coming to Congress}, WASH. POST, Nov. 10, 1895, at 11 ("He also taught English, and his knowledge in this respect may give him an advantage over . . . his fellow Congressmen.").
\textsuperscript{176}  Letter from Representative William M. Treloar, to J.N. Johnson, Esq., Sec’y, Am. Copyright League (Feb. 20, 1896) (on file with the Robert Underwood Johnson Papers, Manuscripts & Archives Div., N.Y. Pub. Library). Although intended for Robert Underwood Johnson, this letter was addressed to "J.N. Johnson," a rather startling bit of ignorance (given the importance of Johnson, discussed infra), suggesting that Representative Treloar was wading into currents of which he was not even dimly aware.
\textsuperscript{177}  Treloar Copyright Bill, \textit{supra} note 160; Amended Treloar Copyright Bill, \textit{supra} note 160.
\textsuperscript{178}  Notice from J. Browning, Chief Clerk of the House of Representatives, Dec. 21, 1895
Copyright Bill was referred to that committee, as expected. From that point the bill was referred to a subcommittee for two weeks, to be followed by a hearing before the full committee.

A. Opposition from the Copyright Leagues

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

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

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

The first objection was that the bill limited copyright solely to citizens of the United States, effectively a repeal of the 1891 International Copyright Act.191 This objection was based on the fact that certain sections specifically stated that only United States citizens could receive copyrights under certain conditions, or required a United States address for a copyright.192 The bill’s
critics recognized that the bill did not directly abrogate the 1891 Act, but were troubled by the ambiguity of these provisions. It seems likely that ambiguity regarding the bill’s treatment of international copyright emanated from a drafting error, and abrogation of the 1891 Act was not part of the substantive intent of the bill.\footnote{Editorial, \textit{Copyright Remade}, \textit{Publisher’s Wkly.}, Feb. 29, 1896, at 386-87. This editorial included a detailed explanation of the bill and then its (lengthy) full text—for many it must have served as their primary point of reference for the bill. While critical of the bill, the piece was much more measured in tone than what would soon come.} For starters, a manufacturing clause would make little sense if foreign copyrights in general were outlawed—it would merely prohibit American authors from having their works printed overseas.\footnote{While this may seem an attractive option nowadays, in the era of cheap shipping and cheap third world labor, this was not the case at that time, making the option most unattractive.} Looking at the textual treatment of foreign copyright in past laws and bills also makes little sense. Both the 1831 and 1870 revisions had specific clauses denying copyright to foreign authors. Especially in light of the passage of the 1891 copyright bill, an explicit revocation of the 1891 Act would seem necessary, but none is found in the Treloar Bill. Section 32 of the Treloar Bill was very quickly amended, so that by the time of the congressional hearings on the bill, a little more than a month after it was introduced, it included the reciprocity provisions for international copyright in the 1891 Act.\footnote{\textit{Treloar Copyright Bill: Hearing on H.R. 5976 Before the H. Comm. on Patents, 54th Cong., 1st Sess. (1896) \textit{[hereinafter Treloar Hearing].}}}

While the first objection to the Treloar Bill was minor, and based only on a drafting error, the second objection to the resolution, that the bill extended the manufacturing clause of the copyright laws to include periodicals, maps, charts, dramatic or musical compositions, engraving, cuts, or prints, would come to be the main concern of those who opposed the Treloar Copyright Bill.\footnote{\textit{See Letter from Albert Smith, Boussod Valadon & Co., to R.U. Johnson, Esq., Sec’y, Copyright League (Feb. 19, 1896) (on file with the Robert Underwood Johnson Papers, Manuscripts & Archives Div., N.Y. Pub. Library) (calling the manufacturing clause the most troubling part of the bill).}} The 1891 International Copyright Act contained a clause requiring that all books, chromographs, photographs, or lithographs be printed from type set in the United States or from plates or negatives or drawings made in the United States.\footnote{An Act to Amend Title Sixty, Chapter Three, of the Revised Statutes of the United States, Relating to Copyrights, ch. 565, 26 Stat. 1106, 1107, § 4956 (1891).} Whether that clause should be broadly construed to include music or narrowly construed to specifically exclude music was debated for several years. Shortly before the Treloar Bill was introduced, the First Circuit Court of Appeals upheld a decision of the Circuit
Court of Massachusetts, which firmly established that this provision should be read narrowly to exclude music.\textsuperscript{198} The Circuit Court’s decision explained the rationale in greater detail, noting that the specificity with which lithographs are included implicitly excludes music from the manufacturing clause.\textsuperscript{199} Indeed, those who had proposed the manufacturing clause amendment to the 1891 Act (the typesetters) “had no interest in including the printing of music in [the] amendment. The music people took no steps to help themselves, nor to help [those who pushed for the manufacturing clause more generally].”\textsuperscript{200} Furthermore, musical compositions and other items were included in the draft of the Frye amendment which put the manufacturing clause into the bill, but that line was crossed out before it was submitted.\textsuperscript{201}

The larger publishers (exemplified by G.H. Putnam) were against any manufacturing clause, either in 1891 or 1896.\textsuperscript{202} Putnam had “accepted the manufacturing condition at the time only because we were all agreed that there was no other way in which a beginning of International Copyright could be arrived at.”\textsuperscript{203} However, he also recognized that the existence of a manufacturing clause for books significantly weakened the hand of the members of the book industry in debate, since the members of the music or other industries could simply retort that the book industry already had a manufacturing clause—why should the music publishers not enjoy the same?\textsuperscript{204} Recognizing that opposing the right of the music publishers to seek a similar right could backfire, Putnam instead argued that “[the music publishers] can do what you choose with your own amendment,

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

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


\textsuperscript{201} R.U. Johnson, The Status of Music Under the New Law, 15 The Critic: A Wkly. Rev. of Literature & The Arts, May 9, 1891, at 256.


\textsuperscript{203} Id.

but you have no right to assume for yourselves the responsibility of ‘revising’ our whole Copyright law.” This had the additional advantage of not antagonizing protectionists (like Representative Draper) who might ordinarily support extending the manufacturing clause.

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

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

The fifth objection to the Treloar Bill was whether the sometimes competing and sometimes complementary Cummings Copyright Bill would better protect public performance rights, since the Cummings Bill came unburdened with the other provisions. Although this may have been true when this resolution was passed, since both bills as introduced contained identical provisions for public performances, the public performance

---

206 Id.
207 A New Copyright Bill, supra note 190.
208 Id.
209 Treloar Copyright Bill, supra note 160, § 27; Amended Treloar Copyright Bill, supra note 160.
210 An Act to Amend Section Forty-Nine Hundred and Sixty-Five, Chapter Three, Title Sixty, of the Revised Statutes of the United States, Relating to Copyrights, ch. 194, 28 Stat. 965 (1895). This Act capped damages from individual infringements and total liability lower than they had been before, in part to protect newspapers from photographers who would extort funds on the difficult-to-disprove charge that the photograph printed in the newspaper was copyrighted by the photographer. Id. § 4965.
211 See A New Copyright Bill, supra note 190. The bills were S. 425, 54th Cong. (1895) and H.R. 1243, 54th Cong. (1895).
212 See A New Copyright Bill, supra note 190.
213 Compare Treloar Copyright Bill, supra note 160, § 28 with Cummings Copyright Bill, supra note 159, § 4966.
language of the Treloar Copyright Bill would evolve so as to provide a broader scope of protection of public performances, including public performances of literary works, even by mechanical means. However, the Treloar Bill would be brought back into lockstep with the Cummings Bill in the end, negating this advantage.

B. Pike County Copyright

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

Two of the nastiest editorials came in the New York Times, both condescendingly entitled Pike County Copyright. The first editorial appeared on March 5, 1896, and seemed to know little, if anything, about Representative Treloar. The simple argument from the first Pike County Copyright editorial was that the Ninth District of Missouri was a remote and uncosmopolitan place, and that the representative from such a district must be ignorant of the will of his uncosmopolitan constituents to introduce a bill relevant to cosmopolitan concerns. The editorial further commented that Treloar stood equally ignorant of current copyright law. The editorial then pointed out, in what was probably not a coincidence, those flaws set out in the resolution of the copyright leagues against the Treloar Bill.

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

---

214 Amended Treloar Copyright Bill, supra note 160, § 16.
215 This was because they were seen as protecting American printers and typesetters from market pressures that could be brought by printers abroad. However, some of the bill’s opponents, including Representative Draper, were ordinarily fairly ardent protectionists.
216 Pike County Copyright I, supra note 164. Pike County Copyright, N.Y. TIMES, Mar. 10, 1896, at 4 [hereinafter Pike County Copyright 2]. Pike County was associated with Mark Twain’s stories of backwoods Missouri. MARK TWAIN, ADVENTURES OF HUCKLEBERRY FINN, at Explanatory Preface (Emory Elliot ed., Oxford University Press 1999) (1884).
218 Pike County Copyright I, supra note 164.
219 Id.
220 Pike County Copyright 2, supra note 216.
composers:

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

... . . .

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

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

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

One and all, however, demanded, with Mr. Johnson, that those portions of the bill which seek to alter the present provisions of international copyright be stricken out, and the law as it is now be allowed to stand. And I may say that we had such assurances from individual members of the Patent Committee, and especially from Mr. Treloar himself, as lead us to believe that that demand will be respected, and that the bill when reported will make no change in the present none too liberal provisions for international copyright.224

221 Id. Audrain is the county in Missouri, bordering Pike County, from which Treloar hailed. See id.
222 See Hearing on the Treloar Bill, WASH. POST, Mar. 5, 1896, at 4; Copyright Matters: Hearing on the Treloar Copyright Bill, PUBLISHER'S WKLY., Mar. 14, 1896, at 474. As was the case with most hearings at the time, there exists no print of the content of the hearing.
223 See Hearing on the Treloar Bill, supra note 222; Copyright Matters: Hearing on the Treloar Copyright Bill, supra note 222.
Nonetheless, Johnson presented the resolutions of the copyright leagues, and especially noted the concerns regarding the possible revocation of the 1891 Act and the opposition to extending the manufacturing clause. Despite the support for the Treloar Bill, Johnson remained of the opinion that there was “not very much chance” of the Treloar Bill getting out of committee.

C. The Second Hearing

The Treloar Bill next began a radical process of revision, in large part through a second hearing held on March 18-20, 1896. Unlike all other hearings on this matter, this hearing was mostly recorded and published, not by the government, but most likely by the advocates of the Treloar Bill. Included in the print is a copy of the Treloar Copyright Bill that is clearly in transition between the original bill as introduced, and the revised bill that would be re-introduced after the hearing. Given the comments made about the bill at the hearing, this version represents either the bill as it was at the hearing, or immediately thereafter, in response to Browne’s comments.

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

---

225 Hearing on the Treloar Bill, supra note 222.
228 There are several reasons for this belief. First, the hearing in general was rather favorable to the bill, especially the first two-thirds containing a lengthy explanation of the bill by Alexander P. Browne. Second, the hearing was published by Alfred Mudge & Son, Printers, who printed music among other items, including, in the past, works of European composers, and thus had a specific interest in seeing the manufacturing clause applied to music. Finally, the testimony of George Haven Putnam, which would have been easily available since it was submitted as a written précis to the committee, was not only not included, but Putnam’s presence was not even recorded. Treloar Hearing, supra note 195; Letter from G.H. Putnam to R.U. Johnson, Esq., The Century Co. (Mar. 19, 1896) (on file with the Robert Underwood Johnson Papers, Manuscripts & Archives Div., N.Y. Pub. Library).
229 Treloar Hearing, supra note 195, § 32.
230 An Act to Amend Section Forty-Nine Hundred and Sixty-Five, Chapter Three, Title Sixty, of the Revised Statutes of the United States, Relating to Copyrights, ch. 194, 28 Stat. 965 (1895) [hereinafter Covert Copyright Act].
to immense liabilities from improperly using copyrighted photographs and other media by capping damages at one dollar per copy printed. Unlike some other features of this bill, Treloar did not have the idea for this change—the *Chicago Tribune* was not being unreasonable to suggest that “[s]ome one has evidently imposed on Mr. Treloar.” Shortly after the Treloar Copyright Bill was introduced, the Photographer’s Copyright League suggested amendments to the Treloar Bill, which would revoke the Covert Copyright Bill, in a lengthy memorandum written to Treloar, and sent as a copy to notables including Robert Underwood Johnson. Upon the incorporation of this amendment, the Photographer’s Copyright League got behind the Treloar Copyright Bill. It is hard to imagine why else the photographers would have supported the Treloar Bill, since they were certainly not angling to be covered by a manufacturing clause. This change would be printed in the second edition of the bill, and receive further scrutiny then.

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

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

---

231 *Bad Feature of Copyright Bill, CHI. DAILY TRIB.*, Mar. 6, 1896, at 3.
232 *Id.*
234 They were already covered by the manufacturing clause of the 1891 Act.
235 Amended Treloar Copyright Bill, *infra* note 160.
236 *See, e.g., Copyright Law Revision, BOSTON DAILY GLOBE*, Apr. 30, 1896, at 6.
237 *Treloar Hearing, infra* note 195, § 24. This reflected the suggestions of Browne. *See infra* notes 246-50 and accompanying text.
238 *Id.* § 24.
239 *Id.* § 31. Had this section been passed into law, a dozen years of controversy that led to the Supreme Court decision in *White-Smith*, and that decision’s overruling with the 1909 Copyright Revision, could have been avoided. *White-Smith Pub. Co. v. Apollo Co.*, 209 U.S. 1 (1908), *superseded by statute, Copyright Act of 1976, 17 U.S.C. § 102(a). See An Act to Amend and Consolidate the Acts Respecting Copyright, ch. 320, 35 Stat. 1075 (1909).*
of proponents of the bill. The day’s testimony was not included in the hearing print, and Putnam’s recollections of it are a bit hazy. Putnam asked to speak first, and Representative Draper extended this privilege to a fellow veteran. However, after Putnam spoke for only twenty minutes, there was an urgent matter on the floor, and the committee adjourned for the day. As Putnam left the room, Chairman Draper whispered that the bill would not be reported, but that it would “be desirable to have all legitimate influence that can be worked up through the Press brought to bear upon the Committee as promptly as practicable.”

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

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

With Browne’s words, the discussion of the public performance right more or less ended. Browne went on to extol the virtues of the bill’s other features, most notably the manufacturing clause, and the stage was set for amendment and resubmission of the Treloar Bill. The public performance section

---

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

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

242 Id. at 391.

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

244 PUTNAM, supra note 240, at 392.


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

247 Treloar Hearings, supra note 195, at 28.
of the bill was meant to track the Cummings Bill exactly, so as not to interfere with the existing law once the Treloar Bill passed.248 This was especially important since the chair of the House Committee on Patents, Draper, felt that the Cummings Bill was “quite likely to become law.”249 What is even more interesting about this section of the discussion is that Browne spoke as if he had written the Treloar Bill himself, or at least helped shape this part of it even before the hearing. Browne then concluded his lengthy testimony with an explanation of what mechanical reproduction was, and why it should be protected.250

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

D. Further Opposition

An additional opponent of the Treloar Copyright Bill made itself known in the Treloar Hearing, and would be a potent ally to

---

248 Id. at 64-65. “The Treloar Bill is the Cummings Bill . . . .” Id at 65.
249 Id. at 64.
250 Id. at 70-73.
251 Id. at 73-76.
253 Treloar Hearing, supra note 195, at 77.
254 Id. at 86.
255 Treloar Hearing, supra note 195, at 88-89.
the more traditional forces opposed to the bill—a faction of the music publishers and composers.256 Led by John P. Rechten of the Schuberths, a faction of the music publishers and composers prepared a petition for composers and their friends to sign:

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

....

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

Such is Mr. Treloar’s incredible proposition.257

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

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


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

259 This similarity was not accidental. See Letter from John P. Rechten, Edward Schuberth & Co., to Robert Underwood Johnson (Mar. 24, 1896) (on file with the Robert Underwood Johnson Papers, Manuscripts & Archives Div., N.Y. Pub. Library) (“I leave of course, the finishing touch to be put on that petition, to you.”).
1891.260 Perhaps one or even ten of these petitions would have been ignored by the House Committee on Patents. However, it was much less likely that the two hundred and two of these petitions that the committee received would be ignored.261 Nor were the form protests necessarily uniform, with several petitioners pinning additional notices to their protests.262 These petitions were presented to Representative Draper on May 12,263 and were introduced in the House and then referred to the Committee on Patents a day later.264 There would be tensions, but ultimately this alliance against the Treloar Bill would be highly productive, with the cracks only visible to a few on the inside.265 Meanwhile, the split between composers and the music publishers was obvious, and would widen further shortly.

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

260 See, e.g., Petition of Ferdinand Dunkley to the Senate and House of Representatives of the United States (Apr. 16, 1896) (on file with The National Archives).
261 See William F. Draper, Cover Sheet for Petitions of Composers of Music and Professional Musicians to the House Committee on Patents (May 13, 1896) (on file with The National Archives).
262 For instance, one individual penned a note to Robert Underwood Johnson, suggesting in jest that the weight of the accumulated petitions be used to crush whoever had introduced this bill. Letter from E.J. Fitzhugh to Robert Underwood Johnson (Apr. 17, 1896) (on file with The National Archives). By contrast, Caryl Florio simply noted that “knowing what I do of American politics, I imagine this protest to be entirely useless.” Letter of Caryl Florio (no date or addressee, pinned to petition dated Apr. 17, 1896) (on file with The National Archives).
263 Petition of Composers et al. to the Senate and House of Representatives (May 12, 1896) (printed copy listing individual petitions which were included under separate cover; this information is on the last page, after the petition text and list of signatories) (on file with The National Archives).

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

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

Id.
In 1896, in light of the controversy over the Treloar Bill, Robert Underwood Johnson, the Associate Editor of *Century Magazine*, felt it wise to revisit the tactic and solicit comments from composers of music on the Treloar Bill. Johnson had reason to believe that this tactic would be successful, since American composers had done well since the passage of the International Copyright Act, and would presumably not want to rock the boat. The resulting letters from professors of music at major universities in America in response to *Century Magazine’s* solicitation were strongly critical of the Treloar Bill, as might be expected. The questions asked to the various professors by *Century Magazine* were somewhat rhetorical, and meant to clearly elicit a certain response while characterizing the bill in a certain way:

1. Are you in favor of amending our present international copyright law by providing that copies of the musical compositions of American composers can be copyrighted only when the type is set up, or the plates made, or the copies manufactured, in the United States, and prohibiting the owner of the copyright from having the composition printed in England, Germany, or elsewhere and importing the copies for sale in the United States upon payment of duties?

2. Are you in favor of a copyright law which will compel the foreign composer to have his works printed in the United States in order to obtain copyright here; although the country of such foreign composer permits copyright there, without any such restrictions, of the compositions of an American?

3. Are you in favor of a copyright law which will compel a foreign publisher, who arranges with an American composer to publish the latter’s work, to print the work in the United States and sell here only such copies as are printed here?

4. In your opinion will it promote the progress of the art of music, will it promote the quality of music, and the use and enjoyment of music by the public, to require, as a condition of copyright in the United States, that the copies must be printed and manufactured in the United States?

5. Is such a requirement, in your opinion, beneficial or injurious to the interests of the composer?

---

268 See id.
269 See *Open Letters: American Musical Authorities Against the Treloar Bill*, 52 *Century Illustrated Monthly Mag.*, July 1896, at 474-76.
270 Id. at 474.
The responses, from composers and professors of music such as John K. Paine of Harvard, Horatio W. Parker of Yale, and E. A. McDowell of Columbia, were in the negative as to all five questions, as might be expected. The questions and erudite responses in a popular magazine helped present the opposition to the bill as at once practical and high-minded, which was undoubtedly the goal of Johnson. And yet ultimately, the battle itself, or rather the lack thereof, would be fought in the committee.

E. The Committee’s Inaction

Chairman Draper was personally in favor of a more “liberal” copyright law, and as such opposed the Treloar Bill. However, after the March 18-20 hearing, Draper felt that a majority of the committee supported the bill. To counteract this, he adopted a simple policy: delay. The first delay was not entirely of his doing, although it had been his suggestion at the March hearing: the resubmission and reprinting of the amended Treloar Bill. However, Draper simultaneously kept the committee from meeting by visiting his home state of Massachusetts for ten days. On April 15, before the revised Treloar Bill was available in printed form, the Chair proposed that the committee not meet again on this subject until the following winter. However, this was not to be, and the next hearing on the revised Treloar Bill was held on May 13, 1896.

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

This hearing would prove to be the last meeting of the Committee on Patents for the session, but Treloar requested that a subcommittee be appointed on the bill, and this request was granted. Over the summer, the bill was given over to the “tender mercies” of a subcommittee chaired by Ben. L. Fairchild of New York and also comprised of Treloar and W.S. Kerr of Ohio. This step into subcommittee led Draper to believe that the Treloar Bill would now have a definite action by the committee in the next session, but in reality this was not to be. Others were of a different opinion: Robert Underwood Johnson was of the opinion that “most of Mr. Treloar’s powder has been set off” by early May, while the Publisher’s Weekly, on the other hand, welcomed this as a chance to make clearer the objections to the bill when congressmen would be less busy.

It is thus perhaps strange that no record can be found of any activity by the subcommittee, or on the Treloar Copyright Bill generally during that summer, and this silence was the harbinger of the bill’s effective demise. The following fall the Treloar Copyright Bill lost its primary backer when the Music Publishers Association dropped their support for the bill. It is quite likely that the campaign of petitions and articles had an important effect on the constituents of the Music Publishers Association. With this development and the shortness of the session, Chairman Draper no longer felt that any more action need be taken on the Treloar

---

280 See Treloar Hearing, supra note 195, at 64-65.
281 Amended Treloar Copyright Bill, supra note 160, § 16.
282 See id. § 25.
283 Letter from Representative William F. Draper, Chairman, Comm. on Patents of the House of Representatives, to R.U. Johnson, Esq. (May 14, 1896) (“It is probable, however, that a sub-committee will be appointed to consider the bill during the interim between the two sessions. Mr. Treloar desires this and courtesy to him requires it.”).
286 Id.
288 See Copyright Legislation, PUBLISHER’S WKLY., May 23, 1896, at 856.
289 Letter from George W. Furniss (of the Oliver Ditson music-publishing house) to Robert Underwood Johnson (Apr. 12, 1897) (recounting events a few months earlier); see also Letter from William F. Draper, Office of Geo. Draper & Sons, to R.U. Johnson, Esq., Sec’y (Nov. 30, 1896).
A few months later, Treloar seemed to have accepted the fact that his bill would never make it out of committee:

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

The image is somewhat of a sad one—that of Representative Treloar, already a lame duck, showing up to every committee meeting in hope of moving his bill forward, and yet there was not even a quorum, let alone actual activity. A small consolation must have been that part of his proposed system had already been enacted as the Cummings Bill a week earlier. Upon leaving Congress, Treloar returned to Mexico, Missouri, taking a position as Assistant Postmaster.\(^{292}\) He would then relocate to Kansas City, and then St. Louis, continuing to compose and sell music, passing away on July 3, 1935.\(^{293}\) He never again held elected office.\(^{294}\)

### F. The Music Publishers

The dust having settled, it is worth asking what the Treloar Bill really was. One interpretation is that it was the bill of an idealistic musician from Missouri who came to Congress on a fluke and saw a chance to help a cause in which he believed. This would explain why he never had an ally in the Senate to introduce the bill concurrently there.\(^{295}\) While this explanation seems correct on the surface, the details of the bill’s story give it less credence. As noted above, the support of the Photographers League was suspicious. Perhaps even more important, though, was a new group that had been formed less than a year before the bill’s

---

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


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

\(^{293}\) See Munstedt, supra note 173, at 370-71.

\(^{294}\) See Treloar, William Mitchellson, supra note 161.

\(^{295}\) Letter from Senator Orville H. Platt to R.U. Johnson, Esq. (Feb. 28, 1896) (wondering why Treloar’s bill was not concurrently introduced into the Senate).
introduction, the Music Publishers Association of the United States. The group was formed in June 1895, in part to lobby for changes to the copyright law favorable to music publishers. The Music Publishers Association was initially among the bill’s most ardent supporters, and when it removed its support, the bill lost all steam.

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

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

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

In the 1890s, this breakthrough in music publishing would occur. The first million-selling song in America was “After the Ball” in 1893, and it would hardly be the last. At the same time, an industry locus was coalescing around 28th Street between

---

297 The Music Publishers’ Association of the United States, AM. ART J., June 22, 1895, at 171 (noting that one of the purposes of the new organization was “[t]he necessary action looking toward a revision and improvement of the administration of the present copyright system, with the view of making it an adjunct of greater value to the publishing interests of this country than it now is”).
298 See LEONARD FEIST, AN INTRODUCTION TO POPULAR MUSIC PUBLISHING IN AMERICA 28-29 (1980).
299 Id.
300 See id. at 22-23.
Broadway and Sixth Avenue in Manhattan, which would come to be known as Tin Pan Alley. By the mid 1890s, a call for copyright protection for musical performances would begin to sound in earnest.

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

Evidence that the Music Publishers Association was behind the Treloar Bill’s manufacturing clause is fairly apparent. In the hearing on the Treloar Bill, Alexander P. Browne, the lawyer from Boston who represented music publishers, often sounded like he knew the bill better than Treloar himself, and at times his tone implied that he had wrote it. Representative Draper noted during the hearing that those interested in encouraging passage of the Cummings Bill included music publishers as well as the much more visible dramatists. And as soon as the music publishers dropped their support for the Treloar Bill, the bill was done.

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

---

301 Id. at 51; FRANK J. ESPOSITO & TARA PRESTON, MANHATTAN’S MUSICAL HERITAGE 9 (2006).
302 Copyright in Music, PUBLISHERS WKLY., Mar. 3, 1894, at 387 (“It seems therefore not unreasonable that . . . under certain conditions [a musical composition’s] performance or repetition in public may be protected, and that those who disregard this principle shall be brought to account.”).
304 Id.
305 Treloar Hearing, supra note 195, at 67; see also infra Part IV.B.
Pan Alley publishers had “a Jewish complexion.”

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

IV. THE CUMMINGS COPYRIGHT BILL

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

A. Problems with the Existing Dramatic Law

The 1856 dramatic copyright bill had been passed without excessive controversy, the debates suggesting that Congress would pass almost any copyright bill so long as it did not involve international copyright. That act contained a fairly simple provision for relief—the play pirate would pay $100 for the first illicit performance, and $50 for each additional one. Although injunctions were issued, they were not provided for in the statute. As time went on, this remedy proved deeply insufficient, and the pirates would simply pay their fine and still have plenty of proceeds left over. Injunctions likewise failed, as the play pirate

306 ISAAC GOLDBERG, TIN PAN ALLEY: A CHRONICLE OF THE AMERICAN POPULAR MUSIC 108-09 (Frederick Ungar Publ’g Co. 1961) (1930) (noting that until the 1890s, music publishing was not notably Jewish, but then “[a]s if a sudden, it seemed, the business took on a Jewish complexion.”).


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


311 Id.
simply took his production to a different circuit and performed it there, or simply signed over his interest to a puppet party who had not been enjoined.312 Indeed, this remedy was so insufficient that Bronson Howard, perhaps the leading American playwright of the day, had not copyrighted a play since 1878.313

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

Dittenhoefer was at the time one of the leading theater lawyers in the country.317 Early in his life he was active in the Republican Party, becoming friendly with Lincoln and voting for him as an elector from New York.318 Dittenhoefer served as a local judge during the Civil War, filling out the remainder of the term of a judge who had died on the bench, and carried the title of “Judge” for over a half-century more.319 A recognized “authority in laws relating to the drama and the stage,” Dittenhoefer was a logical choice to draft the bill.320 His advocacy in favor of protection against piracy of operas is a bit puzzling in light of his involvement in The Mikado litigation on behalf of the Duff’s pirate production, but it is worth noting that throughout that incident he was adamant about what he felt the laws were, and not whether these laws were particularly wise.321

The first draft of Dittenhoefer’s bill set forth a fairly punitive view of copyright law. The bill covered dramatic and operatic compositions, but not musical compositions. Thus, it would have saved Gilbert and Sullivan, but Gounod would still be out of luck.

---

312 Congressman Covert’s Dramatists Bill, BROOKLYN DAILY EAGLE, July 2, 1894, at 2.
313 The Stage, L.A. TIMES, May 27, 1894, at 17 (under “Gossip in the Wings”).
315 Notes, supra note 314, at 76.
316 Protects Playwrights from Piracy, WASH. POST, Dec. 15, 1896, at 4; Current Topics, 55 ALB. L.J. 1, 4-5 (1897).
317 A.J. Dittenhoefer, 5 AM. LAWYER 365 (1897).
318 See A.J. Dittenhoefer, HOW WE ELECTED LINCOLN 1-6 (1916).
319 See A.J. Dittenhoefer, 12 BANKING L.J. 165 (1895). He was also offered the post of U.S. district judge for the district of South Carolina by President Lincoln, but declined the nomination. Judge Abram J. Dittenhoefer, 10 MEDICO-Legal J. 338 (1894) (on file with author).
320 2 A.J. DITTEHOEFER NEW YORK STATE’S PROMINENT AND PROGRESSIVE MEN 104 (Mitchell C. Harrison, comp., N.Y. TRIB. 1900).
321 See Actor, Manager, and Play, N.Y. TIMES, July 26, 1885, at 3. Dittenhoefer had declined to represent Stetson and Carle, despite being Stetson’s longtime attorney, since his “long opinion would be flaunted in [his] face,” because he had already expressed his opinion in the case “irrevocably.” Id.
The same monetary damages as the 1856 Act were included, but producing a pirate production was now also a misdemeanor which carried up to a year of jail time, and these productions could also be enjoined by the circuit courts, with such injunctions being national in scope. Further, injunctions could be either ex parte or on hearing. A producer could sue to have the injunction lifted, but only on notice to the copyright holder.

B. The 53rd Congress

Dittenhoefer’s bill was introduced to the House of Representatives by Representative Amos J. Cummings on April 24, 1894,322 and by request to the Senate by Senator David Bennett Hill on May 3, 1894.323 Both men had colorful careers before coming to Congress, but neither was particularly influential once there. Cummings was a former journalist and, according to some, was the father of the human interest story.324 Hill, by contrast, was a former governor of New York, and a consummate machine politician.325 However, Hill was past his prime after having a dramatic fall from grace when he ran for president in 1892 and overplayed his hand, manipulating the voting in the New York primary with an unusual degree of chicanery.326 Because of the resulting outrage, the New York primary was repeated and any chance that Hill had at the presidency was lost.327 Despite their political shortcomings, both men would champion these bills to varying degrees until the end. The committee chairs would also champion these bills successfully. Representative James W. Covert was the chair of the House Committee on Patents in the 53rd Congress, and would guide the bill through its first rough stages.328 Representative William F. Draper, who we have already encountered in the Treloar Bill controversy, was the chair of the committee for the 54th Congress and was vital in pushing the bill through. The chair of the Senate Committee for the 54th

322 H.R. 6835, 53rd Cong. (1894).
326 Id. at 221-24.
327 Id. at 235.
Congress was Senator Orville Platt, one of the most powerful men in the Senate, and a veteran of the international copyright fight. He would prove instrumental in this fight as well.

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

The Senate Committee on Patents reported their bill without amendment on May 24, but the House Committee reported the bill with amendments on June 29. The House amendments were twofold, first requiring that the performance be for profit in order to trigger sanctions, and second requiring the clerk of the court from which the injunction was issued to transmit documents related to the injunction upon request. A day later, Scientific American published an editorial sharply critical of the Senate
version of the bill,\textsuperscript{341} and shortly thereafter the \textit{Publisher’s Weekly} did the same,\textsuperscript{342} but the Chair of the House Patents Committee, Covert, nonetheless felt it would pass easily.\textsuperscript{343} Opponents of the bill argued that more criminal offenses should not be created, but Covert believed that this criticism would sway few.\textsuperscript{344} He was mistaken.

On July 28, 1894, rather than debating the amended bill, Covert asked that the House debate a substitute bill from the committee that he had not formally introduced, containing similar provisions but organized differently and less protective of plays.\textsuperscript{345} The bill was read, and Covert requested unanimous consent to have the substitute bill replace the amended Cummings Bill, but Representative Albert J. Hopkins of Illinois objected.\textsuperscript{346} After some arguments over whether the substitute bill needed to be printed, the original bill was reported with amendments due to the lack of unanimous consent.\textsuperscript{347} Representative Hopkins then entered into a debate with Covert over the substance of the Cummings Bill, questioning whether it was necessary to change the structure of injunctive relief in the federal courts.\textsuperscript{348} Hopkins persisted in this line, and subsequently other members of the House joined in his concerns.\textsuperscript{349} Covert attempted to defend this bill with a detailed statement of why it was needed, noting that nationwide injunctive relief was particularly important in this case since many play pirates traveled the country easily with their product and had few, if any, attachable means with which they could ordinarily be restrained.\textsuperscript{350} Covert then went on to explain the substitute version and why it was milder in its terms, which mollified the critics some.\textsuperscript{351} The critics, however, remained concerned about the precedent the Cummings Bill would make in terms of jurisdiction—giving a federal court national reach, even into other federal circuits.\textsuperscript{352} After some additional discussion, the House adjourned, not to consider the Cummings Bill again in the 53rd Congress,\textsuperscript{353} despite

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{341} \textit{Proposed Criminal Enactment for the Protection of Dramatic Copyrights}, 70 Sci. Am., June 30, 1894, at 402 (calling the bill “very absurd”).
  \item \textsuperscript{342} See \textit{Dramatic Copyright}, \textit{Publisher’s Wkly.}, July 7, 1894, at 10 (arguing that the bill was too vague as to what was a protected work).
  \item \textsuperscript{343} \textit{Covert’s Dramatic Copyright Bill}, Wash. Post, June 27, 1894, at 7.
  \item \textsuperscript{344} See id.
  \item \textsuperscript{345} 53 Cong. Rec. 7974 (1894). The text of the substitute bill is also available here. \textit{Id.}
  \item \textsuperscript{346} \textit{Id.} at 7974-75.
  \item \textsuperscript{347} See id. at 7975.
  \item \textsuperscript{348} See id.
  \item \textsuperscript{349} \textit{Id.} at 7975-76.
  \item \textsuperscript{350} See id. at 7976; see also \textit{The Copyright of Plays}, Wash. Post, July 29, 1894, at 2.
  \item \textsuperscript{351} 53 Cong. Rec. 7976 (1894).
  \item \textsuperscript{352} See id.
  \item \textsuperscript{353} See id. at 7977. Hopkins apparently had more to say on this matter, and asked that
\end{itemize}
\end{footnotesize}
Covert’s meeting with the Speaker of the House to request another day for discussion.354

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

During the intervening time, the American Dramatists Club began to compile a list of copyrighted performance works and distributed it for free to managers and theaters in the United States and Canada.360 The American Dramatists Club also turned to convincing states to add complementary provisions to their own criminal code, making unauthorized public performances of unpublished manuscript works a crime.361 In 1895, New
Hampshire became the first state to pass into law statutory protection for the public performance of dramatic and musical compositions. While no other state would follow until 1899, the club had achieved its first success, and the inclusion of music in the New Hampshire statute would signal the movement towards including music in the federal dramatists’ bill.

C. The 54th Congress, 1st Session

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

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

1783-1906 105-12 (Gov’t Printing Office, 2d ed. 1906) [hereinafter COPYRIGHT ENACTMENTS]. The subject matter of these statutes did not expand on the existing state common-law protection of public performance rights—none included published works. The primary purpose of these statutes was to act as a complement to the proposed federal law, since uncopyrighted works were not included in the federal statute. Finally, the question of whether those statutes that remain in force are preempted by federal law remains open. See 17 U.S.C. § 301 (2006).

362 See COPYRIGHT ENACTMENTS, supra note 361, at 105.
363 See id. at 105-12.
364 See, e.g., To Prevent the Piracy of Plays, N.Y. TIMES, Dec. 19, 1895, at 16; The Copyright of Plays, HARTFORD COURANT, Dec. 21, 1895, at 8; Against Piracy of Plays, PUBLISHER’S WKLY., Dec. 21, 1895, at 1195.
365 To Prevent Piracy of Plays, supra note 333.
367 S. 2306, 54th Cong. (1896).
368 See id. The New Hampshire law was signed on March 13, 1895. COPYRIGHT ENACTMENTS, supra note 361, at 105.
369 S. 2306, 54th Cong. (1896).
370 Id.
makes it appear as though the bill simply established a nationwide service of process for these injunctions.\footnote{\textit{See id.} As well as including opera, of course.}

In the 53rd Congress, the Cummings Bill had not received much attention from the copyright leagues. While public performance rights would never be a top priority to the leagues as a whole, for the 54th Congress the leagues brought the Cummings Bill under their tent by naming Bronson Howard the first vice-president of the American Authors Copyright League in early 1896.\footnote{Notes, 25 \textit{The Critic}, Feb. 29, 1896, at 154.} Nonetheless, the other members of the copyright leagues were generally quite unaware of the progress of the Cummings Bill, often finding it difficult to get a copy of the latest draft.\footnote{\textit{See, e.g.}, Letter from Robert Underwood Johnson to Edmund Clarence Stedman, President, Copyright League (Mar. 8, 1896) (on file with the Edmund Clarence Stedman Papers, Rare Book and Manuscript Library, Columbia Univ. Library) (“I learn that my associates have been hunting for the Cummings Dramatic Copyright Bill for you in vain.”).} It is likely that they were distracted by fighting the Treloar Bill, but the fact that the copyright leagues were now officially behind the Cummings Bill certainly would not have hurt the bill’s reception.

The first hearing was held on February 19, 1896, in the House Committee on Patents, under the Chairmanship of Draper. Bronson Howard was the first to speak, describing the necessity of nationwide enforcement of injunctions against pirate productions.\footnote{\textit{See To Protect Dramatists}, \textit{N.Y. Times}, Feb. 20, 1896, at 5.} Harrison Gray Fiske followed, explaining the many attempts that had been made so far to fight play piracy.\footnote{\textit{See id.}} Representative H. C. Miner was next, appearing in the capacity of a former theater-manager, issuing a stirring and damning condemnation of play pirates and their methods.\footnote{\textit{See id.} This is the same Harry Miner who a decade earlier had appropriated Rosenfeld’s pirate production of \textit{The Mikado} for his own theater when Rosenfeld lost his contempt case. \textit{See supra} note 129 and accompanying text.} A.M. Palmer then made comments along a similar line, and Judge Dittenhoefer concluded, giving a thorough explanation of the legal issues raised by the Cummings Bill. A petition was also prepared and given, describing the size and scope of the American theater industry and how this protection was needed for it to thrive:\footnote{\textit{For the Protection of Plays}, \textit{N.Y. Times}, Feb. 19, 1896, at 5.}

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

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

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

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

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

The list of dramatists signing the petition took up a full page,

---

378 The American Dramatists Club, Petition to the Senate and House of Representatives of The United States for the Amendment of the Copyright Law, Relating to the Fraudulent Production of Plays, from the Dramatists, Theatrical Managers and Other Members of the Dramatic Profession of the United States (1895) (editorial copy on file with the Rutherford B. Hayes Presidential Library).
with Bronson Howard’s name prominently at the top, and a list of other theater-people, which took up more than twenty more pages. At the hearing there was only one member who raised any qualms about the Cummings Bill, J. C. Hutcheson of Texas.

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

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

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

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

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

---

379 Id. at 6.
380 To Protect Dramatists, supra note 374.
381 H. JOURNAL, 54th Cong. 301-02 (1st Sess. 1896).
384 Treloar Hearing, supra note 195, at 64.
385 Supra note 249.
Draper’s comment serves to explain the amendment to the bill a bit better, and reinforces the reasonable suspicion that amendments expanding the scope of a law rarely happen of their own accord. At the same time, the influence of the Music Publishers Association is not as clear in this case. The Dramatists Club had already pushed through a public performance bill in New Hampshire that covered music in March 1895, prior to the formation of the Music Publishers Association in June 1895. As such, there may not have been the same coordinated effort of music publishers for this amendment like there was for the Treloar Bill.

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

On April 24, 1896, the Senate Committee on Patents reported back their version of the Cummings Bill with amendments. In substance it was a copy of the House version, but it changed the text in some cases in order to smooth over some rough patches of verbiage. With this revision, the path of the bill as a House bill (H.R. 1978) would end, the bill being subsumed into a Senate bill (S. 2306). On May 20, 1896, Senator Hill asked the Senate to consider the bill, to which there was no objection. Hill read the amendments to the bill, and it passed without objection, or even comment. Two days later the bill was sent to the House. Shortly thereafter, Draper moved to suspend the rules and pass S. 2306 in the House as well. Victory was now

386 Treloar Hearing, supra note 195, at 67.
387 Activity in the Copyright League, 25 THE CRITIC, Apr. 25, 1896, at 298.
388 Letter of A.J. Dittenhoefer, Esq., Law Offices of Dittenhoefer, Gerber & James, to Senator David B. Hill (Mar. 20, 1896) (on file with the David Bennett Hill Papers, Dep’t of Special Collections, Syracuse Univ. Library).
389 Investigation of the Copyright Bills, PUBLISHER’S WKLY., Apr. 4, 1896, at 625.
390 S. JOURNAL, 54th Cong., at 261 (1st Sess. 1896).
391 See S. 2306, 54th Cong. (as amended, Apr. 24, 1896).
392 28 CONG. REC. S5464 (1896).
393 See id.
394 28 CONG. REC. H5564 (1896).
395 Id. at H6292.
in sight. The bill “was read at length.”  

The Speaker pro tempore said that the bill was not at the table, and changed the subject.  

The First Session of the 54th Congress ended almost immediately thereafter.

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

As a result of these and other tactics, Draper chafed under the speaker’s “despotic” control, and felt that his committee work was going to waste. This was doubtless particularly vexing since Reed gave the chairmanship of the Committee on Patents to Draper as a token of appreciation for not pushing for a seat on the Ways and Means Committee, for which many had been advocating.  

Even after the bill was passed, bitterness over this incident had not, with Representative Draper noting:

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

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

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

Despite having been “lost in the shuffle at the wind-up of the last session of Congress,” another session was coming in the fall, and the American Dramatists Club kept up their efforts to support the bill. In addition to their usual efforts, they continued to update the list of copyrighted plays and operas, hoping to “stand

---

396 Id.
397 Id.
398 WILLIAM F. DRAPER, RECOLLECTIONS OF A VARIED CAREER 261 (1908) (“[S]till he would not give me time, as he wanted a short session.”).
399 See id. at 270.
400 See id at 261.
401 See id at 262.
402 See id at 255.
404 See Robbers of the Stage, WASH. POST, July 19, 1896, at 18.
of the play pirates until the passage of a law to punish them."\textsuperscript{405} One enterprising manager also invited a good number of House members from New York to his theater for a free show and, in between acts, discussed the bill with them.\textsuperscript{406} By the end of the show, most of these Representatives were on board.\textsuperscript{407}

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

Representative Draper entered the second (and final) session of the 54th Congress determined to pass the Cummings Bill, seeing it as “a matter of simple justice, needed to complete our copyright legislation.”\textsuperscript{408} On the very first day of the second session, December 7, 1896, the Cummings Bill was sent to the full House from the House Committee on Patents.\textsuperscript{409} Draper’s concerns that the dramatists’ bill would not even be considered\textsuperscript{410} were mollified when, on December 10, the debate on the bill on the floor of the House was finally joined.\textsuperscript{411}

First Representative Draper read the bill, along with a new report that followed fairly closely in the lines of the previous one.\textsuperscript{412} Then the debate commenced, with Representative Hopkins once again acting as the antagonist.\textsuperscript{413} Hopkins’ objections to the bill were to its feature of nationwide injunctions, an objection which he had raised two years earlier, and also that the one hundred dollar minimum damages were extended from dramatic works to musical ones also.\textsuperscript{414} This time though, anticipating trouble, Draper had sent Hopkins a personal copy of the Cummings Bill in advance, which managed to effectively neutralize the procedural complaints Hopkins had made in the 53rd Congress.\textsuperscript{415} Without these complaints, Hopkins did not play a major role in the debates. Representative John F. Lacey then addressed Draper, questioning the need for such harsh punishment as incarceration, and even if there was a need for a change at all in the dramatic copyright laws.\textsuperscript{416} Draper responded

\textsuperscript{405} Id.; see also The American Dramatists Club List, Publisher’s Wkly., June 20, 1896, at 1008.


\textsuperscript{407} Id.

\textsuperscript{408} Id.

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


\textsuperscript{411} 28 CONG. REC. 85 (1896).

\textsuperscript{412} H. Rep. 54-2290 (1896).

\textsuperscript{413} 28 CONG. REC. 85 (1896).

\textsuperscript{414} See id.

\textsuperscript{415} See id.

\textsuperscript{416} See id.
to these charges ably, but was not as successful with the questions of Representative James A. Connolly, who took issue with the bill’s provisions for an *ex parte* injunction—that is, an injunction that could be granted without giving notice to the other party.\(^{417}\) As the debate continued, a string of amendments were proposed. First an amendment was proposed to take out the criminal liability clause of the bill, leading to a strong reaction from Representative Cummings.\(^{418}\) Representative George W. Hullick next offered an amendment that “if said performance and representation shall be for charitable or benevolent purposes, it shall be a good defense to any prosecution under this act,”\(^{419}\) leading Representative Covert to respond that such a performance was even worse, as it added hypocrisy to theft, since it would be doing wrong under the banner of doing right. As a result, the amendment failed.\(^{420}\) Covert’s remarks were followed by some general debate over whether pirating a play was theft or something less sinister, to some reaction from the gallery.\(^{421}\) After this, Representative Lacey suggested an amendment which gutted the entire Cummings Bill and the 1856 Act and made the “printing, publication, and sale” of a dramatic or musical work “sufficient consent to the public performance or representation thereof.”\(^{422}\) This failed as well. With all other amendments having been disposed of, and the bill seemingly poised for a vote, Representative Connolly suggested one more amendment in line with his previous objections: to remove the provisions for an *ex parte* injunction.\(^{423}\) This failed at first, but then he asked for a division, noting that Draper was content with this amendment, and the amendment passed.\(^{424}\) Without further debate, the bill passed the House with the Connolly Amendment.\(^{425}\) Strikingly, these debates were the only time in Congress, up to this point, where there was an honest debate over whether a right of public performance for published works was really a good idea. These debates also addressed the question of what exactly a copyright is—whether it is a natural right or a government-granted privilege—which was a question that had been raised implicitly or explicitly by all public

\(^{417}\) See id. at 86.
\(^{418}\) See id. at 87.
\(^{419}\) See id. at 88.
\(^{420}\) Id.
\(^{421}\) Id. at 88.
\(^{422}\) Id. at 89.
\(^{423}\) Id. at 91.
\(^{424}\) Id.
\(^{425}\) See id. See also Passed the Copyright Bill, WASH. POST, Dec. 11, 1896, at 3 (describing the actions on the floor during the debate of the bill).
performance bills since the Ingersoll Copyright Bill.426

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

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

With the Cummings Copyright Bill finally through Congress, the bill’s advocates were a bit confused as to how the next step—that of getting the President to sign it—worked.439 Bronson

---

427 Draper, supra note 398, at 267.
428 Letter of A.J. Dittenhoefer, Esq., Law Offices of Dittenhoefer, Gerber & James, to Senator David B. Hill (Dec. 11, 1896) (on file with the David Bennett Hill Papers, Dep’t of Special Collections, Syracuse Univ. Library).
429 Id.
430 Letter of A.J. Dittenhoefer, Esq., Law Offices of Dittenhoefer, Gerber & James, to Senator David B. Hill (Dec. 12, 1896) (on file with the David Bennett Hill Papers, Dep’t of Special Collections, Syracuse Univ. Library).
431 Id.
432 See Dramatic Piracy Stopped, supra note 406.
433 Id. The quotation is attributed to Charles H. Hoyt. Id.
435 29 Cong. rec. 129 (1896).
436 Id. at 132.
437 Id.
438 Id.
439 Letter of A.J. Dittenhoefer, Esq., Law Offices of Dittenhoefer, Gerber & James, to Senator David B. Hill (Dec. 14, 1896) (on file with the David Bennett Hill Papers, Dep’t of
Howard shortly thereafter went on a visit to Washington, and had an interview with the President’s private secretary, who took “a lively interest in the bill.”\(^{440}\) The President’s secretary also informed them that the bill would not be signed into law until after the holiday.\(^{441}\) Thus, on January 6, 1897, the Cummings Copyright Bill was signed into law.\(^{442}\)

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

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

It was clear that the new law was an immediate and ringing success for the dramatists.\(^ {444}\)

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

V. CONCLUSION—THE ROAD SINCE 1897

Reaction to the Cummings Bill’s passage was mostly positive, as had been expressed after it passed the House. Negative reaction mostly came later, especially regarding the bill’s inclusion of music, for which less stringent protection may have been desirable, since having music played is perhaps the primary engine for demand in that business. 455 Others in the music field went further, saying that “it [would] be highly desirable that this absurd law . . . be amended as soon as possible.” 456 These criticisms were minor and rare though, and the bill was soon firmly ensconced into American law. The subsequent omnibus copyright revision of 1909 kept this right, while adding to it the right to make mechanical reproductions (as had been contemplated by the Treloar Bill), and introducing an exception for nonprofit performances. 457 However, the right would go relatively unexercised until the formation of performing rights societies. 458

The American Society of Composers, Authors and Publishers (ASCAP) was formed on February 14, 1914, by a group of composers to “assure that music creators are fairly compensated for the public performance of their works, and that their rights are

451 See A Feast After Victory, supra note 446.
452 Copyright Act Welcomed, supra note 445.
453 A Feast After Victory, supra note 446, at 9.
454 Copyright Act Welcomed, supra note 445.
455 Amendments to the Copyright Law, 76 Sci. Am., Apr. 10, 1897, at 226.
456 Queer Copyright Law, MUSIC, May/Oct. 1898, at 92 (on file with author).
457 See An Act To Amend and Consolidate the Acts Respecting Copyright, ch. 320, 35 Stat. 1075, § 1 (c) (1909). The question of whether to include a not-for-profit exception had been decided in the negative in 1897 after some debate, but apparently Congress felt it would be a good idea after all. See supra Part IV.
458 See FEIST, supra note 298, at 52.
Fairly shortly thereafter, the Supreme Court decided that all public playing of music was included under this clause of the Copyright Act, even such things as background music played in restaurants. Justice Holmes famously held:

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

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

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

---

461 Id.
variations on an existing copyright work.464

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