

Pimps and Ferrets

# **Pimps and Ferrets:**

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Copyright and Culture in the United States: 1831-1891

Version 1.1 September 2010

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**Eric Anderson**

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by Eric Anderson

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## ***A Note on this Book***

Humanities academics in the United States generally receive little payment from the sale of books they have written. Instead, scholars write in an economy of prestige, promotion, and duty. Prestige comes from publishing with a reputable university press, from being well-reviewed in important academic journals, and from the accolades of academic peers.

For a professionally young academic in the humanities at a medium-ranked institution in the United States, a peer-reviewed book at a mid-ranked University Press is essential for tenure and promotion. The doctoral dissertation (sometimes quite heavily revised) typically forms the core of this first academic book and sometimes several additional articles.

Occasionally maligned, the usual alternative to tenure is termination. Promotion (i.e. from Assistant to Associate Professor) leads to job security and a ten or fifteen thousand dollar increase in annual salary. In this context, book royalties are a negligible incentive.

This book is a lightly revised version of my doctoral dissertation, completed in December of 2007. After graduation, I submitted it to a small academic legal studies press, where it was favorably reviewed by the editor of that press and by a knowledgeable senior academic associated with the Press, and accepted for publication. Subject, of course, to suitable formatting, minor corrections, and the completion of an Index. As is not unusual for small academic presses, all of these tasks were my responsibility under the terms of the offered contract.

The Press would provide a cover, an ISBN, front matter, and the financing of an initial print run of a few hundred relatively expensive hardbacks. The Press would handle advertising and distribution, and had an established record of selling to important law libraries and academic research collections.

I would assign my copyright rights to the publisher for the duration of the copyright (i.e. until 70 years after my death – meaning until at least 2080, and hopefully much longer). There was

no provision for free electronic distribution of the book, though the contract permitted me to extract material from the book for three traditional academic journal articles.

In the academic world, this is a reasonable deal – the Press gets more rights than they immediately need, but a non-standard (more complex) deal requires more legal overhead for them and could complicate potential downstream deals, including perhaps electronically distributing their entire output. The Academic gets a peer-reviewed book that is placed in important library collections, and, subject to the terms of their employment, makes important strides towards job security and a raise.

I, however, am not currently employed in academia, and the logic of academic publication thus fails. I eventually rejected the offered contract.

This book, then, is a lightly-revised version of the manuscript that was accepted for publication. Known typographical errors have been fixed. Some obfuscatory language has been clarified. A particularly memorable error has been corrected. Pages are sized at A5 for easy printing (2 pages per side), and it should be portable to a variety of devices.

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# INTRODUCTION

The bill in substance provides that [...] copyright patents shall be granted to foreigners; they may hold these monopolies for forty-two years; the assigns of foreigners may also obtain copyrights; all postmasters and customs officers throughout the United States are constituted pimps and ferrets for these foreigners; it is made the duty of postmasters to spy out and seize all books going through the mails that infringe the copyrights of foreigners; if an American citizen coming home brings with him a purchased book, it is to be seized on landing unless he can produce the written consent of the man who owns the copyright, signed by two witnesses. Who the said owner may be, in what part of the world he lives, the innocent citizen must find out as best he can, or be despoiled of his property.

The source of this heated prose of pimps and ferrets? The May 19, 1888 issue of *Scientific American*.<sup>1</sup>

With the rise of digital reproduction and the expansion of the Internet, copyright issues have assumed tremendous prominence in contemporary society. Domestically, the United States is awash in copyright-related lawsuits. Internationally, fears of copyright violation strongly influence U.S. foreign policy, especially with China. Hardly a week goes by without some new copyright-related headline in the news. In a globalized world with cheap digital reproduction, copyright matters.

Far-reaching copyright policy decisions are being made in a historical vacuum, as if the issues raised are unique and unprecedented. Yet copyright has a long and complex history that can be usefully mined for precedents, models and suggestions. Digital reproduction may be new, but piracy, reprinting, and controversy are as old as copyright.

As the rage of “pimps and ferrets” expressed by *Scientific American* suggests, the nineteenth century U.S. was absolutely rife with copyright-related controversy and excitement, including international squabbling, celebrity grandstanding, new technology, corporate exploitations, and ferocious arguments about piracy, reprinting, and the effects of copyright law. These controversies, and others like them, form the raw material for this book.

Then, as now, copyright was very important to a small group of people (authors, publishers, and lawyers) and slightly important to much larger groups (book consumers, readers in a variety of sites). However, as this book demonstrates, these readers and consumers had quite definite ideas about copyright, its function, and its purpose, in ways not obvious to the denizens of the legal and authorial realms.

My goal, simply put, is to contribute to contemporary understandings of copyright by showing the varied and interesting

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<sup>1</sup> “New Copyright Bill Now before Congress.” *Scientific American*. May 19, 1888. 304. The bill in question died in the House of Representatives. A slightly extended version of the article was reprinted almost three years later, under the same title. See “New Copyright Bill Now before Congress.” *Scientific American*, Jan. 10, 1891. 17.

alternative ways people have thought about copyright in the past. What did they think copyright was, and what was its purpose? Was it property? Something else? How did it function? Who might it benefit? Who could it harm? To answer questions like these, I frame copyright, not as a series of legal statutes or cases, but as a collection of popular ideas and a cultural construct.

One of the inspirations for this project was Jessica Litman's "Copyright as Myth." Suggestively, Litman observed that legal specialists assume that people understand what copyright is, and what it is for – an assumption that is not at all borne out by experience. Litman writes:

Copyright law turns out to be tremendously counterintuitive; that is why it is fun to teach it, and why it can be such a good substitute for smalltalk and other species of cocktail party conversation. Part of the reason that laypeople (by which I mean lawyers and non-lawyers and authors and non-authors; indeed, everyone but the copyright specialist) find copyright law hard to grasp could be its mind-numbing collection of inconsistent, indeed incoherent, complexities. [...] Although writers have suggested that members of the public find the idea of property rights in intangibles difficult to accept, there seems to be little evidence that members of the public find the idea of a copyright counterintuitive. Rather, the lay public seems to have a startlingly concrete idea of what copyright law is and how it works. This popular idea, however, has little to do with actual copyright law.<sup>2</sup>

Of course, it remains obscure just *what* people think copyright *is*. For me, this book is in part, an answer to this interesting question.

The existing literature about copyright is vast, especially with

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<sup>2</sup> Jessica Litman, "Copyright as Myth" 238-239.

regard to specific legal aspects or aspects of contemporary copyright policy, but works with a historical focus are relatively uncommon. The few historical works available typically focus on events early in the history of copyright, beginning in the seventeenth and eighteenth centuries and extending no further than the landmark U.S. case of *Wheaton v. Peters* in 1834.<sup>3</sup> A few others, instead of tracing the early history of copyright, seek to historically ground recent copyright changes. However, these typically look back only a few decades, and certainly no further than the Copyright Act of 1909.<sup>4</sup>

There are almost no historical works on copyright-related events between 1834 and 1909. A few works by historians focus on the international copyright controversy.<sup>5</sup> Literary historians have been slightly more prolific, exploring connections between copyright and the development of professional authorship and/or authorial subjectivity.<sup>6</sup> However, no broader studies of copyright in the nineteenth century U.S. currently exist, nor do the specialist studies the topic deserves.<sup>7</sup>

<sup>3</sup> E.g. See the limited amount of space devoted to the rest of the nineteenth century in Benjamin Kaplan, *Unhurried View of Copyright* 25-33; Lyman Ray Patterson, *Copyright in Historical Perspective* 213-214. The best book on the eighteenth century origins of British copyright is Mark Rose, *Authors and Owners: The Invention of Copyright*.

<sup>4</sup> E.g. Siva Vaidhyanathan, *Copyrights and Copywrongs*, Jessica Litman, *Digital Copyright*.

<sup>5</sup> See Aubert Clark, *Movement for International Copyright* and James J. Barnes, *Authors, Publishers, and Politicians*. More recently, Catherine Seville included a relevant chapter in *Internationalisation of Copyright Law*.

<sup>6</sup> Some recent examples include Martin T. Buinicki, "Negotiating Copyright: Authorship and the Discourse of Literary Property Rights in the Nineteenth Century" Michael J. Everton, "The Courtesies of Authorship: Hannah Adams and Authorial Ethics in the Early Republic" and Michael Newbury, *Figuring Authorship*. See also the multiple excellent works by Meredith McGill and Melissa Homestead. Although largely concerned with eighteenth-century German states, Martha Woodmansee's "Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'" has also been influential.

<sup>7</sup> Attentive readers will see possibilities for at least a half-dozen additional book-length studies and numerous smaller pieces.

As a book, this project makes two important contributions. First, it begins the project of filling the gaping hole in the history of nineteenth-century U.S. copyright. Secondly, it illustrates a different, and perhaps more utilitarian, approach to the study of the history of copyright. Focusing on the popular ideas and ideologies of copyright provides a distinctly different perspective than the usual focus on the law or the author. People have always had quite firm (and quite varied) ideas about what copyright is and what it means. However, these ideas about copyright are often embedded in ways of understanding that have little or nothing to do with the text of copyright law. Thus, a history that focuses on popular ideas may be more broadly useful than specialist legal scholarship.

The chapters of this book are arranged chronologically. Chapter One begins with an overview of the historical background of U.S. copyright law, including the British origins of U.S. copyright, copyright in the colonial era, and the U.S. Copyright Acts of 1790 and 1831. The chapter then turns to an examination of the interplay between antebellum copyright and various ideas of authorship, with particular emphasis on the connections between copyright and republicanism.

Chapter Two introduces the ongoing nineteenth-century controversy over international copyright. For over a century, from the very first U.S. Copyright Act in 1790, until the International Copyright Act in 1891, the U.S. explicitly refused to recognize the copyrights of other nations. Concerned with culture and ideas, this chapter examines American attitudes towards international copyright in the context of events like the Panic of 1837 and the 1842 tour of the U.S. by Charles Dickens. The chapter also looks at the ways of thinking about copyright – and the links made with ideas about cheap books – as illustrated by writings by people like Cornelius Mathews and John Blair Dabney.

Two major developments key the beginning of Chapter Three, an examination of thinking about copyright before, during, and after the U.S. Civil War. First, an 1856 amendment to U.S. copyright law extended protection to dramatic performances. Before this,



copyright only protected the text itself, not public performances of the work. Second, in 1865, copyright was first extended to the product of a new technology, the photograph. U.S. copyright law had been extended before, to include engravings and dramatic plays, but this was the first extension associated with a completely new technology. The chapter concludes with an examination of the startlingly diverse meanings associated with copyright in this period, as many people connected wildly divergent ideas about copyright to various aspects of the emerging market society.

Chapter Four examines copyright in the first part of the Gilded Age, from the Copyright Act of 1870 well into the 1880s. During this period, the continued expansion of copyright led to confusing categories and arbitrary distinctions, as copyright was increasingly captured by the legal profession. For some, the meanings of copyright were inseparable from the processes and institutions that administered it. For others, such as medical men, thinking about copyright was driven by the needs of professionalization. The later decades of the nineteenth century also saw widespread increases in the influence of expert opinion, and copyright was no exception.

Chapter Five returns to the topic of international copyright, exploring how ideas of copyright – as a tariff, a monopoly, or as a force raising the price of books – were mobilized politically to delay passage of an International Copyright bill. The chapter concludes with a look at the practical politics of the passage of the 1891 law, with particular emphases on the importance of a manufacturing clause, and how the political support of publishers and printing unions for *international* copyright depended on fears of *domestic* competition.

Throughout, my work relies on a broad swath of magazine and newspaper articles, letters, and editorials about various copyright-related controversies, both mainstream and obscure. These sources illustrate the diversity of thinking about copyright issues during the nineteenth century, and suggest a variety of alternative frameworks for considering copyright in other times.

Twenty-first century copyright debates too-often settle into

portraying copyright as either a natural property right, or as an essentially utilitarian tool that the State uses to promote (or hinder) innovation. However, taking a hard look at nineteenth-century ideas about copyright reveals considerable nuance and diversity in how people thought about copyright, and can suggest some interesting alternatives for framing contemporary copyright problems.



# CHAPTER I: COPYRIGHT AND REPUBLICANISM

## ***British Background of US Copyright***

In the United States, the legal foundation of copyright is Article I, Section 8, Clause 8 of the U.S. Constitution. Specifically:

Congress shall have the power [...] to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and discoveries.

Although not mentioned by name, this exclusive right provides the legal basis for both patents and copyrights.<sup>1</sup>

Briefly, early U.S. copyright was a direct development of copyright in Great Britain.<sup>2</sup> It grew out of the printers, bookbinders,

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<sup>1</sup> In U.S. law, trademarks are legally considered regulation of commerce, and not included in clause 8.

<sup>2</sup> Readers interested in the earlier history of copyright should look to L. Ray Patterson's canonical 1968 *Copyright in Historical Perspective* and (more recently) Mark Rose's *Authors and Owners: The Invention of Copyright*.

and booksellers guild system, specifically a printing monopoly granted to the London Stationer's Company (founded in 1403) in their 1557 Charter. This bargain between guild and crown granted the ninety-seven members of the Stationer's Company a near-monopoly on the English book industry, as well as the power to enforce this monopoly. In turn, the crown got protection against seditious and heretical books.<sup>3</sup> Copyright, with roots in the reign of Bloody Mary and religious strife, started as censorship.

The Licensing Act under which the Stationers operated expired in 1694, and after a period of some industry chaos, was replaced by the 1710 Statute of Anne.<sup>4</sup> Recognizably connected to the earlier censorship laws, the Statute of Anne sought to bring order to the book trade by codifying the practice of stationer's copyright.<sup>5</sup> This law provided for either a 21-year or 14-year monopoly (depending on the circumstances), as well as financial penalties for infringement.<sup>6</sup>

Less systemized than it would become, English (and later, British) copyright was put on firmer legal ground by two precedent-setting cases later in the eighteenth century.<sup>7</sup> Both these lawsuits involved publishers suing other publishers over the printing of works which, under the 21-year time limit of the Statute of Anne, arguably should have been in the public domain.<sup>8</sup> However, the notion of the

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<sup>3</sup> For more information on the history of this ancient organization, see Cyprian Blagden, *Stationer's Company: A History, 1403-1959*.

<sup>4</sup> Technically, the Statute of Anne was enacted in 1709 and became effective in April of 1710, but until the 1752 adoption of the Gregorian calendar, the legal beginning of New Year in England was March 25<sup>th</sup>. 1710 is the date usually attributed to the Statute, but some older sources use 1709. (See Patterson, *Copyright in Historical Perspective* 3 n 3).

<sup>5</sup> See Patterson, 143-50.

<sup>6</sup> Interested readers should refer to the mentioned sources, as well as John Feather's *Publishing, Piracy, and Politics: A Historical Survey of Copyright in Britain* for more on the historical development of the publishing industry.

<sup>7</sup> With armed Jacobite rebellions in 1715 and 1745, as well as the collapse of the South Sea Bubble in 1720, this was a tumultuous era.

<sup>8</sup> The various roles of printers, publishers, and booksellers were not separate in this era.

public domain had not been legally established, nor had the power of the law to place a limits upon the duration of a copyright been judicially accepted in actual practice.

The first case, *Millar v. Taylor* (1769) sought to decide whether there was an English common law basis for copyright, and if so, whether the Statute of Anne superseded it. The decision was 3-1 for a common-law right, and against a time-limited copyright. The majority justices, including William Murray (Lord Mansfield), held that there was a common-law right of ownership of literary property. As property, copyright, in effect, was to be perpetual. However, a few years later a Scottish court reached precisely the opposite conclusion in *Hinton v. Donaldson*.

Having conflicting laws in England and Scotland led to a fair degree of chaos in the trade, and, not incidentally, assisted the continued development of publishing in Edinburgh.<sup>9</sup> These conflicting cases were reconciled in *Donaldson v. Beckett* (1774). In it, the judges of the House of Lords overturned *Millar*, declaring that any common-law right to a perpetual copyright had been supplanted by the Statute of Anne.<sup>10</sup> Note that there were not actually any writers involved in either of these cases – authorship, at least in the legal realm, was defined by disputes between publishers.

*Donaldson* later crossed the Atlantic to provide guidance in the first U.S. Supreme Court case on copyright, *Wheaton v. Peters* (1834). However, a number of elite writers in the nineteenth-century U.S. were terrifically fond of quoting Lord Mansfield and the justices of *Millar* to support a sort of Lockean natural rights justification for copyright as property.<sup>11</sup> Misled, perhaps, by his stature as one of the great jurists of the eighteenth century, many of these writers failed to acknowledge that Lord Mansfield was overturned in *Donaldson*.

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<sup>9</sup> See Mark Rose, *Authors and Owners: The Invention of Copyright*, especially 67-91.

<sup>10</sup> See Patterson 172-9, as well as works by Mark Rose, Tyler Ochoa, and Trevor Ross.

<sup>11</sup> For one influential nineteenth-century example of this sort of revisionist legal scholarship, see Eaton S. Drone, *Treatise on the Law of Property in Intellectual Productions* (1879) 20-26.

Others attempted to explain (or pretend) that the judges of the House of Lords had actually meant to decide the case differently. These sometimes blatant bits of historical revisionism often tell us more about the copyright politics of the writer than about the historical legal record.

## ***Copyright in Colonial America***

Copyright was pretty much insignificant in the pre-Revolution American colonies – printers were kept on a short leash, and most books were printed in London. A little-invoked 1672 Massachusetts law that prohibited printing or reprinting without consent is about as close to a copyright law as the colonies came.<sup>12</sup> Of course, colonial printers were subject to government oversight and censorship. One notorious example of royalist attitude comes from a 1671 letter by Sir William Berkeley, then-governor of Virginia:

I thank God, there are no free schools nor printing, and I hope we shall not have (them) these hundred years; for learning has brought disobedience and heresy, and sects into the world and printing has divulged them, and libels against the best government. God keep us from both!<sup>13</sup>

Berkeley's attitude must be considered in light of his context as a veteran of English Civil War (he fought as a Cavalier), and as governor of an unruly colonial outpost (he was removed from office for the brutality with which he put down Bacon's Rebellion in 1676). Although particularly outspoken, Berkeley's preference for censorship and control was hardly unique.

In addition to the various restrictions and restraints upon colonial printers, the changes in British Law were quite slow to trickle across

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<sup>12</sup> See Bugbee, Chapter 5 for more on pre-Constitution copyright.

<sup>13</sup> Quoted in Gross 375.

the Atlantic. For example, despite the different provisions of the 1694 Licensing Act, colonial governors were repeatedly instructed by London over the next three decades to require prior approval for all publications.<sup>14</sup> Enforcement of the law was different in the center of the Empire, than for the more marginal colonies, and the plain language of the Statute did not reflect actual practice.

American colonial printers were much more daring by the mid-eighteenth century. However, copyright remained of minor economic importance for them. In part, this had to do with the priorities of the era – copyright did not apply to news or political broadsides. Additionally, the earliest presses were owned by gentlemen and operated by hirelings, a business model that does not rely on copyright. And of course, the storied independent printer-publisher of the early and mid-1700s relied more on government contracts (for the printing of laws, announcements, and the like), blank forms of various sorts, and similar utilitarian paper ephemera than upon the printing of books.<sup>15</sup>

## ***Copyright in the US Constitution***

After the American Revolution, the Articles of Confederation left copyright matters to the individual States.<sup>16</sup> Thus, from 1783 to 1786 twelve of the original thirteen states enacted some form of a copyright law (Delaware was the exception).<sup>17</sup> Some of these early

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<sup>14</sup> Botein 127.

<sup>15</sup> See Stephen Botein's "Meer Mechanics' and an Open Press: The Business and Political Strategies of Colonial American Printers" for an excellent examination of the business practices, sources of income, movements, family connections, and relationships with the State of colonial printers.

<sup>16</sup> For a comparison of copyright in the early U.S. to that of revolutionary France, see law professor Jane Ginsburg's "A Tale of Two Copyrights." Literary scholars may find the chapter on French copyright in David Saunders' *Authorship and Copyright* also useful.

<sup>17</sup> For a good general overview of early American copyright, see Patterson *Copyright in Historical Perspective*, chapter 9. Some writers prefer to rely on Benjamin Kaplan's *An Unhurried View of Copyright*, a collection of lectures



laws were simple grants of monopoly to an individual for a specific product – private bills conveying the exclusive right to a particular book or map to a specific person. Others were more general sorts of copyright laws.<sup>18</sup> Many examinations of this period attribute the enactment of these laws to the efforts of Noah Webster, who spent considerable time and effort lobbying various legislatures.<sup>19</sup> However, Bruce Bugbee's thorough examination downplays the effect of Webster's efforts.<sup>20</sup>

A patchwork of thirteen individual republics proved unsatisfactory in practice, leading to the 1787 Constitutional Convention in Philadelphia. Here, on September 5, David Brearley of New Jersey proposed the constitutional clause supporting copyright. There was no recorded debate, nor any particular note in James Madison's journal of the Convention.<sup>21</sup> Indeed, the clause is treated only in passing as one of the several topics of Federalist 43. Madison's complete comments:

The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged in Great Britain to be a right of common law. The right to useful inventions seems with equal

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delivered in 1966. Kaplan's history of copyright (particularly regarding developments in the British Isles) relies heavily on Blagden.

<sup>18</sup> See Bugbee, *Genesis of American Patent and Copyright Law*, chapter 5 for more information.

<sup>19</sup> For example, see Ringer 125. Ringer's paper was part of U.S. Bicentennial activities sponsored by the American Bar Association.

<sup>20</sup> There is a pronounced tendency in some circles to be frankly celebratory about Noah Webster's contributions. This celebration sometimes has more to do with contemporary intellectual property politics than the historical record. For example, by over-privileging the role of Webster and a few other men, lawyer Thomas Nachbar's article, "Constructing Copyright's Mythology" constructs just that, but perhaps not in the way Nachbar intended.

<sup>21</sup> Although concerned mostly with the development of patents, Bruce Bugbee starts off (literally page 1) with a description of this non-event. For a legal historian's take on the development of the Constitutional basis for patent and copyright, see Edward C. Walterscheid's *The Nature of the Intellectual Property Clause*.

reason to belong to inventors. The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provision for either of the cases, and most of them have anticipated the decision of this point by laws passed at the instance of Congress.

Although many of these assertions would later prove more controversial than Madison anticipated, the copyright clause aroused no controversy for the ratification of the U.S. Constitution.<sup>22</sup>

## ***Copyright Act of 1790***

The first copyright law of the United States was the Copyright Act of 1790.<sup>23</sup> Passed by the House of Representatives on April 30 and by the Senate on May 14, the act was signed by President Washington on May 31, 1790, and took effect immediately.<sup>24</sup> A direct descendent of the Statute of Anne, this “Act for the Encouragement of Learning” provided that any U.S. citizen or resident could have the sole right of printing, reprinting, publishing, or vending any map, chart, or book for fourteen years. If the author was still living at the end of this time, the author’s monopoly could be extended for an additional fourteen-year term by complying with the specified procedures.

Copyright registration was both compulsory and complicated. Under the Act of 1790, to register a copyright, the author (or their assign) was required to deposit a printed copy of the title page (or equivalent) with the clerk’s office of the district court where the author or proprietor resided, paying a fee of sixty cents. Furthermore, the author (or assign) had to have a notice of the grant of copyright published in a newspaper for four weeks, as well as

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<sup>22</sup> See Joyce and Patterson, “Copyright in 1791,” for more on the eighteenth century legal history of the copyright clause.

<sup>23</sup> Act of May 31, 1790, 1<sup>st</sup> Cong. 2<sup>nd</sup> Sess, 2 Stat. 124

<sup>24</sup> See Solberg, *Copyright in Congress* 29 and passim for detailed information on other, stillborn, copyright legislation.

sending a required copy of the final printed product to the U.S. Secretary of State, to be preserved by his office.<sup>25</sup>

These particular procedures proved unwieldy in practice, and were modified later. However, the very difficulty of this process illustrates how lawmakers thought of copyright as a special and unusual thing, to be reserved for a relatively few important books, charts, and maps. Note that copyright did not generally apply to newspapers, magazines, paintings, engravings, sheet music, or anything but the specifically named books, charts, and maps.<sup>26</sup> Significantly, an 1824 attempt to extend copyright to paintings and drawings died in the Senate without coming up for a vote.<sup>27</sup> The State reserved copyright for mechanically reproduced, useful, and important works, of enduring value.

In addition to establishing a federal copyright and specifying how it was to be administered, Section 5 of the Act of 1790 intentionally established the United States as a pirate nation.<sup>28</sup> The language is deceptively brief for such a far-reaching policy:

Nothing in this act shall be construed to extend to prohibit the importation or vending, reprinting or publishing within the United States, of any map, chart, book or books, written, printed, or published by any person not a citizen of the United States, in foreign parts or places without the jurisdiction of the United States.<sup>29</sup>

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<sup>25</sup> Although the requirement to deposit maps with the Secretary of State may make sense to modern readers, recall that the Secretary of State was also responsible for administering the early patent system in the U.S.

<sup>26</sup> At least some judges interpreted “book” quite broadly, and included sheet music under this rubric. E.g. *Clayton v. Stone* (1829). See also Patry *Copyright Law* 30 n 91. However, note that many of Patry’s sources are writing in a different political and legal climate, much later in the nineteenth century.

<sup>27</sup> Solberg, *Copyright in Congress* 32.

<sup>28</sup> “Pirate” is used nonjudgmentally.

<sup>29</sup> Act of May 31, 1790, 1<sup>st</sup> Cong. 2<sup>nd</sup> Sess, 2 Stat. 124

Simply put, the U.S. would not recognize foreign copyrights, and U.S. publishers were completely free to import and/or reprint whatever foreign texts they thought would sell. Reiterated in the copyright acts of 1831 and 1870, this remained explicit U.S. policy for over a century, from 1790 until 1891.<sup>30</sup>

Although the unwieldy provisions for registration and very narrow scope of copyright may seem laughable to some modern readers, this initial Copyright Act served the policy needs of the early U.S. well enough for over forty years, from 1790 until 1831.

During this span Congress enacted only two revisions to the U.S. law. The first Act, in 1802, specified the language and location of the copyright notice that was required on any copyrighted work, and extended copyright protection to engravings, etchings, and prints.<sup>31</sup> The second Act, in 1819, granted original cognizance in copyright lawsuits to the circuit courts of the United States. Before this, copyright suits involving less than \$500 were tried in state court, unless the dispute was between citizens of different states.<sup>32</sup>

In addition to these minor revisions to the law, there were several private copyright bills enacted during this period. The first, in 1828, extended John Rowlett's copyright in *Rowlett's Tables of Discount or Interest*. Rowlett benefited from additional extensions in 1830 and 1843, for an eventual total of 52 years of copyright protection.<sup>33</sup>

Perhaps the most intriguing of these private copyright bills is the 1859 grant of an additional fourteen years of protection for *History, Statistics, Conditions and Prospects of the Indian Tribes of the*

<sup>30</sup> In effect, this refusal to extend copyright privileges to citizens of other nations (especially the U.K.) served as an assertion of U.S. sovereignty over their own intellectual policy. See Siva Vaidhyanathan, *Copyrights and Copywrongs* 11-2 for a discussion of the differences between "intellectual property" and "intellectual policy." The precedent for this style of policy is especially clear in the history of patent law, where many nations awarded "patents of importation," a form of patent granted to whomever *brought* an invention into the awarding nation.

<sup>31</sup> Act of April 29, 1802, 7<sup>th</sup> Cong., 1<sup>st</sup> Sess., 1 Stat. 171.

<sup>32</sup> Act of Feb. 15, 1819, 15<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 2 Stat. 481. See also Patry, *Copyright Law* 32 n 94.

<sup>33</sup> See Patry, *Copyright Law* 27 n 80.

*United States* to novelist and slavery apologist Mary Harmon Schoolcraft, presumably for the benefit of her husband, the putative author of the work and then-ailing Henry Rowe Schoolcraft (1793-1864).<sup>34</sup> Including Schoolcraft and Rowlett, there have been only ten such private extensions in the entire history of the United States.<sup>35</sup>

## Copyright Act of 1831

The first major revision to the copyright law of the U.S. was the Copyright Act of 1831.<sup>36</sup> This Act extended the base duration of copyright from 14 years to 28. Legal provisions for a possible 14-year extension were unchanged, effectively increasing (with the extension included) the maximum term of copyright from 28 years to 42 years.<sup>37</sup> This was the maximum duration of a copyright until 1909.

Under the terms of the Act, extensions of copyright were available only to (as relevant) the author, inventor, designer, or engraver, if living. If dead, the extension was available only to the creator's widow, child, or children. Copyright extensions were not available

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<sup>34</sup> Act of Jan. 25, 1859, 35<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 11 Stat 557. See Patry 27 n 80; R.R. Bowker, *Copyright* 38. An earlier version of this manuscript mistakenly awarded the Schoolcraft extension to Henry Rowe Schoolcraft's first wife, writer and poet Jane Johnston Schoolcraft (1800-1842, Ojibwe name Bamewawagezhikaqu.) For information on Jane Johnson Schoolcraft, see *The Sound the Stars Make Rushing Through the Sky: the Writings of Jane Johnson Schoolcraft*, edited by Robert Dale Parker.

<sup>35</sup> Rowlett had three. Most of the rest were various special cases during the first half of the nineteenth century. The only twentieth century private copyright bill was designed to extend or restore copyright in the religious works of Mary Baker Eddy. This extension was overturned as a violation of the Establishment Clause of the First Amendment. See Patry, *Copyright Law* 27 n 80. Rowlett's private bills presage the sort of retroactive 20-year copyright extensions sought and granted in the Copyright Term Extension Act (1998), but note that there are tremendous differences of scale.

<sup>36</sup> Act of Feb 3, 1831, 21<sup>st</sup> Cong., 2<sup>nd</sup> Sess., 2 Stat. 436.

<sup>37</sup> The longer term was applied retroactively, extending to 28 years the initial term of copyright for works in which the copyright had not expired.

to others, including any past purchasers of the copyright. These longer terms were for the benefit of the author or his heirs, not the printer or publisher.

Under this Act, copyright was defined as the “sole right and liberty of printing, reprinting, publishing, and vending.”<sup>38</sup> It covered books, maps, charts, musical compositions, prints, cuts, and engravings. This is the first explicit mention of music in U.S. copyright law, and applied only to printed sheet music. Performances of copyrighted music, whether public or private, were not included.

Procedures for getting a copyright were simplified from the 1790 law. The author or proprietor had to deposit a printed copy of the title of the work with the clerk’s office of the District Court in which they resided, paying a fee of fifty cents. They also had to deposit a printed copy of the work within three months of publication.

The printed work had to include a notice of copyright, of particular form and location. The language was specified in the bill:

Entered according to act of Congress, in the year  
\_\_\_\_\_, by A.B., in the clerk’s office of the district  
court of \_\_\_\_\_.<sup>39</sup>

The clerk of court was to forward copies of these records, as well as the deposit copies of the copyrighted works, on to the Secretary of State at least once per year.

The 1790 requirement that the author or proprietor publish notice of their initial award of copyright in a newspaper was dropped. However, notice was still required for the renewal of an existing copyright. Although it is unclear why this latter requirement was kept, recall that the extension was available only to the author or his heirs. Thus, if the author had sold the initial term of copyright to a

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<sup>38</sup> Act of Feb 3, 1831, Section 1.

<sup>39</sup> “A. B.” is replaced with the name of the author, not the clerk. Calling this a “copyright notice” is a little misleading, since the word “copyright” does not appear.

publisher, the 14-year extension represents a de facto transfer of the copyright from the publisher back to the author. The author could then sell the restored copyright anew.

Significantly, the Copyright Act of 1831 explicitly reiterated the piracy clause of the 1790 Act. Section 8 reads:

And be it further enacted that nothing in this act shall be construed to extend to prohibit the importation or vending, printing, or publishing, of any map, chart, book, musical composition, print or engraving, written, composed, or made, by any person not being a citizen of the United States, nor resident within the jurisdiction of thereof.

This language differs only slightly from that used in 1790. It would be reiterated again in still another slightly different form in Section 103 of the 1870 copyright revision. Thus, U.S. publishers were still free to ignore foreign copyrights.

## ***Republicanism and Copyright***

Legally speaking, antebellum copyright was established by the Copyright Act of 1831. But examining the Act tells us little about the cultural and intellectual status of copyright – what did people think copyright was? What was it for? Was it a form of property, or not? Whom might it benefit? Whom could it harm? How is it connected to ideas of authorship, reading, or to the non-literary events of the day? Some of these questions can be usefully illuminated by examining some of the copyright-related controversies of the 1830s and 1840s.

During this period, there was a good deal of heated rhetoric over whether or not copyright represented a species of property. Briefly, the main site of conflict was U.S. piracy and the lack of international copyright. Early in the period, the discussion was inseparable from the ongoing cultural anxiety over American literature and

nationalism. However, after the Panic of 1837, the resulting depression, and the (nearly simultaneous) advent of cheap books, the debate emphasized the effect of copyright upon the price of books, and the potential effects of these cheap books upon their readers.

Later, a visit and advocacy campaign by Charles Dickens prompted extensive discussions of International Copyright, including a variety of articles, petitions, and organizing efforts. Important themes included literary property, republican authorship, cheap books, and the effects of reading. Despite the sound and fury of International Copyright advocates, the copyright status quo was preserved. Examining this conflict provides important evidence of how people thought about copyright. But before doing so it will be useful to discuss some relevant ideas about the nature of authorship.

### ***Authorship: Lockean and Prestige***

One of the recurring (though by no means dominant) themes over the last few hundred years has been to think of copyright as a species of property. This rhetoric has become much more prevalent over the last few decades – especially with the emergence of the term “intellectual property” in U.S. legal discourse after World War II.<sup>40</sup> However, this “proPERTIZATION” process has a much older history, specifically in the phrase “literary property.”

In the early nineteenth century, this way of thinking about copyright is most commonly seen in legal and/or philosophical circles. For example, consider the assertion of literary property in the opening sentence of “Law of Copy Right” from an 1829 issue of the legal journal *United States Intelligencer and Review*:

If there is any single species of property which  
merits greater protection from the laws of the

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<sup>40</sup> William Fisher examined the reports of the U.S. federal courts via the Lexis system, finding the phrase “intellectual property” appeared only once before 1940. It is ubiquitous today. See “The Growth of Intellectual Property” n.p. n 105



country than any other, it is literary property, because it is from this that society derives the most extensive benefit.<sup>41</sup>

At first glance, it appears that literary property is treated here as simply one species of property. However, notice that literary property merits protection *from* the laws, not *by* the laws. In this version, literary property is conceived of within a natural-rights framework. To this way of thinking, copyright exists in the common law, and statutory law is a potential interference.

Continuing the natural rights theme, this writer goes on to justify literary property with a straightforward appeal to the labor-value ideas included in John Locke's *Two Treatises of Government*.<sup>42</sup> Title arises from occupancy, "which Mr. Locke, and many others, considered to be founded on the personal labour of the occupant."<sup>43</sup> Because the writer has labored with his/her brain, goes this line of thought, the writer owns the resulting product.

In practice, Lockean models of authorship present a very individualistic and atomized version of authorship, broadly assuming the importance of the individual genius and the romanticized author. This idea of authorship ignores or downplays the contributions and influence of whoever has gone before. In this version, copyright framed as essentially the recognition and protection of property by the State, typically in perpetuity.

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<sup>41</sup> *United States Intelligencer and Review*. March 1829, 66. Emphasis in original. Much of the article is devoted to summarizing and quoting a court decision that found newspapers were not subject to copyright.

<sup>42</sup> *Ibid*. The most relevant portion of John Locke is Section 27 of Book 2 of *Two Treatises on Government*. Ironically for those who sought to justify "literary property," Locke had argued *against* the perpetual copyright enjoyed by the Stationer's Guild in the late seventeenth century. See Mark Rose "Nine-Tenths of the Law" 78-9.

<sup>43</sup> From a policy-making perspective, this method has certain difficulties – as Siva Vaidhyanathan mentions, framing "questions of authorship, originality, use, and access to ideas and expressions" as questions of property rights limits the range of policy options towards such topics as fair use. It's hard to argue for "theft." See *Copyrights and Copywrongs* 12-3.

In the 1829 article in question, this Lockean approach is contrasted with a straw-man argument that authors write for prestige. “Glory” quotes the author “is the reward of science, and those who deserve it scorn all meaner views. It was not for gain that Bacon, Newton, Milton and Locke instructed and delighted the world.”<sup>44</sup> This idea, cast as old-fashioned, “will find very few supporters at the present day.”

A prestige model of authorship is rejected as old-fashioned and insufficient. In this alternative model, authorship is understood as undertaken in a prestige economy. In some cases, writing is seen as a duty of educated gentlemen and an important way of performing their social roles. Alternatively, writers are understood to operate in a patronage system, where fame and glory are rewarded via support of the rich and powerful, or a pension from a grateful State.<sup>45</sup> In this model, literary property is more about reputation than about ownership. As in academia, issues like attribution and appropriate dedication are especially important. Copyright, if present, has little to do with property, instead functioning as a form of control.

## ***Republican America***

Ideologically, the 1830s and 1840s in the United States were dominated by republicanism. It was an exciting and unsettling time. In 1829, Andrew Jackson had just succeeded John Quincy Adams to the presidency. Thomas Jefferson and John Adams were recent memories, having died in 1826, and James Madison would live until

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<sup>44</sup> The author is quoting eighteenth century civil libertarian Charles Pratt, Lord Camden’s speech during a 1774 parliamentary debate over the issues raised in *Donaldson v. Beckett*. The writer in *United States Intelligencer* takes some broad liberties with the precise meaning of the quotation by omitting passages.

<sup>45</sup> Obviously associated with writers like William Shakespeare, and typically embedded in an extremely hierarchical class system, it is easy to dismiss this version of authorship as obsolete, or a relic of feudalism. However, a descendant of prestige authorship influences much contemporary academic writing, with the tenure-and-promotion committee replacing Henry Wriothesley, 3rd Earl of Southampton (one of William Shakespeare’s patrons.)

1836. Regional conflict flared over the South Carolina Nullification Crisis in 1832-3, presaging the U.S. Civil War. And the first of the penny daily newspapers, The *New York Sun* was founded in 1833, followed quickly by James Gordon Bennett's *New York Herald* in 1835.

During this period, popular ideas about copyright were dominated by the ideology of republicanism. Of course, this was not unique to the 1830s. As Michael Everton writes:

It is hard to over-dramatize the pervasiveness of republican ideology in early American print culture. Even before the Revolution, printers such as Robert Bell could address frankly "Those Who Possess a Public Spirit" in a subscription advertisement. In an 1801 broadside, Mathew Carey based an appeal to printers and booksellers for the expansion of the print market on the prerequisite of print to a nation's growth.<sup>46</sup>

A staple of high school civics classes in the guise of the "hardy yeoman farmer," republican ideology saw individual liberty (at least for white men) as best preserved by a constrained central government and supported (at least ideologically) by a system of independently-minded small landowners. Essential to these yeomen, and thus the preservation of liberty, was education.

A particularly compelling example uncovered by Michael Warner is that of William Manning. A farmer, former Minuteman, and patriot, Manning wrote to argue for the utility to the nation of a decentralized and democratic magazine that would be cheaply available to all. Manning's justification for his project was straightforward:

Learning & Knowledg is assential to the preservation of Libberty & unless we have more of it

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<sup>46</sup> Michael Everton, "Courtesies of Authorship." 7.

amongue us we Cannot Seporte our Libertyes  
Long.<sup>47</sup>

For writers like Manning, an educated populace was essential for fighting corruption and tyranny.

As Warner notes (expanding on Jürgen Habermas's argument that printing was essential to the development of the institutions of a bourgeoisie public sphere), Manning illustrates how "the act of reading was linked closely to the performative values of civic virtue."<sup>48</sup>

But beyond the virtues of reading, republican authorship mythologizes a society where any citizen can participate in the public sphere by writing. A distinctly non-hierarchical take on authorship, republican ideology defines the value of writing "in opposition to private appropriation and distinction."<sup>49</sup> Within this framework, the goal and justification for writing is the promotion of individual liberty and civic virtue.<sup>50</sup>

In the republican model of authorship, an author's purpose is to contribute to the public good, to educate and inform, promote virtue, and to fight tyranny. For an author to depend upon the largess of a patron is seen as slavish. However, instead of proposing that the author's livelihood be based on a property right to their work, this ideology concentrates upon lowering barriers to entry and extending authorship to a broad swath of society. Taken to the extreme, in this model there would be no professional authors – but every citizen would have the education, opportunity, and civic duty to participate in a populist public sphere by writing.

In the republican model, there is no ownership aspect to copyright. It exists only as a utilitarian incentive to authors, and

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<sup>47</sup> Quoted in Michael Warner, *Letters of the Republic*, 130-1.

<sup>48</sup> Michael Warner, *Letters of the Republic*, xiv.

<sup>49</sup> Michael Warner, *Letters of the Republic*, 131-2.

<sup>50</sup> To a certain extent, the nurturing liberty aspect of republican authorship parallels that of republican motherhood, where the duty of mothers was to instill republican values in the next generation. Linda K. Kerber has written extensively about republican motherhood.

should be modified or even abandoned if some other form of incentive proves more effective.<sup>51</sup> In the U.S., this ideology of authorship was strongest in the first half of the nineteenth century, and exerted considerable influence on the foundation of U.S. copyright law.<sup>52</sup>

Of course, notions of republican authorship rarely exist in anything like a pure form. Instead, they appear as a set of common ideas about the functions and purposes of writing. The actual invocation of these ideas in the magazines and newspapers of the era is much messier, and usually embedded in complex connections to such topics as economics, trade policy, nationalism, nativism, the desirability and purposes of literature, Anglophobia and/or Anglophillia, and issues related to the book industry.

Illustrating these complex connections is an 1832 article from *Atlantic Journal, and Friend of Knowledge*. Attributed in the text to “B. Franklin, Junr.,” this article was probably written by nineteenth century polymath and botanist Constantine Samuel Rafinesque-Schmaltz, founder and editor of *Atlantic Journal*. A wide-ranging indictment of the “impediments to knowledge, literature, and science,” the author lists no less than 25 major problems.<sup>53</sup>

Not much of a populist, the writer starts off by bemoaning the lack of polished and wealthy patrons of literature in the U.S. He goes on to complain about the insincerity, low tastes, and high expenses in the book industry.<sup>54</sup> Yet for all this, immediately adjacent to a complaint about the neglect of knowledge by wealthy

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<sup>51</sup> If stripped of the key emphasis on individual liberty, some of the ideological elements of Republican authorship could be turned to state-centered versions in a totalitarian society.

<sup>52</sup> Approaches emphasizing utilitarian copyright and individual liberty have influenced some of the opposition to contemporary copyright regimes.

<sup>53</sup> B Franklin, Junr., “Impediments to Knowledge, Literature, and Science, In the Unites States” *Atlantic Journal, and Friend of Knowledge*.” Winter, 1832, 124-6.

<sup>54</sup> The author’s complaints about puff pieces, flattery, and venal book reviewers are quite striking. For more on the cultural value of sincerity in the nineteenth century U.S., see Karen Haltunnen’s *Confidence Men and Painted Women*.

men is a paean to republican literacy:

As long as we shall have many citizens depraved by intemperance, notorious vices, bad habits, and ignorance, --even of reading and writing.... and thus easily led by vicious propensities and designing men, we cannot hope to be a perfect people; but we may gradually improve by increasing the means of instruction. All voters for instance ought to be able to read and write!<sup>55</sup>

In addition to literacy, the patronage of the rich, and the gradual abolition of slavery, the writer's proposed correctives are creation of voluntary associations and increased competition.

Patriotic associations ought to be formed, which publish nothing but American works. Book hawkers ought to compete with booksellers. And "our most ingenious men" ought to be induced by "ample fame and reward" to invent cheap methods of printing.<sup>56</sup>

Strikingly, Rafinesque does not propose lowering the price of books or reducing the impediments to science via legal correctives, such as tinkering with the terms, conditions, or duration of copyright. Instead he emphasizes new technology and increased competition. This absence reflects the general dislike of monopolies and state-based solutions characteristic of the republican era.

Republican ideology was notoriously suspicious of monopolies, and thinking of copyright as a monopoly dominated some influential circles. Andrew Jackson, for example, went so far as to single out copyright and patents as the only constitutionally permissible monopolies in his 1832 veto message regarding the reauthorization of the Second Bank of the United States:

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<sup>55</sup> Ibid., 125-6. Emphasis and ellipsis in original. The emphasis on improvement and general context suggests this should not be read as a call for voter literacy tests.

<sup>56</sup> Ibid., 126.

On two subjects only does the Constitution recognize, in Congress, the power to grant exclusive privileges or monopolies. It declares that "Congress shall have power to promote the progress of sciences and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." Out of this express delegation of power, have grown our laws of patents and copyrights. As the Constitution expressly delegates to Congress the power to grant exclusive privileges in these cases [...] such a power was not intended to be granted as a means of accomplishing any other end.<sup>57</sup>

However, republican disdain for monopoly, like attitudes towards authorship and copyright, always exists in a complex relation to other ideas.

## ***Bad Books***

Given the privileging of literacy and the opposition to hierarchy essential to republican ideology, the price of books was an important issue. One writer put it succinctly:

Books are the vehicles of knowledge. The cheaper books are, the more accessible and diffusible

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<sup>57</sup> Published as Andrew Jackson, "Veto Message from the President of the United States." *Banner of the Constitution*. July 18 1832, 252-3. The politics of patents in the Jacksonian era can also be seen as paradoxical. Steven Lubar describes the situation thusly: "On the one hand, a patent was a monopoly, onerous to working people and one of the principal objects of Jacksonian anger. On the other hand, especially in the 1830s, patents were increasingly thought to be an integral part of economic progress, something Jackson and his followers supported. Patents also fit nicely with the Jacksonian effort to use the powers of the state to support private enterprise for the general good." See Lubar 941.

becomes the knowledge which they convey.<sup>58</sup>

Simply put, accessible and inexpensive knowledge would mold citizens as manly, independent, industrious, and virtuous. Indeed, the idea of cheap books operated as a persuasive and basis for copyright policy, and proved a potent political refrain through the entire nineteenth century.

However, if reading good books is one of the roads to virtuous citizenship, a corollary is that reading bad books can create a villainous populace. Within this context, worry about demoralizing novels was caught up in elite worries about activities of the non-elite. From a *North American Magazine* article on contemporary literature:

What is it? What is its characteristic? What its predominant features? What the stamp and image of its qualities? Shall I answer? It is composed, then of FANATICAL TRACTS and DEMORALIZING NOVELS!”<sup>59</sup>

This excerpt is part of an 1833 exchange between poet Sumner Lincoln Fairfield and Mr. Simpson of the *National Banner*.<sup>60</sup>

Fairfield is critical of the book industry, claiming in his section on “Bibliopolists” that they “amply deserve the scourge of the satirist.”<sup>61</sup> However, his criticism of booksellers is overwhelmed by his criticism of book buyers:

After all the accusations which can be brought against the bibliopolists, the great fault remains with a servile, apathetic, unintellectual public. Nothing

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<sup>58</sup> “Cheap Books.” *Atlantic Journal and Friend of Knowledge*. Summer 1832, 39.

<sup>59</sup> “Patrons of American Literature.” *North American Magazine*. Oct., 1833, 377. Emphasis in original.

<sup>60</sup> Apparently John S. Simpson of the *National Banner and Nashville Whig*.

<sup>61</sup> It is tempting to read “Bibliopolist” as a portmanteau word meaning “bibliomonopolist.” However, consultation with the OED reveals that this is incorrect. Bibliopolist has been used to refer to a “bookseller” since the sixteenth century.



will ever prosper while the purchasers of foreign books, the votaries of foreign fashions, the worshippers of foreign follies remain what they are.<sup>62</sup>

Although Simpson is mostly annoyed with the unscrupulous behavior of “namby pamby poetaster” editors and “unmanly and dishonorable” booksellers, Fairfield focuses his ire on the consumer side of the book industry.<sup>63</sup>

Although not specifically named in the article, Fairfield’s anger was clearly spurred by the popularity in the U.S. of Englishwoman Frances Trollope’s pungent 1832 travel book, *Domestic Manners of the Americans*. Trollope was highly critical of the culture and people she encountered in the U.S., and readers in both the U.S. and England bought thousands of copies.

In such a context, consuming bad English books was servile and slavish:

The very offals and lees of degenerated England are offered up to us as – and, such is the almost inconceivable infatuation of our independent citizens, the servile revelers exult in their vassalage. Ere we shall cease to deserve the foreign abuse which we so eagerly purchase, a great, radical reformation must occur; we must become, what we are not, a Nation [...] a generous, steadfast, and highminded people, who will not worship the baboon gods of Europe.<sup>64</sup>

Copyright is mentioned only in passing in the larger exchange, in the context of anxiety over the effect of the consumption of foreign books upon the future of the nation and people. More striking is the

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<sup>62</sup> “Patrons of American Literature.” *North American Magazine*. Oct., 1833, 380.

<sup>63</sup> *Ibid.*, 378.

<sup>64</sup> *Ibid.*, 380. “Baboon Gods of Europe” would be a great name for a band.

embedded idea of the relationship between text and reader.

Books are thought of as powerful and dangerous things. Reading the wrong materials risks corruption, especially of women, youth, and non-elite men, and thus endangers hard-won republican liberty.

Ideas about the power of reading are repeated later in the nineteenth century, but in 1833 the connection between the availability of cheap English books and the lack of international copyright is not yet strongly developed. Copyright is not yet proposed as an essential barrier to bad books, but instead embedded in a litany of complaints about bookmakers and book-buyers.

## ***Republicanism and Copyright: US and UK***

Culturally, ideas about republican authorship influenced the development of copyright law. The essential examination of this topic is Meredith McGill's *American Literature and the Culture of Reprinting*, especially with regard to the foundational case of U.S. copyright, *Wheaton v. Peters* (1834).

Amusingly meta-appropriate, the foundational copyright decision of the U.S. Supreme Court was over a dispute about the publication of U.S. Supreme Court decisions. The facts of the case were straightforward. Briefly, court reporter Henry Wheaton had prepared an extensively annotated edition of the opinions of the court. It was quite expensive. His successor, Richard Peters, produced a much sparer (and thus cheaper) style of court report. In addition to his continuing work, Peters also prepared a (much cheaper) abridged edition of Wheaton. Wheaton sued, and lost.

The decision by the court followed the lead set in the U.K. in *Donaldson v. Beckett*, finding that there was no legal basis for a common-law copyright in the U.S., and that the procedures set by Congress for registration of a copyright were legal and proper. There could be no perpetual copyright in the United States.

After a detailed examination of the relevant documents, McGill concludes that the ideology of republican authorship was essential to this decision:

In *Wheaton v. Peters* the argument on behalf of common-law copyright is met by a theory of authorship of equal coherence and, given the ideological bent of the new nation, far greater persuasive power. This theory of authorship, grounded in a republican belief in the inherent publicity of print and the political necessity of its wide dissemination, stressed the interests of the polity over the property rights of individuals and maintained that there could be no common-law property in a manuscript [after publication].<sup>65</sup>

Thus, republican ideas about authorship, the public sphere, and utilitarian copyright were essential to the formation for the juridical institutions that would determine how copyright was enforced. Note that, as *Donaldson v. Beckett* involved a dispute between booksellers, *Wheaton v. Peters* was a dispute between editor-annotators. No writers or authors were directly involved, republican or otherwise.

Given the common origins of copyright in the U.S. and U.K. via the Statute of Anne and *Donaldson v. Beckett*, it is illustrative to compare events in the U.S. with those in the U.K. Particularity illuminating is the parliamentary conflict over the extension of the term of copyright in 1837-42. Influenced by William Wordsworth, English author and M.P. Thomas Noon Talfourd introduced a bill for the revision of copyright in 1837.

At the time his bill was introduced, copyright in the U.K. lasted for 28 years, automatically extensible for the life of the author.<sup>66</sup> In contrast to the republican ideology then-dominant in the U.S., Talfourd's approach supported a natural right to a perpetual copyright. However, in what was labeled a "compromise between extreme right and expediency," Talfourd proposed that copyright be

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<sup>65</sup> Meredith McGill, *American Literature and the Culture of Reprinting*, 47.

<sup>66</sup> Martha Woodmansee, "Cultural Work of Copyright." 68.

lengthened to the life of the author, plus sixty years.<sup>67</sup>

Opposed by publishers and various well-organized factions (including the radical free traders of the “Doctrinaire” party), the bill was delayed by parliamentary maneuvers and the death of William IV.<sup>68</sup> When the bill was brought up again for debate in 1841, author, historian, and Whig politician Thomas Babington Macaulay eviscerated the chances of immediate passage with a speech that trashed Talfourd’s proposed extension, and persuaded Parliament to put off the Second Reading for another six months.<sup>69</sup>

In his speech, Macaulay emphatically rejected the patronage model of authorship, accepting copyright as the only alternative method of rewarding authors.<sup>70</sup> However, Macaulay also rejected the natural rights arguments advanced by Talfourd, instead arguing that copyright was a utilitarian monopoly granted by the state. As such, it was a necessary evil and required stringent limitation:

Copyright is a monopoly [and...] the effect of monopoly generally is to make articles scarce, to make them dear, and to make them bad. [...] It is good that authors should be remunerated; and the least exceptionable way of remunerating them is by a monopoly. Yet monopoly is an evil. For the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is

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<sup>67</sup> See Macauley 199.

<sup>68</sup> See John Feather, *Publishing, Piracy and Politics*. 125-149. Catherine Seville has also written extensively about the 1842 Copyright Act. Note that the free trade movement in mid-nineteenth century Europe also included serious attempts to limit or abolish patents. See Fritz Machlup and Edith Penrose, “The Patent Controversy in the Nineteenth Century.” There is little evidence this movement had any effect in the U.S.

<sup>69</sup> Speech of February 5, 1841. Reprinted in *Works of Lord Macaulay*, Vol. 8, 195-208.

<sup>70</sup> “I can conceive of no system more fatal to the integrity and independence of literary men than one under which they should be taught to look for their daily bread to the favour of ministers and nobles.” *Ibid.*, 198.

necessary for the purpose of securing the good.<sup>71</sup>

In his concern for the evil of monopoly, Macaulay (rather an old-fashioned Whig) echoes some of the rhetoric found in the U.S.

However, this disdain for monopoly is not accompanied by republican ideas about the benefits of cheap books or the effects of reading on the populace or nation. Despite the elimination of rotten boroughs by the Representation of the People Act (1832), the overall terms of the U.K. debate reflect an elite culture that is much more secure about the state of its national literature, and considerably less concerned about the reading (for good or ill) of a mass public.

Indeed, both Talfourd and Macaulay were notable literary figures of their day, and references to Shakespeare, Milton and Samuel Johnson figure prominently in their debate. Instead of spreading knowledge or fighting tyranny, the essential issue is to maintain access to the classics and to properly remunerate English authors.

Talfourd soon lost his seat in Parliament, but a compromise Copyright Act was passed in 1842. Spurred by Macaulay, this act extended the duration of copyright in the U.K. to either the life of the author, plus 7 years, or for 42 years, whichever offered the most protection.<sup>72</sup>

The U.K. copyright debate was widely reported on in the U.S., though not with any special emphasis. For example, Philadelphia-based *Gentlemen's Magazine* sandwiched an excerpt of one of Talfourd's speeches between articles puffing a particular "ethical novel" as suitable for "domestic circles" and the scientific racism of (purportedly albino) "White Negroes" and *New York Literary Gazette* reprinted a letter by English poet Walter Savage Landor on "Sergeant Talfourd's Copyright Bill."<sup>73</sup>

Judging by their choice of excerpt, *Gentleman's Magazine* was

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<sup>71</sup> Ibid., 198-9.

<sup>72</sup> With some exceptions. See Seville, *Literary Copyright Reform*.

<sup>73</sup> "Literary Copyright" *Gentleman's Magazine*. Sept 1837, 219-20; Walter Savage Landor, "Sergeant Talfourd's Copyright Bill." *New York Literary Gazette*. June 8 1839, 150.

more interested in the subject of international copyright than in British domestic politics. More importantly for events in the U.S., the U.K. debate spurred British authors to petition the U.S. Congress in favor of International Copyright. The resulting disputes and debates – what was copyright, what could it cause or might it prevent – periodically burst forth throughout the rest of the nineteenth century.



## CHAPTER II: INTERNATIONAL COPYRIGHT

### *International Copyright in the 1830s*

Perusing a list of the various U.S. copyright acts suggests that the years of Nat Turner's Rebellion and the Trail of Tears were a quiet time for U.S. copyright, as there were only two minor adjustments to the law. The first, an 1834 amendment, assigned to the clerk of the district courts responsibility for recording transfers of copyright.

The second, part of the 1846 Act establishing the Smithsonian Institution, added the deposit of two additional copies of the printed work. In addition to the single copy required by the Copyright Act of 1831, one copy was to be deposited with the Smithsonian, and another with the Library of Congress.<sup>1</sup> This law had little practical effect, since there was no enforcement provision for these newly added depository requirements, and failure to comply with this particular provision was found by the courts not to invalidate a copyright.<sup>2</sup> However, looking solely at this sparse list misses the initial stirrings of the international copyright debate, an issue that

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<sup>1</sup> Act of August 10, 1846, 29<sup>th</sup> Cong., 1<sup>st</sup> Sess., 9 Stat. 106.

<sup>2</sup> Patry, *Copyright Law and Practice*, 40-1. An 1867 amendment added a \$25 fine for failure to comply with the deposit requirement. See also Chapter III.



would periodically recur for the rest of the century.

The Copyright Act of 1831 reiterated the Act of 1790 in refusing to extend copyright protection to non-residents. Thus, until 1891 U.S. publishers were free to reprint works from the U.K. This was controversial in some quarters, and there was periodic agitation for an international copyright provision, either by treaty or by legislation, for the next sixty years. In general, the goal of this activism was to make U.S. copyright available to British authors.<sup>3</sup>

Many U.S. authors supported a version of international copyright, thinking (in part) that it would increase the cost to U.S. publishers of printing books by U.K. authors, resulting in more sales for U.S. authors. In contrast, most non-authors opposed international copyright until late in the nineteenth century.

Briefly, publishers opposed international copyright because they thought it would increase their costs. Workers in the U.S. book trades opposed it because they feared it would result in fewer books being manufactured in the U.S. And the reading public opposed it because it would raise the cost of books. However, this summary oversimplifies a complex web of arguments spanning two-thirds of the century.

One of the most striking things about these arguments is the stridency and resolve of many U.S. authors – copyright policy was quite important to many writers, and they wrote about it extensively. Non-writers generally had less access to the print public forum.

On the surface, this situation parallels the logic of collective action, as theorized by economist Mancur Olson.<sup>4</sup> If an issue is of tremendous importance to a small group (e.g., authors), and of minor importance to a large group (e.g., readers), the more intense interests of the smaller group will lead them to take more aggressive action (lobbying, propaganda, etc.), resulting in efficacious political action. In contrast, the more amorphous interests of the larger group provide

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<sup>3</sup> There was much less attention to copyright relations with other nations.

<sup>4</sup> See Mancur Olson, *Rise and Decline of Nations*, 17-35. This work further develops and applies some of the ideas Olson proposed in *Logic of Collective Action* in ways more accessible to non-economists.

little motivation for individual action. However, in reading the angry words of these nineteenth century author-activists, it is essential to remember that the vigor of their arguments was matched with almost complete political impotence.

This impotence is sometimes erased in examinations of international copyright for two reasons. First, author-activists advocating international copyright produced a disproportionate amount of the historical record, including books, magazines, pamphlets, petitions, and letters. While this prolific output is not proportional to their political and cultural power, it is widely available and readily accessible to researchers. Second, because the desires of authors were eventually enacted, there is a temptation look to back at the various expansions and extensions to copyright law as some sort of inevitable progression towards a more perfect form.<sup>5</sup> This teleological fallacy mistakes the activism of authors as effectively *causing* the changes in the law, however belatedly.

Much of the older scholarship on international copyright suffers from this problem, typically expressed by framing the history in question as if it was somehow akin to a civil rights movement or a quest for progress. In general, these scholars are biased towards the success of their author-subjects, finding satisfaction in the eventual extension of U.S. copyright to non-residents.

In the context of these generations of ineffectual activism, it is important to understand that changes in attitudes towards copyright were caused by broader cultural and economic factors, not the advocacy of a few dozen individuals. Indeed, the 60-odd years of activism by authors had more to do with creating and performing authorship as a profession than the expressed goal of international copyright.

Despite this occasional difficulty, some of the older scholarship on the international copyright conflict is superbly researched and still very useful. In particular, James J. Barnes' 1974 book, *Authors, Publishers, and Politicians: the Quest for and Anglo-American Copyright Agreement, 1815-1854* is an excellent examination of the

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<sup>5</sup> Several of the older writings on the history of copyright commit this error.

politics of the failed 1854 treaty between the U.S. and U.K. for reciprocal copyrights. Barnes combines a good understanding of the U.S. book industry with impressive work on the roles of some prominent American and British figures in the diplomacy and politics of international copyright on both sides of the Atlantic.

A bit older but in some ways more broadly useful is Aubert J. Clark's 1960 book, *Movement for International Copyright in Nineteenth Century America*. Like Barnes, Clark conducted extensive research into the roles of a few prominent figures, and is particularly strong on the history of international copyright in the halls of the U. S. Congress. Moreover, where Barnes cuts off his detailed examination in 1854, Clark covers the entire nineteenth century. More recently, Catherine Seville provides a cross-Atlantic perspective on this history as part of her *Internationalization of Copyright Law* (2006).<sup>6</sup>

The first sign of U.S. Congressional interest in international copyright is a bill introduced by Henry Clay in the spring of 1837. Led by Clay, and responding to a petition by 56 British authors, the U.S. Senate commissioned a Select Committee to look into the matter, ordered the bill to be printed, and took no further action.<sup>7</sup> The petition, a commentary upon the justice of their cause, and the report of the Select Committee were later printed in the dull and naively nationalistic *American Quarterly Review*.<sup>8</sup>

In their petition, the British authors downplay their pecuniary interest in copyright with a few passing references to profits. Instead, they emphasize how international copyright would promote the production of authoritative texts:

The works thus appropriated by American booksellers are liable to be mutilated and altered at the pleasure of the said booksellers, or any other persons who may have an interest in reducing the

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<sup>6</sup> See Seville, *Internationalisation*, 146-252.

<sup>7</sup> Solberg, *Copyright in Congress*, 33-4.

<sup>8</sup> See Frank Luther Mott, *A History of American Magazines*. Vol. 1, 273.

price of the works, or in conciliating the supposed principles or prejudices of purchasers [...] and the names of the authors being retained, they may be made responsible for works which they no longer recognize as their own.<sup>9</sup>

According to the signers of this petition, the American public suffered by the resulting uncertainty.

By “made responsible,” the authors mean not a legal or financial responsibility (as in libel, for example), but one of reputation. They fear having their name attached to a mutilated text. In this way of thinking, copyright is a tool to control reputation, not an economic incentive. As such, it is connected to the older prestige-based notions of authorship, as well as the historical relationship between copyright and censorship. However, instead of censoring heresy, they would censor unauthorized texts as mutilations of authorial intent.

Commentary on the proposed measures was interrupted by the May 10 Panic of 1837 and resulting depression.<sup>10</sup> Pre-Panic commentary from U.S. literary and legal sources was generally supportive of international copyright. However, there was only a partial connection with the British petitioners’ concern for reputation, authenticity, and control. Instead, copyright was connected to broader notions of status.

For example, a poetic yet error-laden history of copyright law in the Bangor-based *Maine Monthly Magazine* discusses copyright in the language of the nationalistic sublime.<sup>11</sup> Apparently no American

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<sup>9</sup> *American Quarterly Review*. March, 1837, 215.

<sup>10</sup> A crisis over specie, hard money, and bad debts, the resulting severe depression lasted from 1837 to 1843.

<sup>11</sup> *Maine Monthly Magazine*. Feb., 1837, 358-365. One of the amusing aspects of this article is the author’s quoting of English historian Catharine Macaulay’s 1774 “A Modest Plea for the Property of Copyright.” Responding to *Donaldson v. Beckett*, Macaulay wrote: “Authors, it seems, are beings of a very high order, and infinitely above the low considerations of the useful, the convenient, and the necessary.” On the surface, this reads as a satirical attack on

who embraced such splendors as the alpine plants of New England, antique forests, or the magnificent magnolia of the Floridas, could but deplore the lack of a national literature.<sup>12</sup> International copyright and literary property were offered as solutions to this problem. This strongly felt lack of an American Literature was combined with an elitist distaste for the products currently available:

There would be some consolation if the reprints we are favored with were of the standard productions of the old world, or new works of decided utility; on the contrary the land is overrun with volumes of trash; they are numerous as the frogs of Egypt. Generally those works of fiction are selected which will most readily sell, no matter how ephemeral or unworthy. [They] pervert the public taste.<sup>13</sup>

Again, reprints of bad books are described as a source of contamination to the republican body politic. This particular author is relatively vague about just which books are “bad,” but overly commercial books (“that which will most readily sell”) and ephemeral fiction come in for special vitriol.

An alternative justification for international copyright was put forth in a three-part series appearing in *American Monthly Magazine*, a New York based rival of *Knickerbocker*.<sup>14</sup> In this series, the most powerful arguments – posed to writers, publishers, and readers – all

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the idea that authors need not get paid since they live on glory and eat rainbows. However, since “convenient” was slang for a mistress, and “necessary” for a privy, the simple statement on “low considerations” may be deceptively scandalous. However, it is not at all clear whether Macauley, her reprinter, or the readers of the *Maine Monthly* would have read at this punny level.

<sup>12</sup> Ibid., 364. This passage is particularly illustrative of how the aesthetic of the sublime was motivated by U.S. nationalism.

<sup>13</sup> Ibid., 364-5.

<sup>14</sup> Edited by at this time by Park Benjamin, the Panic killed the money-losing *American Monthly Magazine* in 1838. See Barnes 1-7 for a quick overview of the effect of the Panic on the book trade. See Tebbel, Vol. 1. for a more thorough examination.

connect copyright to social status.

Parts One and Two, “To the Writers of America,” and “To the Publishers of America” appeared in the spring of 1837, before the Panic. The first begins by lingering over the lack of professional authorship in the U.S.: “Writers, as a distinct class, can hardly be said to exist.”<sup>15</sup> Instead, “Writing in America is an amateur business, to be done at one’s leisure, or in moments abstracted from more important avocations.”<sup>16</sup> This rhetoric is reminiscent of the idea of writing as a part of being an educated and worldly gentleman.

However, the gentlemanly role is rejected here, in favor of arguing that the supposed economic benefits of international copyright would elevate the prestige of writers. In this ideology, the increase in status would be more than economic, since, with international copyright, writers would create a distinctly American literature. They would then be explicitly honored and gain status for this service to the nation.

The second essay, addressed to the publishers, also appeals to ideas of status. The article begins by gently castigating republishers, who are: “compelled by circumstances to do a great wrong. Viz: to throw an incubus upon American literature.”<sup>17</sup> (The book reprint market was dominated by Carey & Lea of Philadelphia until the mid-1830s, and by Harper & Bros. of New York for decades after that.<sup>18</sup>) The article goes on to describe how the “most important effect [...] of the copy-right law upon publisher would be found in its power to elevate the character of the business.”<sup>19</sup> Again, this rhetoric invokes older ideas of the literary patron. Consider the far-reaching benefits rhetorically attributed to a more genteel publishing industry:

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<sup>15</sup> “Copyright No. 1. To The Writers of America” *American Monthly Magazine*. Feb., 1837. 153.

<sup>16</sup> *Ibid.*, 155.

<sup>17</sup> “Copyright Law No 2. To the Publishers of America.” *American Monthly Magazine*. March, 1837.

<sup>18</sup> James J. Barnes *Authors, Publishers, and Politicians*. 49. For a detailed study, see John Tebbel, *History of Book Publishing in the United States*. Vol. 1.

<sup>19</sup> “Copyright Law 2. To the Publishers of America.” *American Monthly Magazine*. March, 1837. 286.

An intelligent and educated publisher occupies a very important and enviable station in the community. He is a powerful patron of literature: at his house are gathered the genius and talent of the land; to him the trained writers, men of established fame and high standing resort as a common friend; the young and modest aspirants look to him as a benefactor and a parent; all take pleasure in perpetuating his name and toiling for his fortune.<sup>20</sup>

The appeal of this proposed patriarch/patron/publisher proved resistible. Perhaps the status of their typically extraordinarily complex finances was more persuasive.<sup>21</sup>

The third article in this series, "To the Readers of the United States," did not appear until October, well after the first wave of bank failures resulting from the Panic of 1837. Structured like the other articles in this series, the initial argument segues into a thoroughly developed argument grounded in status. In this case, the article begins with a moral argument. Supporting pirate publishers is "morally wrong." These pirates "make of us a nation of literary Algerines."<sup>22</sup>

Instead of developing these threats of immorality or of contamination by Barbary pirates, the writer dwells on the associations between books and status.<sup>23</sup> This line of status argument dwells on the physical characteristics of books, and the

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<sup>20</sup> Ibid., 286.

<sup>21</sup> The Panic and shortage of hard currency resulted in some bizarre transactions. For example, see Barnes 1-2 for a description of how unreliable banks led Harper & Bros. to try to pay Edward Lytton Bulwer (name changed to Edward Bulwer-Lytton after 1844) a promised £150 with some very nebulous rupees from their Calcutta agent.

<sup>22</sup> "Copyright Law No 3. To the Readers of the United States." *American Monthly Magazine*. Oct., 1837. 374.

<sup>23</sup> The U.S. fought Algiers and the other Barbary states in from 1801-5 and again in 1815. Algeria became an unruly colony of France in 1830, and remained so until 1962.

problems of cheap editions. The reader can “buy and read, and buy again, if your eyes are not spoiled by the brown paper and [tiny] type.”<sup>24</sup> It is a rhetorically easy jump from these brown books to castigating the “wretched edition [...] not worth preserving.” Moreover, “no man who has the least pride in his library would allow the first reprints of English novels a place” on his shelf.<sup>25</sup> Here, the display of (not-brown) books as part of a fine library is a source of status, and part of being an educated white gentleman.<sup>26</sup>

The idea that books ought to have lasting value was an important part of ideas about copyright in both popular and legal realms. In addition to the disdain for ephemera expressed above, this idea was influential in the 1829 copyright case *Clayton v. Stone*.

Considering what is encompassed by the constitutional basis for copyright (i.e., what gets included in the promotion of science and the useful arts), the Court found that news is not science and thus not a suitable subject for copyright. The ephemeral nature of news is central to the court’s reasoning. Science is “of a more fixed, permanent and durable character” and “cannot, with any propriety, be applied to a work of so fluctuating and fugitive a form as that of a newspaper or pricecurrent, the subject-matter of which is daily changing, and is of mere temporary use.”<sup>27</sup> In other words, copyright is special, and reserved for works of lasting utility.

On the whole, during this period, copyright was especially connected to ideas of status, whether of the author, the publisher, the reader, or the text. The British petitioners worried about the effects on reputation of an inauthentic (or at least, uncontrolled) text. American commentators like those of *American Monthly* thought of copyright as a route to higher status for writers, for more genteel publishers, and more cultivated readers. There was considerable disdain for ephemera in both magazine articles and the law.

<sup>24</sup> “Copyright Law No 3. To the Readers of the United States.” *American Monthly Magazine*. Oct., 1837. 375.

<sup>25</sup> *Ibid.*, 376.

<sup>26</sup> Thorstein Veblen would theorize this sort of behavior as conspicuous consumption in his 1899 *Theory of the Leisure Class*.

<sup>27</sup> *Clayton et al. V. Stone et al.* 1829.



Copyright was associated with being special, of high-status, utilitarian, and durable. This would change after 1837.

## ***Copyright and the Panic of 1837***

By far the most severe economic crisis in the antebellum U.S., the effects of the Panic of 1837 were wide ranging, resulting (after a partial recovery in 1838) in a severe depression lasting from 1837 to 1843. Banks collapsed, interest rates soared, and per capita incomes stagnated. Banks ceased specie payments, and the value of banknotes in circulation dropped precipitously. Several states defaulted on their public debt.<sup>28</sup> In the printing industry, unemployment and underemployment were common, as were the problems of transacting business without a stable currency.

This economic context led to a shift in copyright discourse towards the context of book manufacturing. Introduced before the Panic, Clay's above-mentioned bill to extend copyright privileges to non-residents was poorly received after the economic collapse. In this context, economic arguments over the creation, manufacture, and sale of books dominated thinking about copyright.

Legislatively, the Senate Patent Committee reported Clay's bill out of committee in 1838 without amendment, but added a report rejecting the premise of the bill.<sup>29</sup> As Barnes notes, the negative report borrows heavily from aspects of Philip H. Nicklin's 1838 *Remarks on Literary Property*.

Written in response to the petition of British authors, Nicklin examined the claims of these authors and the pro-copyright report from Clay's 1837 Select Committee, finding them unconvincing. Nicklin's comparisons of book prices found great approval with the committee, as well as with contemporary reviewers, illustrating the

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<sup>28</sup> See Holt 61-87 for a nice overview of the political ramifications of the Panic.

<sup>29</sup> Sometimes called the Ruggles report, after Chairman John Ruggles of Maine. This report should not be confused with the pro-copyright "Report of the Select Committee." This latter report was being reprinted by pro-copyright organizations as late as 1889.

importance of economic arguments after the Panic.<sup>30</sup>

On the whole, reviewers worried about the effects of competition from Europe, while the Committee took notice of the sheer size of the domestic industry:

the number of persons presently employed in the United States in the various branches connected with book-making and periodical publication, has been estimated at two hundred thousand – and the capital employed in those branches, at from thirty to forty millions of dollars.<sup>31</sup>

In the Senate report, International Copyright is thought of in relation to the whole printing and publishing industry, and specifically, to the book as a made object. In this thinking, only manuscripts are written. Books are manufactured.<sup>32</sup>

In marked contrast to the power accorded his economic arguments, Nicklin's philosophical arguments in favor of perpetual copyright were ignored. *American Jurist* for example, dismissed perpetual copyright as constitutionally unsupportable, barring "some pious fraud be resorted to by Congress, and sanctioned by the judiciary."<sup>33</sup>

Historical scholars generally attribute this negative Senate report to the economic hardship caused by the Panic. Barnes does so directly. Clark, examining the petitions lodged against Clay's bill by

<sup>30</sup> Barnes 68-9; "Critical Notices." *American Jurist and Law Magazine*. July, 1838. 476-9.

<sup>31</sup> Report of Committee on Patents, June 25, 1838. Also quoted in a review of "Remarks on Literary Property" *New York Review*. April, 1839, p. 273. Some sources (e.g. the APS database) attribute this review to Nicklin, but he is the subject, not the author.

<sup>32</sup> A particularly succinct exposition of this point occurs in Roger Stoddard's "Morphology and the Book from an American Perspective." 4. Stoddard writes: "Whatever they may do, authors do *not* write books. Books are not written at all. They are manufactured by scribes and other artisans, by mechanics and other engineers, and by printing presses and other machines."

<sup>33</sup> "Critical Notices." *American Jurist and Law Magazine*. July, 1838. 478-9.

such groups as the Columbia Typographical Society of the District of Columbia, concludes that Congress considered the salient issues to be “threat to American industry, fear of unemployment, and cheap books for the masses.”<sup>34</sup>

The refrain of “cheap books” is very important to nineteenth century copyright discourse. Cheap books – the penny press and the dime novel – were plentiful later in the century, but the first big drop in book prices occurred during the Panic of 1837. Driven by deflationary pressures, aggressive competition between printers, technological advances in printing and papermaking, and cheap content, the average price of a book dropped from around \$2 in the 1820s to around 50 cents during the depression of 1837-43.<sup>35</sup> A comparable volume might cost much as \$7 in the U.K.

As described above, cheap texts were important to republican ideology as an element of creating a virtuous citizenry. However, the importance of cheap books extended beyond political thinking. Bluntly, people really like cheap books. This liking is not limited to the U.S. – Martha Woodmansee, for example, observes that public opinion in eighteenth century Germany was very much on the side of book piracy:

For the reading public as a whole considered itself well served by a practice which not only made inexpensive reprints available but could also be plausibly credited with holding down the price of books in general through the competition it created.<sup>36</sup>

Clark makes a similar observation about the nineteenth century U.S., noting that many Americans vaguely appreciated that “somehow or other the lack of copyright was associated with cheap books, which

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<sup>34</sup> Barnes 67-74; Clark 54.

<sup>35</sup> Barnes 4; See also Tebbel Vol. 1. There is still significant work to be done on the economics of the nineteenth century publishing.

<sup>36</sup> Martha Woodmansse, “The Genius and the Copyright.” 442.

they wholeheartedly favored.”<sup>37</sup>

## ***Folsom v. Marsh***

Thinking about copyright as one economic element of the publishing industry found further expression in the legal realm in *Folsom v. Marsh* (1841). (In the United States, *Folsom* is particularly important as the foundation of fair use doctrine.) The case was a difficult one. Jared Sparks had spent nine years preparing the nearly 7,000-page, twelve-volume, *Writings of George Washington*. While a tremendous achievement, it was also very expensive.

Working from Spark’s collection, Rev. Charles W. Upham had put together a 2-volume work explicitly suitable for school libraries. His work, *Life of Washington in the Form of an Autobiography*, consisted largely of Washington’s own words. To do so, Upham had selected several hundred of Washington’s letters and official documents, connecting them with explanatory material. These letters and documents, taken verbatim from Spark’s collection, amounted to some 353 pages of Upham’s 866-page work.<sup>38</sup>

After an exhaustive review of whether or not personal letters could be subject to copyright, Justice Joseph Story determined that the plaintiff did have a valid copyright, and found that the “real hinge” of the case was whether the defendants “had a right to abridge and select” and, if so, what the limits were.

After carefully examining the various aspects, Story decided upon a multi-part test to assess fair use:

the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the

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<sup>37</sup> Clark 55.

<sup>38</sup> *Folsom et al v. Marsh et al* (1841).

original work.<sup>39</sup>

This framework considers copyright in relation to the market – the fairness of a use is determined by value, sale and profit.

As for the case, after carefully setting these criteria, Story rather regretfully found for Sparks, urging an amicable settlement while granting a perpetual injunction against the defendants. Sparks would go on to prepare his own 2-volume abridgement in 1843.

## ***Anxiety over American Literature***

Americans in the 1840s loved novels. In books or in magazines they read works by Charles Dickens, William Thackeray, Charlotte Brontë, Emily Brontë, Elizabeth Gaskell, George Sand, Alexander Dumas, Victor Hugo, Honoré de Balzac, and a host of others.<sup>40</sup> They also read work by Edgar Allan Poe, James Fenimore Cooper, Catherine Maria Sedgewick, William Gilmore Simms, and other American writers. Even with the thriving reprint trade, nearly half of the novels reviewed in major magazines in 1840-60 were American.<sup>41</sup> Despite this obvious success, there was considerable anxiety expressed by writers over the state of American Literature.

As suggested in the 1833 exchange between Fairfield and Simpson, republican worries about the lack of American Literature were closely connected to American nationalism and worry about the future of the Republic. Implicit in this worry was the assumption that reading shapes the reader, particularly in regard to the power and utility of the novel form.<sup>42</sup>

Constructing literature as powerful also makes it dangerous. For if literature exerts influence, then the writings of foreigners can

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<sup>39</sup> These basic premises were codified in the Copyright Act of 1976.

<sup>40</sup> Nina Baym, *Novels, Readers, and Reviewers: Responses to Fiction in Antebellum America*, 23.

<sup>41</sup> Ibid.

<sup>42</sup> Assumptions about the power of a text to shape the reader help explain why copyright was extended to fiction in the first place.

represent foreign influence and a source of potential contamination. The resulting xenophobia and easy racism is sometimes blatant, as Fairfield follows a section on “The Servitude of the American Mind” with one on “The English in America”:

Beware! The word should be echoed and reechoed forever, to all true Americans— beware of foreign influence! Beware of trusting such a locus horde of Irish emigrants! Beware of committing your public offices – the education of your children – the welfare of your country to the panders of despotism.<sup>43</sup>

In this logic, European literacy is taken as the wellspring of civilization, and its lack as barbarism. From an 1838 issue of *American Monthly Magazine*:

The debt we owe to literature is incalculable. Without the goodly aid of books, those treasures of language, [...] the very words we utter would have been but an ill-formed, rude mass of sounds; such as the natives of Tonga or the Feejee islands gibbers at a high dance or some fiendish sacrifice.<sup>44</sup>

Thus ideas about the power of literature slide into a dichotomy between the civilized/bookish and the uncivilized/gibberish of some Other.

## ***Copyright, Literature, and the Market***

In the late 1830s and early 1840s, rhetorical connection of authors and literature as forces for nation and civilization was common in commentary on international copyright, as was distress over the state

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<sup>43</sup> “The Patrons of American Literature.” *North American Magazine*. Oct., 1833, 383.

<sup>44</sup> “The New Copyright Law.” *American Monthly Magazine*, Feb., 1838, 111-2.

of American Literature. For example, *American Monthly* juxtaposes the civilized “treasures of language” with deep worry that American Literature “has become a sorry phrase, mentioned with a curl of the lip, and a piteous sneer of contempt.”<sup>45</sup>

This worry was in part driven by discomfort with the idea of literature as a market commodity. One reaction was to insist that commercialized writing cannot fill the civilizing role reserved for Real Literature. For, “would a bill of lading [have] reduced these warring babblings of Babel to harmony and grace?”<sup>46</sup>

Tension between ideals of authorship and discomfort with the market is particularly evident in an 1839 essay, probably by William Gilmore Simms, entitled “International Law of Copy - Right” that appeared in the Richmond-based *Southern Literary Messenger*.<sup>47</sup> Simms begins by identifying property as the “distinguishing feature between rude and polished nations.”<sup>48</sup> This rhetorical link between literature and property is closely connected to the way that property signals and enforces status in a market economy. Simms continues by rejecting the “fulsome dedications and that cringing sycophancy” of a patronage system.<sup>49</sup> Instead, he muses about an idealized self-made young author arising via his merit from “the lowly cottage of the humble poor.”<sup>50</sup> Copyright, in this romanticized vision, regularizes authorship as a paying profession.

When it comes to relations with publishers, Simms prefers to cast copyright as control. The current situation “places the choice of books into the wrong hands” – the publishers.<sup>51</sup> These market-driven menaces ignore the desire of the “more intelligent and cultivated

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<sup>45</sup> Ibid., 107.

<sup>46</sup> Ibid., 112.

<sup>47</sup> Writing later, Benjamin Blake Minor, editor of the *Southern Literary Messenger* from 1843-47 convincingly attributes this essay to William Gilmore Simms. Minor 73.

<sup>48</sup> “International Law of Copy – Right” *Southern Literary Messenger*. October, 1839. 663.

<sup>49</sup> Ibid., 664.

<sup>50</sup> Ibid., 666.

<sup>51</sup> Ibid., 665.

classes” in favor of light fiction. International copyright, as Simms saw it, would reform this plebian market: “Had our publishers to pay the price of copyright for all works they reprinted, it is quite certain that they would not be so fond of catching up and reprinting the trashy works of the day.” In a market thusly regulated, “the trifling novel and catch-penny, the cheap nonsense of the day [...] would be superseded by works of greater value.”<sup>52</sup> Other writers took a similar view, as “A Friend to Letters” who found light novels “as fair subjects of taxation here as opium in China.”<sup>53</sup>

According to Simms, regulation of trashy novels would be only one of the benefits to international copyright. In addition to transforming “the interest of the publisher” into “the interest of the community,” international copyright would lead to better American authors, and more of them. These authors would both create and evince the honesty, justice, and civilized status of America, and garner praise from abroad. With international copyright “the republic of letters will move triumphantly on.”<sup>54</sup>

Simms’ discomfort with the role of authorship in a market, desire for regulation of the market, and desire for control all contribute to a discourse that linked international copyright to the fate of American Literature. But the printing industry was about to illustrate just what the market thought of these genteel approaches to Literature. Pirated content, technological improvements, and innovative business models would forever alter the literacy landscape in the 1840s. This radical change would start in the magazines and newspapers, especially the cheap mammoth weeklies.

## ***Magazines in Antebellum America***

A great deal of the reading material published before the Civil War was in the form of magazines. Many of these magazines were short lived, but there were thousands – organizational sociologist Heather

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<sup>52</sup> Ibid., 665.

<sup>53</sup> “A Native Literature,” *Southern Literary Messenger*. June, 1844. 381.

<sup>54</sup> Ibid., 665.



Haveman has compiled longitudinal data for over 5,000 antebellum magazine titles.<sup>55</sup>

Originally referring to a storehouse or repository, especially for military supplies, the first use of the term “magazine” to refer to a publication was probably *Gentleman’s Magazine*, founded in London in 1731. This publication describes itself as “a Monthly Collection, to treasure up, as in a magazine, the most remarkable Pieces.”<sup>56</sup> Early American magazines typically operated on the eclectic model, reprinting whatever pleased them from other sources instead of emphasizing original material. Frank Luther Mott claims that at least three-quarters of the total content of American magazines during the period 1741 to 1794 was reprinted extracts from “books, pamphlets, newspapers, and other magazines, both English and American.”<sup>57</sup>

The lack of international copyright and the narrow focus of domestic copyright led to the founding of explicitly piratical magazines. *Harper’s Monthly*, for example, started in 1850 with almost exclusively pirated material. By 1860, it had a circulation of 200,000.<sup>58</sup> Some publications even embraced and marketed the pirate label. Founder Nathaniel Parker Willis, for example, conceived *Corsair*:

To take advantage, in short, of the privilege assured to us by our piratical law of copyright; and [...] “convey” to our columns, for the amusement of our readers, the cream and spirit of everything that ventures to light in England, France and Germany.<sup>59</sup>

*Corsair* was joined by *Bucaneer* [sic], as well as the mammoth newsprint weeklies *Brother Jonathan* and *New World*. Termed

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<sup>55</sup> Heather A. Haveman, “Antebellum Literary Culture And the Evolution of American Magazines.”

<sup>56</sup> Frank Luther Mott, *History of American Magazines*. Vol.1 6.; “Magazine,” Oxford English Dictionary.

<sup>57</sup> Ibid., 39.

<sup>58</sup> Clark 79.

<sup>59</sup> Quoted in Mott, Vol. 1, 356-7.

mammoth because of their size, these massive New York papers contained current news, reviews, articles on travel, and a great deal of serial fiction. Other cities had their own versions, including the Boston *Notion* and in Philadelphia, *Waldie's Literary Omnibus*.

Finding that book reprinters like Harper & Bros., would rush the latest novels from abroad into print, spoiling the market for the serial version, the New York weeklies began issuing complete novels as "extras." Breaking with traditional book industry practices and distribution systems, the mammoth weeklies thrived until April 1843, when cutthroat competition combined with rule changes by the U.S. Post Office (un-sewn papers had previously been mailed at newspaper rates) to end the viability of that particular business model.<sup>60</sup>

Extras put the fiction of the day within the reach of a much wider audience. A new novel by Charles Dickens, for example, sold for as little as ten cents.<sup>61</sup> Or for those of a more sensational taste, *New World* advertised that Edward Bulwer Lytton's *Zanoni* would be available in a single extra of "33 quarto pages," priced at only 12½ cents per copy, or ten for a dollar.<sup>62</sup> Print runs for these extras ran into the tens of thousands of copies – *New World* sold 26,000 copies of *Zanoni* within a few weeks, and *Brother Jonathan* reportedly sold 33,000 copies of their own edition.<sup>63</sup>

It is not surprising that pirates had pronounced ideas about copyright. However, their attitudes were neither simplistic nor uniform. *Corsair*, for example, took significant notice of Talfourd's efforts to extend the term of copyright in Britain, reprinting in 1839 at least five articles about U.K. copyright. All of these articles advocated for the expansion of copyright. Similarly, a brief original article comments approvingly on efforts in Congress to extend copyright in 1840, metaphorically expressing *Corsair's* willingness to abandon their piratical ways:

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<sup>60</sup> Ibid., 361.; Barnes 8-22.

<sup>61</sup> Ibid., 360.

<sup>62</sup> They probably meant 32 pages. *New World*. June 25, 1842, 412. Amusingly, the ad is right in the middle of a diatribe about "copyright-mad dunces."

<sup>63</sup> Barnes 11-2.

we shall be prepared to strike our flag to the supremacy of the laws, and running up the broad banner of equal rights, career over the ocean of literature ready to barter the products of toil or pay for the labours of others.<sup>64</sup>

As this extract suggests, *Corsair*'s approach was to publicly express a willingness to conform to a non-existent law. This both buffered *Corsair* from criticism and emphasized the legality of their current practices.

In contrast, *Brother Jonathan* and *New World* printed heated attacks on international copyright, particularly in the context of Charles Dickens' 1842 visit to the U.S. (ostensibly undertaken to gather materials for his future work). Wildly popular in the U.S. at the time of his January arrival, Dickens (1812-1870) was soon caught up in public advocacy for an Anglo-American copyright law.

Sidney Moss examines this visit in detail in *Charles Dickens' Quarrel with America*, but generally Dickens' public appeals were considered unseemly, and his public image suffered. For example, on February 12, James Watson Webb (1802-1884), of the New York *Courier and Enquirer* editorialized:

Mr. Dickens has been honored with two public dinners since his arrival in the United States; and on both occasions he has made an appeal to his hosts on behalf of a law to secure him a certain amount in *dollars and cents* for his writings. We are [...] mortified and grieved that he should have been guilty of such great indelicacy and gross impropriety.<sup>65</sup>

Webb's words were kinder than many. On February 22, only a

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<sup>64</sup> "Law of Copyright." *Corsair*: Jan 11, 1840. 698.

<sup>65</sup> Quoted in Sidney Moss, *Charles Dickens' Quarrel with America*. 3. Ellipsis in Moss.

month after arriving in the U.S. Dickens complained of his treatment to Jonathan Chapman mayor of Boston:

I have never in my life been so shocked and disgusted, or made so sick and sore at heart, as I have been by the treatment I have received here [...] in reference to the Intentional Copyright question.<sup>66</sup>

Dickens was treated much more kindly in *Brother Jonathan* than by the penny press. From an article published on February 19:

That Mr. D. should entertain such views is perfectly natural, and perfectly proper; and that he may entertain them without subjecting himself to the charge of sordidness, or improper avarice, we fully believe.<sup>67</sup>

However, after this promising prelude, *Brother Jonathan* went on to poke holes in various arguments made in favor of copyright. Illustrating the still-lingering effects of the Panic of 1837, most of their arguments are economic. For example, they claim an international copyright law, would cut the size of the U.S. printing trade in half:

you would divert the application of eight millions of capital into other employment, absolutely destroying a large portion it. Follow this proportion out through type founding, printing machine building, book binding, manufacture of book binders' tools, and the production of book binders' stock; estimate the number of men, women, and children whom you throw out of employment, and others who you effect indirectly, and then inquire what the authors of

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<sup>66</sup> Ibid., 9. Ellipsis in Moss.

<sup>67</sup> "Copyright, Tariff &c." *Brother Jonathan*. Feb 19, 1842. 212.

England have done to entitle them to the benefit of this give-away game on our part.<sup>68</sup>

Copyright for *Brother Jonathan* is not a function of authorship, but only one element of the larger printing industry and the manufacture of books.

While *Brother Jonathan* probably overstates the matter, the 1842 status quo in the printing industry was very much built upon the ability to freely reprint. Changes to the copyright law would have been changes to the regulatory environment in which the printing industry evolved, and would have resulted in dislocations and changes to the established industry. However, these sorts of changes are continuous in any industry – the legal, cultural, technological, or similarly vital environment changes, and businesses and industries adapt or die.

Connections between copyright and industry were notably absent in an International Copyright petition signed by U.S. authors. Dickens presented this petition, which he may have drafted himself, to Senator Henry Clay. Instead of printers and employment, the petition speaks of authors and property:

Your petitioners are at a loss to perceive why literary property is not just as much entitled to protection as the productions of manual handcraft or labour.<sup>69</sup>

Signers of this petition included Washington Irving and William Cullen Bryant.

Especially interesting are the inclusion of signatures by reprinters like Rufus Wilmot Griswold, founder of *Brother Jonathan* and Nathaniel Parker Willis, captain-editor of the by-then-defunct *Corsair*.<sup>70</sup> It is not clear why these men attached their names. One

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<sup>68</sup> Ibid., 212.

<sup>69</sup> Lawrence Houtchens. "Charles Dickens and International Copyright." 20.

<sup>70</sup> Ibid., 20-1. Griswold would briefly serve as hired agent for the American Copyright Club.

speculation is that they knew the petition would be ineffective.<sup>71</sup> They may also have felt it an appropriate courtesy to extend to a visitor.

A more famous newspaperman – and one who had certainly done his share of pirating in the 1830s – was strident in his support of Dickens. *New World* thought Horace Greeley's position grossly inconsistent, holding him up as an example:

So long as it was in their interest to steal, they stole;  
when it ceased to be for their interest, they were very  
much shocked that some people should continue to  
be guilty of the same misdemeanor.<sup>72</sup>

Among the targets of this broadside from the mammoth weekly were the book reprinters who, unable to compete with low-priced newspaper extras, had temporarily reversed political and editorial tack in support of international copyright.

*New World's* frustration reflects their idea of copyright as but one of many economic elements of the printing industry. An established business model (reprinting inexpensive editions of British books) is threatened by innovation (reprinting in the even cheaper mammoth weekly format), and the endangered businesses react with pious hypocrisy. Continued *New World*:

English books can now be printed at so low cheap a  
rate that they can no longer enjoy their old, exclusive  
monopoly of republication.

Moralizing about copyright is simple hypocrisy; the pirates of yesterday are trying to protect themselves against the pirates of today.<sup>73</sup>

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<sup>71</sup> Ibid., 24-6.

<sup>72</sup> "English Authors on International Copyright." *New World*. May 14, 1842. 319.

<sup>73</sup> This phrase is indebted to Lawrence Lessig's description of how "the law, through 'property,' can be used by the kings of yesterday to protect themselves

The label of insincerity was extended to those outside of the fratricidal printing industry. "Humbug" cried *New World* of yet another petition, this one by an assortment of British authors. According to *New World*, each of these authors:

entertains a sovereign contempt for America, and would, had he traveled through the country, have ridiculed our people and institutions, and set us down as a nation of barbarians, for not eating eggs out of the shell.<sup>74</sup>

Framing it as an appeal for special treatment by a group that had treated America with derision, *New World* could dismiss these sorts of petitions out of hand.

Whatever the effects of these protests, the petitions presented by Dickens resulted in exactly nothing, and the continued sniping (in print) by both sides led to continued hard feelings. For his part, Dickens painted an unflattering portrait of American manners in *American Notes for General Circulation* and in *Martin Chuzzlewit*. These anti-American sentiments, of course, were pirated and reprinted expansively in the U.S.

*Martin Chuzzlewit* caused particular consternation in the printing industry. As was typical, the novel was initially published as a serial, in monthly installments. American publishers would not wait for the entire work, but reprint each segment as soon as it arrived. Thus they were surprised and excited when, deep into the course of the story, the titular character of *Martin Chuzzlewit* departed for America.

Dickens' portrayal of America was distinctly unflattering, and at least some U.S. reprinters thought this sudden shift in story was designed to embarrass and shame them into ceasing the story mid-serial. Of course, they reprinted the chapters anyway – the very notoriety of the work made it salable.<sup>75</sup> These hard feelings would

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against the kings of tomorrow." See *Future of Ideas*. xix.

<sup>74</sup> "English Authors on International Copyright." *New World*. May 14, 1842. 319.

<sup>75</sup> Moss 134-7.

last until Dickens' triumphant reading tour of the U.S., twenty-five years later.<sup>76</sup>

Although *New World* and its ilk had obvious economic interest in constructing copyright narrowly, their emphasis on price hints that their views might be closer to that of the broader culture than those of elite culture. The mammoth weeklies were certainly affordable -- a subscription to the weekly *New World*, for example, was only \$3. This very affordability suggests a market-driven concern for a broader economic swath of American citizenry than is typical of the writers and publishers of more elite publications.

*New World*, for example, explicitly worried about the effects of international copyright in terms of economic class. The "rich" would be fine, but the "middling and lower classes" (i.e. their customers) would suffer.<sup>77</sup> International copyright would "deprive the mass of the people of the literary advantages they now possess, and check the present extensive diffusion of knowledge among the lower classes." Farmers and mechanics are mentioned repeatedly, though graziers also deserve to while away time not devoted to their kine with cheap editions of Boz.<sup>78</sup>

*New World* presents more than a romanticized connection between education and the republican ideology of the yeoman -- their argument is supported by a specific list book prices, comparing those in the U.K. to those in the U.S. The list compares the prices of 10 books, of a variety of genre, including biography, history, poetry, and religious books. Unsurprisingly, Dickens makes the list. Both *Pickwick Papers* and *Nicholas Nickleby* are listed at \$5 in the U.K. An edition in the U.S. is \$2, though a "plain edition" of the latter is only 75¢, 80% off the U.K. price. Discounts on some other works

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<sup>76</sup> Dickens would also advocate reform of the British patent system in the 1850 short story "A Poor Man's Tale of a Patent." See Mark Janis, "Patent System Reform: Patent Abolitionism" for more about Dickens and the role of the figure of the heroic inventor in patent history.

<sup>77</sup> "The International Copyright." *New World*. March 5, 1842. 157.

<sup>78</sup> Some editors used Dickens' early pen name to draw a rhetorical distinction between grasping Dickens and delightful Boz. A "grazier" is a person who grazes cattle.



figure at nearly 90% off. These are powerful arguments for readers with middling funds.

## ***The American Copyright Club***

Stirred by Dickens' visit, the most prominent American advocates for International Copyright were the members of the American Copyright Club.<sup>79</sup> The club was founded in New York in 1843, and had about 25 core members, mostly New York literary figures.<sup>80</sup> William Cullen Bryant was President. Club activities were dominated by the Corresponding Secretary, Cornelius Mathews (1817-89), one of the founders, with Evert Augustus Duyckinck (1816-78), of the short-lived literary monthly *Arcturus*.<sup>81</sup>

Cornelius Mathews' public connection to Dickens and the copyright controversy began with his speech in favor of international copyright at the City Hotel dinner for Dickens. The text of the speech was later printed in *Arcturus*, perhaps in expanded form.<sup>82</sup> Laden with colorful metaphors, his speech illustrates how copyright, when thought of as a form of control, operates as a salve to uncertainty.

The first source of anxiety is over the chaos and unpredictability of the market. In Mathews' case, this is expressed via some decidedly colorful metaphors, as books from England are pilfered by monsters from Greek mythology:

Twenty, yea, fifty, or a hundred hands – for the giant

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<sup>79</sup> For more on the makeup and activities of the American Copyright Club see Clark 70-74; Barnes 77-83.

<sup>80</sup> There were also over a hundred associate members. However, the contribution of associate members may have been limited to not objecting (regrets-only) to the use of their names. See Barnes 81. The membership list is notably lacking in both women authors and in abolitionists.

<sup>81</sup> Mathews is known in some literary circles for a serial satire "The Career of Puffer Hopkins."

<sup>82</sup> "The Loiterer: Mr. Mathews' Speech on the International Copyright" *Arcturus*, March, 1842. 312-8.

of Republication is single-eyed and many-handed – are thrust forth, spasmodically to clutch the first landed copy; it is followed, watched to its first destination; violent hands are perhaps laid on it to snatch it from its first possessor; it is reprinted.<sup>83</sup>

Mixing Cyclops and Hecatonchires, Mathews casts market as monster, and text as booknapped baby. Unspeakable violations are the norm, for the “field of letters” is “in a state of desperate anarchy.”<sup>84</sup>

His solution to this fear of uncontrollable market forces? Market regulation, as embedded in international copyright. Order would replace chaos, worth would replace trash:

under the regulations of an International Copyright, the work of a British author would be published here in its order; would take its chance with other works, native and foreign; would be valued and circulated according to its worth; and would hold its rank in due subordination to the judgment passed upon by the side of other compositions.<sup>85</sup>

Order, and the mitigation of Mathews’ epistemological crisis, comes from regulation.

Linked with the regulation of the market is the need for expert guidance, since so many readers prefer trash. In the chaotic marketplace:

the judgment of the general reader is so perplexed that he cannot choose between Mr. Dickens and Mr. Harrison Ainsworth—between the classical drama of

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<sup>83</sup> Ibid., 314.

<sup>84</sup> Ibid., 313.

<sup>85</sup> Ibid., 313.

Talfourd and the vapid farce of Borcicault.”<sup>86</sup>

Mathew’s call connects international copyright to elitist disdain for popular taste and the construction of literature as something that can only exist in relation to a skilled interpreter.

As a celebratory toast for a Dickens banquet, Mathews’ speech was not well received. *New World* (though hardly an unbiased source) termed it “soporific,” and James J. Barnes notes that many of Mathew’s contemporaries found the speech a bore.<sup>87</sup> Not deterred, Mathews’ carried on, writing appeals and pamphlets, giving speeches, and circulating letters on international copyright.<sup>88</sup> Apparently he “constantly din[n]ed in the ears of all who would listen.”<sup>89</sup> However, his enthusiasm might have actually harmed his cause, since Mathews, apparently somewhat eccentric in his personal habits, excited in much of his acquaintance what Perry Miller termed “a frenzy of loathing beyond the limits of rationality.”<sup>90</sup>

In his capacity as Corresponding Secretary of the American Copyright Club, Mathews was instrumental in the creation of a pamphlet entitled “Address to the People of the United States in Behalf of the American Copyright Club.” The preparation of and printing of this pamphlet was the main accomplishment of the club.

The pamphlet continues themes developed in Mathews’ speeches. Property in a text is declaimed identical with any other form of

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<sup>86</sup> Ibid., 316. William Harrison Ainsworth (1805-1882) was a prolific English historical novelist, then well established in his career. Dion Boucicault (c. 1820–1890), then early in his career, went on to great popular success as an actor and playwright.

<sup>87</sup> *New World*. March 5, 1842. 157; Barnes 82.

<sup>88</sup> E.g. “An Appeal to American Authors and the American Press on Behalf of an International Copyright.” *Graham’s Lady’s and Gentlemen’s Magazine*. Sept., 1842. 121-4.; “Mathews on International Copyright.” *The Magnolia: or, Southern Apalachian.*, Sept., 1842. 192.; “Mathews on Copyright” *Magnolia*. April, 1843 267-9.

<sup>89</sup> Clark 64.

<sup>90</sup> Quoted at Clark 64. Perry Miller discusses Mathews in *The Raven and the Whale*.

property, and an essential part of “purer” civilization.<sup>91</sup> Chaos reigns, since “the era of broad-cast publication, has also been an era of unbounded confusion and uncertainty,” and the market saturated with “books of a noxious character [...] whatever is coarsest and vilest.”<sup>92</sup> According to the American Copyright Club, “every landmark separating good from bad in literature has been broken down.”<sup>93</sup>

In this chaotic market, the Club worries that readers cannot discriminate as they should. As Meredith McGill correctly observes, this anxiety slides easily into epistemological panic.<sup>94</sup> Considering Duyckinck and Mathews, McGill connects this expressed panic over textual uncertainty to “a more fundamental anxiety about cognition, individual difference, and the instability of national identity.”<sup>95</sup> This panic also has racist overtones raised through the specter of miscegenation. The pamphlet continues:

In nine cases out ten, the purchaser buys without knowledge of the work and carries into the heart of his family a poison that may taint blood and character for generations to come.<sup>96</sup>

The first part of this image reflects anxiety over the state of the marketplace – about buying a trashy pig in a literary poke. The second part transforms this anxiety from the marketplace to one over the lingering contamination of the family. Tainted blood could refer to the biracial children of master and slave, but also invokes deep anxieties over contamination from (at this point non-white) Irish immigrants.<sup>97</sup>

In either case, the crisis lies in the inability to assign the object to

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<sup>91</sup> American Copyright Club 6.

<sup>92</sup> Ibid., 9-10.

<sup>93</sup> Ibid., 10.

<sup>94</sup> Meredith McGill, *American Literature and the Culture of Reprinting*, 202-3.

<sup>95</sup> Ibid., 203.

<sup>96</sup> American Copyright Club, 11.

<sup>97</sup> See Noel Ignatiev, *How the Irish Became White*.

a symbolic category by looking.<sup>98</sup> Indeterminacy, openness, and ambiguity cause disorientation and distress. From this perspective, the market has torn down the guideposts of quality, resulting in (for them) unbearable uncertainty. More broadly, in a time of great flux, anxiety about social status cuts across multiple sites. For Mathews and the American Copyright Club, policing reading via international copyright – so that a book might literally be judged by its cover – would assuage some of that worry.

However artfully worded or evocative of panic over symbolic boundary-maintenance, the pamphlets and petitions of the American Copyright Club contributed almost nothing towards changing people's views on copyright policy. For example, the 1844 publication of a collection of works by Mathews prompted the commercial *Merchant's Magazine* to chime in with their take on international copyright. The arguments advanced in favor of International Copyright were: "not enough to convince us of either the justice or expediency of the measure." Instead, copyright would deprive Americans of "those inspirations of genius bestowed upon the gifted for the benefit of many."<sup>99</sup>

Impotent in political circles, within New York literary circles the skirmishing over copyright helped propel a split in the Young America movement. Combining literary and political interests, this movement included Cornelius Mathews, William A. Jones, Evert Augustus Duyckinck, and John O'Sullivan, editor of *United States Magazine and Democratic Review*.<sup>100</sup> Originally, the group was ideologically committed to promoting literature that would instill republican virtues in American youth. However, the elitism of Mathews and Duyckinck led them to strongly support international copyright. But by 1843 O'Sullivan concluded that America was better served by cheap books, and took a firm stance against international copyright.

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<sup>98</sup> See Mary Douglas, *Purity and Danger*.

<sup>99</sup> "The Various Writings of Cornelius Mathews." *Merchants Magazine and Commercial Review* March, 1844., 298.

<sup>100</sup> See McGill, 200-1.

Best known for coining (or at least publicizing) the phrase “manifest destiny” in 1845, O’Sullivan strongly opposed the positions taken by Dickens and the members of the American Copyright Club in his *United States Magazine*.<sup>101</sup> Coming at the same time as the noisy 1843 controversy about the authenticity of the “Fejee Mermaid” promoted by P.T. Barnum, O’Sullivan’s first sentence sets the tone: “The International Copyright so eagerly clamored for is all a humbug.” Not to be mistaken, he repeats the charge directly to Dickens: “Sir, you are a Humbug!”<sup>102</sup>

O’Sullivan, claiming not to be a reprinter himself, seems particularly appalled by the epithets leveled at republishers. Calling them “pirates, plunderers, and pickpockets” offends him.<sup>103</sup> However, much of O’Sullivan’s criticism is on financial grounds. For him, International Copyright is a “species of tariff tax,” and should be considered in relation to trade policy.<sup>104</sup> If American authors needed protective legislation, then:

The proper enactment to that effect should have its place as a section in the Tariff Bill; and by imposing a suitable regulated percentage on the selling price of the foreign republication [...] the desired tax on republication would contribute to the support of our own government instead of going beyond seas.<sup>105</sup>

It is difficult to tell whether O’Sullivan really did think of copyright as a species of tax or simply recognized a politically

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<sup>101</sup> “International Copyright Question.” *United States Magazine and Democratic Review*. Feb., 1843, 115-22.

<sup>102</sup> For more on Phineas Taylor Barnum, and the Fejee mermaid, see Neil Harris, *Humbug*. 62-67.

<sup>103</sup> “International Copyright Question.” *United States Magazine and Democratic Review*. Feb., 1843, 115. Given the intemperate language and the masculine mores of the day, it is perhaps a little surprising that there are no known duels or physical beatings administered over international copyright.

<sup>104</sup> *Ibid.*, 116.

<sup>105</sup> *Ibid.*, 117.

effective label. Across the Atlantic, a much cannier politician, Thomas Babington Macaulay, had spoken effectively of copyright as a tax back in 1841, saying: “the principle of copyright is this. It is a tax on readers for the purpose of giving a bounty to writers.”<sup>106</sup>

Whatever the case, placing international copyright under the rubric of the trade policy clearly promotes “International” as the most important element in International Copyright. O’Sullivan’s understanding of copyright may not be reflective of the “common sense” idea of copyright among non-authors, but his exasperation comes through clearly.

## **John Blair Dabney**

Considerations of American nationalism, the chaotic marketplace, the effect of reading, and the dangers of cheap books dominated copyright discourse by authors during the 1840s. However, even on their home turf, authorial constructions of copyright ideology were contested by non-authors. A particularly evocative example occurred over several issues of the 1844 *Southern Literary Messenger*.

Briefly, the January issue carried the first of a four-part series of open letters from William Gilmore Simms advocating international copyright to Congressman Isaac E. Holmes, as well as an article by Edwin De Leon decrying cheap literature.<sup>107</sup> Simms may have been prompted by a December 1843 letter from Cornelius Mathews, writing in his capacity of Corresponding Secretary of the American Copyright Club.<sup>108</sup>

These articles provoked a response from John Blair Dabney of Virginia, who was in turn answered by several additional articles on international copyright. In addition to the continuing Simms letters, these included direct responses from Edwin DeLeon, and two anonymous contributors, as well as a series of celebratory letters by

<sup>106</sup> Thomas Babington Macaulay. Speech of February 5, 1841. Reprinted in *Works of Lord Macaulay*, Vol. 8, 201.

<sup>107</sup> Simms’ letters appeared in the January, March, June, and August issues.

<sup>108</sup> See Barnes 78-80.

George Frederick Holmes purporting to respond to Simms about the state of American literature.<sup>109</sup>

In these letters, Simms advocates for copyright in the manner of five years earlier, emphasizing the civilizing role of literature as “the highest, if not the only definite proof of national civilization” and authorship as the wellspring of great things:

To American authorship, not yet thirty years old, the nation is largely indebted for much of its public morality, its private virtues, its individual independence, and that social tone which prevents the absolute and general usurpation of opinion, in matters of taste, by foreign and inferior models [and] our commercial tendencies.<sup>110</sup>

This is not a new, unique, or even (for this context) particularly florid stance. De Leon’s style is similar, claiming great dangers for cheap books, “calculated to lower and debase the minds of the great mass of the people.”<sup>111</sup> George Sand’s supposed lack of morality came in for special venom.<sup>112</sup>

In the introductory note to Dabney’s (two part) article, Benjamin Blake Minor, editor of the *Southern Literary Messenger*, notes that his own views on copyright coincide with those of Simms, though he is printing the “very able and gentlemanly communication” to “promote the liberal discussion of important questions.” Since he printed at least eleven articles directly or indirectly advocating international copyright and only one article that opposed it, one might question the depths of his commitment to discussion.

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<sup>109</sup> The free, on-line, Making of America project at the University of Michigan has the complete run of the *Southern Literary Messenger*.

<sup>110</sup> “International Copyright Law.” *Southern Literary Messenger* Jan 1844. 7.

<sup>111</sup> “Cheap Literature.” *Southern Literary Messenger* Jan, 1844. 33-4. Other elements of the exchange are less noteworthy – the Holmes letters for example, largely eschew addressing copyright directly, preferring to compliment Simms on his efforts.

<sup>112</sup> *Ibid.*, 39.



On a methodological note, this is an excellent example of how research that looks to the literary organs of the day can miss important elements of the history of copyright. Both quantity and quality can be misleading in this context – there are far more articles advocating international copyright, and they come from more prestigious sources.

William Gilmore Simms (1806-1870) was a noted novelist of the day and a strong supporter of slavery. Edwin De Leon (1818-1891) would later work as a diplomat and propagandist for the Confederacy. He wrote travel books, novels, and memoirs. (In 2005 the University of Kansas Press published his *Secret History of Confederate Diplomacy Abroad*, rediscovered by William C. Davis). Long-time University of Virginia professor George Frederick Holmes (1820-1897) and editor Benjamin Blake Minor (1818-1905) both served as university presidents – Holmes at the University of Mississippi and Minor at the University of Missouri.

In contrast, John Blair Dabney is a much more obscure figure. Minor, for example, calls him a “scholarly citizen” who has a noteworthy brother.<sup>113</sup>

Despite the prestige of the authors, the eleven-to-one ratio of articles, the noble labors of Simms and DeLeon, and the taken-for-granted tone of Holmes, passage of an international copyright bill was still 47 years away. Clearly, their position on authorship and international copyright was not politically persuasive, and it is this failure of the authors to persuade that makes Dabney so interesting.

Broadly speaking, authors thought the stakes were high – so they were strongly motivated to write. Indeed, the extensive response to Dabney’s iconoclasm suggests he definitely touched a nerve. But for most of the population, the stakes of copyright were diffuse, so they were less motivated to write (even assuming they had access) and they left fewer literary traces.

Researching diffuses attitude towards copyright can be difficult.

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<sup>113</sup> George E. Dabney, a Baptist minister and author of a short history of the religious persecution of Baptists in Virginia in the seventeenth and eighteenth centuries. See Minor 123.

One method is to read between the lines and against the grain of the writings by the various advocates of international copyright, trying to divine the more widespread beliefs in the limpid pools of elite straw men, metaphors, and what they find especially provoking. This approach has to be used with great care, at it tends to implicitly assume a symmetry to the dispute that may not exist. However suggestive, “the authors are for it” does not transparently lead to “and non-authors opposed it.” The authors writing in *Southern Literary Messenger*, for example, were very concerned with the connection between copyright and a national literature. However, this is not helpful for understanding whether non-authors made the same connection or the basis for their possible disagreements. This situation is what makes Dabney’s article so useful – he engaged with the arguments of authors on their own ground, articulating a position aligned with the politically dominant position on copyright.

Dabney’s expressed motivations for writing are explicitly political. He thinks international copyright would be bad policy, “fraught with the most disastrous consequences to the cause of popular education and to the interests of the American publisher.”<sup>114</sup> And braced for criticism, he will not be deterred by the “argument of epithet.”<sup>115</sup>

Echoing *Donaldson v. Beckett*, Dabney sees copyright as a utilitarian bargain of limited scope:

Copyright is, in truth the mere creature of legislation, produced and fashioned exclusively with a view to the interests of the community where it is established, and which should endure no longer than is consistent with those interests.<sup>116</sup>

However, instead of considering copyright as a market-based

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<sup>114</sup> “Reply to E.D. and Mr. Simms.” *Southern Literary Messenger*. April, 1844. 193. Dabney’s article was split across the April and May issues.

<sup>115</sup> *Ibid.*, 194.

<sup>116</sup> “Reply to E.D. and Mr. Simms.” *Southern Literary Messenger*. May, 1844. 289.

incentive, Dabney thinks of it as a species of reward. “It is a gratuity, a bounty” he writes, “a gratuitous concession.”<sup>117</sup> This distinction is subtle but important. For such government-sponsored rewards are not appropriate for foreigners. Dickens, for example, got his reward in the U.K.

Moreover, if copyright is a privilege, not a right, then the moral appeals of authors for justice are nonsensical – the butcher and tailor metaphorically invoked by De Leon don’t lay claim to the gratitude of the public.<sup>118</sup> By this logic, moralizing authors become ingrates flinging around gross vituperations to assert a privileged place in the market.

At first glance, his reward-centered model of copyright may seem connected to the pre-market patronage model of authorship. However, Dabney’s article presents a markedly different and wholly coherent way of thinking about reading, authorship, literary property, and ultimately, copyright.

First, Dabney clearly sees publishing as an industry: “bookmaking has been converted into a trade, a manufacture, in which quantity is regarded more than quality, and profit more than fame.”<sup>119</sup> However, writing about cheap books within the tenets of political economy, he reverses the usual authorial connection between the price of books and the state of literature.

Basically, Dabney assumes that the market for books is price-dependent. A cheap book will sell more copies, and this “multitude of buyers” will more than make up for the lower price.<sup>120</sup> A huge American market for books is the result of a cultivated “taste for reading” driven in part by these same low prices.<sup>121</sup> Within this growing market:

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<sup>117</sup> Ibid., 289.

<sup>118</sup> Ibid., 195, 198.

<sup>119</sup> “Reply to E.D. and Mr. Simms.” *Southern Literary Messenger*. April, 1844. 195.

<sup>120</sup> “Reply to E.D. and Mr. Simms.” *Southern Literary Messenger*. May, 1844. 290.

<sup>121</sup> Ibid., 291, 293.

the demands for literary labor has expanded with such inconceivable rapidity as to overbalance beyond all proportion the reduced price of its productions.<sup>122</sup>

For Dabney, the cheaper the book, the bigger the market, the more work there will be for authors. International Copyright is thus unnecessary.

Instead of worrying about the effects of a rapidly expanding market, Dabney sees cheap books as bringing the benefits of literature to the masses:

A thirst for knowledge, a relish for polite letters, in other times and countries dwelt only in high places; in courts, and castles, and colleges. In this enlightened age, and in this favored land, they have descended from those lofty habitations. They visit the lowly cottage. They cheer the humble fireside. They enliven the solitude of the wilderness. They sweeten the toils of the workshop. They move on the great deep of the popular mind and stir up its slumbering waters from their innermost recesses.<sup>123</sup>

Echoing republican ideology, bringing these benefits to the middling and lower classes is in turn essential to the political survival of the nation. Since “all ultimate power under our institutions resides in the mass,” it is essential that the public mind be enlightened. This is accomplished via cheap books, which are necessary “to infuse enlightened views into the multitude, to teach the mass to think and reason, and to supply them with materials for the exercise of the understanding.”<sup>124</sup>

Dabney accompanies his sentimental paean to the necessity of a

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<sup>122</sup> Ibid., 291.

<sup>123</sup> Ibid., 292-3.

<sup>124</sup> Ibid., 293.

thoughtful republican citizenry with an understanding of the reader as thoughtful and empowered. Trashy novels hold no fear for him:

I do not participate, I confess, in the apprehensions of those worthy people, who are filled with consternation at the sight of licentious books; who shrink from them as from the touch of a poisonous reptile; who believe that the whole mass of society will be polluted by their perusal.<sup>125</sup>

Dabney supports his point with anecdotes about the lack of corruption among the men and women of his acquaintance, as well as veiled accusations of unworldliness on the part of Simms and De Leon. It is only the repeated exposure to immorality that is dangerous, he argues, and no person would engage in this sort of base behavior unless they were already depraved.

In addition to his blasé view of the effects of trashy novels on the elite, Dabney links nationalism and a postulated American mind to claim a sort of *republican readership*. In this model, American readers take what they find useful and discard the rest:

Instead of halting with cautious timidity in the rear of European precedent, we have advanced with a daring and confident step in the career of improvement, acknowledging no guide but reason, and discussing the lessons of past times as well as the example of other nations in a spirit of bold and liberal inquiry.<sup>126</sup>

Forged in the crucible of the New World, republican readers are too resilient to be influenced by mere writing. “The American mind,” he writes, “is not of that texture to be daunted, or subdued by mere

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<sup>125</sup> Ibid., 295.

<sup>126</sup> “Reply to E.D. and Mr. Simms.” *Southern Literary Messenger*. April, 1844. 194

paper artillery.”<sup>127</sup> This represents a fundamentally different understanding of the relationship between text and reader than that presented by Simms and DeLeon – in republican readership, the audience has agency to pick and choose, instead of being the vessel receiving a powerful text.

Dabney’s denial of the corrupting power of the text over the reader is accompanied by a denial of the author as lonely genius. Instead, Dabney presents authorship as cumulative and collaborative:

Every great achievement of intellect has been the result of combined effort, of the united resources of many minds coöperating in the accomplishment of the same enterprize. Trace the history of any valuable improvement in art, or science, and you will find that it was not a sudden inspiration, an initiative perception, a mere accident; but that the author was conducted progressively to the point of discovery by the vestiges of previous adventurers in the same path of speculation.<sup>128</sup>

This approach echoes Isaac Newton’s oft-quoted line “If I have seen further [than others], it is by standing upon the shoulders of giants.”<sup>129</sup>

Although (perhaps reinforcing the notion of authorship as cumulative) this metaphor is not original to Newton, it does suggest a connection between the patronage model of discovery (and financial support) and collaborative authorship. Given the connections between market capitalism and individuality, a market-based model seems to require an atomized idea of the creative process. Certainly the marketplace had no difficulty accommodating the ideology of the

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<sup>127</sup> Ibid., 194.

<sup>128</sup> Ibid., 197.

<sup>129</sup> Isaac Newton, Letter to Robert Hooke. The metaphor was apparently dates to at least the 12<sup>th</sup> century. Some sources speculate a connection to Chartres cathedral, where some of the stained glass features New Testament apostles perched over Old Testament prophets.

romantic author, the idea that knowledge was the product of genius, and that it could be segmented into small, clearly defined packages. But correlation is not causality – and Dabney certainly sees no problem connecting collaborative authorship to the industrializing market.

More practically, Dabney is very uncomfortable with the notion of property rights in ideas.<sup>130</sup> This includes a direct assault on the extension of Lockean labor-value logic to thinking: “the supposed analogy between the productions of mental labor and other property is wholly illusionary.”<sup>131</sup> Ideas, instead, are intangible and uncontrollable:

Some things, such as air and light, are essentially incapable of permanent appropriation, and have, therefore, never been considered the proper subject of ownership. [...] In like manner every man may claim the exclusive use and enjoyment of his private thoughts and speculations, so long as they are confined to his own bosom and are subject to his control; but when, by his own voluntary communication, they mingle with the great mass of knowledge, they are no longer susceptible of individual appropriation.<sup>132</sup>

In Dabney’s mind, then, a utilitarian copyright is opposed by one which attempts to extend ownership to ideas.

But how does one define title to a wisp of thought? In the legal realm, this dilemma would eventually lead to the establishment in *Baker v. Selden* (1879) of the legal fiction termed the idea/expression

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<sup>130</sup> Given that Simms, De Leon, and Holmes would all be known as apologists for slavery, it is tempting to connect their advocacy of literary property with that of human property. Connections between copyright and slavery would become more pronounced later in the antebellum period.

<sup>131</sup> “Reply to E.D. and Mr. Simms.” *Southern Literary Messenger*. April, 1844. 196.

<sup>132</sup> *Ibid.*, 198.

dichotomy. Copyright could cover the language, the “rhetorical ornament” but not the underlying ideas. However, that development was still 35 years away, and in practice, the distinction between idea and expression – between symbol and meaning – remains counterintuitive.

To summarize, for Dabney, copyright is a privilege – not a right – and a reward for particularly deserving individuals. These thinkers are rewarded for their contributions to existing knowledge, not because they own some product of individual inspiration or because copyright is essential to the operation of the book marketplace, but for the benefits to society. Copyright is neither trade nor tariff, nor a route to (unneeded) market regulation, but a utilitarian gratuity, that should endure no longer than necessary, and which can be abandoned should some other mechanism better serve the nation.

## ***Exasperation with Copyright***

Shifting focus from Richmond, Virginia to Cincinnati, Ohio, a similar (but more exasperated) take on copyright appeared in the short-lived *Western Literary Journal* in January 1845. According to Frank Luther Mott, this “really promising” monthly came to a premature end when editor E.Z.C. Judson (later famous as dime novelist Ned Buntline) had to flee the country after “one of his numerous shooting scrapes down in Kentucky.”<sup>133</sup>

Identified only as J.R.E., the writer of this article was clearly familiar with British legal cases on copyright, and began by denying that there is “any such thing by the law of nature and reason as literary property” since “natural rights are plain and palpable.”<sup>134</sup> For J.R.E. a natural right has to be intuitive, and literary property fails the test. It followed then, since there is no natural property right in an idea, copyright cannot be justified on a moral basis. Instead, copyright “should be placed upon its true grounds – upon principles

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<sup>133</sup> Mott, Vol. 1, 388.

<sup>134</sup> J. R. E. “International Copyright” *Western Literary Journal and Monthly Review*. Jan., 1845. 136.



of policy, and not upon so metaphysical a foundation as that of a property in ideas”<sup>135</sup> And the dominant policy was one of cheap books.

Appropriately for a publication edited (in part) by the future author of *Buffalo Bill, the King of the Border Men* (1869), J.R.E. puts unusual value on light entertainment:

The pioneer may lay down his axe in the forests of Iowa, and learn from Alison the wars of Europe. He may delight his imagination with the romances of Scott. With Froissart for his guide, he may go back to the middle ages, and see mailed knights, and glittering ladies, and pompous pageants, and tournaments, and single combats, and all the incidents of a chivalrous age around him, and that for the price of two or three days labor.<sup>136</sup>

J.R.E. goes on to compare the prices for Archibald Alison’s massive *Modern History of Europe from the French Revolution to the Fall of Napoleon*, which sold for \$50 in England. In America, it was \$4 – Harper Bros. produced a (presumably abridged) pirate edition.

J.R.E. has no worry about the effect of trashy novels on those who are earning a dollar or two per day.<sup>137</sup> Instead, the wide dissemination of knowledge via cheap books is presented as essential: “Knowledge is our heart’s blood as a nation. We cannot exist free, without intelligence.”<sup>138</sup> Given the prominence accorded Scott and Froissart, the knowledge to be gained by reading seems to be dominated by a sentimental education in the constructions of chivalry. Apparently the virtuous yeoman farmer of republican

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<sup>135</sup> Ibid., 138.

<sup>136</sup> Ibid. Jean Froissart (c. 1337- c. 1405) chronicled medieval France.

<sup>137</sup> Although there were wide variations across trades and regions, \$10 per week seems to have been a reasonable cash wage for skilled (white male) labor. Unskilled or farm labor would have been half this, or less, perhaps as little as 70¢ per day.

<sup>138</sup> Ibid., 138-9.

ideology is transformed into a chivalrous yeoman pioneer.

But for J.R.E., copyright is a matter of policy, not morality, and cheap books are a delight. However, the final paragraph of the essay suggests the fundamental copyright-related emotion felt by the writer is exasperation with incessant authorial demands:

I will state in conclusion, that I am sick of the cant about starving authors. [...] Under the present laws no author will starve, unless he deserves to be driven by starvation to the anvil, the plough, or the counting room.<sup>139</sup>

Good authors will find a market without international copyright. Bad ones ought to seek out another line of work. Embedded is the idea that authors are a species of tradesmen, casting international copyright as a form of subsidy for writing that would not otherwise sell. Instead of a regulation *of* the market, copyright becomes protection *from* the market.

The frustration expressed by John O'Sullivan, J.R.E., and the legions annoyed with Cornelius Mathews suggests that by the mid-1840s the international copyright movement was widely seen as a hobbyhorse pursued by cranks and bores.

Supporters of international copyright worried this was the case, too. In one of those convoluted republications so common to 1840s magazines, an 1847 issue of *Literary World* reprinted an excerpt from *Punch* commenting on a rebuke of *Punch* that apparently originally appeared in the *Courier and Enquirer*. The gist of the piece is that *Punch* erred in aiming their satire at U.S. publishers Wiley & Putnam (who claim to pay English authors), and that the advocates of international copyright harm their cause with infighting and wild criticism of their allies.

In this piece, copyright is no longer an abstract question of ethics, since the topic has been:

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<sup>139</sup> Ibid., 139.

seized on by the restless and aspiring to lift a name into notoriety [and] appropriated as a hobby by some interested party upon which to ride.<sup>140</sup>

Being “seized upon by some fidgetty litterateurs” international copyright became “associated in the minds of many with the common humbugs of the day.” Although the proffered explanation was weak, the effect was real – international copyright was widely considered a humbug.

## ***Effect of International Copyright***

Squabbles over the lack of international copyright erupted again over a proposed 1853 treaty for reciprocal copyrights between the U.S. and the U.K.<sup>141</sup> The treaty received a good deal of coverage in the press, mostly in support. Coverage largely continued earlier trends – on one side were ideas about property rights, American literature, and justice to authors. On the other were denial of property rights in ideas, opposition to monopolies, and support of the domestic book manufacturing industry.<sup>142</sup>

Editorial commentary in the *New York Daily Times* (later the *New York Times*) was extensive – founder and editor Henry J. Raymond (1820-1869) was a strong opponent of the treaty, and engaged in a running debate with lawyer John Jay (grandson of the founding father) over the merits of international copyright.<sup>143</sup>

Other organized opposition came from the book trades. For example, future cross-Atlantic telegraph pioneer Cyrus W. Field, at this time a major wholesale paper dealer, wrote to Harper & Bros. on

<sup>140</sup> “Punch on International Copyright.” *Literary World*. May 29, 1847. 395-6.

<sup>141</sup> For more on various aspects of the treaty see Barnes for a detailed look at activities of the various prominent individuals involved, Clark for the broadest overview, or Eaton for a succinct (if somewhat dated) look at international copyright during 1837-1860.

<sup>142</sup> See Clark 46 for a slightly different summary.

<sup>143</sup> E.g. Articles in the 1843 *New York Daily News* on Feb 15, 22, and 24 (2), 28 (2); March Mar 15, 16, and 26.

February 8, 1854:

GENTLEMEN, – we enclose Petition against the International Copyright *Treaty* with the signatures of the principal Paper Houses attached. We find the Booksellers are actively engaged in obtaining signatures to a similar petition, and we have therefore not interfered with them. We have written a letter and enclosed one of the forms, to Mr. Edward Walker and endeavored to persuade him to make a stir among the Bookbinders, and the same to Mr. J.F. Trow, to induce him to stir up the Printers. The enclosed you will please forward to Washington, D.C.

We remain truly your friends,  
CYRUS W. FIELD & Co.<sup>144</sup>

Whether as a result of these petitions, bribery, or the press of other business, the treaty died in the U.S. Senate without ever coming up for a vote.<sup>145</sup>

Whatever the cause, the recovery from the depression of 1837-43 did not end the widespread desire for cheap books, and there seems to have been little political benefit in supporting a treaty associated with higher prices. A compromise international copyright law would not pass until 1891.

One unavoidable question is the effect of the lack of International Copyright upon nineteenth century American writing. The naïve assumption is that, if copyright acts as a financial incentive for writers, stronger copyright laws would have led to increased production. With higher pay, an author – Edgar Allan Poe (1809-49), perhaps – would be motivated to write more. However, this

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<sup>144</sup> Letter reprinted by J. Henry Harper in *House of Harper*, 108. See also Barnes 257-8.

<sup>145</sup> See Barnes 216-62 for more on the circumstantial evidence of insufficient bribery by the British advocates of the treaty.

argument presents several thorny problems.

First, it is completely unknown what effect the lack of international copyright had upon the American market for literature. Did piracy and fierce competition promote more innovative business practices, and cheap books promote a larger market? Perhaps. Would authors have been paid more if they sold fewer copies at a higher price per copy? Probably not.<sup>146</sup>

Second, higher pay does not transparently lead to more production. As Jessica Litman points out, academic and legal theorizing of copyright often simply assumes that authors understand and are motivated by copyright.<sup>147</sup> However, there is little evidence that this is the case, and a good deal that suggests it is false, at least in some cases. Emily Dickinson (1830-86) is one blatant example, Frederick Douglass (1818-95) another. Finally, in at least some cases, higher pay could even decrease the financial necessity to write. After some base standard of living is secured, other activities (e.g. leisure) or non-pecuniary rewards (e.g. prestige) might have a higher priority.

A more provocative argument is that the lack of international copyright somehow assisted in the production of the texts of canonical American Literature. After all, in addition to those mentioned above, the period of legalized piracy and cheap books produced such American icons as Louisa May Alcott (1832-88), Horatio Alger, Jr.(1832-99), Kate Chopin (1851-1904), James Fenimore Cooper (1789-1851), Ralph Waldo Emerson (1803-82), Nathaniel Hawthorne (1804-64), Harriet Jacobs (1813-97), Herman Melville (1819-91), E.D.E.N. Southworth (1819-99), Harriet Beecher Stowe (1811-96), Henry David Thoreau (1817-62), Mark Twain (1835-1910), and Walt Whitman (1819-92). However, even this

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<sup>146</sup> Terrence A. Maxwell modeled the impact of different copyright schemes from 1800 to 1900 as part of a larger dynamic simulation of the U.S. publishing industry, finding that very high levels of copyright protection was associated with lower sales figures and higher competition among authors. Although I remain skeptical of the utility of these simulations, Maxwell's work is certainly thought-provoking. See Maxwell, "Is Copyright Necessary?" n.p.

<sup>147</sup> Jessica Litman, "Copyright as Myth." 242-3.

argument neglects to consider the effects of how literature comes to be defined as such, as well neglecting the role of copyright in the production of important “non-literary” works, including textbooks and nonfiction.

Realistically, the relevant criteria are so individual, complex, and difficult to study that no definitive conclusion can be reached about the effect of international copyright on the quantity or quality of nineteenth century American writing. One excellent attempt – a very well researched attempt to determine if reprinting of the British Tennyson harmed Henry Wadsworth Longfellow (1807-82) – is entirely unconvincing.<sup>148</sup> Indeed, some current writing on the historical effects of copyright is all too often a thinly disguised apologia for an author’s copyright politics.<sup>149</sup>

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<sup>148</sup> Warren S. Tryon undertook a detailed look at comparative sales figures, concluding that reprinting did not harm Longfellow. An older work (1952), Tryon’s archive work is excellent, but his methodology does not support his conclusions. See “Nationalism and International Copyright: Tennyson and Longfellow in America.”

<sup>149</sup> Some level of embedded politics is inevitable, but one result can be history that is written as a legal brief (or a paperback legal brief that is disguised as history). The result is work that ignores or effaces historical elements that do not fit the author’s agenda regarding contemporary copyright politics.



# CHAPTER III: COPYRIGHT SHADOWED BY WAR

## ***Introduction***

Obviously, the middle of the nineteenth century in the United States was dominated by the events of the U.S. Civil War. But viewed through the lens of copyright, the period between the 1854 failure of the International Copyright treaty and the Copyright Act of 1870 includes significant changes in copyright law and copyright-related controversy that illustrate important changes in policy and thinking about copyright.

First, during this period, U.S. copyright law was first extended to cover not only texts, but *performances* of texts – specifically, dramatic productions. Given the lack of suitable precedents and actual practices of the writers of plays, this extension proved difficult and confusing.

Second, copyright was also expanded to include photographs, arguably the first time a new technology had prompted the revision of copyright law. Culturally, professionally, and legally, the extension of copyright to photography was modeled on the much older copyright protections offered to prints and engravings, and



generally went quite smoothly.

Third, during this period copyright and copyright policy increasingly served as sites of struggle over other issues of the day. Battles over copyright policy became proxy battles over slavery, abolition, and anxiety about contaminating foreign influences. Young America worried about European influence and hoped for a distinctive American literature. Harriet Beecher Stowe – and her lawsuit over a translation of *Uncle Tom's Cabin* – connect copyright to the ongoing development of professional authorship and struggles between writer and reader. Copyright meanings and politics were subordinate to other agendas.

Fourth, “copyright” was distinctly a polysemous term in this period. Depending on the social context of use, “copyright” might refer to copyright registration, money, status, authenticity, originality, or control. Literary, advertising, and religious sources illustrate the overlapping and oft-conflicting meanings of copyright, as developments challenged the utilitarian, republican, and economically populist ideas of copyright that dominated earlier in the century.

## ***Revisions to Copyright Law***

The span 1854-1870 included several technical revisions to U.S. copyright law. At the beginning of this period, copyright covered books, maps, charts, engravings, prints, and written musical compositions. It did not cover musical or dramatic performances, photographs, translations, derivative works, or any forms other than those listed above.

Governed by the requirements of the Copyright Act of 1831, registration of a copyright was mandatory.<sup>1</sup> Registration procedures under the Copyright Acts of 1790 and 1831 are described in Chapter One, but to briefly review: to register a copyright the author (or their assigns) paid a fee and filed a printed copy of the title page with the clerk of the District Court in which they resided. After printing of the

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<sup>1</sup> Act of Feb 3, 1831, 21<sup>st</sup> Cong., 2<sup>nd</sup> Sess., 2 Stat. 436.

book, map, chart, engraving, print, or sheet music, they were also required to deposit a copy of the best edition. These records and deposit copies were periodically forwarded to Washington D.C. by the Clerk of the Court. In general, failure to comply with registration requirements resulted in an invalid copyright, though failure to comply with the additional deposit copies required after 1846 was treated more leniently.<sup>2</sup> Because of the expense and trouble in obtaining a copyright, most magazines and ephemera were not registered.

From 1831 to 1909, a copyright lasted for an initial term of twenty-eight years, and was renewable once, by the author or their heirs, for an additional fourteen years.<sup>3</sup> U.S. copyrights were not available to non-U.S. residents, and the U.S. explicitly refused to acknowledge the copyrights of other nations until 1891.<sup>4</sup>

The most significant changes to copyright law during 1854-1870 were expanded coverage for drama and photography, and most of the other adjustments during this period were simple tinkering with the mechanics of copyright registration. An 1855 amendment allowed the legally required deposit copies to be mailed postage-free.<sup>5</sup> An 1859 law to organize the printing and distribution of public documents moved responsibility for keeping copyright records from the Department of State to the Patent Office, then part of the Department of the Interior.<sup>6</sup>

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<sup>2</sup> Two additional required deposit copies, one for the Smithsonian and one for the Library of Congress, were added by the Act of August 10, 1846, 29<sup>th</sup> Cong., 1<sup>st</sup> Sess., 9 Stat. 106. However, there was no enforcement provision, and failure to comply did not result in invalidation of a copyright. See Patry, *Copyright Law and Practice*, 40-1.

<sup>3</sup> The possible renewal term was lengthened to twenty-eight years in 1909. The resulting fifty-six year maximum duration for copyright protection was abandoned in 1976.

<sup>4</sup> See Copyright Act of 1790, Section 5, Copyright Act of 1831, Section 8, Copyright Act of 1870, Section 103.

<sup>5</sup> Act of March 3, 1855, 33<sup>rd</sup> Cong., 2<sup>nd</sup> Sess., 10 Stat. 685. See also Patry, *Copyright Law*, 41.

<sup>6</sup> Act of Feb. 5, 1859, 35<sup>rd</sup> Cong., 2<sup>nd</sup> Sess., 11 Stat 380. The repeal of the 1846 Act deposit requirement is in Section 6. Transfer from State to Interior is in

This 1859 Act also repealed the section of the 1846 Act that required a copy to be deposited with the Smithsonian and the Library of Congress. The deposit requirement was restored for the Library of Congress in 1865.<sup>7</sup> This time, the requirement had some tiny teeth, as failure to respond to a written demand from the Librarian of Congress for a deposit copy could result in the voiding of a copyright.

Free postage and threatening letters proved insufficient in practice, and an additional 1867 amendment added a \$25 fine for failure to deliver, within one month of publication, a printed copy of any “book, pamphlet, map, chart, musical composition, print, engraving, or photograph” registered for a copyright.<sup>8</sup> Finally, an 1861 procedural amendment specified that appeals of copyright and patent cases from the Circuit Courts would go the U.S. Supreme Court, without regard to the dollar amount at stake.

## ***Drama and Copyright***

In addition to developing the Library of Congress and tweaking copyright-related legal procedures, changes to copyright law during this period extended the protections of copyright to dramatic performances. In an era before recorded sound, live performances and readings were tremendously popular. Shakespeare held a prominent place on U.S. stages, and lecturers were a distinctively popular form of entertainment – during the period 1840-1860, more than three thousand lectures were advertised in New York City.<sup>9</sup>

No public performances of any kind – including readings, plays, lectures or music – were protected by copyright before 1856. In

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Section 8. See also Patry, *Copyright Law*, 42-3.

<sup>7</sup> Act of March 3, 1865, 38<sup>th</sup> Cong., 2<sup>nd</sup> Sess., 13 Stat. 540.

<sup>8</sup> Act of Feb. 18, 1867, 39<sup>th</sup> Cong., 2<sup>nd</sup> Sess., 14 Stat. 395. Librarian Ainsworth Spofford was evidently exceptionally vigorous in pursuing the timely deposit of copies. See Patry *Copyright Law*, 42-3, especially n 132, n 135-6.

<sup>9</sup> Donald Scott, “The Popular Lecture and the Creation of a Public in Mid-Nineteenth Century America.” 791; See Lawrence Levine, *Highbrow/Lowbrow* for an overview of Shakespeare in U.S. culture.

general, criticism of this situation focused on the potential for unfair competition. One example, from the *New York Daily Times*:

Lecturers and dramatists are a kind of vagabonds to whom the law accords no protection in the exclusive enjoyment of their productions [...] A dramatist produces a play, but he cannot print it without running the risk of its being performed at all the theaters in the country, whether he likes it or not; a lecturer cannot protect himself against any enterprising reporter who may choose to take down a verbatim copy of his lecture, and deliver it himself the next night.<sup>10</sup>

This line of thought concludes with a vague call for Congress to consider whether the author of a lecture, a play, or an opera might be entitled to some sort of legal protection.

The force of this call is dampened by a concluding paragraph that argued audiences value performances over content. Specifically, commenting on William Makepeace Thackeray's request to refrain from reporting his "Four Georges" lectures, the article claims that:

It is not what he says that people go to hear, but his manner of saying it. Let any one try the experiment of delivering one of Mr. Thackeray's lectures, and it would be found that it is not the lecture, but the lecturer that people went to hear.<sup>11</sup>

In this ambivalent environment, Congress passed the 1856 amendment to extend the protection offered by copyright to the

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<sup>10</sup> "Rights of Lecturers." *New York Daily Times*, Oct. 31, 1855, 4.

<sup>11</sup> Ibid. Thackeray made two reading trips to the U.S. On the 1852 trip he lectured on "English Humourists," including Jonathan Swift and Laurence Sterne. The 1855 lectures, "Four Georges," are about kings of England. They were subsequently published in *Cornhill Magazine* in the U.K, reprinted in the U.S. in *Littrell's Living Age*, and also published in book form.

performances of dramatic compositions. Under the new law, the “author or proprietor” of any dramatic composition maintained the “sole right to print and publish” the work and gained “the sole right also to act, perform, or represent [the work] on any stage or public place.”<sup>12</sup> Managers or actors found to be in violation of the act were subject to fines of not less than \$100 for the first performance and \$50 for any subsequent performances. The act was *not* retroactive, applying only to works with copyrights “hereafter granted,” and included language to address performance rights acquired in advance of a valid copyright.

Commentary on the new law echoed nationalistic elements of the earlier international copyright debate. Writing in the New York-based weekly sporting journal *Spirit of the Times: A Chronicle of the Turf, Agriculture, Field Sports, Literature and the Stage*, one editorialist hopes the new law leads to a distinctive American theatre:

Now that the successful dramatist has secured to him the pecuniary advantage to be derived from his labors, we may hope for the commencement and building up of something like a permanent and respectable national drama, which will, I trust, push from the modern stage some of the vile trash [...of] French, English, and German melo-dramas.<sup>13</sup>

According to this ideology of copyright, increased monetary rewards will lead to more and higher-quality American dramatic authorship, a distinctively American Literature for the stage, and the exclusion of corrupting foreign influences.

Examining the actual practices of dramatists in the nineteenth century U.S. reveals this hope to be so much wishful thinking. In New York, one of the first results of the Act was a rush to register copyrights for plays of dubious originality. From the *New York Daily Times*:

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<sup>12</sup> Act of August 18, 1856. 34<sup>th</sup> Cong., 1<sup>st</sup> Sess, 11 Stat. 138.

<sup>13</sup> “Letter from ‘Acorn’.” *Spirit of the Times*. Sept. 6, 1856, 349.

For some days subsequent to the passage of the Act Murray-street was haunted by singular-looking young men, with long hair and inky finger-nails, each with a bundle of soiled paper under his arm or sticking out of his coat pocket, in cases where the coat had a pocket that would hold anything. All of these gentlemen wore an expression of mingled triumph and anxiety. They cast curious glances at each other, and eyed each other's bundles with ill-disguised curiosity. The fact was, every one of these distinguished dramatists was alarmed, lest his companion should be about to copyright a version of his play; for these dramatic rivulets had one source – one fountain-head – Paris.<sup>14</sup>

Venturing to the Copyright Office, the reporter summarizes the various copyright registrations for plays, noting disputes over authorship, misunderstandings of copyright law, and gossip over forthcoming productions.

Misunderstandings of copyright law, a lack of established procedures for applying the law to performances, and the failure of the law to take into account the writing and publication practices of dramatists resulted in significant litigation. For example, it was unclear what counted as publication for a play – was being set in print enough, or did it have to be offered for sale? The resulting confusion led to such absurdities as “private” printings of plays labeled as “printed but not published.”<sup>15</sup>

It was also unclear how a newly registered copyright might apply

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<sup>14</sup> “Plays and Playwrights.” *New York Daily Times*. Sept. 9, 1856, 4.

<sup>15</sup> Based on English printing precedents, it is obscure whether the “printed but not published” disclaimer would have had any legal force in an actual U.S. copyright lawsuit. The disclaimer is apparently intended to maintain some of the common-law protections for unpublished manuscripts in a printed work which was not publicly offered for sale. For a letter condemning this practice in general (and Dion Bouicault in particular), see “Copyright Laws” [letter to the editor] *New York Times* Jan 31, 1872, 5.

to older works, including works which had been publicly performed but existed only in manuscript. Further controversy was generated over competing translations and adaptations of published novels, as copyright did not protect derivative works until 1870.

These dramatic lawsuits generated considerable coverage in the New York press.<sup>16</sup> Prominent playwrights John Brougham and Augustin Daly both participated in copyright lawsuits, and prolific dramatist Dion Boucicault was especially litigious, though only occasionally a U.S. resident.<sup>17</sup>

Part of the confusion arose from the conflict between the notions about authorship embedded in copyright law and the actual practices of nineteenth century dramatists. Dion Boucicault stole from John Brougham. The British stole from the French. The Americans stole from everyone.<sup>18</sup> Despite the “singular-looking young men” thronging the copyright office, the actual practices by writers of plays simply did not conform to the ideals of romantic authorship.<sup>19</sup>

Authorial practices of adaptation, translation, and rewriting thread throughout conflicts over dramatic copyright. *New York Daily News* reports that the first play registered in New York is “taken from the French.”<sup>20</sup> Copyrighted burlesque (in the 1862 meaning of the term) “King Cotton” was “in all the scenes that contain a particle of

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<sup>16</sup> E.g. “Law Reports.” *New York Times*, Jan., 2, 1860, 3; “Dramatic Copyright” *New York Times*, Dec., 18, 1868, 2; “Dramatic Property.” *New York Times*, March 29, 1868, 4. See also the coverage and commentary in publications like Philadelphia-based *American Publisher’s Circular* as well as *Spirit of the Times: A Chronicle of the Turf, Agriculture, Field Sports, Literature and the Stage*. For the history of *American Publisher’s Circular* see Mott, *History of American Magazines*, Vol. 3, 491-3.

<sup>17</sup> For example, see the controversy over a play based on Mayne Reid’s novel, *The Quadroon*. “Rights and Wrongs of Authors.” *New York Times* Jan. 15, 1863, 4.

<sup>18</sup> For an example of these allegations (toward Boucicault as well as more generally), see “Dramatic Pilfering” *New York Times* Aug 17, 1868, 4.

<sup>19</sup> This is hardly unique to the nineteenth century. *Hamlet*, for example, is based on an earlier play, probably by Thomas Kyd, and many of the plot elements can be traced back to a medieval Danish text, *Gesta Danorum*.

<sup>20</sup> “Plays and Playwrights.” *New York Daily Times*. Sept. 9, 1856, 4.

interest” an “unblushing plagiarism” of James Robinson Planché.<sup>21</sup> *Spirit of the Times* even refers to attempts to copyright *Macbeth*.<sup>22</sup>

Chaos, litigation, and intertextual borrowing led to cynicism over the quality of copyrighted dramas. Publicly proclaiming and defending a dramatic copyright looked overly-defensive to the *New York Times*:

It may be laid down as a general proposition that when a dramatist evinces any special anxiety concerning the copyright of a production to which he puts his name, and aggressively threatens the world with pains and penalties for infringement of his valuable title – it may, we say, be laid down as a general rule that the dramatist has been either making a wholesale appropriation from the French, or pilfering in a smaller way from some piece of English origin.<sup>23</sup>

Using copyright to claim a monopoly on the imported products of other nations smacks of what economists call rent-seeking, not the distinctly American theatre advocates of dramatic copyright had promised.

Copyright law is always messy when applied to a new area, and some of this litigation and confusion stemmed from efforts to apply an inadequate law. In passing an amendment only a few hundred words in length, Congress demonstrated no effort to anticipate the issues peculiar to the theatre or to live performance. Moreover, the necessarily vague language of the law allowed the courts to expand definitions of infringement in ways not anticipated by Congress, and “well beyond the literal words of the dramatic composition.”<sup>24</sup>

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<sup>21</sup> “Amusements.” *New York Times* July 28, 1862, 5. For the history of burlesque, see Robert G. Allen, *Horrible Prettiness: Burlesque and American Culture*.

<sup>22</sup> “Foolish Practices.” *Spirit of the Times* Dec. 20 1856, 540.

<sup>23</sup> “Amusements.” *New York Times* July 28, 1862, 5.

<sup>24</sup> Patry, *Copyright Law and Practice*, 41-2.



Some confusion arose from the freedom to create derivative works. Before 1870, a playwright did not need permission to base a play upon a novel, poem, or story by another writer, even if that writer had a valid U.S. copyright. For example, the dozens of plays and minstrel shows based *Uncle Tom's Cabin* did not need permission from Harriet Beecher Stowe – the law simply did not extend that far.<sup>25</sup>

Extra confusion arose from applying copyright to an intangible form. For with this short amendment, Congress had opened an entirely new genre to copyright: performance. The differences between a book and a performance are legion. In contrast to a mechanically reproduced text, live performance is not fixed. Every staging of a play is slightly different – even without the time-honored tradition of improvisation. Every performance is different, and some are so different as to be completely different works. When this flexible form was combined with the freedom to create derivative works, it was quite unclear exactly what protections copyright offered.

Where was the line between imitation and infringement? What criteria were appropriate? Reporting on *Boucicault v. Fox* (1862), the *New York Times* tried to uncover just *what* is “that legal originality to which the statute gives protection.”<sup>26</sup> Did copyright protect dramatic ideas? If plot and character were the essence of a drama, were they now protected by copyright? Mused the *Times*:

In these later days, the stock of incidents and plots has been so far used up, that it becomes a question of importance how far authors are justified, and how far their labor can be protected, in making, use of that old material.<sup>27</sup>

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<sup>25</sup> Authors were first permitted to “reserve the right to dramatize or to translate their own works” by the Copyright Act of 1870. See § 86 of Act of July 8, 1870, §§ 85-111, 41<sup>st</sup> Cong., 2<sup>nd</sup> Sess., 16 Stat., 198, 212-217.

<sup>26</sup> “Rights and Wrongs of Authors.” *New York Times* Jan. 15, 1863, 4.

<sup>27</sup> *Ibid.*

In this case, a muddled decision by Judge William D. Shipman did not clarify how the law might deal with originality in dramatic productions, in part because so much potential evidence was excluded on procedural grounds. Although hopeful in tone, the reporter was left with only “the idea that a work may be original in the eye of the law [but not] in the eye of the critic.”<sup>28</sup>

This was a recipe for copyright infringements to be assessed on a case-by-case basis, via opaque and judge-applied legal criteria, and for playwrights never to be certain exactly what qualified as copyright infringement. The resulting confusion contributed to the eventual protection of derivative works in the Copyright Act of 1870.

## **Photography and Copyright**

Publicly announced by Louis Daguerre in 1839, the daguerreotype was the first commercially viable form of photography. Invented in France, it quickly spread to the U.K. and the U.S.

Significantly, daguerreotype is a positive-only process. A single exposure produces only a single print – there is no negative. Thus, creating multiple pictures requires multiple exposures, and considerable effort.

Although further technological development (ambrotype, tintype) reduced the cost of a photograph, mass production from a single original was not possible until after the 1850 invention of albumen printing on treated paper. When combined with use of a glass negative, this development allowed for repeated printing of images, and revolutionized popular use of photographs, particularly in the 1860s fad for small photographic prints known as *carte de visite*.<sup>29</sup>

In the absence of a technology for mass production, there was little pressure for copyright to be extended to earlier forms of photography. Instead concern centered upon reproduction by

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<sup>28</sup> Ibid.

<sup>29</sup> Jim Cullen’s text *The Art of Democracy* does a particularly nice job of succinctly contextualizing photography in nineteenth century U.S. culture. See Cullen, 113-115.

photography of works originally created in older media. *Albion*, for example, skeptically reported on an 1855 French case concerning a photograph of a painting. In this particular case, a painter sued a photographer for exhibiting a photo of his painting, asking for 500 francs. As reported in the U.S.:

The tribunal, finding that [the painter] could not prove that any promise of payment had been made, and considering that the photographic reproduction of a painting is calculated, by making the work widely known, to benefit the artist, declared the demand unfounded, and dismissed it, with costs.<sup>30</sup>

The technology of the day simply did not allow for a photograph to substitute for a painting and, in the logic of the court, an inferior copy was only advertising the original.

Although it is unclear from this article what specific photographic technology was involved, note that the alleged offense is the exhibition of a single image. The photo was not offered for sale, especially not as multiple copies – but these issues were only a few years away.

*Albion* kept a generally close eye on U.K. copyright cases connected to photography.<sup>31</sup> Perhaps ironically, *Albion* was largely devoted to reprinting articles from the U.K.<sup>32</sup> The above notice, for example, appears to have originated with a London newspaper. It was also reprinted in *Littell's Living Age*.<sup>33</sup>

During this period, concern over the sale of photographic reproductions focused on competition with engraving, not on the compensation of the artist. For example, *Scientific American* took

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<sup>30</sup> “A New Sort of Legalized Piracy” *Albion: A Journal of News, Politics, and Literature*. Dec. 1, 1855, 574.

<sup>31</sup> E.g. *Albion* articles: “Fine Arts” July 23, 1859; “English Copyright of Photographs,” March 15, 1862; “Artistic Copyright.” Jan. 4, 1868.

<sup>32</sup> Frank Luther Mott, *History of American Magazines*. Vol. 2, 128.

<sup>33</sup> “Weekly Gossip of the Athenaeum.” *Littell's Living Age*. Dec. 22, 1855, 747-749.

special notice in 1863 of a London trial over the “photographic piracy of engravings.”<sup>34</sup> The plaintiff, prominent London art dealer and publisher Ernest Gambart (1814-1902), had purchased for the then-fantastic sum of £5,500 the painting “The Savior in the Temple” by William Holman Hunt (1827-1910). Gambart then commissioned a high-quality engraving, which was protected by British copyright law, offering these for sale at the rather steep price of ten guineas. The defendant then *photographed the engraving* (not the painting) and sold the photographic prints for as little as one shilling.

*Scientific American* noted that photography of engravings was widespread:

Since photography has attained to such perfection *fac-similies* of superior engravings have been taken and sold in considerable numbers in London, thus injuring the sale of engravings which cost large sums of money to reproduce. A league has therefore, been formed in that city by the publishers of engravings, for the purpose of putting down this practice of photographic piracy.<sup>35</sup>

The article continues by noting two other cases where publishers of engravings brought U.K. copyright suits against the purveyors of photographic reproductions. In this case, the defendant prevailed with the jury.

This conflict is between two mass-reproducible forms, the engraving and the photograph. Although similar to each other, neither is remotely a replacement for the original painting. They are smaller, drabber, and far less expensive. But in the marketplace, the upstart new technology of photography could compete with the old, established purveyors of much more expensive engravings.

Copyright, the right to control the reproduction of the image, is separate from physical ownership of a painting. But when there is no

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<sup>34</sup> “Photographic Piracy of Engravings.” *Scientific American*, June 6, 1863, 353.

<sup>35</sup> Ibid. Emphasis in original.

technologically and financially feasible method of reproduction that leads to a substitute for the original, there is no need to extend legal protections to the image. If the painting is effectively un-reproducible, then physical ownership of the painting encompasses control of the only authentic image.

## ***Cartes de Visite***

Until technology permitted both high quality negatives and high quality prints, it was essential to have physical possession of the original photographic negative to be able to reproduce an image. Second- or third-generation prints offered poor-quality, and little competition. This was explicitly true during the 1860s fashion for *cartes de visite*.

Like the technology of daguerreotypes, the fashion for *cartes de visite* began in France before moving to the U.K. and the U.S. Mass-produced portraits of friends, family, celebrities, landscapes, and other scenes, these images are approximately two inches by three and one-half inches. Photos were relatively cheap and plentiful – a single London studio was reported to have produced seven hundred thousand portraits.<sup>36</sup>

In addition to distributing and trading photos with friends, people collected cards depicting famous people, scenes, or art. An 1863 advertisement in Philadelphia-based *Arthur's Home Magazine*, for example, lists nearly a hundred *cartes de visites* for sale, including a long list of generals, as well as poets, politicians, paintings, and tableau.<sup>37</sup> These sold for fifteen cents each, eight for a dollar. Images of popular writers, actresses, or sports figures reportedly sold

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<sup>36</sup> “Cartes de Visite.” *Saturday Evening Post*. March 1, 1862, 3. This article, reprinted from the London-based *Once a Week* was also reprinted in *Albion*.

<sup>37</sup> “Cartes de Visite.” [Advertisement] *Arthur's Home Magazine*, July, 1863, 54. Publisher Timothy Shay Arthur is better known as author of the temperance novel *Ten Nights in a Barroom and What I Saw There* (1854). For more on *Arthur's Home Magazine*, see Mott, *History of American Magazines*, Vol 2. 416-8.

tens of thousands of copies.<sup>38</sup>

Largely a middle-class phenomenon, collecting images was quite popular.<sup>39</sup> Some images were from actual sittings by living people. Others reproduced images from paintings. The Philadelphia vendor described above also advertised images of Washington – six pictures of George and two of Martha – photographed from six different painted portraits, a bust, and a miniature.<sup>40</sup> And for collectors, D. Appleton & Co. of New York advertised fourteen different styles and sizes of photo albums, some models holding up to two hundred *cartes de visite*, available in as many as eight different styles of bindings.

None of these reproductions were covered by copyright. Before 1865, copyright covered books, maps, charts, engravings, prints, and written musical compositions. It did not cover photographs, and it did not cover the original paintings or sculpture.

Given the state of the technology, copyright was also relatively unimportant to production and sale. As was recognized at the time, high quality images had to be printed from a first-generation negative, though piracy did exist. As an article in *Saturday Evening Post* puts it:

It is true that negatives can be taken from positives, of from *cartes de visite* already in existence; but the result is a deterioration of the portrait [...] although dishonest persons are to be found who will commit piracy in this manner for money.

Control of the negative included control of reproduction. Since a second-generation copy was significantly inferior quality, the legal protections offered by copyright were less necessary.<sup>41</sup> As with a

<sup>38</sup> Cartes de Visite.” *Saturday Evening Post*. March 1, 1862, 3

<sup>39</sup> “Photograph Albums for Cartes de Visite.” [Advertisement] *American Publisher’s Circular and Literary Gazette*. Dec. 1, 1862, 133. See also Cullen, 114.

<sup>40</sup> “Washington Portraits, 8 for \$1.” *Arthur’s Home Magazine*, April, 1863, 200.

<sup>41</sup> The parallels with audio cassette tapes are striking.

painting, ownership of the physical object conveyed practical control of the image.

There are signs that significant piracy existed. A small advertisement in the long-lived (1838-1914) *American Phrenological Journal*, for example, was headed with the clarion call of “Cartes de Visite! Carte de Visite! Carte de Visite!” However, the advertised service was “pictures of any kind copied and enlarged, or reduced to any size.”<sup>42</sup>

It is currently obscure just how much copying of each other various *cartes de visite* vendors might have engaged in, but if the practices of book and magazine publishers are a clue, it was probably considerable, and the competition led to tremendous innovation. Whatever the case, the available evidence suggests this form of copying generated little public ire and certainly no noisy appeals to Congress for copyright protection.

## ***Photography is not Engraving***

Attempts to persuade the courts to extend U.S. copyright protections to cover photographs as prints or engravings failed. In *Wood v. Abbott* (1866), the plaintiffs sold small photos of two crayon drawings which they had commissioned from an artist. Trying to comply with copyright law, they had deposited printed copies of the titles of the photos, as well as copies of the photos before offering the photos for sale. The images were sold attached to a small paper card, which had the then-current form of a copyright notice attached.

In other words, they had done all they could to comply with the statutory requirements for the registration of a copyright. The defendants had purchased copies of these two small pictures, photographed them, and sold the reproduced images.

The plaintiffs argued that these reproductions were prints under

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<sup>42</sup> “Cartes de Visite!” [Advertisement] *American Phrenological Journal*, July, 1863, 30. For a brief history of this publication, as well as highlights of phrenology in other sources, see Mott, *History of American Magazines* Vol. 1, 447-450.

the meaning of the law – and lost the case. Judge William D. Shipman’s decision, reprinted entire in the *New York Times*, immediately notes “that the question in controversy is whether or not these photographs are prints, cuts or engravings, and therefore protected by statute.”<sup>43</sup> Shipman follows a detailed (and unnecessary) technical description of the then somewhat-recent technology of photography by ruling that:

[Photography] is not printing in any sense known to the arts at the time this Copyright Act was passed; nor is it an extension of the old processes, or a new development of the art of printing or engraving as they were understood. It is entirely an original and independent method of producing and multiplying pictures – an art, not of printing or engraving, but of securing the delineation of picture by light operating on sensitive surfaces. In no just sense, therefore, can it said to be within the act of 1831.<sup>44</sup>

Since photography was not envisioned by the framers of the 1831 Copyright Act it was not covered by copyright. If Congress wanted copyright to cover photographs, they would have to say so explicitly.

Shipman’s legal reasoning was made easier by the course of political events. Although not handed down until 1866, this case concerned copyright registrations from several years prior. And in 1865, with a single sentence, Congress had extended copyright protection to photographs and negatives, “to the same extent, and upon the same conditions” as prints and engravings.<sup>45</sup> (The rest of this amendment was devoted to adjusting and enforcing the requirement for a deposit copies with the Library of Congress.)

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<sup>43</sup> *Hamilton Wood et al v. Milton Abbott et al* (1866). Decision printed under the heading “Law Reports” in *New York Times*. June 12, 1866, 2. *Wood v. Abbott* is also available via LexisNexis (30 F. Cas. 424).

<sup>44</sup> *Ibid.*

<sup>45</sup> Act of March 3, 1865, 38<sup>th</sup> Cong., 2<sup>nd</sup> Sess, 13 Stat. 540.



This change in copyright law evoked little mention and generated no controversy. *Harper's New Weekly*, for example, barely mentioned the bill, burying a brief notice among the other activities of the House of Representatives, deep in the larger news section, and in tiny print.<sup>46</sup>

In marked contrast to the difficulties encountered in extending copyright to protect live performance, copyright in engravings offered an effective precedent for thinking about copyright in photographs. The U.S. Supreme Court, eventually asked if copyright for photographs was constitutionally permissible – as “writings of authors” – made a similar connection in *Burrow-Giles Lithographic v. Sarony* (1884), noting that maps and charts had been eligible for protection since 1790.<sup>47</sup>

Functionally, treating a mass-produced photograph as a print works smoothly because the two genres are so similar. Both are mechanical reproductions of a graphical image. They are of roughly similar sizes and physical composition. Culturally, the two are similar as well. Aesthetically, they are used to depict similar themes. Their problematic status as art – and of their creator as artist – followed similar trajectories.<sup>48</sup>

Legal procedures for these analogous forms were well established – U.S. copyright law had protected prints and engravings since 1802. Of course, photography and engraving were still in different legal categories, but when thinking about copyright, these similarities made it easy to leverage existing knowledge and procedures.<sup>49</sup>

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<sup>46</sup> “Domestic Intelligence.” *Harper's New Weekly*. March 11, 1865, 147.

<sup>47</sup> For a reading of *Burrow-Giles Lithographic v. Sarony* (1884), see Jane M. Gaines, *Contested Culture* 51-82.

<sup>48</sup> Although covering much broader ground than that of lithograph and photograph, in “The Work of Art in the Age of Mechanical Reproduction,” Walter Benjamin famously connected duplication and mass audiences with a shift in the underlying connections of art from the ritual to the political.

<sup>49</sup> Since copyright did not extend to the protection of derivative works until 1870, a genre-crossing reproduction – a photograph of an engraving or an engraving of a photograph – would not have violated copyright law.

Legally, culturally, and professionally, people who knew how to think about a print or engraving knew how to think about a photograph.

Extending copyright to dramatic performances proved much more problematic. Developed in a creative environment that did not include copyright, the actual practices of playwrights were a poor fit with the assumptions about authorship and creativity embedded in copyright law. In addition, using copyright to protect performance was new, so there were no appropriate established procedures, either legally or professionally. And most seriously, extending the limited monopoly protection of a tangible object – book, chart, map, print, engraving or sheet music – to an intangible, ephemeral, performance was fraught with difficulties. The result was muddled law, inconsistently applied, and confusion about what was – or was not – protected by copyright. This confusion would later contribute to the extension of copyright to derivative works in the Copyright Act of 1870.

## ***Copyright Policy as a Site of Conflict***

For plays and photographs, the meanings of copyright were closely connected to the functional characteristics of the forms. On other occasions, copyright ideology and policy functioned as a site for other conflicts and developments of the era. This was particularly the case in the ongoing agitation over the lack of international copyright and over copyright as it related to *Uncle Tom's Cabin*.

In the antebellum period, controversies apparently about copyright were sometimes connected to arguments over national union and the abolition of slavery. In general, these reiterated elite themes from earlier in the antebellum period, especially when connecting copyright to the prevention of foreign contamination, the development of a national literature, and to the supposed benefits and functions of a national literature.

Turning once more to the Young America movement, an unsigned 1851 cover article in Evert A. and George L. Duyckinck's *Literary*

*World* connected international copyright and the development of a national American literature to fundamental issues of national unity:

Physical interests will hold the States together for the present; but as the strain of the various elements increases, nothing can keep us to a central union but the intimate fusion of the whole country through common sympathies, derived from and kept in lively response, by national writers.<sup>50</sup>

Even more explicit is an example from an 1853 issue of *United States Review*.<sup>51</sup> Going beyond the literary nationalism of the Duyckincks, this lengthy article connected international copyright to the prevention of insidious European influences:

We mean that of foreign, and most especially British, literature, which, by operating on public opinion, through a gentle and insensible process, changes the views of [people, who...] thus become willing instruments, passive tools, or active agents, in undermining and eventually overthrowing, their own government and institutions.<sup>52</sup>

Specifically and startlingly, danger arose from “the community of purpose established between the abolitionists of the United States and England.”<sup>53</sup>

Fiercely nationalistic, and convinced slavery cannot be eradicated without the destruction of the Union, this writer loudly worries that controversy over abolition in the U.S. serves foreign interests:

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<sup>50</sup> “Copyright Question.” *Literary World*. July 26, 1851, 61.

<sup>51</sup> “National Literature, and the International Copyright Treaty” *United States Review* Aug., 1853, 97-117.

<sup>52</sup> *Ibid.*, 99.

<sup>53</sup> *Ibid.*, 101.

England is the most malignant and dangerous enemy we have in the world, for she is aiming a deadly blow at the property and safety of one-half the States of this Union, and attempting to stimulate the other half to join in the conspiracy.<sup>54</sup>

Here, copyright is connected with protecting the Union and preventing foreign influence, especially via an international copyright agreement. By preventing the free reprinting of writing from overseas, international copyright “would go a great way in ridding us of the daily doses of foreign trash poured down our throats by American publishers.”<sup>55</sup> Copyright is a site for nationalism, for ideas of writing as powerful and potentially insidious, and for expressing fears of foreign contamination and the disintegration of the Union. Of course, as it turned out, no amount of international copyright could police domestic threats to the slaveholding Union.

## **Harriet Beecher Stowe**

It is difficult to understate the effect of *Uncle Tom's Cabin* on the culture of the 1850s U.S. More than a book, and more than a political polemic, *Uncle Tom's Cabin* was a broad-based cultural phenomenon. It was everywhere – even the xenophobic *United States Review* article described above included a dig at Harriet Beecher Stowe and her British hostesses, “the noble ladies of Stafford House.”<sup>56</sup>

*Uncle Tom's Cabin* also was the subject of one of the most important copyright lawsuits of this period, *Stowe v. Thomas* (1853). Examining this case shows how meanings of copyright functioned as

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<sup>54</sup> Ibid., 108

<sup>55</sup> Ibid., 114.

<sup>56</sup> Ibid., 106. Stafford House (now Lancaster House) was the London mansion of the Duchy of Sutherland. Duchess Harriet Sutherland was a noted sponsor of Harriet Beecher Stowe and a prominent supporter of the British abolitionist movement.

a site for other issues, and illustrates how the author of the book, the law, and a group of readers thought of copyright in very different ways.

Originally published as a serial in *National Era*, Stowe's 1852 novel was wildly popular, selling more than three hundred thousand copies in the first year after its publication. Even more people saw one of the many *Uncle Tom*-inspired theatrical productions – by 1858 at least ten plays had been produced which were about *Uncle Tom's Cabin* in one way or another, including adaptations, parodies, and antiabolitionist polemics.<sup>57</sup> The earliest-appearing play, drawing upon the serial publication of *Uncle Tom's Cabin* in *National Era*, had a short run at the Baltimore Museum two months *before* the publication of the book.<sup>58</sup>

None of these plays had Stowe's permission to use her characters or story in a theatrical production.<sup>59</sup> Nor was the range of derivative work produced limited to plays, as *Uncle Tom's Cabin* became one of the first mass-market merchandizing phenomena. A huge range of other *Uncle Tom*-related products were available, including songs, touring panoramas, tippets (scarves), hats, cards, picture books, engravings, and statues.<sup>60</sup> It was translated into dozens of languages, and widely reprinted outside of the U.S.

One domestic translation provoked the Stowes to sue.<sup>61</sup> In 1853, Harriet Beecher Stowe and her husband sued publisher F.W. Thomas for copyright infringement. Briefly, Thomas had commissioned a German-language translation of *Uncle Tom's Cabin*, and published it as a serial in his Philadelphia-based German-language daily newspaper, *Die Freie Presse*. Thomas had not sought Stowe's

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<sup>57</sup> See Eric Lott for a succinct summary, *Love and Theft*, 212-215. Lott concentrates his particular analysis on the two most popular and influential dramatizations, those by George Aiken and H.J. Conway.

<sup>58</sup> *Ibid.*, 212.

<sup>59</sup> At least one asked for permission, but was refused. Lott cites Stowe's "Puritan antitheatrical prejudices" for this refusal. *Ibid.*, 213.

<sup>60</sup> *Ibid.*, 273 n 12.

<sup>61</sup> Given the legal status of women in the antebellum U.S., husband Calvin Ellis Stowe had to be party to any legal agreements or lawsuits.

permission, nor paid royalties. Moreover, Stowe had commissioned her own translation from Professor Hugo von Hutten and registered a copyright for the Hutten translation.<sup>62</sup> Legally, the case hinged on whether Stowe's copyright was infringed by Thomas's parallel translation – there was no suggestion that Thomas had plagiarized the Hutten translation.

Stowe's signed affidavit, filed with the court on March 11, 1853, is largely legal boilerplate establishing that Stowe held a valid copyright to *Uncle Tom's Cabin*, that she had satisfied the various legal requirements (registering a copyright for a serial was relatively unusual), and that the defendant had in fact actually published translations of specific pages of *Uncle Tom's Cabin* in his newspaper on specific days.

This legal document illustrates copyright functioning as a site of essential tension about authorship as a profession. Although tangential to the current discussion, there is excellent academic work exploring the connections between *Uncle Tom's Cabin*, Harriet Beecher Stowe, work, property, and the gendered workings of the nineteenth-century capitalist marketplace.<sup>63</sup> Melissa Homestead, for example, dissects the tension between Stowe's well-known assertion that "God wrote" *Uncle Tom's Cabin* and Stowe's active defense of her right to profit. Homestead convincingly connects Stowe's stance to an older, "pre-Romantic mode of authorship [...] in the sense that [Stowe] was a mere copyist, transcribing a vision that did not originate with her."<sup>64</sup>

Romantic and pre-Romantic forms of authorship are absent from Stowe's affidavit. In contrast, the document monetizes authorship via repeated references to the "profits which she reasonably expected to receive" from Stowe's authorized translation, as well as how she

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<sup>62</sup> Melissa Homestead, "Stowe," 213; Stowe, "Deposition of Harriet Beecher Stowe, 1850," 5. A digital scan of the original document is available on-line from U.S. National Archives. ARC Identifier: 278936.

<sup>63</sup> See Rachel Naomi Klein, "Harriet Beecher Stowe and the Domestication of Free Labor Ideology" for a succinct summary of this strand of scholarship.

<sup>64</sup> Homestead, "Stowe" 209.

“was in hopes and reasonably expected to receive large profits.”<sup>65</sup> The affidavit does *not* contain claims about her moral right as an author to control her work, invoke issues of authenticity, claim that her translation is superior, appeal to benefits for society or to the advancement of American literature, or otherwise rely on the form of appeal common in other public controversies over copyright.

These omissions may be a result of the genre of Stowe’s complaint – issues like this had little legal relevance to 1853 copyright law. More broadly, this difficulty of discovering authorial agency in profits illustrates how copyright was a site of conflict in the development of authorship as a profession.

Stowe lost her lawsuit, and emphatically – copyright law did not include the ability to control translations, dramatizations, or other derivative works until the Copyright Act of 1870. From the perspective of the law, Stowe’s absolute dominion over her creation ended at the moment of publication. U.S. Supreme Court Associate Justice Robert Cooper Grier, writing in his capacity as a circuit-riding trial judge for the U.S. Circuit Court of the Eastern District of Pennsylvania:<sup>66</sup>

By the publication of Mrs. Stowe's book, the creations of the genius and imagination of the author have become as much public property as those of Homer or Cervantes. Uncle Tom and Topsy are as much *publici juris* as Don Quixote and Sancho Panza. All her conceptions and inventions may be used and abused by imitators, playwrights and poetasters. They are no longer her own – those who have purchased her book, may clothe them in

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<sup>65</sup> Both passages are from Stowe, “Deposition” 5. There are other examples of similar language.

<sup>66</sup> In addition to meeting as a group, U.S. Supreme Court Justices spent considerable time riding individual circuits (thus “circuit court”) as trial judges. This practice began with the Judiciary Act of 1789, and continued (with adjustments) until the 1891 creation of the U.S. Court of Appeals by the Evarts Act.

English doggerel, in German or Chinese prose. Her absolute dominion and property in the creations of her genius and imagination have been voluntarily relinquished. All that now remains is the copyright of her book; the exclusive right to print, reprint and vend it, and those only can be called infringers of her rights, or pirates of her property, who are guilty of printing, publishing, importing or vending without her license, "*copies* of her *book*." [...] A translation may, in loose phraseology, be called a transcript or copy of her thoughts or conceptions, but in no correct sense can it be called a copy of her book.<sup>67</sup>

Grier's 1853 decision was supplanted by the Copyright Act of 1870.

Based on careful and thoughtful legal analysis, Grier's approach to copyright is stunningly narrow by contemporary standards. But his decision is completely consistent with nineteenth-century judicial practice of thinking of copyright in very limited terms. If specific legal requirements were not fulfilled, a copyright was not valid. And – for translations as well as for photographs – copyright protections were not extended to new forms, however analogous, however similar, until Congress explicitly authorized such an extension.

In the English-language press, Stowe's lawsuit was duly reported but did not generate any special controversy or commentary.<sup>68</sup> But as research by Melissa Homestead demonstrates, Stowe's lawsuit was the subject of both extensive coverage and high feelings in the U.S.

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<sup>67</sup> *Stowe v. Thomas* (1853). In addition to the transcript available through services like LexisNexis, digital scans of Grier's handwritten decision are available online from the U.S. National Archives. ARC Identifier: 278937. Emphasis in Grier's (scanned) original, though not included in LexisNexis transcript.

<sup>68</sup> See Homestead, "Stowe." 235-6 n 38 for a succinct and accurate summary of the English-language coverage. In contrast, reprinting of Stowe's work abroad drew much more opprobrium. See, for example James Parton's 1867 *Atlantic Monthly* jeremiad: "There is an American lady living at Hartford, in Connecticut, whom the United States has permitted to be robbed by foreigners of \$200,000. Her name is Harriet Beecher Stowe." "International Copyright." 430.



German-language press, particularly in Philadelphia. Homestead summarizes the opposition of the latter:

The German-language press, however, recognized that Stowe's claim against Thomas represented an attempt to expand the private property rights of authors to the possible detriment of the *German* reading public. The German-American press was outraged that Stowe claimed the right to make *her* translation the *only* one available, or to prevent the publication of a translation altogether.<sup>69</sup>

For this group of readers, Stowe's attempt to profit via a then-expansive use of copyright connects to issues of control and censorship. Homestead continues:

To [Otto] Reventlow and his German-speaking brethren, F.W. Thomas and his translator were not faceless figures notable only because they incurred Stowe's wrath. They were important agents of German language and culture in America – agents whose ability to do this important work could be destroyed if Stowe's claims succeeded.<sup>70</sup>

For these readers, copyright is a site of struggle over control of the materials and meanings of a particular subculture, colored with nationalism, language, and group identity.

## ***Copyright and Language***

Copyright, as a term, has historically included many different meanings, and in practice, refers to much more than the provisions of

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<sup>69</sup> Ibid., "Stowe" 214. Emphasis in original.

<sup>70</sup> Ibid., 215-6.

copyright law, in sometimes startling ways. These diverse (and sometimes contradictory) meanings associated with copyright are always connected to the particular contexts, aesthetics, and motivations of the sites of use.<sup>71</sup> This diversity is particularly evident in relatively mundane writing – especially advertising – and as language used casually, in metaphor, or as analogy, especially in writings apparently unrelated to copyright law or policy.

In practice, sometimes “copyright” was sometimes simply used as an adjective meaning “copyrighted.” This use is not always obvious at first glance, creating potential confusion for the unwary researcher. For example, may be initially unclear whether an article labeled a “copyright manifesto” is an article *about* copyright, or is instead an article that *has been* copyrighted.

One example is from William Lloyd Garrison’s *Liberator*, reporting on reactions in the Richmond *Enquirer* to “Senator [Stephen A.] Douglas’s *copyright manifesto*.”<sup>72</sup> A moment of research reveals that Douglas’s article, originally published in *Harper’s New Monthly*, is about popular sovereignty in the territories.<sup>73</sup> This “copyright manifesto” is not about copyright at all.

Referring to the copyrighted status of Douglas’s article, *Liberator* performed two actions. First, by flagging Douglas’s article as copyrighted, *Liberator* implicitly informed interested readers that Douglas’s article would not be reprinted, directing them to seek out the initial publication in *Harper’s New Monthly*. Second, because securing a copyright required a significant effort on the part of the publisher, especially for a magazine article, flagging the copyrighted

<sup>71</sup> This section has been informed by work by linguists George Lakoff and Mark Johnson on metaphor, and by rhetorician John Logie on the *pathos*, *ethos* and *logos* of the terms “hacking,” “piracy,” “sharing,” “theft,” and “war” in debates over peer-to-peer filesharing on-line both contributed to this section. See Lakoff and Johnson, *Metaphors We Live By* and Logie, *Peers, Pirates, and Persuasion: Rhetoric in the Peer-to-Peer Debates*. “Ethos,” “Logos,” and “Pathos” refer to Aristotelian bases for a rhetorical appeal, roughly equivalent to “appeal as an authority,” “appeal to logic” and “appeal to emotion,” in that order.

<sup>72</sup> *Liberator*, Oct 7, 1859, front page. Emphasis added.

<sup>73</sup> Stephen A. Douglas, “The Dividing Line Between Federal and Local Authority” *Harper’s New Monthly* June, 1859, 519-537.

status of a work acknowledges that it is thought to be valuable, important, or interesting by the original publisher. Although *Liberator* was unlikely to have concurred with Douglas's positions, in the context of the magazine industry, the extra effort involved leads copyrighted works to have higher status than un-copyrighted works.

Potential confusion for modern researchers may also stem from the form of the archaic copyright notice. To continue with the Douglas example, the *Harper's New Monthly* copyright notice reads:

Entered according to Act of Congress, in the year  
1859, by Harper and Brothers, in the Clerk's Office  
of the District Court for the Southern District of  
New York.<sup>74</sup>

Notice that this (properly executed) notice includes neither the word "copyright" nor the contemporary © symbol. And as required, the notice is not attached to the article proper, but appears on the cover of the magazine.<sup>75</sup>

Given these elements, knowing whether or not a particular work was actually copyrighted requires looking beyond the text itself. Moreover, because the legal requirements for a valid nineteenth-century copyright were quite specific, and because failure to precisely comply resulted in the invalidation of said copyright, even the presence of a properly formed copyright notice is not indisputable evidence of the copyright status of a work. Then, as now, spurious claims of protection by copyright law were legion.<sup>76</sup>

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<sup>74</sup> *Harper's New Monthly* June, 1859, cover.

<sup>75</sup> An alternative form of copyright notice that used the word "copyright" and a date was permitted by the 1874 Print and Notification Amendments. See Patry, *Copyright Law* Vol. 1, 46-7. Use of the © symbol was permitted by the 1909 Copyright Act.

<sup>76</sup> In contemporary use, spurious claims of copyright typically take the form of impermissibly broad prohibitions of those potential uses enshrined in U.S. federal fair use laws. See U.S. Title 17, § 107.

## Copyright Means Money

In the magazine world, copyright could mean “copyrighted.” Alternatively, magazine and reprint publishers could use “copyright” to refer to a sum of money or a payment to an author. This use appears in both advertising and articles throughout the mid-nineteenth century.

A *Harper's Weekly* appeal for subscriptions, for example, follows puffery about their coverage of John Brown's 1859 Harpers Ferry raid with a list of fiction recently serialized in *Harper's*, listing work by Charles Dickens, Wilkie Collins, and Elisabeth Gaskell. Wanting, perhaps, to forestall accusations of piracy, the ad specifically notes payments by *Harper's* to these U.K. authors:

It is hardly necessary to add, that the foreign serials which appear in *Harper's Weekly* are purchased from their authors by the proprietors of *Harper's Weekly* who, in many instances, give for a mere right of priority *what amounts to a handsome copyright to the author*.<sup>77</sup>

Because the U.S. did not respect the copyrights of other nations until 1891, Harper & Brothers was (sometimes) willing to pay to be the first to the U.S. market with a new publication.

Here, “what amounts to a handsome copyright” does not refer to a right to publish or to distribute, but to the sum of money paid to the author for proof sheets.<sup>78</sup>

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<sup>77</sup> “Harper's Weekly, A First-Class Illustrated Newspaper.” [advertisement] *Harper's Weekly*, Dec. 17, 1859, 815. This text is repeated in additional ads (under varied headlines) on Dec 24, 1859, as well as in at least ten more issues in the first half of 1860. Emphasis added.

<sup>78</sup> Sometimes this practice took part as part of an informal (and oft-broken) practice among publishers termed “Courtesy of the Trade.” Briefly, U.S. publishers agreed that whoever first announced a particular reprint would not be subject to underselling by other editions. However, given the plethora of complaints by publishers, Courtesy of the Trade seems to have been respected more in the breach

Although most strongly associated with reprinters, this use of language was not unique to Harper & Brothers or to the antebellum period. For example, using copyright to mean a sum of money is repeated in this 1875 *Scribner's Monthly* update on the international copyright:

The book of every native author comes directly into competition with books [...] on which the American publisher *pays little or no copyright*. Consequently, *his copyright must be small*, no matter how valuable his book may be, or how much time, money, and labor it might have cost him.<sup>79</sup>

Here, copyright refers specifically to the money paid by a publisher to an author, not to the law or to literary property.

This meaning of copyright is most commonly encountered in the broad discourse of international copyright, including arguments over reprinting, international copyright policy, piracy, and violations of trade practices. Rhetorically, collapsing the distinction between copyright and the money paid to an author also collapses the distinctions between a formalized system of copyright and the various *ad hoc* measures used in place of international copyright.

On the surface, this juxtaposition served the rhetorical purposes of U.S. reprinters – if money is framed as identical to copyright, then the practice of payment for proof sheets makes accusations of piracy nonsensical. However, this collapse of the object with money paid for the object is made by U.S. writers on *both* sides of the international copyright controversy, without any obvious confusion, uncertainty, or intent to mislead. In the above examples, the piratical Harper & Brothers claim its payment “amounts to a handsome copyright,” yet sixteen years later, a pro-international copyright

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than in actual practice.

<sup>79</sup> “International Copyright.” *Scribner's Monthly*. July, 1875, 378-9. Emphasis added. According to the article, the “question of international copyright” was “taking a rest.”

article in *Scribner's* effaces “amounts to,” moving from simile to equivalence.

## Copyright Means Status

The straightforward meanings of “copyright” described above give way to complex intertwined meanings in sites of more popular use. Some of these uses focus on connotations of status, authenticity, and originality. Others connect copyright to control, competition, and monopoly. But across all these disparate meanings, the language of copyright always draws from the context of the language-user, especially across different segments of the book industry.

Instead of using “copyright” to mean “copyrighted” or “money,” language directed at the broader public (including advertising) often connects copyright with status. In book advertising, for example, high status connotations of “copyright” were repeatedly used to market then-marginalized “highly-wrought” domestic novels.<sup>80</sup>

Adjacent to an amusing caricature of Horace Greeley as a chained lunatic, one example advertises *The Earl's Heirs*, “A new *copyright novel* of domestic life.”<sup>81</sup> Could this be a novel about copyright? How exciting! Alas for the copyright nerd, this specific usage refers not to some breathtaking melodrama of copyright policy, but to a novel that is copyrighted. This is not an isolated use – publisher T. B. Peterson & Brothers of Philadelphia advertised another “new copyright novel of domestic life” (E.D.E.N. Southworth's *Love's Labor Won*) a few months later.<sup>82</sup>

Nor is this turn of phrase is not a Peterson-specific quirk – a

<sup>80</sup> See Nina Baym, *Novels, Readers, and Reviewers*, 207-9.

<sup>81</sup> “By Author of East Lynne.” [advertisement] *Harper's Weekly*, March 29, 1862, 208. Emphasis added. Elibron Classics reprinted *The Earl's Heirs: A Tale of Domestic Life*, by Ellen Wood (usually referred to as Mrs. Henry Wood), in 2003. Wood's most popular novel, *East Lynne*, was a Victorian bestseller and has been repeatedly adapted for stage and screen. A 1931 film version (directed by Frank Lloyd) was nominated for Best Picture.

<sup>82</sup> “Mrs. Southworth's New Book!” [advertisement] *Harper's Weekly*, July 12, 1862, 448.

different publisher made the same connection in an 1863 advertisement for a reprinted dime novel. “A New Copyright Novel, published this day, *Sybil Campbell; or the Queen of the Isle* by Cousin Mary Carleton,” the ad proclaimed, touting availability from publisher Frederic A. Brady – 50¢ in paper covers and 75¢ in cloth.<sup>83</sup>

This 1863 “New Copyright Novel” was not new – it had been published by pulp fiction pioneer Erasmus Beadle & Company in 1861, for only 25¢.<sup>84</sup> Author May Agnes Fleming (who also wrote as Cousin May Carleton and M. A. Earlie), was one of the writers instrumental in the formation of the genre of “highly-wrought fiction.”<sup>85</sup>

But connections to Beadle and to sensationalistic fiction were erased in this advertisement. Only inches away from an ad trumpeting “Women’s Rights!!” (to “beautiful wavy hair” with purchase of Irvins’ Patent Hair Crimpers), the ad for *Sybil Campbell* firmly insists upon quality – it is printed on “fine paper,” and includes twelve illustrations by F. O. C. Darley, one of the most important, prolific, and well-known illustrators of the day. These illustrations, the ad notes, were printed on “finely calendared paper, separate from the letter-press.” Emphasizing fine illustrations on special paper (calendared paper has been pressed between rollers to produce a smooth surface) positions the book as a high-quality manufactured object. Somewhat anti-climactically, the story “has been pronounced first-class.”

The advertisement works hard to represent *Sybil Campbell* as a quality work. This was a considerable challenge – all three of these popular “copyright novels” were highly-wrought domestic fiction. Strongly gendered as female, written by women, and largely read by women, this was the “d\*\*\*ed mob of scribbling women” that so frustrated Nathaniel Hawthorne.

Calling these books “copyright novels” was to claim higher status for the texts of a marginalized literary form. For the publisher, the

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<sup>83</sup> “A New Copyright Novel.” [advertisement] *Harper’s Weekly*, May 9, 1863, 303.

<sup>84</sup> Worldcat lists no fewer than seven editions of the novel.

<sup>85</sup> See Michael Denning, *Mechanic Accents*, 188.

connotations of originality, merit, and status associated with copyright helped repackaging popular fiction, moved it up-market, and justified a hefty increase in price.

Paradoxically, in the context of highly-wrought fiction, using “copyright novel” to claim higher status also identifies the book as an upstart literary social climber. Higher status, more masculine-gendered, or more obviously “literary” books were also copyrighted, but did not typically advertise as such. Already of higher status, these latter works did not benefit from the copyright novel label.

Although the association between copyright and status is particularly pronounced in the context of literary social climbers, similar connections can be seen in other segments of the market. Interestingly, some higher-status sites connect copyright with status when considering a book with a particularly marketable reputation.

A lengthy 1883 *Atlantic Monthly* essay on the state of American letters, for example, connects the term “copyright book” with fears that proposed legal changes could hurt the market for new works. Specifically, the writer fears that changes in the tariff and the lack of international copyright would “force American publishers into the publication of those *copyright books* only whose reputation has already been made.”<sup>86</sup> Publishers would be protected, the author repeats, “in the case of *copyright books*, whose reputation is already made.”<sup>87</sup> New works – books without an established reputation – would suffer.

In this usage, a “copyright book” is not only a book by a U.S. resident and one that is legally protected by copyright, but also a book with a positive and marketable reputation. Interestingly, here, “copyright book” does *not* include a connotation of newness. On the contrary, for this particular writer, copyright is associated with protecting established works, not with newness. These copyright books are established and staid, not innovative or inventive.

Although often associated with status or innovation, ideas of copyright were fluid enough to allow wildly different meanings in

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<sup>86</sup> “Authorship in America.” *Atlantic Monthly*, June, 1883, 814. Emphasis added.

<sup>87</sup> Ibid.



slightly different contexts. An 1893 review of a poetry anthology, for example, associates copyright with both newness and *low* quality. Specifically, the reviewer commends the compiler for excluding recent work:

He has arranged his matter substantially in chronological order, and as he excluded *copyright poems* and poems of living authors, he has the advantage of Time as a critic.<sup>88</sup>

Looking at this text, it is tempting to read “copyright poems” as simply meaning poems that were copyrighted. But given the specific details of this publication, copyright law is almost completely irrelevant.

Briefly, the anthology in question is *A Paradise of English Poetry*, and virtually no works that might be included would be covered by copyright. At the time of publication, the U.S. had been making copyright protections available to foreign writers for only two years. Thus, in this context, excluding “copyrighted poems” excludes only English poetry published after 1891.<sup>89</sup> Even without the commended exclusion of recent work, this is not much of a barrier in 1893.

Although maintaining the association of copyright with newness, this reviewer reverses the association of copyright with higher status. Too new, these “copyright poems” have not stood the test of time, and are automatically judged as being of less merit than older works. For poetry, at least, “lofty and permanent examples” are essential for “a book of high order” and copyright is associated with newness and innovation – and bad poetry.<sup>90</sup>

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<sup>88</sup> “Comment on New Books.” *Atlantic Monthly*, June, 1893, 852. Emphasis added.

<sup>89</sup> Of course, this anonymous reviewer might have misunderstood the effects of the recent law – as Jessica Litman points out, it is never safe to assume that authors and/or other interested parties actually understand copyright law. See Jessica Litman, “Copyright as Myth.”

<sup>90</sup> “Comment on New Books.” 852.

These associations are completely opposite the associations connecting copyright to books of a marketable reputation. But within the context of a poetry review, these radically different ideas of copyright are perfectly sensible, illustrating just how diverse and malleable ideas about copyright were. Although they share considerable cultural background, a poetry reviewer in 1893, an 1883 literary article, and Civil War-era advertising for highly-wrought novels were operating in dramatically different aesthetic contexts, and these different contexts led to the association of dramatically different ideas with copyright.

## **Copyright Means Authenticity**

As suggested by the examples above, ideas of copyright during this period tend to be embedded in the system of market relations. Connections between authenticity and copyright repeat this theme.

A striking example appears in the advertising for militantly abolitionist journalist, editor, and publisher James Redpath's quickie postmortem biography of John Brown.<sup>91</sup> Repeatedly advertised in Garrison's *Liberator*, *Life of Capt. John Brown* was represented as the "only genuine and reliable biography, authorized by, and for the Benefit of the Family," of which "any re-printing will be prosecuted as an infringement of copyright."<sup>92</sup>

Framing his work as the most authentic available, the advertisements for Redpath's book use copyright to insist upon control of the book in the marketplace. Available through agents and locations like the Boston Anti-Slavery Office, Redpath's book "will not appear in the public press," be reprinted, or be serialized.<sup>93</sup> Sales,

<sup>91</sup> For more on Redpath, see von Frank, "John Brown, James Redpath, and the Idea of Revolution."

<sup>92</sup> "Life of Capt. John Brown." [Advertisement] *Liberator*, Jan 20, 1861, 11. See also the variant version "30<sup>th</sup> Thousand Now Ready!" [Advertisement] *Liberator*, March 2, 1860, 35. Originally published by Thayer and Eldridge of Boston, Redpath's book is actually titled *Public Life of Capt. John Brown*.

<sup>93</sup> Ibid. A distribution plan for *Life of Capt. John Brown* is described by "publisher's agent" John W. Lewis in a headnote above the Jan. 20, 1860

it is emphasized, will be only “for the benefit of [Brown’s] family.” Copyright is rhetorically wielded as a legal bludgeon to control how the book is printed and distributed.

In addition to this legal-economic use of copyright, copyright is also invoked to control how John Brown is remembered. A long-time admirer of Brown, Redpath is a decidedly biased biographer of “the glorious old man,” “philanthropist,” and “patriot.” Claiming to be the only authentic version and using copyright to control a market also limits competition, by both economic practice and abolitionist ideology. These advertisements do claim the right to being the only biography of Brown – only “the best that can be produced at the present time.”

Interestingly for the scholar of copyright, this association of copyright with authentic biography trumps associations between copyright and creativity. Indeed, ideas of newness, innovation, and originality conflict with the value placed on authenticity in nineteenth century non-fiction, suggesting authorial insincerity. Thus, limiting copyright to relatively narrow claims of authenticity and control of the marketplace (as in the Redpath example) avoids the then-problematic claims of creative non-fiction. In short, in the aesthetic of the day, a sincere and honest non-fiction author would have no need for tricks and innovations, and thus less need to protect originality. Therefore, the ideological logic of copyright is sometimes distinctly different for fiction and non-fiction.

## ***Copyright Means Reduced Competition***

Marketplace invocations of copyright intended to reduce or prevent competition are quite common in the second half of the nineteenth century. Typically, these are intended to threaten potential infringers, warn off possible business competitors, complain of (non-existent) infringement, or appeal to (legally nonsensical) copyright protection when patents or trademarks will offer no help.

In simplest form, this anti-competitive rhetoric takes the form of

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*Liberator* ad.

published threats of suits for copyright infringement, as in this example:

Booksellers Are Cautioned against purchasing or selling a paper covered book, which hails from Philadelphia, entitled “Matrimonial Brokerage in the Metropolis,” as we hold the copyright of the genuine book of that title, and shall rigidly prosecute all infringements thereof. Those who wish for the genuine, authorized, and only perfect edition, will please remember that it is bound only in cloth, and is alone published by Thatcher & Hutchinson, 523 Broadway, N.Y.<sup>94</sup>

The complete title of this interesting 1859 collection by “a Reporter of the New York Press,” is *Matrimonial Brokerage in the Metropolis; Being True Narratives of Strange Adventures in New York, and Startling Facts in City Life*.

Taken literally, it appears that New York-based Thatcher & Hutchinson feared that their \$1 edition of genuine and authentic nativist sensationalism might be undersold by paperbound pirates hailing from rival Philadelphia. There is no reason to believe the claim of copyright is not genuine, and my search did not reveal any pirated editions of *Matrimonial Brokerage*, raising the possibility that this warning is intended to function as advertising hype.<sup>95</sup> Nevertheless, considering the above text, copyright is strongly associated with “we shall rigidly prosecute all infringements” and with its marketplace sense, as a legally-enforced limited monopoly.

This apparently-valid marketplace saber-rattling of Thatcher & Hutchinson is in marked contrast to many similar uses, as many other warnings to potential competitors were based on clearly spurious

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<sup>94</sup> “Booksellers are Cautioned.” [Advertisement] *Harper’s Weekly*, March 26, 1859, 207. Capitalization and line breaks are reformatted.

<sup>95</sup> The 1859 Thatcher & Hutchinson edition is available in both print and microform editions. See Worldcat.

claims of copyright. An 1842 advertisement for a “Manifold Writer,” for example, laid claim to being “New and Grand” as well as “Highly Improved.”<sup>96</sup> (A manifold writer is a form of blank book that allows the use of two-sided carbon paper to produce duplicates.) More relevantly, the ad also claimed that “a copyright has been secured” for the ruling of the lines on the blank pages.

Simple lines on a page would not have qualified for copyright, and this claim is almost certainly spurious.<sup>97</sup> Note that the ad makes no claims to a patent – presumably because this “New and Grand Invention” represented only an incremental improvement over procedures that had been around more than thirty years.<sup>98</sup> Instead, this claim of copyright serves to warn potential imitators, is used to threaten potential rivals, serves to limit competition.

A similarly spurious claim was made by clergyman Thomas H. Stockton over his 1853 “new *copyright plan* for the publication of the Bible.”<sup>99</sup> Stockton, perhaps best (un-)known for offering the opening prayer at the 1863 Gettysburg Address, planned to sell, together with a mahogany case, a sixty-six volume edition of the Bible. His plan devoted thirty-nine separate books to texts from the Old Testament, and twenty-seven to the New Testament, and included color-coding by subject. The Gospels, for example, were to be bound in blue, and the Acts of the Apostles in pink.

Initially described in *National Era*, Stockton revisited his plan

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<sup>96</sup> “Take Notice.” [Advertisement] *Liberator* Oct., 21 1842, 167. For a succinct summary of the history of the use of carbon paper and manifold systems, see JoAnne Yates, *Control Through Communication*, 46-48.

<sup>97</sup> Formal rulings on copyright issues related to blank forms and the like were still several decades away. The 1879 case *Baker v. Selden* found that the processes and specific forms used in a particular bookkeeping method were not protected by copyright. *Baker v. Selden* relied in part on a 1869 U.K. case, *Page v. Wisden*, which found that forms used for scoring the game of cricket were not legally copyrightable.

<sup>98</sup> Englishman Ralph Wedgewood patented a form of carbon paper in 1806, and his version of a Manifold Writer soon followed. See Yates.

<sup>99</sup> “The Bible at the Faith.” *National Era*, Nov. 3, 1853, 173. Emphasis added. Stockton was also a published poet and served repeatedly as Chaplain to the U.S. House of Representatives.

five years later in two lengthy letters to the editor of the same publication. The first of these letters is largely concerned with his recent relocation to Philadelphia, financial difficulties, and renewed preaching.<sup>100</sup> The second letter details his progress in his publication plan over the intervening five years:

A block model was made; a few publishers were visited. A fine book model was made; and the plan was extensively announced. A copyright was secured, for the sake of Bible Christianity. The profits were pledged – to Bible Christianity. Nothing remained but to issue the work.<sup>101</sup>

The work, however, remained un-issued.

Considering the above passage, the good Reverend is clearly having difficulty claiming a copyright over the Bible, and feels a marked need to avoid appearing greedy. Thus, Stockton's position as a clergyman shapes the meanings he associates with copyright. This is particularly evident in his claim that his copyright is for the *plan* (not *The Book*), and his insistent dedication of anticipated profits to Bible Christianity.<sup>102</sup>

Stockton's repeats his claim to a copyrighted plan in his lament about a similar multi-volume Bible published in the U.K.:

The great London house of Bagster & Sons seized upon my plan, without the slightest acknowledgement, and having capital, soon produced "*The Paragraph Bible, in Separate Volumes*," and have it now on sale, contrary to my own copyright, in our own cities!<sup>103</sup>

<sup>100</sup> "Issues of Life." [letter] by T H Stockton, *National Era*, Feb. 18, 1858, 25.

<sup>101</sup> "Issues of Life." [second letter] by T H Stockton, *National Era*, March 18, 1858, 41

<sup>102</sup> It is unclear what precisely Stockton meant by "Bible Christianity."

<sup>103</sup> Ibid. Quote marks and italics both in original. Samuel Bagster & Sons published a variety of Bibles, popular religious texts, and works on Christian

Stockton's claim to have copyrighted a plan is rubbish.

In 1858, copyright covered books, maps, charts, engravings, prints, musical compositions (but not musical performances) and performances of dramatic works. Copyright did not cover plans, ideas, wishful thinking, or pipe dreams. Even if Stockton had managed to find a publisher in the U.S., the lack of international copyright meant that Samuel Bagster & Sons were under no legal obligation to respect Stockton's claim – and neither was Stockton constrained by Bagster.

If Stockton had an actual publication, with a valid copyright (perhaps only covering his commentary), and Bagster & Sons had duplicated this commentary, then Stockton might have been able to prevent the importation of the infringing work into the U.S. And that's all.

Indeed, Stockton goes on to note that other publishers, including the American Bible Society and American Bible Union, have published multi-volume Bibles, bemoaning that no publisher wanted to work with him. Perhaps because there are no real legal issues involved, Stockton is reduced to complaints about the quality of the competition – Bagster & Sons, for example, have made “rather a clumsy and unsightly affair of it.”<sup>104</sup> Clearly, Stockton is irate that his plan has been duplicated by others, and he turns rhetorically to copyright to express his anger. But Stockton does not understand copyright as a lawyer. Instead, as expressed in these letters and as clergy, he understands copyright as a means for control over the use and the credit for an idea.

More broadly, the conflation of copyright with control over ideas suggests ideas are thought of as precious and rare – if ideas are plentiful, there is no particular gain to be had from exerting control over a simple one. And Stockton's idea is a simple one – disassembling the Bible into separate books of the Bible is both obvious and of little practical utility. A sixty-six volume Bible might be somewhat unwieldy in practice, but Stockton's loving descriptions

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theology during the nineteenth century.

<sup>104</sup> Ibid.

of mahogany cabinetry and leather bookbinding make it clear that this is to be an item of conspicuous consumption, proudly on display in the pious parlor. It is a wonder he did not return to the scroll format.

## **Copyright Means Originality**

Legally, copyright has never protected ideas, but a significant strand of popular meaning associates copyright with the origination of an idea. Importantly, this association does necessarily include control over the purportedly original idea among the fruits of copyright, only a claim of authority.

Abolitionist Edmund Quincy, for example, claimed that William Lloyd Garrison's practice of reprinting "slander, defamation, denunciation and misrepresentation" of himself (Garrison) in the pages of *Liberator* was "an original invention of Mr. Garrison."<sup>105</sup> As such, the writer continued, "he is certainly entitled to take out a Copyright as its Author or a Patent as its Inventor."

Printing critical comments is cited as proof of Garrison's "sense of right and justice, and of his [illegible] integrity" and as a foundation for historical validity. Within this metaphorical invocation of copyright and patent, Quincy makes no claim to the control of this method, only to Garrison as originator, as part of his broader assertions of moral and intellectual superiority.

Although it may be tempting to cite the disconnection of creation from control to an anti-slavery mindset, this way of thinking of copyright was not limited to the abolitionist press. Later in the nineteenth century, for example, a letter to the editor of *Forest and Stream* also connected creation and control in a description of bird-watching:

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<sup>105</sup> "The Refuge of Oppression." by E. Q. *Liberator* Oct 21, 1858, 166. Boston Brahmin and abolitionist Edmund Quincy was a long-time supporter of Garrison and *Liberator*, and sometimes served as editor in Garrison's absence. See Frank Luther Mott, *History of American Magazines*. Vol. 2: 275-296 for a succinct overview of the history of *Liberator*.



The [previously published] article in *Forest and Stream*, entitled “Summer Robin Roosts,” was a great surprise to me. I had studied the subject for years and thought I owned the copyright. It was the first intimation I had received that others were engaged in the same study.<sup>106</sup>

The author of this letter is not writing to complain that someone else has stolen his idea or article, but to share at length his own observations on the subject, gleaned from many years of bird-watching. His reference to copyright is not a claim to scientific priority or a demand for acknowledgement, but a rhetorical claim for authority via long experience. Whether abolitionist or free as a bird, in these cases, a copyright-related claim of invention does not necessarily include claims to control.

## **Copyright Means Control**

In contrast, some literary examples downplay the marketplace role of copyright in favor of emphasizing origin and control. A gently satirical column from *Harper's Weekly*, for example, begins by describing a naval officer's inarticulate response to a toast at a public banquet.<sup>107</sup> Continuing, the columnist models a succinct and unassuming response he considers more appropriate for suitably humble military men, offering it to all in need:

There, Sir, is not that [proposed toast] about the thing? I shall not copyright it, but give full permission to all distressed mariners who fear they will run ashore on the shoals of Hesitation or go to pieces on Break-Down Rock, to use it as they like.<sup>108</sup>

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<sup>106</sup> “The Summer Roosts of Birds.” [letter] *Forest and Stream: A Journal of Outdoor Life*. Jan 21, 1892, 52.

<sup>107</sup> “Bohemian Walks and Talks.” *Harper's Weekly*. Jan. 2, 1858, 3-4.

<sup>108</sup> *Ibid.*, 4.

Legally and literally, this abjuration of copyright protection is meaningless – none of the January 2, 1858 issue of *Harper's Weekly* was covered by copyright.

Given the specific legal requirements, few nineteenth century magazines bothered except under special circumstances. Moreover, it is not at all clear that a short toast would legally qualify for copyright protection by the legal standards of the day. Instead, this rhetoric invokes copyright as a tool of control, which, although abjured, could potentially be used to prevent other “distressed mariners” from benefiting.

Copyright is connected not only to control of the marketplace, but to a marketplace of control. For example, the narrator of a lengthy satirical essay about the trials and tribulations of authorship, appearing in *Yale Literary Magazine*, thinks of copyrights in terms of control *and* as something able to be secretly bartered.<sup>109</sup>

Aspiring to laurels, our unhappy narrator finds himself “afraid to converse naturally and freely, lest I say some good thing, worthy of print.”<sup>110</sup> Repeating his verbal *bon mots* in print, he worries, could reveal his anonymous authorship, or even worse, gain for him a reputation of repeating himself! Faced with this epic dilemma, a veritable Scylla and Charybdis, (and also a poor hand at punning) our narrator takes to purchasing witticisms from his friend Harry.

This process begins slowly, via “tendering him a dozen cigars for his copy-right” to a single pun.<sup>111</sup> Alas, the expenditures for copyrights mounted, eventually expanding to encompass the exchange of 4000 cigars for 570 puns. These tidbits of charming repartee were carefully recorded in a notebook, so that our narrator could attempt to introduce them at opportune moments. For his part, our narrator’s ghostwriter “honestly observes his part of the contract in never repeating them elsewhere.”

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<sup>109</sup> “Reminiscences of an Unhappy Author.” *Yale Literary Magazine*. July, 1849, 362-376.

<sup>110</sup> *Ibid.*, 371.

<sup>111</sup> *Ibid.*, 372. The hyphenation “copy-right” is relatively common in the first half of the nineteenth century.

Extending this poetical business model to other suppliers, our narrator also reports rewarding two of his friends with “fresh wine and cigars” for a particularity waggish response over dinner. Explicitly, the purpose of this copy-right was “bribing them to silence, till I should have the honor of ushering it into the world.”<sup>112</sup> Here, copyright refers not to printed use, but to the agreement between author and ghostwriter.<sup>113</sup>

Copyrights can be bought and sold, but only in secret. Since this way of thinking about copyright includes both text (of a witticism), and credit (for inventing it), any exchange must necessarily remain invisible to third parties. Copyright, in this scenario, includes the credit of authorship, and is thus an economic item of exchange, but not one capable of being exchanged in an open market.

## Conclusion

Copyright means copyrighted. Copyright is money. Copyright means status. Copyright means authenticity. Copyright is anti-competitive. Copyright means originality. Copyright means control. Varying from context to context, these diverse meanings and associations for copyright are always dependant upon the specific context of use. Some sites, some writers, some contexts favor one aspect or another, while effacing meanings that are irrelevant or problematic in that context.

Considering as a whole this bundle of popular meanings for copyright in the U.S. in the second half of the nineteenth century, it is striking how many of them are specifically related to market relations. Although my underlying research methodology supports

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<sup>112</sup> Ibid., 373. A digression on sham originality and romantic authorship a falsehood abetted by copy-rights, silence, and cigars is omitted.

<sup>113</sup> Readers are reminded of Johnny Carson’s successful suit over the catchphrase “Here’s Johnny!” Any value presumably arose from Ed McMahon’s delivery, but Carson reaped the rewards. McMahon, of course, got the (metaphorical) cigars. See *Carson v. Here’s Johnny Portable Toilets* (1983) and/or James Boyle, *Shamans*, 101-3.

only fairly general conclusions about the relative power or prevalence of these various meanings, legal and literary associations are comparatively sparse in popular discourse, and much less diverse.

On the whole, this thinking of copyright in terms of the market continued trends started earlier in the century, even as professional authorship replaced Republican authorship and collusion between publishers helped regulate a chaotic marketplace. Cheap books were still desired by some and feared by others, foreign influence was still feared – although fear of abolition temporarily displaced fear of European degeneracy among some – and there was endless nationalist anxiety over the state of American letters.

Copyright was largely thought of as an aspect of the market. Impassioned connections between copyright, theft, morality, property, and the rights of authors were largely confined to, well, authors.

The market-centric aspect of nineteenth century copyright has been somewhat unappreciated by existing scholarship, perhaps because of disciplinary commitments. Most existing copyright history comes from either legal or literary history. Legal historians (c.f. the excellent work by William Fischer or Edward Walterscheid) focus on the development of the law and the history of judicial thought. Literary historians (c.f. the equally excellent work by Melissa Homestead or Meredith McGill) focus on the importance of copyright for particular authors, or the connections between copyright and the development of professional authorship.

Neither of these approaches is interested in questions about the cultural meanings of copyright. Nor should they be – their methods and commitments are elsewhere. However, it is troubling that many academic approaches tend to miss how copyright is – in practice and in ideology – a mechanism for regulating the market.<sup>114</sup> Focusing on authors (and authorship), however fascinating, risks

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<sup>114</sup> Richard Posner has written extensively on the connections between economics and intellectual property, but generally without much historical context. E.g. Landes and Posner; Posner.

misunderstanding the development of copyright and mistaking romanticized authorial propaganda for causal agents of change. Taking a closer look at copyright shows that change in the market and culture during the nineteenth century directly sculpted thinking about copyright in important ways. This process continued in the last years of the nineteenth century, influenced by the new genres of industrial capitalism and the emergence of new professions, as will be examined in Chapter Four.

## **CHAPTER IV: COPYRIGHT IN THE GILDED AGE**

### ***Introduction***

The period from 1870 to 1890 continued the slow expansion of copyright begun in the 1850s. The length of copyright terms remained unchanged, and the protections of the law expanded to new genres of industrializing capitalism, including industrial designs and commercial labels, as well as some categories of fine arts. Relying fundamentally on legal applications of subjective aesthetic criteria, these new categories generated a good deal of confusion.

Copyright law in this era was also dramatically sculpted by judicial opinion. Federal trademark law – grafted onto and overlapping with copyright and patent law – was first found unconstitutional by the U.S. Supreme Court and then resurrected by Congress under the aegis of interstate commerce. These resulting categories were also distinctly challenging to understand or administer. An additional challenge arose when the Court formalized the notion that copyright protects the expressions of an

idea, but not the idea itself. This distinction proved (and continues to be) counterintuitive for many people.

With these confusions, copyright law became an increasingly esoteric and specialized field of law. A gap grew between copyright law and lay understanding of copyright. Fundamental concepts became the domain of the specialist, and common-sense notions and the plain language of the law no longer produced a competent understanding of how copyright worked. This chapter examines important elements in this process and illuminates a largely unstudied aspect of copyright – how copyright was understood in some nonfiction genres.

Many examinations of copyright study, theorize, and think about copyright solely in terms of literature – especially the novel.<sup>1</sup> But copyright also strongly influences other, less literary, sites. Considering copyright solely within the context of fiction – whether highbrow literature or dime novel – ignores these significant connections. But during the late nineteenth century, the emergence of specialist literatures, and the proliferation of professional journals makes focusing on non-fiction both possible and relevant.

Three of these sites are explored in this Chapter. First, examining the confusing results of the extension of copyright registration to labels illustrates how copyright can be experienced as a product of institutional processes. Second, glancing at the meanings associated with copyright in medicine illustrates how thinking about copyright can be shaped by the needs of a particular profession. Finally, looking to how copyright was thought about in the Question and Answer columns of a technical publication illustrates how copyright had become increasingly esoteric and specialized. Highly educated laypeople – even those intimately connected to the (Constitutionally mandated) innovation and the progress of science – offered questionable advice to readers based on assumptions that copyright remained intuitive and sensible.

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<sup>1</sup> In contemporary discourse this has been supplemented by an almost equally narrow focus on digital distribution of popular music and movies.

## Copyright Act of 1870

In the summer of 1870, Congress passed “An Act to Revise, Consolidate, and Amend the Statutes Relating to Patents and Copyright.”<sup>2</sup> A complete rewrite of U.S. copyright law, this bill explicitly repealed and replaced the Copyright Act of 1831, consolidating and modifying the intervening decades of amendments.<sup>3</sup>

Under the terms of the revised Act, copyright continued to be available for “any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof.”<sup>4</sup> In addition, for the first time, some genres of fine arts were also eligible, specifically: “painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts.”

The legal protections provided by copyright continued to be relatively narrow. In the language of the law, the holder of a copyright had the “sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending.” In addition, copyright law protected live public performances of dramatic compositions, and, for the first time, reserved to authors the rights to dramatize or translate their own works.<sup>5</sup> However, copyright still did not offer protection against any other forms of derivative work – such as the assorted merchandise of the *Uncle Tom’s Cabin* phenomenon – or protect against public display of a copyrighted work.<sup>6</sup> Furthermore, while copyright protection was available for printed sheet music and published lyrics, the law did not

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<sup>2</sup> Act of July 8, 1870, 41<sup>st</sup> Cong., 2<sup>nd</sup> Sess., 16 Stat. 198-217. Copyright is dealt with in §§85-111, Stat. 212-217.

<sup>3</sup> Ibid., §111.

<sup>4</sup> Ibid., §86.

<sup>5</sup> Ibid., §86. The latter provision effectively overturned *Stowe v. Thomas* (1853).

<sup>6</sup> This merchandise is discussed in the previous chapter. Copyright protection for public displays of copyrighted objects was not spelled out in U.S. law until the 1976 Copyright Act. See R. Anthony Reese 84, 92-98 for relevant legislative history.



include protection against any sort of musical performance.<sup>7</sup>

The most significant changes effected by the new law were administrative. Responsibility for administering copyright records was transferred from the Patent Office (which remained part of the Department of the Interior) and from the Clerks of the various District Courts, to the Librarian of Congress.<sup>8</sup> Registration procedures were only slightly modified. A person seeking to register a copyright was required to mail – before publication – a printed copy of the title page to the Librarian of Congress, paying a fee of fifty cents.<sup>9</sup> After publication, the registrant had ten days to send two copies of the best edition to the Library. For subsequent editions, additional deposit copies were required if there had been “substantial” changes.<sup>10</sup> Procedures for non-book forms were generally similar, depending on the nature of the work. For example, for fine arts forms, a description substituted for a title page, and a photograph of the finished work for the deposit copy.

Transfers of a copyright were to be made in writing, and had to be recorded with the Library of Congress within sixty days of execution.<sup>11</sup> Additional fees were charged for recording these transfers, as well as proving copies of copyright records.<sup>12</sup> There was one bright spot for the legendary starving author, confronted with these mountains of fees: all of this correspondence, as well as the

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<sup>7</sup> In *A Treatise on the Law of Property in Intellectual Productions* (1879), Eaton S. Drone opined that lyrics were essential for pieces that include music, such as opera, to be protected as dramatic compositions. In the U.S., instrumental pieces, including symphonies and concertos, could be protected as sheet music, but not against unauthorized performances. See Drone 175-6, 460. Note that Drone was criticized by reviewers of the day for being too polemical, e.g.: “not sufficiently distinguishing between his own views of what the law ought to be and what the courts have declared it to be.” See “Mr. Drone’s Treatise on Copyright,” *International Review*, June, 1879. 702.

<sup>8</sup> Act of July 8, 1870, 41<sup>st</sup> Cong., 2<sup>nd</sup> Sess., 16 Stat. 198-217. §85.

<sup>9</sup> *Ibid.*, §92.

<sup>10</sup> *Ibid.*, §93.

<sup>11</sup> *Ibid.*, §89. Drone devotes more than forty pages to describing the various legal requirements for transferring a copyright.

<sup>12</sup> *Ibid.*, §92.

deposit copies, could be mailed to the Librarian of Congress without postage if plainly labeled as “copyright matter.”<sup>13</sup>

The Act also described the monetary penalties for both copyright infringement and failure to comply with deposit requirements or for falsely claiming a copyright.<sup>14</sup> The term of copyright remained at 28 years, with a single 14-year renewal available for the author (if living), or his widow or children (if dead).<sup>15</sup> Finally, reiterating language drawn from the 1790 and 1831 Acts, the 1870 Act explicitly continued U.S. policy of *not* extending copyright protection to persons “not a citizen of the United States or resident within.”<sup>16</sup> This policy was not superseded until the passage of the Chace Act in 1891.

## ***Reactions and Confusions***

Published reaction to the 1870 Act was muted, largely centering on the registration and deposit requirements. Some publishers objected to the centralization of records in Washington, D.C. S.R. Crocker’s Boston-based *Literary World*, for example, noted:

as a mere matter of convenience it would be a great deal easier for a Boston publisher to send a clerk up to the United States Court House to enter a book – a

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<sup>13</sup> Ibid., §95.

<sup>14</sup> Ibid., §§94, 98-102.

<sup>15</sup> Ibid., §88. To summarize, the original term of a U.S. copyright was 14 years, with one 14 year renewal possible, from 1790 until 1831; 28 years, with one 14 year renewal, from 1831 to 1909; and 28 years, with one 28 year renewal, from 1909 until January 1, 1978. The latter date was set by the Copyright Act of 1976. This Act abolished copyright registration and renewal in the U.S., as well as altering the term of a copyright to 50 years after the death of the author. The term of copyright was further extended in 1998, until 70 years after death. Many observers expect another term extension to be taken up in Congress in 2017.

<sup>16</sup> Ibid., §105. The language of the 1870 Act varies only slightly from that of the comparable clauses in earlier law, specifically §5 of the 1790 Copyright Act and §8 of the 1831 Copyright Act.

work of ten minutes— than to conduct negotiations by letter with a party five hundred miles away.<sup>17</sup>

In addition to concern about registration, *Literary World* worried that searches for information about existing copyrights might take more time and expense. They did not see centralization as beneficial.

Also problematic for some was the requirement for deposit of two copies of the “best edition.” This, *Literary World* worried, meant two copies of the most expensive edition. For publishers of cheap books, this would be no burden, but for limited editions of fine books, or books with extravagant bindings, the financial burden upon the publisher might be significant. Arguing this point, *Literary World* mused aloud about a hypothetical deposit of two sets of Lee & Shepard’s mammoth collected works of U.S. Senator Charles Sumner, which was priced at fifty dollars per set. This, they worried, represented “an undue tax on publishers” of fine books, or of books with limited print runs, especially when added to the “hundred and one other imposts which the publishing interest now struggles under.”<sup>18</sup> Despite these worries, the revised procedures did not prove particularly onerous in practice.

Charged with administration of the revised registration procedures, Librarian of Congress Ainsworth Spofford also found cause for complaint. First, these new duties led to an increased workload at the Library of Congress – Spofford reported he was devoting two full time staffers and a good deal of his own time to

<sup>17</sup> “A New Copyright Law” *Literary World: A Monthly Review of Current Literature*. August 1, 1870. 43-4. S.R. Crocker’s Boston-based publication (founded in 1870) should not be confused with Evert and George Duyckinck’s earlier (1847-1853) New-York based publication of similar name. See Mott, *History of American Magazines*, Vol. 3, 454-456 for a description of the former, Mott, Vol. 1, 766-768 for an overview of the latter.

<sup>18</sup> Ibid. Charles Sumner (1811-1874) served as U.S. Senator for Massachusetts from 1851 until his death. A ferocious and vocal supporter of abolition and Radical Republicanism, Sumner is today commonly remembered for being beaten senseless on the floor of the U.S. Senate in 1856. Sumner took three years to recover. His assailant, U.S. Representative Preston Brooks (South Carolina), died in 1857.

copyright-related matters, and requested funding for additional personnel.<sup>19</sup> More difficult was the provision for copyright registration of the labels used for commercial products. Thousands of labels were registered in the first years of the new law. Spofford, however, saw them as too large a departure from the traditional library collection, and considered their Constitutional status as “writings of authors” suspect.<sup>20</sup>

Librarian Spofford’s discomfort with the inclusion of commercial labels under the same terms as books reflects how copyright law was growing increasingly distant from the book format for which it was first designed, and was still ideologically associated.

The expanding law extended policies and procedures originally associated with books and booksellers to non-book forms. Yet these new genres did not have the same cultural functions or status as books. Books, it turns out, are poor analogies for labels on cans of pork or on patent medicines. Thus, protection for some genres could not be easily justified under the Constitutional power to “promote the Progress of Science and useful Arts,” and there was considerable confusion over the limits of protection and the boundaries of genres.

## ***Overlapping Categories***

At an administrative level, the terms of the 1870 Act offered three potential protections for commercial products: copyright, design patents, and trademarks.<sup>21</sup> Unsurprisingly, these categories were multiple, unstable, overlapping, and confusing.

First, copyright protection was available for some commercial product labels under the provisions for engravings, cuts, or prints. As mentioned, the resulting deluge of thousands of labels upon the

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<sup>19</sup> Patry, *Copyright Law* 46, citing the 1870 *Annual Report of the Librarian of Congress*.

<sup>20</sup> See Patry 46-7 for a summary of Spofford’s position.

<sup>21</sup> Typically referred to as a “trademark” in current usage, nineteenth century usages also included “trade marks” and “trade-mark.” Original usage has generally been maintained.

Library of Congress did not suit Librarian Spofford, who proposed that “prints, cuts, or engravings which are intended to be used upon any article of manufacture (except books)” were not appropriate matter for the Library of Congress.<sup>22</sup>

Responding to his complaints, Congress amended the law in 1874, clarifying that copyright registration for engravings, cuts, or prints with the Library of Congress, “applied only to pictorial illustrations or works connected with the fine arts.” Prints or labels used for articles of manufacture could still be registered under copyright law, but responsibility for registration was with the Patent Office, not the Library of Congress.<sup>23</sup> Under the terms of the amendment, the Patent Office “began issuing certificates of *copyright* for labels and prints designed for use with manufactured goods, a procedure that continued until 1940.”<sup>24</sup>

This amendment was little noticed at the time of passage. For example, *Scientific American* – a publication who would later have considerable cause for complaint with the administration of this law – noticed it only in passing. Much more concerned with potential patent profiteering, they took only brief notice in a single flippant column about goings-on in Congress.<sup>25</sup>

A second category of protection under the Copyright Act of 1870 was that of patents for designs and decorations on manufactured objects. Design patents were available for:

any new and original design for a manufacture, bust, statue, alto-relievo, or bas-relief; and new and original design for the printing of wool[I]en, silk, cotton, or other fabrics; and new and original impression, ornament, pattern, print, or picture, to be printed, painted, cast, or otherwise placed on or worked into any article of manufacture; or any new,

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<sup>22</sup> 1872 *Annual Report of the Librarian of Congress*, 4-5. Quoted at Patry 46.

<sup>23</sup> Act of June 18, 1874, 43<sup>rd</sup> Cong, 1<sup>st</sup> Sess., 18 Stat. 78. See especially §3.

<sup>24</sup> Patry, *Copyright Law*: 47. Emphasis in original.

<sup>25</sup> “Notes from Washington D.C.” *Scientific American*. July 11, 1874. 20.

useful, and original shape or configuration of any article of manufacture.<sup>26</sup>

The goal of this style of law was protection of decorative elements on manufactured products from imitation, a classic example being patterns printed on bolts of cloth. Design patents lasted three and one half, seven, or fourteen years, and cost ten, fifteen, or thirty dollars, depending on the length of protection.<sup>27</sup>

There was considerable overlap between what qualified for protection as a design patent and what qualified for copyright protection. Statues, for example, were specifically mentioned in both categories. In practice, legal questions were settled on a case-by-case aesthetic basis – objects seen as fine arts qualified for copyright protection, and those seen as ornamental utilitarian objects qualified for design patents.<sup>28</sup> However, constructing these categories fundamentally relied upon the idea that there are clear and generalizable aesthetic differences between fine arts and industrial arts. In practice, drawing distinct lines between the two proved difficult.

A third axis of potential confusion resulted from the inclusion in the 1870 Act of the first U.S. federal trademark law.<sup>29</sup> Under this law, trademarks were registered with the Patent Office. Registration required information about the products associated with the mark, about the use of the mark, and a description and facsimile of the mark. Holders of registered trademarks could sue for damages any who “reproduce counterfeit, copy or imitate” the mark for “goods of substantially the same descriptive properties and qualities as those referred to in the registration.”<sup>30</sup>

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<sup>26</sup> §71, Act of July 8, 1870, 41<sup>st</sup> Cong., 2<sup>nd</sup> Sess., 16 Stat. 198-217. Design patents were first permitted by the Patent Act of August 29, 1842. See Pogue 40-47 for a succinct overview of the legislative history of design patents in the U.S.

<sup>27</sup> See §§73-75.

<sup>28</sup> Although mostly concerned with the 1909 Act, see Pogue 46-51 for an overview of some relevant legal issues.

<sup>29</sup> Act of July 8, 1870, 41<sup>st</sup> Cong., 2<sup>nd</sup> Sess., 16 Stat. 198-217, §§ 77-84.

<sup>30</sup> *Ibid.*, §79.

Passed in an era well before the passage of the Pure Food and Drug Act (1906), this trademark law was intended to protect consumers as well as producers. The law tried to prevent confusion or fraud in the marketplace, particularly by maintaining the connection between a commodity and a brand. Innovation, originality, and creativity, so fundamental to patent and copyright, were irrelevant.<sup>31</sup> Because of this irrelevance, the trademark sections of the 1870 Act, plus the 1876 amendment that increased damages and criminalized violations, were found unconstitutional by the U.S. Supreme Court in the consolidated *Trade-Mark Cases* (1879).<sup>32</sup>

In the United States, the ability to legislate patent and copyright law arises from the Constitution: Congress has the power “to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”<sup>33</sup> In this case, the Court found that the lack of a creative element meant trademarks could not be justified by the same clause. Associate Justice Samuel Freeman Miller wrote for the Court:

The ordinary trade-mark has no necessary relation to invention or discovery. The trade-mark recognized by the common law is generally the growth of a considerable period of use, rather than a sudden invention. It is often the result of accident rather than

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<sup>31</sup> See Vandavelde for an overview of trademark law within the framework of nineteenth century legal thinking about property, and Merges for a similar overview of the twentieth century.

<sup>32</sup> In the *Trade-Mark Cases*, the Court consolidated *United States v. Steffens*, *United States v. Wittmann*, and *United States v. Johnson*. All three cases involved sales of alcohol under counterfeit marks: Steffens was charged with possession and sale of counterfeit G.H. Mumm champagne, Wittmann with buying and selling counterfeit Piper Heidsick champagne (an 1869 treaty with France allowed reciprocal registration of trademarks), and Johnson (et al) with infringing Charles F. O'Donnell's mark for OK Whiskey. The U.S. Supreme Court stepped in because U.S. Circuit Courts in New York and Ohio had reached different conclusions on the constitutionality of Federal trademark law.

<sup>33</sup> Article 1, Section 8, Clause 8 of the U.S. Constitution.

design, and [...] neither originality, invention, discovery, science, nor art is in any way essential to the right conferred by that act.<sup>34</sup>

Copyright, Miller continued, protected the “fruits of intellectual labor.” In contrast:

The trade-mark may be, and generally is, the adoption of something already in existence as the distinctive symbol of the party using it. At common law the exclusive right to it grows out of its use, and not its mere adoption. [...] It requires no fancy or imagination, no genius, no laborious thought. It is simply founded on priority of appropriation.<sup>35</sup>

Simply put, since trademark law as enacted did not promote the progress of science or the useful arts, it did not lie within the powers of Congress.<sup>36</sup>

The *New York Times* was mildly troubled by the Court’s finding, terming it “a disappointment to the mercantile community.”<sup>37</sup> The validity of the existing law “had repeatedly been assumed,” and the resulting situation – a mishmash of treaties, state laws, and common law – was unsatisfactory. Congress was also unsatisfied, and replaced the overturned trademark law in 1881 with one that more firmly anchored legal justification for trademarks in the Interstate Commerce Clause.

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<sup>34</sup> *Trade-Mark Cases* (1879).

<sup>35</sup> *Ibid.*

<sup>36</sup> A second line of argument, that trademarks were constitutionally justified as a regulation of interstate commerce, was also rejected, since the 1870 law made no distinction between interstate and intrastate enforcement of trademarks. This was changed in the 1881 replacement law. Justice Samuel Freeman Miller may be best known for writing the majority opinion in *Wabash v. Illinois* (1886), a very influential interstate commerce case

<sup>37</sup> “The Trade-Mark Law Swept Away.” *New York Times*. Nov 9, 1879. 4.



## ***Idea Separated from Expression***

Criticizing the *Trade Mark Cases*, The *Times* objected to legal and business uncertainty, potential piracy, and inconsistent and changing legal standards. If particularly concerned about changing legal standards, the *Times* could, that same year, also have been disturbed by the codification of the idea/expression dichotomy in copyright law. Although troubling to some, drawing a clear distinction between a thought and the expression of that thought is a well-established feature of copyright law. Copyright protects the expression of an idea, but not the idea itself.

*Baker v. Selden* (1879) was a dispute between the estate of Charles Selden, former chief accountant to the treasurer of Hamilton County, and W.C.M. Baker, auditor of Greene County, both in Ohio.<sup>38</sup> Both Selden and Baker had published books describing systems of bookkeeping. Selden's widow, feeling that Baker had pirated the work of her late husband, sued, and won. However, her victory was overturned on appeal by a unanimous Supreme Court. Regarding the facts of the case, it is unclear to what extent Baker was actually influenced by Selden's ideas.<sup>39</sup>

As far as the Court was concerned, influence was irrelevant. Copyright protected the book, not the system described in the book. The Court was quite clear on this issue: "there is a clear distinction between the book, as such, and the art which it is intended to illustrate."<sup>40</sup> More extensively:

The description of the art in a book, though entitled to the benefit of copyright, lays no foundation for an exclusive claim to the art itself. The object of the one is explanation; the object of the other is use. The

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<sup>38</sup> See Pamela Samuelson's work, especially "The Story of *Baker v. Selden*," for a detailed legal history of this case.

<sup>39</sup> *Ibid.*, 7-8; 12-14 for interesting observations about Selden's (perhaps quite limited) actual influence on Baker's system.

<sup>40</sup> *Baker v. Selden* (1879).

former may be secured by copyright. The latter can only be secured, if it can be secured at all, by letters-patent.<sup>41</sup>

This distinction between system and description evolved into the idea/expression dichotomy in contemporary copyright law.<sup>42</sup>

In considering potential copyright protection for what were essentially blank accounting forms, the Court was careful to limit their denial of protection to diagrams and illustrations that were inextricably bound with useful arts.<sup>43</sup> Creative work was different, and remained protected:

these observations are not intended to apply to ornamental designs, or pictorial illustrations addressed to the taste. Of these it may be said, that their form is their essence, and their object, the production of pleasure in their contemplation. This is their final end.<sup>44</sup>

Founded on a clear-cut distinction between utility and art, this opened a can of epistemological worms. Aesthetic distinctions had to be drawn in the law between commercial art and fine art. The resulting improvisations, legal fictions, and inconsistently applied rules of thumb haunt the law to this day.<sup>45</sup>

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<sup>41</sup> Ibid.

<sup>42</sup> Although typically attributed to *Baker v. Selden*, the acceptance of this idea in legal thought was actually more gradual. See Samuelson, "Story" 27-30.

<sup>43</sup> The legal doctrine of idea/expression merger suggests that courts should be cautious in allowing exclusive rights to expression if there are so few ways to express a particular idea that doing so effectively conveys a monopoly on the idea.

<sup>44</sup> *Baker v. Selden* (1879).

<sup>45</sup> Lengthy durations for copyright protections mean the legal protection can outlive the (continually evolving) underlying aesthetics.

## **Esoteric and Institutional**

The court's decision in *Baker v. Selden* was widely reported at the time. The *New York Times* printed a summary of the decision.<sup>46</sup> *Scientific American* reprinted the article from the *Times* and excerpted the Supreme Court's decision.<sup>47</sup> As evinced by this widespread notice, copyright issues – even those apparently esoteric – were of widespread public interest. However, the increasingly confused categories and counterintuitive legal principles made copyright laws less and less intelligible to laymen. Copyright was being colonized by the legal profession.

One important source of confusion was the legal differences between fine art and industrial art. An apparently trivial 1882 amendment to the copyright law provides an excellent example. This short amendment permitted the required notices to be placed on less obtrusive locations for some objects. The language of the amendment seemed straightforward:

The manufacturers of designs for molded decorative articles, tiles, plaques, or articles of pottery or metal subject to copyright may put the copyright mark [...] upon the back or bottom of such articles.<sup>48</sup>

This minor change passes largely unnoticed by later legal commentators. William Patry, for example, describes it only in the context of a “lack of general hostility to design patents.”<sup>49</sup> On the other hand, 1882 *Scientific American* found the law deeply troubling.

Founded in 1845, *Scientific American* was neither a naïve nor disinterested commentator on these matters. At this point a weekly

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<sup>46</sup> [untitled notice] *New York Times*, March 12, 1880. 4. (column 6)

<sup>47</sup> “How Copyright Differs from Patent-Right.” *Scientific American*, April 10, 1880. 228; “Supreme Court of the United States: *Baker v. Selden*.” *Scientific American*, May 29, 1880. 344.

<sup>48</sup> Act of August 1, 1882, 47<sup>th</sup> Cong., 1<sup>st</sup> Sess., 22 Stat. 181.

<sup>49</sup> Patry, *Copyright Law*, 46.

that covered patents and patent law, inventions, copyright, and mechanical, technical, and scientific matters for an audience of roughly forty thousand readers, *Scientific American* was not shy of expressing an opinion.<sup>50</sup> Among other things, the magazine waged journalistic war on quacks and perpetual motion schemes, and was a pioneering supporter of subways and aviation.<sup>51</sup> Publishers Munn & Company were also for many years the largest patent agency in the world, continually advertising their expertise in preparing registration applications for patents, caveats, trademarks, labels, and copyrights.<sup>52</sup> Clients were guaranteed at least a short mention in *Scientific American*, and ads for Munn & Company's services were included in every issue for decades.<sup>53</sup>

These interested experts found the 1882 amendment "a model of ambiguity," since the language of the act implied – but did not explicitly say – that objects "hitherto only protected by design patents [...] may now be copyrighted."<sup>54</sup> No previous copyright law had mentioned items like tiles, plaques, and pottery, leading *Scientific American* to wonder if the law for these items had changed. Concluded the magazine, "As a law it is unintelligible, and only adds confusion to what was sufficiently confusing before."<sup>55</sup>

*Scientific American's* frustration was pointed enough to prompt a lengthy letter from Boston attorney (and Harvard Law School graduate) Thomas William Clarke. In his letter, Clarke describes in detail the hearings before the congressional Patent Committee and stakes a broad claim for hegemony of the law over distinctions between "fine" and "industrial" arts. According to Clarke, in the hearings,

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<sup>50</sup> See Mott, *History of American Magazines*, Vol 2. 316-324.

<sup>51</sup> Ibid., 319-20.

<sup>52</sup> A caveat was a form of provisional patent application. Their use was discontinued in 1909.

<sup>53</sup> For two representative examples see: "Patents." [ad] *Scientific American*. March 28, 1874. 204; "Patents." [ad] *Scientific American*. Oct. 21, 1882. 268.

<sup>54</sup> "A Dubious Amendment of the Copyright Law." *Scientific American*. Oct. 21, 1882. 256.

<sup>55</sup> Ibid.

It was argued and conceded that all things upon which labor and expense have been bestowed, unnecessary to prepare them for service, but solely to improve their appearance, are broadly to be considered as “works of the fine arts.” Modeling, sculpture, carving, architecture, engraving on wood or metal, lithography, painting, printing, bookbinding, cabinet work, inlaying, repousse [metalwork], enameling, have always been held to be “fine” as distinguished from “industrial” arts, and works of these sorts are subjects of copyright just as music and prints are.<sup>56</sup>

Under this reasoning, “fine arts” is extended to encompass nearly everything.

*Scientific American*, perhaps more familiar with the actual creative processes of industry, remained dubious. Their note appended to Clarke’s letter reiterated the plain language of the law, observing that Clarke collapsed all industrial arts into the fine arts. For, by Clarke’s definition:

every piece of figured crockery, every embroidered collar or slipper, every striped or otherwise decorated plow or wheelbarrow, in short nearly every item of apparel, machine, tool, household utensil, or other product of the industrial arts, is a work of fine arts.<sup>57</sup>

Clarke was making a very expansive claim.

Clarke made another broad claim, illustrating how members of the legal system were laying claim to special powers over copyright. Specifically, after insisting on a distinction between fine and

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<sup>56</sup> Thomas William Clarke, “The Copyright Law Amendment.” [letter] *Scientific American*. Nov 11, 1882. 308.

<sup>57</sup> Ibid. [appended to Clarke’s letter]

industrial arts, Clarke reserved for the courts the sole power to negotiate these categories. Wrote Clarke “it must always be remembered that the privilege of adjudication on what is and what is not ‘fine arts’ is vested in the Federal judiciary and nowhere else.”<sup>58</sup> In his mind, the law had built copyright as a system of complex and confusing categories, and now they would rule them.

A third letter, this one from Washington, D.C., lawyer J.H. Adriaans, tried to dampen the flames of controversy, suggesting to *Scientific American* that Congress had not actually departed from the law of “engraving, cut, or print” and that the new law only applied to things that had previously been subject to copyright.<sup>59</sup> The fine arts had not subsumed the industrial arts after all. But, as the necessity of hearing from yet another lawyer illustrates, understanding copyright law increasingly demanded specialized legal knowledge from professional attorneys.

## **Copyright and Administrative Procedure**

For some, the negotiation of the categories and confusions of copyright increasingly occurred with the powerful institutional entities that administered copyright. A particularly clear example graced the pages of *Scientific American* over the summer and fall of 1884. In this case, conflict arose over the practical distinctions between registration as a label and registration as a trademark. Both were administered with the Patent Office, who had chosen to treat the categories as mutually exclusive.<sup>60</sup>

Newly appointed Patent Office Commissioner Benjamin Butterworth, *Scientific American* complained:

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<sup>58</sup> Ibid.

<sup>59</sup> J.H. [John Henry] Adriaans, “Copyright Act Amendment.” *Scientific American*. Dec. 2, 1882. 357.

<sup>60</sup> In general, treatment varied with how different Commissioners chose to administer registration.

acts as if it was his office to divide all marks of designation into two classes, according to some special classification called for by law. On inspection of the statutes no such state of things can be found to exist.<sup>61</sup>

According to *Scientific American*, when a label was presented for potential registration, the Patent Office examiners decided, “*prima facie*,” whether it was eligible for copyright protection, trademark protection, or neither.<sup>62</sup> There were no provisions for a label that *included* a trademark.

Further complicating the matter, registrants were restricted to applying in only one of the categories. They had little recourse if they chose the wrong one, and were rejected:

On application a fee must first be paid, which fee is not returned. If the label is decided not to be registerable as such, the applicant, pocketing his loss, may apply for trademark registration, paying another and larger fee. Here too he may be ruled out, when he is left without any way of recovering his fees.<sup>63</sup>

The fee for registering a copyright for a label was \$6, and for a trademark, \$25.<sup>64</sup> From the magazine’s perspective, this lack of clear standards meant copyright was experienced as unpredictable, arbitrary, unsupported by law, and potentially leading to financial hardship for applicants – and clients.

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<sup>61</sup> “Labels as Subjects of Copyright.” *Scientific American*. August 9, 1884. 80. Ohio Republican Benjamin Butterworth was a member of the U.S. House of Representatives for 1879-1883 and 1885-1891. He was Commissioner of the Patent Office from 1883-5 and again in 1896-8.

<sup>62</sup> “Labels and Trademarks.” *Scientific American*. July 26, 1884. 49.

<sup>63</sup> Ibid.

<sup>64</sup> Indexed to consumer prices, \$25 in 1884 is roughly equivalent to \$530 in 2006 dollars.

Illustrating the prominence of Munn & Company at the Patent Office, Franklin Austin Seely, employed as the “Examiner of Trade Marks,” wrote to *Scientific American* to defend his boss. The Patent Commissioner “is simply exercising the discretion which the statute intends he shall exercise.”<sup>65</sup> Commissioner Butterworth also responded, stating his position in the *Official Gazette* of the U.S. Patent Office. Commented *Scientific American* upon this clarification:

Three divisions of label and trade mark matter are created by the Commissioner’s decision. There is first, the label, which must be descriptive; secondly, the trade mark, which must be arbitrary or non-descriptive, and in use in commerce with some foreign nation or Indian tribe; and thirdly the subject matter for a trade mark, but not in the prescribed commercial use. Of these three the first two are registrable, the last the Commissioner decides is non-registrable.<sup>66</sup>

The two categories continued to be mutually exclusive, and the practical distinction between a copyright and a trademark was that of descriptive versus non-descriptive, as administered by Examiner Seely. Frustrated with the lack of statutory support, *Scientific American* continued “All this distinction is purely a Patent Office

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<sup>65</sup> F.A. Seely “Registration of Labels.” [letter] *Scientific American*. Aug. 30, 1884. 133. Brevetted to Lt. Colonel of quartermasters during the U.S. Civil War, Franklin Austin Seely was also extensively involved with the Anthropological Society of Washington and on the editorial board of *American Anthropologist*. See “The Patent Centennial” *Scientific American*. April 4, 1891. 214. An unnamed New York lawyer also wrote to offer his own rather murky interpretation of the law. See “Erroneous Interpretation of the Label Law by the Patent Office.” [letter] *Scientific American*. Sept. 13, 1884. 165.

<sup>66</sup> “Recent Decisions of the Commissioner of Patents Concerning the Trade Marks and Labels.” *Scientific American*. Oct. 18, 1884. 240. The Commissioner’s decision was printed in the *Official Gazette* of the U.S. Patent Office on Sept. 30, 1884.



creation.”<sup>67</sup>

At *Scientific American*, copyright was experienced as an apparatus of administration, rules, and procedures. However, as illustrated by this example, the practices of copyright were not handed out by fiat. Instead, they were defended and clarified through negotiations between powerful institutional players – in this case, between a government agency, the Patent Office, and an organization, Munn & Company, with considerable expertise, influence, and access to the public.

## ***Copyright and Professional Medicine***

Conflict over copyright for labels was negotiated by conflict between institutions with financial and professional interests in copyright. However, a different mechanism, the requirements of the processes of professionalization, shaped thinking about copyright in another emerging site, medicine.

Not yet established as a profession, U.S. medicine was not particularly well paid, had relatively few standards for training, and encountered considerable competition from both lay practitioners and unregulated quacks. The gradual growth of professional standards, training, and organizations would not lead to increased cohesion, power, and prestige for the profession until the first decades of the twentieth century.<sup>68</sup>

The multiple ways in which medicine created and validated knowledge were connected to the development of professional authority. As John Paul Starr puts it, this process requires:

first, that the knowledge and competence of the professional have been validated by a community of his or her peers; second, that this consensually validated knowledge and competence rest on

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<sup>67</sup> Ibid.

<sup>68</sup> See John Paul Starr, *Social Transformation of American Medicine*, especially Chapter 3.

rational, scientific grounds.<sup>69</sup>

Medical thinking about copyright took place within this framework. The values connected to copyright in medicine – accuracy, openness, and altruism – were essential for the peer validation of knowledge. A novelist faces a different set of constraints.

At first glance, many discussions of copyright in U.S. medical journals in this period strongly parallel those in elite literary contexts. Medical commentators connected copyright policy to nationalism and the development of authorship. For example, sandwiched between a favorable review of *Treatise on Medical Electricity* and a report of a fine levied on a (lay) abortionist, an 1860 editorial in the Philadelphia-based *Medical and Surgical Reporter* favored International Copyright “so far as it concerns medical literature.”<sup>70</sup> Rhetorically drawing on language associated with literary authorship and nationalism, this article claims that “American medical literature” would benefit by excluding foreign “trash,” thereby raising “the respectability of American authorship” and stimulating the growth of original research.<sup>71</sup>

Columbus-based *Ohio Medical and Surgical Journal* took a similarly nationalistic stance, writing that “American Medical Literature can never flourish, as long as the best foreign works can be had for nothing.”<sup>72</sup>

The similarities between medical authorship and literary authorship fade with the increasing development of medicine as a profession. Already visible by mid-century, the different values of medical authorship and literary authorship became more pronounced as the century progressed, especially as reflected in thinking about copyright.

In particular, medical commentators were more likely to discuss

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<sup>69</sup> Ibid., 15. Starr’s third criteria is omitted.

<sup>70</sup> “International Copyright.” *Medical and Surgical Reporter*, June 2, 1860. 188.

<sup>71</sup> Ibid., 189.

<sup>72</sup> “Part Fourth: Bibliographical Notices and Reviews.” *Ohio Medical and Surgical Journal*, Jan. 1, 1851. 283.

copyright in connection with issues of accuracy, quality, and openness than were writers in other genres. In one early example, *Medical and Surgical Reporter* bemoaned in 1860 the attractiveness of cheap books that were “not much worse” than the best texts. By outselling newer, more accurate, and more expensive books, these mediocre texts became a “direct obstacle” to good research.<sup>73</sup>

Two decades later, accuracy was still important. In this example, *Medical News and Abstract* emphasized the benefits that would accrue from ending the unauthorized publication of lectures by professors of medicine. Abhorred by this writer, this longstanding practice led to “frequent gross inaccuracies” and was “as great a fraud upon the reader as [...] upon the rights and reputation of the author.”<sup>74</sup>

Literary commentators on copyright might emphasize the connections between copyright and authenticity, especially in conjunction with issues of authorial reputation and control of the “pure” text. Medical commentators, in contrast, emphasized accuracy instead of authenticity, and rhetorical gestures to the reputation of the author were supplemented with marked concern for the needs of a professional medical audience.

The professional needs of medicine also led medical commentators to think of copyright in connection with the ethics and secrecy in medicine. For example, *Medical and Surgical Reporter*, working through the ethics of patents for medicines or medical instruments, was careful to distinguish copyrights from patents and secret preparations. “To monopolize medical preparations is to grow fat on human misery,” wrote the editor-physicians.<sup>75</sup> Secret

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<sup>73</sup> “International Copyright.” *Medical and Surgical Reporter*, June 2, 1860. 189.

<sup>74</sup> “Medical News: The Law of Copyright as Applied to Oral Lectures.” *Medical News and Abstract*, June, 1881. 372. According to *Medical News*, *Lancet* had long engaged in this practice (and been sued as early as 1824). The specific occasion of the article was a legal dispute between G.P. Putnam’s Sons and Dr. Leo T. Meyer over publication of anatomy lectures delivered by Dr. William Darling.

<sup>75</sup> “Patents in Medicine and Surgery.” *Medical and Surgical Reporter* Aug. 31, 1867. 190.

preparations were abhorrent to them, especially for patent medicines.

Copyright for books, however, was different, since “copyright does not limit knowledge, as it never extends to the ideas advanced.”<sup>76</sup> Although the editors’ confidence might well have been misplaced (*Baker v. Selden* still lay twelve years in the future), their distaste for secrecy is clear. Without misery, there might be little call for medicine – but to profit from a secret was unethical. It was also contrary to the system of peer-validated knowledge essential for development of professional authority.

A related line of medical thought connects copyright, medical literature, and noncommercial ideals. For example, in 1882, *Medical Times and Gazette* of London described American medical literature as “very voluminous and characterized by great originality, inventive genius, industry, and practicality.” Delighted, New York-based *Medical News* was pleased and proud to report that American work was recognized in other nations.<sup>77</sup>

A leading medical journal of the day, *Medical News* followed up by noting the enormous strides taken by American medical literature. Only a few years before, “students had few text-books of home production, and the medical issues from American presses were largely composed of reprints.”<sup>78</sup> Now, however, “our men of mark are known, and quoted with respect wherever the language is read.” Moreover, and explicitly, “All this has been accomplished in the absence of an international copyright law.”

Magnanimously, *Medical News* acknowledged the vital role played by cheap reprints in the development of American medicine. British reprints had filled the American medical journals. More specifically, English works were:

unsurpassed in practical value by those of any other race [...] and the humblest student was thereby

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<sup>76</sup> Ibid. See also the response from a reader, “The Patent-Right and the Copy-Right.” *Medical and Surgical Reporter*. Sep. 21, 1867. 256.

<sup>77</sup> “Free Trade in Medicine.” *Medical News* Jan. 7, 1882. 20.

<sup>78</sup> “American Medical Literature.” *Medical News*. Jan. 21, 1882. 74.

enabled to avail himself of their teachings; and to this free communication of their ripest professional experience we doubtless owe the training of many minds.”<sup>79</sup>

Because this is a celebratory retrospective, worry about the accuracy of those reprints is notably absent.

*Medical News* concluded the series with faint support for the principle of intentional copyright on the basis of protection of literary property. Significantly, this support was grounded in belief that copyright did not mean much to the field of medical literature. As far as they were concerned, passage of a copyright bill would result in no particular increase in the status of American medical authors and no special stimulus to the development of American medical literature. Nor, on the other hand, would it lead to increased prices for medical books. Copyright, the series concluded, was irrelevant.<sup>80</sup>

Copyright did not matter because medical authors did not write for money:

Professional men, unlike professional literateurs [sic], write from many motives, among which that arising from expected pecuniary rewards is frequently, perhaps, the least. Many labor from an honest ambition for fame, or from a sense of duty to their fellow; many others, because a well-written and successful work is one of the surest aids to professional success.<sup>81</sup>

This stance is similar to the prestige model of authorship – the writer is rewarded by the benefits accruing with fame, not the royalties on a

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<sup>79</sup> Ibid. By this logic, piracy is particularly valuable for developing professions or young industries.

<sup>80</sup> “International Copyright.” *Medical News*. Jan. 28, 1882. 107.

<sup>81</sup> Ibid., 106.

copyright.<sup>82</sup>

The disclaimer of monetary motives was not based on the lucrative nature of nineteenth – century medical practices. On the whole, doctors were not rich – as Starr notes, “Although a few eminent doctors made handsome fortunes, many before 1900 could hardly scrape together a respectable living.”<sup>83</sup> Medical literature was not a product of the gentlemanly obligations of rich men. On the contrary, the *Medical News* continued, medical authors “find in composition a congenial employment for the leisure hours, which, during the earlier years, at least, of professional life, are all too numerous in the experience of nearly all of us.” Medical literature, it seems, was a product of underemployment.

This ostensible disregard for monetary considerations is part of the professionalization of medicine. Turning once again to Starr:

The contradiction between professionalism and the rule of the market is long-standing and unavoidable. Medicine and other professions have historically distinguished themselves from business and trade by claiming to be above the market and pure commercialism.<sup>84</sup>

Thus, although dissident voices called for a “paying practice” and insisted that “the medical man who secures a reward [...] by means of a copyright” was acting properly, the dominant way of thinking about copyright in the field of medicine was inexorably shaped by the environment of emerging professionalism.<sup>85</sup> The requirements of a developing profession led copyright to be thought of in connection with accuracy, openness, and altruism – when it was thought to matter at all.

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<sup>82</sup> Discussed in Chapter One.

<sup>83</sup> Starr, *Social Transformation*, 7.

<sup>84</sup> *Ibid.*, 23.

<sup>85</sup> David Prince, “The Patent-Right and the Copy-Right.” [letter] *Medical and Surgical Reporter*, Sept. 21, 1867.

## Copyright in Technical Journals

Proponents of medical literature thought of copyright within the context of their developing profession, eschewing secrecy and greed. Proprietors of patent medicines had other priorities. For example, aspiring snake oil salesman T.T.Y., of Frenchbroad, North Carolina, inquired of a popular technical publication, *Manufacturer and Builder*, how best to prevent others from using a descriptive phrase:

Will you please inform me how the different bitters are protected, whether by letters-patent or copyright of labels. I wish to secure the exclusive use of a certain phrase designating the (medical) principle on which my proposed bitters act. What is the best plan to do it?<sup>86</sup>

Responded *Manufacturer and Builder*, in their regular Notes and Queries column:

You may either take out a patent for the prescription you use, or you may copyright a label as a trade-mark, or you may do both. Perhaps copyrighting the trade-mark, etc., is the simplest, quickest, and least expensive. Besides, in that case you may keep the real name of the preparation and the ingredients used a secret, which you cannot do when taking out a patent.<sup>87</sup>

Perhaps the editors of *Manufacturer and Builder* were in need of their correspondent's nostrum, for this advice was of little use.

At the time of writing, the Patent Office did offer copyright protection for labels – though not for “a certain phrase.” The Patent

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<sup>86</sup> “Notes and Queries.” [letter] *Manufacturer and Builder*. Oct. 1878. 239. Bitters, herbal extracts now typically used to flavor cocktails, were originally sold as medicine.

<sup>87</sup> *Ibid.*, 240.

Office also administered trademarks – but in 1878 these were on shaky legal ground, and would in any case not extend to a description of medical principles.<sup>88</sup> As legal advice, “copyrighting the trade-mark” was nonsensical.

Actually, few “patent medicines” were patented. Instead, canny sellers of patent medicine sought other forms of government protection. According to James Harvey Young:

the shrewd could secure government protection for their nostrums without revealing, as a patent application required, the nature of the ingredients. They patented not the formula but the bottle design. And they secured copyrights on the label, the medical literature wrapped around the remedy, and the display posters illustrating it.<sup>89</sup>

For medicine, openness and accuracy were important for building structures of knowledge and authority. For patent medicine, power and influence came from persuasion and selective concealment.

Whether acting scrupulously or not, purveyors of patent medicine could game the system, seeking protection by the law only when it was to their advantage to do so. Thus, in suggesting the reader keep their ingredients a secret, *Manufacturer and Builder* points toward a viable strategy, but – perhaps to their credit – demonstrates little knowledge of how to exploit the system.

However, this ignorance was repeated with other questioners. Questions about copyright were relatively common in technical publications like *Manufacturer and Builder*. Other queries to this publication, for example, included questions about the terms of

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<sup>88</sup> Scholars in diverse fields have written about various aspects of patent history. For more on the legal aspects in the U.S. as connected with the development of employer-employee law, see Catherine Fisk. For historical connections between patents and invention, see Caroline Cooper (in the U.S.) or Christine MacLeod (in the U.K.). For an economic history approach, see Zorina Kahn and Kenneth Sokoloff.

<sup>89</sup> James Harvey Young, “American Medical Quackery.” 587.



copyright in other nations, whether copyright protected recipes or formula, and the limits of copyright protection.<sup>90</sup> The advice provided to these questioners – in at least some cases, probably by Dr. P.H. Van der Weyde, a physicist – was often bad. Whoever responded answered questions about copyright as if copyright reflected scientific values of newness, originality, and the free exchange of ideas.

One enquirer, noticing nearly identical recipes in different copyrighted publications, wrote to ask about the extent of copyright protection for “publishers or compilers of books of recipes and formulas for medicines and the various compounds used in the arts and common industries of every-day life.”<sup>91</sup> Part of a series of letters, the same writer also wanted to know “If a person publishes a book of forms and recipes gathered from the news and scientific papers, has he any right to claim to the use of the recipes?”<sup>92</sup> Furthermore, the writer wanted to know, “does a copyright secure to a publisher the sole right to make and sell his compounds?”<sup>93</sup>

Responding to these questions, *Manufacturer and Builder* demonstrated an understanding of copyright that strongly valued newness and originality. As for recipes, “the copyright of a book does not give any right to matter contained therein which is not new and original.”<sup>94</sup> Since most recipes were old, the writer continued, they could be used by anyone.

*Manufacturer and Builder* refused to think of copyright as standing in the way of the free exchange of ideas. Specifically (and incorrectly) copyright only protected the title of a book: “When you publish a book of recipes you can copyright the title, but you cannot

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<sup>90</sup> See e.g. “Intercommunication.” [letters] *Manufacturer and Builder*. April, 1872. 95.; “Notes and Queries” [letters] *Manufacturer and Builder*. Jan. 1880. 23-4.

<sup>91</sup> C.P.W. “Protection Afforded by Copyright.” [letter] *Manufacturer and Builder*. Jan. 1880, 23.

<sup>92</sup> C.P.W. “Right to Forms and Recipes.” [letter] *Manufacturer and Builder*. Jan. 1880, 23.

<sup>93</sup> C.P.W. “Copyright v. Patent Right.” [letter] *Manufacturer and Builder*. Jan. 1880, 23.

<sup>94</sup> “Protection Afforded by Copyright.” *Manufacturer and Builder*, 24.

copyright the entire contents.”<sup>95</sup> The writer had no doubts about this – to reiterate: “the publisher has no other claim except the copyright of the name of his book.”<sup>96</sup> This meant that, they advised their readership, “if only you adopt a new, attractive title, you can use any number of old recipes and devices.”<sup>97</sup>

For *Manufacturer and Builder*, if an item, recipe, or process was not clearly described as patented, the act of publication made it knowledge free for anyone to use. Again, this stance is expressed with great clarity: “almost anything published in the news and scientific papers is public property, and recipes so obtained can be used by anyone.”<sup>98</sup>

Writing for a field that valued industrial progress and innovation, and not particularly involved with the details of copyright law, *Manufacturer and Builder* thought of copyright in very limited terms. For them, it protected titles of books, but not the contents, unless those contents were “new and original.” Publication freed the ideas and expressions of an author for the larger world. There is ample precedent for treasuring the free flow of ideas enabled by publication. Thomas Jefferson, for example, wrote:

If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it.<sup>99</sup>

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<sup>95</sup> “Selling Copyrights of Published Recipes.” *Manufacturer and Builder*. Jan. 1880, 24.

<sup>96</sup> “Rights to Forms and Recipes.” *Manufacturer and Builder*. Jan. 1880, 24.

<sup>97</sup> “Protection Afforded by Copyright.” *Manufacturer and Builder*, 24.

<sup>98</sup> “Rights to Forms and Recipes.” *Manufacturer and Builder*. Jan. 1880, 24.

<sup>99</sup> Thomas Jefferson, commenting on the 1801 Act for Relief of Oliver Evans. [letter] reproduced in *Writings of Thomas Jefferson*, Vol. XIII, 333-4; Quoted in Walterscheid, “Patents and the Jeffersonian Mythology.” 305-6.

Jefferson was writing about patents, but *Manufacturer and Builder* thought of copyright in the same way.

Considering copyright law, this way of thinking is only a slightly more expansive version of that found in *Stowe v. Thomas* (1853). To review, Justice Grier found that publication of *Uncle Tom's Cabin* meant:

creations of the genius and imagination of the author have become as much public property as those of Homer or Cervantes [...] Her absolute dominion and property in the creations of her genius and imagination have been voluntarily relinquished.

In the legal realm, the 1870 copyright law effectively overturned *Stowe v. Thomas*, and *Baker v. Selden* (1879) separated idea and expression. But these distinctions were not apparent to *Manufacturer and Builder*, less in tune with legal niceties. Instead, their ways of thinking about copyright illustrate some of the difficulties resulting from considering the expression of an idea as something different and apart from the idea itself.

In practical legal terms the advice of *Manufacturer and Builder* on copyright matters was actually quite bad. There is a long history of educated people speaking authoritatively about copyright, but being wrong. They *expect* it to be intuitive, and treat copyright as if it made sense. Writing a dozen decades after *Manufacturer and Builder*, Jessica Litman described this scenario:

The reason people don't believe in the copyright laws [...] is that people persist in believing that laws make sense, and the copyright laws don't seem to them to make sense, because they don't make sense, especially from the vantage point of the individual end user.<sup>100</sup>

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<sup>100</sup> Litman, *Digital Copyright*. 113.

Although Professor Litman is describing copyright in the twenty-first century, as the case of *Manufacturer and Builder* shows, people have erroneously believed that copyright laws made sense for many years.

## **Conclusion**

Between 1870 and 1890, the law of copyright expanded to include items of the fine arts and commercial labels. This expansion was accompanied by administrative changes to the law and the judicial codification of some fundamental principles of copyright law. These fundamentals included a reliance on unstable aesthetic distinctions between utility and decoration, as well as between an idea and the expression of that idea. In this dynamic context, some groups experienced copyright as a product of the rules and procedures that administered it. For others, the ways they thought about copyright were inextricably linked to the creation and validation of professional knowledge. Still others tended to think about copyright as what they guessed it ought to be. As the nineteenth century came to a close, copyright would be prominently featured in the news yet again, with the long-avoided passage of the 1891 International Copyright bill. This Act, ending more than a century of American literary piracy, is the subject of the next chapter.



# CHAPTER V: 1891 INTERNATIONAL COPYRIGHT

## ***Introduction***

In March, 1891 the United States Congress passed an international copyright law. Various referred to as the Chace Act, the Platt-Simonds Act, or the International Copyright Act, this law permitted citizens of other nations to obtain a U.S. copyright, if that nation treated U.S. authors “on substantially the same basis as its own citizens.”<sup>1</sup>

The International Copyright Act generally continued practices found in earlier laws. Compliance with strict rules for registration of copyrights was mandatory. Fees had to be paid, a copy of the printed title of the work had to be deposited with the Library of Congress before publication, and two copies of the complete printed work immediately afterward.<sup>2</sup>

In practical terms, political passage of the Act required several important protectionist features. First, for books and some illustrations, copyright protection was available only if the work was manufactured in the U.S. Specifically, under the terms of this “manufacturing clause,” U.S. copyright was available only:

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<sup>1</sup> Act of March 3, 1891, 51<sup>st</sup> Cong., 2<sup>nd</sup> Sess. 26 Stat. 1106.

<sup>2</sup> Among the minor changes, the Act reduced the time allowed to for receipt of deposit copies. For a less sanguine interpretation of the Act, see Patry, *Copyright Law* 48-50.

In the case of a book, photograph, chromo, or lithograph [when] printed from type set within the limits of the United States, or from plates made therefrom, or from negatives, or drawings on stone made within the limits of the United States, or from transfers made therefrom.<sup>3</sup>

A book might not have been written in the U.S., but to qualify for a U.S. copyright, it had to be typeset there. The manufacturing clause did not apply to some other categories of works, such as sheet music – a foreign composer could seek U.S. copyright protection regardless of where the music was printed. The Act also prohibited the importation of copyrighted works of various categories when printed abroad.

The inclusion of these protectionist features in the law was the product of years of complicated political compromise, and was essential for gaining the support of the traditional foes of international copyright – protectionist politicians, labor unions, and some publishers.<sup>4</sup> On the whole, these political battles were muddled, confusing, and tedious. The details, however fascinating for scholars of Congress, are of limited interest to students of copyright.

The most extensive treatment of Congressional politics is still Aubert Clark's *Movement for International Copyright in Nineteenth Century America* (1960).<sup>5</sup> Older accounts of legislative history are also useful, including George Haven Putnam's anthology, *The Question of Copyright* (1896) and Richard Rogers Bowker's *Copyright: Its History and its Law* (1912).<sup>6</sup> More recently, British

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<sup>3</sup> Act of March 3, 1891, 51<sup>st</sup> Cong, 2<sup>nd</sup> Sess. 26 Stat. 1107 §3.

<sup>4</sup> See Solberg, *Copyright in Congress*, 267-323 for an exhaustive chronology of Congressional actions on copyright between December 1889 and the passage of the International Copyright bill in March 1891.

<sup>5</sup> See Clark, especially Chapter Six, "Passage of the Platt-Simonds Act." 149-181.

<sup>6</sup> See especially Putnam 40-63 and Bowker, 341-372. George Haven Putnam (1844-1930) was president of publisher G.P. Putnam's Sons for over fifty years. R. R. Bowker (1848-1933) also had a long and influential career. He was variously involved with *Publishers' Weekly* as owner or manager from 1879 until

legal scholar Catherine Seville provides a cross-Atlantic perspective on some relevant politics, lobbying, and propaganda efforts in *Internationalisation of Copyright Law* (2006).<sup>7</sup>

More interesting for students of copyright is the opportunity that passage of the International Copyright Act offers for exploring how the ways people wrote or thought about copyright intersected with the practical politics that created and modified copyright law. In this spirit, this chapter examines copyright as an issue of the tariff, of monopoly, and of cheap books. These ideas were used and propagated by the opponents of international copyright, including a notable group of Philadelphians and the *Chicago Tribune*. Despite this powerful opposition, international copyright passed into law.

Scholars of copyright have offered a variety of possible models for explaining changes in copyright, and this chapter concludes by considering several of these in the context of the nineteenth century. Included are considerations of the possible benefits of international coordination, of changes in the balance of trade in intellectual products, and the changes in status of publishers and authors. Many of these models were originally conceived in relation to the massive expansion of intellectual property rights at the end of the twentieth century. The international copyright debate offers a unique opportunity to consider them in a different context.

## **Copyright as Tariff**

In the 1870s and 1880s, public comments in support of international copyright generally reiterated themes from the 1830s, particularly those related to claims of justice and the moral rights of authors. Advocates of international copyright were often on the defensive, since the debate was dominated by three interrelated ideas, ideas that were antithetical to expansions of copyright. Specifically, opponents of international copyright repeatedly and successfully framed

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his death, and was editor-in-chief of *Library Journal* for more than forty years. See Mott, *History of American Magazines* Vol. 3, 491-494, 517-519.

<sup>7</sup> Seville, *Internationalisation* 236-245.



international copyright as a tariff, as a promotion of monopoly, and as inevitably working to raise the price of books.

For politicians to frame copyright as a tax or tariff was hardly new – Thomas Babington, Lord Macaulay, for example, famously spoke of copyright in 1841 as “a tax on readers for the purpose of giving a bounty to writers.”<sup>8</sup> Although the idea of copyright as a tax on readers or a tax on knowledge persisted, in the America of the 1870s and 1880s, copyright was more likely to be framed with the protective tariff.

Books imported into the U.S. were subject to a fifteen percent *ad valorem* (of value) tariff by the 1861 Morrill Tariff Act. This was raised to twenty-five percent in 1864, as part of an attempt to raise revenues for the war.<sup>9</sup> With various exceptions, this basic tariff rate for books lasted until late in the century. The 1890 McKinley Tariff, for example, maintained the basic twenty-five percent rate, while exempting older works, works not available in English, and two copies of books imported for “educational, philosophical, literary, or religious purposes.”<sup>10</sup>

In terms of practical politics, thinking of international copyright in the context of the protective tariff came easily to politicians like William “Pig Iron” Kelly (1814-1890). Pig Iron Kelley, who started his political career as a radical Republican and abolitionist, spent almost thirty fiercely protectionist years representing Philadelphia in Congress.<sup>11</sup> A legislator with considerable interest in tariff issues and his namesake iron and steel industries, Kelley was an influential force for protection. Kelley chaired a variety of Congressional committees over the years, and served on the powerful Ways and

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<sup>8</sup> Thomas Babington Macaulay, “Speech of February 5, 1841.” 201.

<sup>9</sup> Later amendments added exceptions for various categories of works. Although largely focused on the appeals of academics for cheaper imported books after 1872, Dozer includes a succinct overview of the broader topic.

<sup>10</sup> Dozer 91.

<sup>11</sup> Republican Representative William Darrah (“Pig Iron”) Kelley (1814-1890) represented Philadelphia in Congress from 1861 until his death. His daughter, Florence Kelley (1859-1932) was a noted translator, reformer, and activist for labor and consumer rights.

Means committee for twenty years. Throughout his career, Kelley was a staunch supporter of workers in the book industry and an opponent of international copyright. For people like Pig Iron Kelley, international copyright was, like the tariff, an issue of protection.

Framing international copyright as an issue of the tariff created rhetorical difficulties for the advocates of international copyright. Their rhetoric had to negotiate the connections people made between trade protection for the physical book (the tariff) and protection for expression (copyright). This negotiation was particularly unstable for authors who tried to combine advocacy of international copyright with free trade principles. For example, in an 1869 letter to the editor of *The New York Times*, Charles Astor Bristed (writing here as Carl Benson) went out of his way to reconcile his free trade ideals with international copyright:

I am proud to belong to both the Free-trade League and the Copyright Association, and I maintain not only that I am guilty of no inconsistency in doing so, but that I should be inconsistent if I belonged to one and not the other.<sup>12</sup>

Bristed repeated this connection (under his own name) in an 1870 article in *Galaxy*.

In the latter case, writing in his capacity as Secretary of the International Copyright Association, Bristed devoted the first part of his letter to defending the idea that international copyright is compatible with free trade:

There is a very common vague notion that copyright is a sort of *tax* or *tariff* on books. The Rev. Joshua Leavitt, free trader, and Mr. [Edward Deering]

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<sup>12</sup> Carl Benson, "Free-Trade and Copyright Not Antagonistic-Different Senses of the Term 'Protection'." [letter to the editor] *New York Times* June 6, 1869. 3. Bristed used the same pen name in many of his other articles for *Galaxy* and *Spirit of the Times*. See Mott, *History of American Magazines*. Vol. 3, 18.

Mansfield, [...] protectionist, have both assumed that international copyright and free trade are inconsistent and antagonistic. On the other hand [economist] Henry C. Carey has labored at length to show that they are identical. In fact, they are neither one nor the other.<sup>13</sup>

Bristed's insistence that a copyright was identical to physical property, and that international copyright was essential for free trade in literary property, proved unpersuasive to many free traders.

In general, those who, like Reverend Leavitt, coupled free trade principles with opposition to international copyright had strong ideas about the benefits of free trade, about the harm caused by monopolies, and considerable disgust with administrative procedures they saw as cumbersome, anti-competitive, and subject to unfair exploitation.

Little remembered today, and relatively muted in the U.S., free trade ideology drove a widespread European movement to abolish patents between 1850 and 1873.<sup>14</sup> Switzerland, for example, repeatedly rejected implementing *any* form of patent protection. Sausage-making Prussian Otto von Bismarck announced his objections to patents in 1868. The Netherlands went furthest, repealing their patent law in July 1869, only reinstituting it in 1910.<sup>15</sup> Some European free traders writers limited their attacks to the patent system, others, such as Robert Allen Macfie, considered copyright

<sup>13</sup> Charles Astor Bristed, "International Copyright." *Galaxy: A Magazine of Entertaining Reading*, Dec., 1870. 811. Italics in original.

<sup>14</sup> See Fritz Machlup and Edith Penrose, "Patent Controversy in the Nineteenth Century." For one of the relatively few American examples of patent abolitionism, see John C. fr Saloman's [sic] letter to the editor of *Scientific American*. Dec. 16 1854, 107. A more entertaining debate on the subject occurred sporadically in the pages of the Benjamin R. Tucker's long-lived anarchist publication *Liberty: Not the Daughter but the Mother of Order* later in the century, from roughly 1885 to 1895. For suggested lessons from the patent abolition movement, see Mark Janis, "Patent System Reform."

<sup>15</sup> Machlup and Penrose, 4-6. The reinstated Netherlands patent law did not take effect until 1912.

just as onerous.<sup>16</sup>

The difficulty of reconciling free trade ideas with international copyright led some U.S. observers to bafflement, frustration, and accusations of insincerity. A stunning example of this appeared in *Galaxy* in 1872, under the byline of Philip Quilibet, a nom de plume of journalist George Edward Pond.<sup>17</sup> Quilibet, disgusted with false moralizing and posturing by both sides, pointed to economic self-interest as the driving force behind every international copyright faction:

The battle of the booksellers has been raging during the month, or rather a scrimmage of booksellers, bookbinders, gold-beaters, big publishers, little publishers, type-founders, tariff-haters, paper-makers, printers, protectionists, authors, and importers, of whom each talks principle and acts interest, professes patriotism and figures profits, discusses reprints on lofty grounds, and takes counsel of trade selfishness.<sup>18</sup>

Only thinly veiling his accusation of hypocrisy, Quilibet continues, “Each class derives its conscience in the matter from its pocket-book, which derivation is harmless, provided we do not claim to act from self-immolating motives.”<sup>19</sup>

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<sup>16</sup> A sugar manufacturer and MP, Robert Allen Macfie was a prolific anthologist on the subject. See, for example, his widely-distributed two-volume compilation (including subtitle): *Copyright and Patents for Invention: Pleas and Plans for Cheaper Books and Greater Industrial Freedom, with due Regard to International Relations, the Claims of Talent, the Demands of Trade, and the Wants of the People*. (1879, 1884)

<sup>17</sup> For the connection of Pond with Quilibet, see Mott, *History of American Magazines*, Vol. 3, 363. Note that his here language suggests Mott is relying on the not-always-reliable *Appleton's Cyclopedia of American Biography* (1887-1889).

<sup>18</sup> Philip Quilibet, “The Copyright Struggle.” *Galaxy: A Magazine of Entertaining Reading*, April, 1872. 554.

<sup>19</sup> Ibid.

For Quilibet, copyright policy is purely economic, and appeals to justice or morality are self-serving claptrap. However, Quilibet's position was too simplistic to encompass the diverse motives of these various groups – economic motives were occasionally trumped by idealism. For example, one member of the Tariff Commission, John Underwood, thought that keeping the tariff high on books was an excellent way to protect America – perhaps especially poor America – from the corrupting foreign influences of Thomas Huxley, Charles Darwin, and Herbert Spencer.<sup>20</sup>

Confusion over the conflation of copyright and the tariff was still evident sixteen years later, in this case in the Boston-based *Literary World*.<sup>21</sup> Editor Nicholas Paine Gilman – a clergyman and professor who wrote extensively about business economics, profit-sharing, and employer-employee relations – was gentler than Quilibet.<sup>22</sup> Wrote Gilman:

There is a strange relationship between this subject of international copyright and the irrepressible conflict between free trade and protection [....] For what is copyright but a species of protection? And what is international copyright but a bulwark erected by protection against free trade? From this point of view the spectacle of [Harvard] President [Charles William] Eliot presiding at an international copyright meeting one day, and appearing as a sympathetic guest at an anti-tariff dinner the next, is one to be pondered.<sup>23</sup>

To *Literary World*, support for international copyright looked like support for a protectionist tariff. In this framework, support from

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<sup>20</sup> Dozer 80.

<sup>21</sup> For a description of *Literary World*, see Mott, *History of American Magazines*. Vol. 3, 454-456

<sup>22</sup> For the career of Nicholas Paine Gilman, see his obituary in *Economic Journal*. June 1912. 342.

<sup>23</sup> "International Copyright in Boston." *Literary World*. Jan. 7, 1888. 8.

free-traders was confusing.

Not all writers treated the issue so seriously. Juxtaposing copyright, protection, and the McKinley Tariff could lead to lame jokes, as this 1890 example from *Harper's New Monthly* demonstrates:

A number of young writers were discussing the copyright question one evening last July, when one of them observed quietly:

“Well, justice is being done to us at last. The McKinley bill contains a provision that gives us all the protection we want.”

“It does? How?”

“By placing a duty of a hundred percent on yarns.”<sup>24</sup>

Textile puns aside, the political status quo before 1890 was pro-tariff and anti-international copyright.

Missing from these writings are questions about who would benefit from the various policies. In the book trade, the tariff on books provided protection for some groups, but not for others. British imports were kept expensive, but American reprints of British books were cheap. Some business models benefited from this, others suffered. A publisher specializing in fine authorized editions of British books, for example, might find themselves relentlessly undersold.

Employees in the publishing industry were one of the primary beneficiaries of the tariff, as they were protected from competition with cheaper British typesetters and compositors. Considering questions about the protection of labor in the book trades, Donald Marquand Dozer compared statistics from the British Board of Trade with those from the U.S. Bureau (later Department) of Labor. Among his findings:

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<sup>24</sup> “Copyright.” *Harper's New Monthly*. Dec. 1890. 163.

Between 1875 and 1882 the average daily wage of compositors in London, Manchester, and Glasgow ranged from \$1.36½ to \$1.40, whereas in those American cities for which statistics are available during the same period the average daily wage for the same class of printing employees ranged from \$2.64¾ to \$2.81.<sup>25</sup>

Lowering the tariff, U.S. workers feared, would put Americans in direct competition with half-priced British labor.

U.S. readers generally benefited from the protectionist status quo. There may have been fewer fine editions available, but cheap books were plentiful. The lack of international copyright spurred intense domestic competition and innovation by American publishers, leading, in theory, to a diverse and efficient domestic marketplace.

Both free traders and protectionists could think of international copyright as an issue of the tariff. However, neither free trade nor protectionist ideals led to consistent policy preferences. Adherents of either could support or detest international copyright. Some protectionists thought the absence of international copyright protected the printing trades. Others, especially after 1890, thought a modified international copyright would do a better job. Some free traders thought international copyright essential for the free trade in literary property. Others considered it an abhorrent monopoly.

## ***Copyright as Monopoly***

Connecting copyright with monopoly gradually became more common than connecting it with the tariff. Monopoly was not a new way of talking about copyright, but the organization of giant corporations and trusts – the famous Standard Oil trust was organized in 1882 – gave the idea new resonance and a particularly corporate tone.<sup>26</sup>

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<sup>25</sup> Dozer 86.

<sup>26</sup> See Ochoa and Rose for the anti-monopoly roots of U.S. copyright law. For

Speaking of copyright as monopoly was particularly common for the opponents of international copyright in the late 1880s. *Scientific American*, for example, approvingly noticed a speech by Senator Zebulon Vance (1830-1894), Democrat of North Carolina:

the proposed measure of copyright is intended to create a monopoly and enhance the prices of the product, making literature and knowledge dear to the people. [...] International copyright is simply a monopoly. It is a monopoly between America and the chief nations of civilization and the principal authors and sources of knowledge and as such it becomes doubly objectionable.<sup>27</sup>

Copyright *is* a limited monopoly – a set of exclusive rights granted to an author of a period of time. However, in the 1880s, this was combined with worries that international copyright would be used to limit competition and *create* a giant corporate book monopoly.

The occasion of Vance's speech, passage by the Senate of an early version of Senator Jonathan Chace's International Copyright Act (this incarnation died in the House), prompted *Scientific American* to comment:

It is well understood the real object of the bill is to bring about, by aid of Congress, a sort of book trust, by which the prices of books will be advanced throughout the country, the rich publishers made richer and the printers of cheap literature driven from business.<sup>28</sup>

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more on the growth of giant industrial corporations, see Alfred Chandler, *Scale and Scope: the Dynamics of Industrial Capitalism*.

<sup>27</sup> "Passage of the Copyright Bill in the Senate." *Scientific American*. May 19, 1888. 304.

<sup>28</sup> "New Copyright Bill now Before Congress." *Scientific American*. May 19, 1888. 304.



This argument, reducible to “trusts are bad, cheap books are good,” had tremendous political power in the late nineteenth century.

Particularly relevant to fears of monopoly were the two book-related trusts formed in 1890. One, American Book Company, was an amalgamation of four large textbook publishers.<sup>29</sup> Each of the participating companies assigned their “plates, copyrights, publishing rights, illustrations, goodwill and anything else it possessed for all its schoolbooks” to the trust in exchange for stock.<sup>30</sup> Competition was restricted, prices were high, and corrupt practices – including bribery of textbook selectors – were all-too common.<sup>31</sup>

The second trust was the United States Book Company, formed in May 1890 by John W. Lovell.<sup>32</sup> Lovell was a long-time publisher of cheap reprints, including fiction, history, biography, and travel books. “Book-a-Day” Lovell bragged of selling seven million books in a single year, typically priced at ten, twenty, or thirty cents.<sup>33</sup> Most were classics or reprinted novels – *Vanity Fair* and *Pilgrim’s Progress* were both big sellers – but Lovell also published notable theosophical, labor, and feminist books.<sup>34</sup>

United States Book Company combined several publishers, mostly of cheap books. It sought control of the reprint market and to reduce competition.<sup>35</sup> By combining these companies, purchasing others, and buying up printing plates, United States Book reportedly ended up owning as many as twenty sets of stereotypes for some popular texts.

The size and reach of United States Book led some to think prices would rise. For example, *Critic* took the announcement of Lovell’s

<sup>29</sup> See Tebbel, *History of Book Publishing*. Vol. 2, 565-571.

<sup>30</sup> Ibid., 567.

<sup>31</sup> Ibid., 568.

<sup>32</sup> See Stern, “John W. Lovell.”

<sup>33</sup> Ibid., 203.

<sup>34</sup> Including Florence Kelley’s translation of Friedrich Engels, *Condition of the Working Class in England in 1844*. New York: J.W. Lovell, 1887. 120 years later, her translation is still in print. Florence Kelley (sometimes as Florence Kelley Wischniewetzky) was the daughter of U.S. Congressman William “Pig Iron” Kelley.

<sup>35</sup> See Goodman, “United States Book Company.”

book trust to mean “the lack of International Copyright is not to mean ‘cheap books’ any longer.”<sup>36</sup> Lovell responded in print the next week, declaring that “retail prices for the Seaside Library, Lovell Library and Munro Library will still remain 10 and 20 cents a number” unless postal rates were increased.<sup>37</sup>

Lovell’s pledge was never really put to the test, for his ambition and vision exceeded his organizational abilities. Struggling with management issues, United States Book Company was almost immediately reorganized as a group of subsidiaries, and was sent into bankruptcy after the Panic of 1893. It never recovered, and Lovell moved on to other projects. But in 1890, book monopolies were a genuine public policy concern.

Chicago-based *Industrial World*, for example, was decidedly wary of an 1890 bill for international copyright:

The predominant question to be considered is one of public policy, not of authors’ rights. This is the day of monopolistic tendencies and of alluring artifices under the disguise of seeking the general welfare.<sup>38</sup>

Distrust of international copyright and hatred of monopoly often intersected with regional frustration with Eastern domination.

The combination of regionalism and distrust for monopoly was particularly well-developed at the most dedicated Midwestern opponent of international copyright, the *Chicago Tribune*. Under the long-time leadership of one of the giants of nineteenth-century newspapers, Joseph Medill (1823-1899), the *Tribune* forcefully editorialized for Chicago, for workers, and against monopolists and

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<sup>36</sup> “Lovell ‘Book Trust’.” *Critic: a Weekly Review of Literature and the Arts*. April 5, 1890. 172.

<sup>37</sup> John W. Lovell, “Mr. Lovell on Cheap Books.” [letter] *Critic: a Weekly Review of Literature and the Arts*. April 12, 1890. 185.

<sup>38</sup> Reprinted by *Scientific American* as “The Copyright Bill.” *Scientific American*. June 28, 1890. 403. For context on *Industrial World*, see Mott, *History of American Magazines*, Vol. 3, 127.

overreaching industrialists.<sup>39</sup> Oil, railroads, meatpacking, steel, copper, or coal – no trust or monopoly was exempt from Medill and his colleagues.<sup>40</sup>

Regarding copyright, distrust of monopoly was combined with pride in the growth of printing and publishing in Chicago – by 1883, Chicago was the largest publishing center outside the East.<sup>41</sup> Firms like Belford, Clarke & Company combined cheap books with innovative merchandising and sales tactics.<sup>42</sup> Rand McNally, based in Chicago until 1905, published guidebooks, atlases, and cheap paperbacks.<sup>43</sup> Distributing through nontraditional channels, series like their “Globe Library” (which included hundreds of titles) were sold in train stations for only 25¢ per book.

The *Tribune* ran scores of articles opposing international copyright. “Copyright is a Monopoly.”<sup>44</sup> “Copyright is not like property in land or money. It is simply a monopoly granted for a short term to writers.”<sup>45</sup> And monopolies were intended to exploit the public, “a conspiracy between English and American publishers and authors to squeeze out of the readers the maximum price [...] by a method whose effect is exactly the same as a trust monopoly.”<sup>46</sup>

Skimming the headlines of the articles condemning international copyright reveals the depth of the *Tribune*’s distaste. It was a “Copyright Grab,” the “International Copyright Iniquity,” and a “Copyright Conspiracy against Book-Buyers.”<sup>47</sup> The effect of

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<sup>39</sup> See especially journalist Lloyd Wendt’s award-winning *Chicago Tribune: The Rise of a Great American Paper*. Joseph Medill is sometimes credited with “discovering” Abraham Lincoln.

<sup>40</sup> Wendt, 271-283.

<sup>41</sup> Tebbel, *History of Book Publishing*. Vol. 2, 427.

<sup>42</sup> Ibid., 444-448.

<sup>43</sup> Ibid., 290-293.

<sup>44</sup> “Copyright Cry Again.” *Chicago Daily Tribune*. July 15, 1890 8.

<sup>45</sup> Ibid.

<sup>46</sup> “Copyright Conspiracy.” *Chicago Daily Tribune*. March 26, 1890. 4.

<sup>47</sup> “Copyright Grab.” *Chicago Daily Tribune*. Feb. 7, 1890. 4; “International Copyright Iniquity.” *Chicago Daily Tribune*. Feb 16, 1890. 12; “Copyright Conspiracy Against Book Buyers.” *Chicago Daily Tribune*. Mar. 21, 1890. 4.

international copyright would be:

to give a ring of big publishers the monopoly of the publication business in combination with the English publishers, to kill off the small publishers, to make books the luxury of the rich, and to tax American readers.<sup>48</sup>

The *Tribune* published dozens of articles reiterating these themes.

According to the *Tribune*, copyright was not just a monopoly, it was an *Eastern* monopoly. Away from the publishing centers of New York, Boston, and Philadelphia, international copyright debates reflected regional tensions and distrust. The *Chicago Tribune*, for example, berated not just international copyright, but also the “international copyright junta in New York representing the Eastern publishers’ ring.”<sup>49</sup> A vote for international copyright was a vote for “the interests of the Eastern trust-grabbers.”<sup>50</sup> Eastern publishers – explicitly including *New York Times*, *New York Evening Post*, *Boston Herald*, and Harper & Brothers – who advocated international copyright while continuing to reprint British books – were hypocritical “Pirates Preaching Reform.”<sup>51</sup>

Regional tensions certainly played a part in the politics of international copyright. Both the *Chicago Tribune* and renowned book historian John Tebbel claim that support for international copyright was primarily in the Eastern and Mid-Atlantic States, and opposition from the South and West.<sup>52</sup> However, it is unclear how far this claim can be extended, if applied narrowly to voters, newspaper editors, or Congressmen. For example, taking place in the (literally)

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<sup>48</sup> “International Copyright Iniquity.” *Chicago Daily Tribune*. Feb 16, 1890. 12. This headline was repeated multiple times in 1890.

<sup>49</sup> “Copyright Conspirators Still Active.” *Chicago Daily Tribune*. May 13, 1890. 4.

<sup>50</sup> “International Copyright Iniquity.” *Chicago Daily Times*. Dec. 23, 1890. 4.

<sup>51</sup> “Pirates Preaching Reform.” *Chicago Daily Tribune*. June 22, 1890.

<sup>52</sup> Tebbel, *History of Book Publishing* Vol 2. 638,640; “International Copyright Iniquity.” *Chicago Daily Tribune*. Dec. 5, 1890. 4; “International Copyright Iniquity.” *Chicago Daily Times*. Dec. 23, 1890. 4.

chaotic waning hours of a lame duck Congress, voting on the international copyright bill in the House of Representatives cut across both party and region. Perhaps due to the vigilance of the *Tribune*, the majority of the Illinois delegation voted against it.<sup>53</sup>

## **Copyright and Cheap Books**

Cutting across region and decade, the most powerful refrain in opposition to international copyright was that of cheap books. For this line of thought, refusing to respect foreign copyrights was good, since free reprinting led to cheap books. Fighting monopoly was good, since competition between publishers led to cheap books. And during these decades, books were very cheap.

Innovations in printing, paper manufacturing, and distribution drove the prices of books down. According to Michael Denning, this was particularly true during times when economic hardship made labor cheap. Writing specifically of dime novels:

Cheap books were most successful when regular book publishing was in disarray, when prices were generally depressed, and when the cost of labor was low. The first wave of cheap books emerged out of the depression that followed the Panic of 1837; the second wave, triggered by the New York story papers and Beadle's dime books, crested in the years after the panic of 1857; and the third wave appeared with the swell of cheap nickel libraries in the depression that followed the Panic of 1873.<sup>54</sup>

After 1867, cheap books also benefited from the development of paper made from ground wood pulp and improved papermaking

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<sup>53</sup> "Who are Responsible for the Book-Trust Monopoly." *Chicago Daily Tribune*. March 4, 1891. 4.

<sup>54</sup> Denning, *Mechanic Accents*. 19. See also Tebbel, *History of Book Publishing*. Vol. 2, 481-511.

techniques.<sup>55</sup> By 1888, *Scientific American* observed:

Twenty-five cent editions, once regarded as remarkably cheap, are giving way to equally good editions retailing at fifteen and ten cents, and indeed the same books are now being published in a still cheaper form, though in smaller type, selling for six and three cents.<sup>56</sup>

*Scientific American* was particularly fond of cheap scientific and technical works.

However, many of these cheap books were dime novels or other forms of low-status fiction.<sup>57</sup> Some elites found these cheap novels very disturbing. Henry Van Dyke, for example, sermonized on the *National Sin of Literary Piracy*. Punishment for this sin, according to Van Dyke, was “perversion of national taste and manners by [...] foreign books that are both cheap and bad.”<sup>58</sup> Reprinted light reading drew particular ire:

If you will look over the contents of one of our railway book-stalls [...] nine-tenths of the books that are stolen are novels, and nine-tenths of these are novels of a doubtful character.<sup>59</sup>

In this context, “stolen” means reprinted, not shoplifted. Dyke’s preference for more wholesome works, more traditionally distributed, and his worry about the pernicious effects of cheap books reiterated themes from a half-century earlier, as discussed in Chapter Two, pp. 26-28.

<sup>55</sup> Tebbel, *History of Book Publishing* Vol. 2, 482-483.

<sup>56</sup> “Book Publishing Trades and International Copyright.” *Scientific American*. Feb. 4, 1888. 64.

<sup>57</sup> Indexed to consumer prices, 10¢ in 1888 is roughly equivalent to \$2 in 2006 dollars.

<sup>58</sup> Henry Van Dyke, *National Sin of Literary Piracy: A Sermon*. 14.

<sup>59</sup> Ibid.

Interestingly, fear of cheap poisonous literature could also be used to justify cheap good literature. For example, an 1878 contributor to *Atlantic Monthly* confessed to purchasing Victor Hugo's *History of a Crime* in a 10¢ edition from Harper & Brothers' recently launched Franklin Square Library. This reader was rather pleased with the price and quality of these cheap libraries, and how they made "masterpieces" available to a wider public. Specifically, he liked "that they are so largely bought by former habitual readers of Texas Jack books."<sup>60</sup> In his mind, cheap reprints of good books would have a reforming effect on the taste of readers of dime novels.

Ten years later, cheap libraries of good literature were still being praised. *Scientific American*, for example, commented approvingly on the availability of cheap classic fiction: "works of the masters of fiction, the faculty of learning, are now distributed at a trifling cost."<sup>61</sup>

Elite literary skirmishes over the nature of cheap books ignored the preferences of the reading public. Many, perhaps even most, people were less interested in cheap instructional literature than in fun reading.<sup>62</sup> Whether dime novels or story papers, people wanted cheap, fun, disposable reading. As the *Chicago Tribune* put it, people "want the cheap paper editions, which they can read and throw away."<sup>63</sup>

Of course, fun does not equal unimportant. Leisure, play, and amusement are all tremendously important to how people live, and in shaping who and what they are, both now and in the past. For example, reading cheap romances by authors like Laura Jean Libbey formed an essential part of being a "factory girl" in the late nineteenth and early twentieth century.<sup>64</sup>

The potent political argument of cheap books attracted defensive

<sup>60</sup> "Contributor's Club." *Atlantic Monthly*. Sept. 1878. 371.

<sup>61</sup> "Book Publishing Trades and International Copyright." *Scientific American*. Feb. 4, 1888. 64.

<sup>62</sup> For more on the composition of the reading public and their preferences, see Denning, *Mechanic Accents* 27-46.

<sup>63</sup> "Gen. M'Clurg on Copyright." *Chicago Daily Tribune*. Dec. 12, 1890. 4.

<sup>64</sup> See Enstad, *Ladies of Labor*. 56-59.

comments from supporters of international copyright. One succinct illustration is provided by Isaac Kaufmann Funk (1839-1912) of Funk & Wagnalls. Commenting on the doomed 1884 Dorsheimer bill for international copyright, Funk reported that “many” newspapers thought international copyright “would probably sound the death-knell of the so-called cheap libraries.” For Funk, this idea was politically poisonous, since if “the people” believed international copyright would kill the cheap libraries, political agitation by elites was pointless: “we shall hear the death-knell of copyright, though backed by every author and publisher in the land.”<sup>65</sup> Funk’s defense – more typical than convincing – was to simply deny that international copyright would raise prices or endanger the cheap libraries.

## ***Copyright and Politics***

Connections of copyright with tariff, monopoly, and cheap books thread through the practical politics of the passage of the International Copyright Act. These ways of thinking about copyright had significant influence on Congress, and were repeatedly drawn upon by those who opposed international copyright.

For over a decade, the Congressional politics of copyright were dominated by an 1873 report by the Joint Committee on the Library. Known as the Morrill Report after chairman Senator Lot Myrick Morrill, Republican of Maine, the report garnered considerable attention when released.<sup>66</sup> *Harper’s New Monthly*, for example, reprinted the entire report.<sup>67</sup>

The Morrill Report was unambiguously against international

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<sup>65</sup> I.K. Funk, “Copyright and Cheap Books” *Publishers’ Weekly* March 1, 1884. 272. [reprinted from the Feb. 24, 1884 *New York Tribune*]

<sup>66</sup> Seville 204 mistakes Senator Justin Smith Morrill of Vermont for Senator Lot Myrick Morrill of Maine. Lot Myrick Morrill was chair of the Committee on the Library; Justin Smith Morrill was the protectionist author of the 1861 Morrill tariff. See *Biographical Directory of the United States Congress*, <http://www.bioguide.congress.gov>.

<sup>67</sup> “International Copyright.” *Harper’s New Monthly*, May, 1873. 906-911.



copyright. International copyright “would *not* promote the progress of science and the useful arts among the American people.”<sup>68</sup> Instead, it would damage the groups it was intended to protect. International copyright:

Would be of very doubtful advantage to American authors as a class, and would not only be an unquestionable and permanent injury to the manufacturing interests concerned in producing books, but a hindrance to the diffusion of knowledge among the people and to the cause of universal education.

The Joint Committee on the Library liked protecting American workers, liked education, and liked cheap books.<sup>69</sup>

The printed report includes charts of book prices for both the U.S. and the U.K. According to the included statistics, American reprints averaged nearly 60% less than the British original. Startlingly, the price differences were even more pronounced on the other side of the Atlantic – British pirate editions were *also* tremendously cheaper than the American original, averaging about 70% less than the American price.

In the U.K., according to this chart, novels of James Fennimore Cooper were priced at one shilling, as were works by Nathaniel Hawthorne, Henry Wadsworth Longfellow, Herman Melville, Ralph Waldo Emerson, and Maria Sedgwick. Harriet Beecher Stowe’s *Uncle Tom’s Cabin* cost two dollars in the U.S., but only two shillings and sixpence (less than 70¢) in the U.K.<sup>70</sup> Price differences of this magnitude cannot be explained by payments to authors.

One of the key aspects of the Morrill Report is the conclusion drawn from these price differences. The report did *not* use these

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<sup>68</sup> Ibid., 911. Italics added.

<sup>69</sup> For a detailed description of the Congressional politics of the Morrill Report, see Solberg, “International Copyright.” 265-267.

<sup>70</sup> Ibid., 909-910.

price differences to argue that international copyright would reward American authors by ending cheap reprints in the U.K. Instead, the committee used these price distinctions to model how copyright functioned, concluding that copyright worked to raise the prices of books. Explicitly:

From the foregoing exhibits it would seem clear that the law of copyright, as existing in England and this country, in its practical operations in the two countries, tends unmistakably to check the popular diffusion of literary production by largely increasing the price.<sup>71</sup>

On both sides of the Atlantic, texts protected by copyright tended to be printed in fancier, more elaborate, and more expensive editions. However, in the absence of copyright, publishers were forced to compete on other grounds, especially price.<sup>72</sup>

In the wake of the Morrill Report, Congress largely ignored the issue of international copyright for more than a decade. In the mid-1880s, however, the issue resurfaced with renewed vigor. Several bills were introduced and died in committee without ever coming up for a vote.<sup>73</sup> The most prominent attempt, introduced by Rep. William Dorsheimer, Democrat of New York, died after William “Pig Iron” Kelley requested a delay for comments from workers who would be affected, such as paper makers, bookbinders, and printers.<sup>74</sup>

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<sup>71</sup> Ibid., 911.

<sup>72</sup> The cheap books that resulted from reciprocal piracy – on both sides of the Atlantic – were arguably very influential in the amount and nature of cultural exchange between the U.S. and the U.K., and in the subsequent close ties between these nations in the first half of the twentieth century.

<sup>73</sup> Other ideas, such as R. Pearsall Smith’s 1888 scheme for a compulsory royalty system generated considerable comment, but never made it to the legislature. See “Anglo-American Copyright.” *North American Review*. Jan. 1888. 67-85. In this article, Smith describes his system (68-76), and various writers, including Oliver Wendell Holmes and William Dean Howells, responded with brief comments on his plan (76-85).

<sup>74</sup> See Clark 123-125; Seville 218-221 is remarkably similar.

However, the Dorsheimer bill was prominent enough to garner considerable public comment.

In the limited universe of the trade journals of the publishing industry in the 1880s, nearly everyone was in favor of international copyright. The Dorsheimer bill, for example, received extensive treatment in *Publishers' Weekly*. From January to March of 1884, *Publishers' Weekly* printed or reprinted approximately one hundred letters and editorials on the topic. Most were in enthusiastic support of international copyright.<sup>75</sup> In addition to these letters, a *Publishers' Weekly* survey of the leading publishing houses found that fifty-two of fifty-five respondents favored some form of international copyright.<sup>76</sup>

The dominance of the printed record by pro-copyright writing leads some copyright scholars to be sloppy with historical causality. Collections of near-unanimous opinion, like that in *Publisher's Weekly*, cannot be taken as *causing* the passage of international copyright. In this case, passage was still seven years away. Moreover, lobbying and organization by those in favor of international copyright recurred periodically from the 1830s, particularly whenever passage of a bill seemed at all likely.<sup>77</sup> Simply

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<sup>75</sup> E.g. *Publishers' Weekly*, March 1, 1884. 260-274. Most of the comments in this particular issue were reprinted editorials and letters from New York newspapers. The tremendous importance of the issue to *Publisher's Weekly* is illustrated by their extensive coverage. For example, the index for Vol. 25 lists Dorsheimer-related articles on: 37, 39, 58-60, 91-93, 169-175, 198-207, 230-242, 260-274, 294-303, 323-329, 347-351, 378, 380-390, 488, 506, 508-509, 572-573, 595-596, 666.

<sup>76</sup> R.R. Bowker, "Publishers on International Copyright. " *Publishers' Weekly*. March 9, 1884. 378-386. Opponents included the American Tract Society (who wanted stronger protections for proprietors) and Philadelphia publishers Henry Carey Baird & Co. and R.S. Menamin. This survey is also conveniently summarized in Bowker, *Copyright*, 357-358.

<sup>77</sup> These public comments may not accurately reflect the political positions of some publishers, since their public positions in favor of international copyright (especially in conjunction with unlikely amendments) could differ from their private efforts. Harper & Brothers, among others, were periodically suspected of being disingenuous.

put, the printed opinions of authors and publishers had been overwhelmingly in favor of international copyright for half a century, with no discernible effect on the political process, and attributing passage to the 1891 Act to these efforts requires more subtle evidence than has been presented to date.

Letter writing campaigns and petitions from authors were common tactics for supporters of international copyright. One particularly striking example appeared in *Century Illustrated Magazine* in 1886.<sup>78</sup> In this case, *Century* included with the usual cadre of copyright activists (James Russell Lowell, William Dean Howells, Brander Matthews), and academics (the presidents of Cornell and Columbia) a significantly more diverse cast than was typical of these appeals.

Even after a half century of lobbying, the reasons authors gave for supporting international copyright varied tremendously. A sample of some familiar names: Louisa May Alcott (1832-1888), "If women are allowed a vote in the matter, I decidedly cast mine for International Copyright"; Hjalmar Hjorth Boyesen (1848-1895), "mutual stealing is ethically wrong"; Frances Hodgson Burnett (1849-1924), "a right to the control and the protection of the products of one's brain [...] cannot be questioned"; Rebecca Harding Davis (1831-1910), international copyright "would serve to keep the lower mass of worthless literature in each country at home where it originates [...] we should be spared much that is puerile and poisonous"; Frederick Douglass (1818-1895), "I have given very little thought to the subject [...] but I can very readily assent to the justice of the principle"; Frederick Law Olmstead (1822-1903), "the demand for International Copyright is just and reasonable."

The rationales expressed by this collection of authors – literary property, control of the text, prevention of bad books, justice – span the complete range of pro-international copyright positions. There is little to distinguish this collection of 1880s arguments from those of the 1850s, or even 1830s, and no reason to believe letter-writing

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<sup>78</sup> "International Copyright, Plain Speech from American Authors." [letters] *Century Illustrated Magazine* Feb. 1886, 627-634.

campaigns like these led to international copyright.

The diversity of logic in these letters is typical, but the diversity of commentators is not. Authorial appeals for international copyright are overwhelmingly Eastern, white, and male – authors, editors, and publishers of the elite literary establishment. The slightly more diverse writers included in *Century* suggests some advocates of international copyright sought broader political appeal. This, perhaps, explains the unprecedented inclusion of one black man and five white women among forty-five letter writers.<sup>79</sup>

Once again, despite this slightly broader glimpse, the historical record is slanted, since most of those opposing international copyright had less access to print.<sup>80</sup> *Century* did not solicit comments from writers of dime novels, from readers, or from politicians. Thus, for historians of copyright – such as Aubert Clark – to attribute the passage of the 1891 bill to the coordinated activities American Publishers Copyright League and the Authors Copyright League is to allow authors and (some) publishers credit for more practical political influence than they actually possessed.<sup>81</sup>

## ***Philadelphia Obstructionists***

Although not as well-represented in the press, international copyright was subject to sustained and powerful political opposition. For decades, the most ferocious and effective opposition to international copyright came from Philadelphia. Leadership came from three

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<sup>79</sup> A handful of women writers – including Fanny Fern, Maria Cummings, Harriet Beecher Stowe and the writers of *Lowell Offering* – had been involved in copyright-related controversy or litigation over the decades, but were largely excluded from the various copyright-related political movements. *Century* followed-up their collection of letters from writers with a collection of letters from musicians. See “International Copyright on Music.” *Century Illustrated Magazine*. April, 1887. 969-973.

<sup>80</sup> The habit of privileging authors misleads some into concluding that, because authorial agitation preceded passage of the Act, the agitation caused passage of the Act. However, this is an example of the *post hoc ergo propter hoc* fallacy.

<sup>81</sup> E.g. Clark 157-164.

descendants of Philadelphia printer Mathew Carey (1760-1839).<sup>82</sup> Particularly important at mid-century was the writing of one of Mathew Carey's sons, Henry Charles Carey (1793-1879). This Carey, a prolific and influential economist of the American School, wrote extensively on international copyright, chiefly from a protectionist perspective. Carey linked international copyright with free trade and opposed both. His widely-cited *Letters on International Copyright* was originally published in response to the failed 1853 international copyright treaty, was reprinted in 1868, and continued to be influential into the 1870s.

The next generation was equally opposed to international copyright. First, one of Henry Charles Carey's nephews, Henry Carey Baird (1825-1912) actively opposed international copyright through letters and organizing efforts. A publisher specializing in books on technical, industrial, economic, and financial subjects, Baird was also President of the Book Trade Association of Philadelphia.<sup>83</sup>

Led by Baird, Philadelphia publishers organized in 1872 to oppose all forms of international copyright.<sup>84</sup> One of the results of this meeting, according to R.R. Bowker, was the introduction by Philadelphia Rep. William "Pig Iron" Kelley of the Congressional resolution that germinated in the anti-copyright Morrill Report.<sup>85</sup>

In his speech celebrating the twelfth anniversary of the Book Trade Association, Henry Carey Baird delighted in the "well-earned sobriquet" of "Philadelphia Obstructionists" for the group's ongoing opposition to international copyright. The Book Trade Association, claimed Baird, was created "especially to head off the tariff-tinkers and international copyright cobblers."<sup>86</sup> His address was later

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<sup>82</sup> Mathew Carey was connected to some of the elite names of the early republic. He was close to John Adams, was briefly an employee of Benjamin Franklin, and reportedly was supported in his business endeavors by a loan from the Marquis de Lafayette.

<sup>83</sup> As of 2005, H.C. Baird published technical financial journals.

<sup>84</sup> Bowker 351.

<sup>85</sup> Bowker 352.

<sup>86</sup> Henry Carey Baird, *Copyright: National and International. An Address*. 1884.

published as a pamphlet and prominent enough to merit reprinting in *Publisher's Weekly*.<sup>87</sup>

Also in opposition was another of Henry Charles Carey's nephews, Henry Charles Lea (1825-1909). Best known as a historian of the Spanish Inquisition, Lea was involved for many years with the family publishing company.<sup>88</sup> Lea was also active in the politics of international copyright. For example, he opposed the Dorsheimer bill, arguing against international copyright in letters to the editors of the *New York Tribune* and the *New York Evening Post*. These letters were also printed as a pamphlet.<sup>89</sup> Lea would later play an essential role in the passage of a compromise international copyright law, actually writing the clauses necessary to gain the support of protectionists and organized labor.

Other Philadelphians were also active against international copyright, though their actions are less-well documented. For example, publisher H.P. Hazard worked against an 1872 bill.<sup>90</sup> Another Philadelphia printer, Roger Sherman (1822-1886), proved particularly adroit at exploiting powerful ideas about copyright in printed pamphlets.<sup>91</sup> In general, the role of the Philadelphia Obstructionists has not received sufficient attention from scholars examining the political history of international copyright.

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<sup>87</sup> Henry Carey Baird, "Copyright: National and International." *Publishers' Weekly*. March 1, 1884. 268-270.

<sup>88</sup> Per the University of Pennsylvania's collection of Henry Charles Lea's papers, the business was successively named: Carey, Stewart & Company (1792-1817); M. Carey & Sons (1817-1822); H. C. Carey & I. Lea (1822-1827); Carey, Lea, & Carey (1827-1833); Carey, Lea & Blanchard (1833-1838); Lea & Blanchard (1838-1850); Blanchard & Lea (1851-1865); Henry C. Lea (1865-1885); Lea Brothers & Company (1885-1908); Lea & Febiger (1908-1995).

<sup>89</sup> Henry C. Lea "Dorsheimer Copyright Bill."

<sup>90</sup> Clark 109.

<sup>91</sup> The Rutherford B. Hayes Presidential Center has a small collection of pamphlets on international copyright written by Roger Sherman. These pamphlets were part of the personal collection of radical Republican Senator and Cabinet Secretary John Sherman (1823-1900). The two men were apparently not related.

## ***Supporting the International Copyright Act***

Ideologically contested as tariff, monopoly, framed as likely to raise the price of books, and faced by sophisticated and articulate opposition, international copyright passed Congress in the spring of 1891. Why? Was it the climate of the time or something more generalizable? Do theories about the tremendous growth of intellectual property events a century later help explain the passage of the Act? Conversely, can history be used to test theories about the growth of intellectual property at the end of the twentieth century?

One potential explanation locates the political success of the Act in the context of proliferating multinational agreements. For, whether in Philadelphia or abroad, international copyright law was a topic of diplomatic discussion throughout much of the world in the 1880s and 1890s. These decades saw the creation of a number of bilateral treaties and multi-nation copyright agreements.

Of these, the most lasting was the 1886 Berne Convention. The product of many rounds of talks, and much modified since, the Berne Convention obligated signatory nations to grant copyright protection to citizens of all signatory nations upon the same terms as their own.<sup>92</sup>

Ratifying nations were Germany, Belgium, Spain, France, Haiti, Italy, Switzerland, Tunis and Liberia. Great Britain also ratified, but did not implement all aspects of the Berne requirements.<sup>93</sup> Ratification by France and Great Britain extended Berne (after a fashion) to their colonies across the globe, including Algeria, Australia, Canada, India, and South Africa.<sup>94</sup> Several additional nations, including Japan, joined Berne before the close of the

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<sup>92</sup> Since the Berne Convention has been much amended, and many discussions focus on contemporary incarnations, older sources may be unusually useful. For example, see Bowker, 311-340.

<sup>93</sup> In the U.K., Berne compliance was still an issue a century later, in the Copyright, Designs and Patents Act of 1988.

<sup>94</sup> Effective enforcement of copyright law was sometimes impossible for colonial powers. For a short description of Canadian reaction and resentments, for example, see Barnes 138-152. Compare Seville, *Internationalisation* 114-118.



nineteenth century.

Since multilateral copyright agreements were apparently popular and prominent, this model suggests that passage of the International Copyright Act in the U.S. was a reaction to the climate of international cooperation or status-seeking. However, in 1891, Berne was not as important as postulated by this model. In addition to the United States, prominent non-participants included Austria-Hungary, Russia, and the nations of South America.<sup>95</sup> One nation, Montenegro, went so far as to join in 1893 – and then withdraw in 1900.<sup>96</sup> Evidently, the benefits of international cooperation via membership in a multilateral copyright agreement were not obvious to many nations.

The U.S. resisted many forms of multilateral copyright agreements until after the Second World War. In 1952, the U.S. joined the United-Nations sponsored Uniform Copyright Convention, and finally acceded to Berne on January 1, 1989, more than a century after the initial agreement.<sup>97</sup> Thus a model that posits the effects of a climate of international cooperation is not convincing for the 1890s.

In practical terms, there were significant legal differences between copyright as expressed in Berne and the U.S. tradition of copyright. Philosophically, Berne gave much more weight to the rights of the author. There were also differences of scope and eligibility – Berne, for example, protected musical performances.<sup>98</sup>

Berne eventually proposed a different foundational basis for the duration of copyright as well. The original 1790 U.S. duration of copyright – fourteen years (with a possible fourteen year renewal) stems from older patent law traditions, and thus from a doubling of

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<sup>95</sup> Argentina, Bolivia, Paraguay, Peru and Uruguay later signed a competing 1889 Montevideo agreement. Brazil and Chile participated in talks but refused to sign. See Bowker 330-331.

<sup>96</sup> Bowker 321

<sup>97</sup> Important revisions to U.S. for compliance to Berne requirements drove part of the Copyright Act of 1976, but joining was dependant upon the Berne Convention Implementation Act (1988).

<sup>98</sup> U.S. law was later changed.

the traditional seven year apprenticeship.<sup>99</sup> Berne initially left the duration of copyright to the implementing nation. However, reflecting Berne's commitment to the author, this was changed in 1908 to a uniform term of the life of the author, plus fifty years.

Berne and the U.S. also differed in how copyright could be administered. Most obviously, under Berne, copyright protection cannot depend on registration, compel a deposit copy, or require a copyright notice.<sup>100</sup> All of these were mandated by U.S. law, in some cases for nearly two centuries. Registration, for example, was required from the passage of the 1790 Copyright Act until the Copyright Act of 1976 went into effect on January 1, 1978.<sup>101</sup> Thus, a climate of multinational agreements is not a convincing explanation for the passage of the 1891 Act.

A second model based on the climate of the times suggests the late-nineteenth century epistemology of imperialism was a factor. Perhaps the 1890s context of colonialism and imperialism made it easier – ideologically and intellectually – to divide intangibles into distinct categories and imagine them as a species of property to be enforced by the laws of “civilized” nations.

However attractive this idea is, evidence for this level of abstraction is scanty in the political discourse of the day. Interestingly, one of the few examples to connect copyright with imperialism uses the behaviors of imperialism to defend American literary piracy. All U.S. publishers were pirates, wrote Roger Sherman, rhetorically demanding: “Does not the boarding hatchet of the Harpers’ still reek with the blood of Sir Arthur Sullivan?”<sup>102</sup>

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<sup>99</sup> MacLeod, *Inventing*. 18.

<sup>100</sup> Under the terms of the Copyright Act of 1976, registration was allowed but not required, except in the case of litigation.

<sup>101</sup> Registration is still required for legal actions of copyright infringement, but after 1978 the validity of a copyright was no longer dependant upon the registration.

<sup>102</sup> Roger Sherman, “Reasons Why” 15. Arthur Sullivan is best known for his collaborations with William Gilbert, including *H.M.S. Pinafore*, *Mikado*, and *Pirates of Penzance*. Gilbert & Sullivan operettas were often pirated in the U.S., and works like *Mikado* the subject of litigation. See Rosen, “Twilight of

Sherman did not condemn such behavior, seeing it as normal. Other nations were pirates too:

Have the English as a nation been less of “pirates” than we of America? Have they not just stolen Burmah? Are not the French trying their hand now on Cochin China? The Germans *going* for the Caroline and South Sea Islands? Is it not a fact that *man, unregenerate man*, will take anything he can lay his hands on, protected by law or not, if he thinks he can escape punishment?<sup>103</sup>

Sherman was not distressed by imperialism or piracy, but was enraged by U.S. publishers who had started as pirates but now sought to prevent others from following in their footsteps.

Although thought-provoking, Sherman’s vague gesture at scientific Darwinism is more convincingly connected to nations making policy decisions on the basis of competitive self-interest. His particular incarnation of imperialism is more a justification for mercantilism and protection than an advocacy for international copyright.

A third model posits a shift in the balance of trade for authored works as leading to a shift in copyright policy. Earlier in the nineteenth century, Americans read lots of British authors, but few American authors were widely read in Britain. Later in the century, this ratio changed.

Certainly, worries about the balance of authors and publishers were part of the politics of copyright earlier in the century. For example, back in 1837, South Carolina Senator William Campbell Preston opposed a copyright agreement with Britain because they had:

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the Opera Pirates.”

<sup>103</sup> Ibid., 15-16. Italics in original.

Two authors to our one, and were, therefore, more interested in the protection of mental labor; while we published three of four books to their one, and were therefore, more interested in protecting publishers.<sup>104</sup>

Later in the century this balance changed, especially after the massive overseas reprinting of *Uncle Tom's Cabin*.

Writing in *Daedalus*, Carla Hesse connects shifts in the balance of trade in intellectual property to the development of different legal philosophies of copyright across nations.<sup>105</sup> Exporting nations favored natural-rights doctrines of copyright, and importing nations preferred to take a utilitarian view. According to Hesse:

The United States offers an exemplar case. As it evolved from being a net importer of intellectual property to a net exporter, its legal doctrines for regulating intellectual property have tended to shift from the objectivist-utilitarian side of the legal balance to towards the universalist-natural rights side.<sup>106</sup>

Building on Hesse, this model proposes that a shift in the balance of trade leads to a shift in legal philosophy, and eventually to a shift in policy – in this case, tipping the scales in favor of international copyright.<sup>107</sup>

However, this model is much more persuasive if these changes are modeled as taking generations, or even centuries to effect the described changes. Legal philosophies change slowly. And after all, by the time the U.S. joined the Berne convention in 1989, it had been

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<sup>104</sup> Quoted at Dozer 84.

<sup>105</sup> Carla Hesse, "The Rise of Intellectual Property, 700 B.C.-A.D. 2000: An Idea in the Balance" *Daedalus*. Spring, 2002: 26-45.

<sup>106</sup> *Ibid.*, 40.

<sup>107</sup> Scholars like Mark Lemley would point to increased propertization instead of natural rights models of authorship as the causal factor in a similar model.

a net intellectual property exporter for a very long time.<sup>108</sup> Furthermore, the actual passage of the International Copyright Act was politically driven by protection of U.S. internal markets, not ambition to increased rewards from exports.

Application of a balance of trade model to the nineteenth-century U.S. also must account for the asymmetry of the copyright laws of various nations. Although the administrative details varied, U.S. authors could sometimes get copyright protection in Britain, as long as they were resident on British Empire soil at the time of publication. Mark Twain, for example, would vacation in Canada at the time of publication, applying for a Canadian copyright that would protect him throughout the British Empire.<sup>109</sup> This protection was not dependent upon U.S. protection of U.K. authors.<sup>110</sup>

## ***Kings of Yesterday***

The desirability of international agreements, a climate of imperialism, or a shift in the balance of trade in intellectual products may have played some small part in the practical politics of international copyright. However, in garnering political support for the Act, changes in the publishing world were crucial.

Described abstractly, one group, having established their dominance, seeks to limit future competition by changing the rules for newcomers. This model works particularly well for explaining the sea change in attitudes towards international copyright by some American publishers. Simply put, these publishers initially benefited from free reprinting and the lack of an international copyright. However, once these pirate publishers became dominant, they sought international copyright as a means to protection in domestic markets.

<sup>108</sup> A more precise determination of a just how long the U.S. has been a net exporter is highly dependant depends on just what is included as intellectual property and how trade in it is measured.

<sup>109</sup> Described by Vaidhyanathan, *Copyrights and Copywrongs* 56.

<sup>110</sup> British authors also had a variety of methods for seeking payment from U.S. publishers. *Uncle Tom's Cabin* aside, other nations were comparatively negligible markets for American writing.

A century later, Lawrence Lessig was describing a similar dynamic when he wrote: "The law, through 'property,' can be used by the kings of yesterday to protect themselves against the kings of tomorrow."<sup>111</sup>

There is considerable support for this model in the commentary of the day. New competition was portrayed as threatening and disruptive. For example, *Century* obsessively labeled the upstart publishers:

The new generation of piratical publishers who have come into existence since the war [...] have broken up the courtesy of the trade, through an ingenious system of piracy within piracy, and their piratical editions constitute the cheapest literature that the country has ever seen.<sup>112</sup>

Whether a failure to respect the (largely mythical) conventions of the industry, aggressive investment in modern equipment, innovative distribution methods, non-traditional sources of capital, cheaper non-union labor, or seeking out and developing new markets, the sources of disruption to older business models were endless. And as a result, "publishers who used to insist that piracy was necessary [...] now] strongly object to it, and insist that the foreign author must be protected."<sup>113</sup>

Philadelphian Roger Sherman made the same connection, in this case in an 1884 open letter to William Dorsheimer. For Sherman, it was simple:

I can understand fully why large bookmaking firms such as Harper & Bros., Appleton & Co., of New York, Henry C. Lea's Son & Co., and J.B. Lippincott & Co., of this city, favor the passage of an

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<sup>111</sup> Lessig, *Future of Ideas* xix.

<sup>112</sup> "Copyright Negotiations" *Century Illustrated Magazine*. March, 1882. 667.

<sup>113</sup> Ibid.

international copyright law, all of whom have publicly asserted and demonstrated their hostility to cheap reprints of foreign works in the country, as interfering with the sale of their more expensive and profitable editions.<sup>114</sup>

Established publishers wanted international copyright because cheap libraries cut into profits.

According to Sherman, the established publishers had tried to compete, but with markedly limited success:

Until recently these houses had a monopoly in the reproduction of these so-called reprints [...]. But there has sprung up of late years a class of publishers such as George Munro & Co., The Lakeside Publishing Company, American News Co., and others [...]. It was for this especial reason that Harpers issued the *Franklin Square Library* – that they might put a stop to further attempts in this direction. Having failed [illegible] they now propose to accomplish their ends by means of international copyright law.<sup>115</sup>

Unable to win in the marketplace, these publishers turned to the law. For Sherman, then aged in his early sixties, these barriers to future self-made publishers were deplorable. Prevented from the printing practices of their piratical predecessors, “where would be the hope of the young and enterprising man?”<sup>116</sup>

The *Chicago Tribune* joined Roger Sherman in connecting the

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<sup>114</sup> Roger Sherman, “An Open Letter.” 5. Bound in a pamphlet with “International Copyright (Reply): [letter] to the American Bookseller.” Philadelphia, 1884. See also Roger Sherman, “True Inwardness of the International Copyright Question.” Printed as part of “Open Letter to the Members of the American Copyright League” [pamphlet] Philadelphia, 1886.

<sup>115</sup> Sherman, “Open Letter.” 7-8. Italics in original.

<sup>116</sup> *Ibid.*, 5.

inability to compete with cheap reprints to changed attitudes by publishers. Interestingly, the *Tribune* suggests avoiding competition with cheap libraries spurred *more* support for American authors from established publishers. Succinctly:

Prior to 1875 all the publishers were opposed to an international copyright. Shortly afterwards followed the era of the cheap library reprints of foreign works. The old publishing houses, not caring to compete with them, turned their attention to American literature, with the result that it has greatly flourished since that date. The authors were in clover. They did not need the international copyright, but were dragooned into its advocacy by the old publishing houses, which were determined to choke off the cheap libraries and monopolize the foreign business.<sup>117</sup>

In this argument, publishers gained the support of American authors through deception.

The competition from upstart new publishers explains the change by publishers from opposition to advocacy of international copyright. Confronted with new business models, low barriers to entry into the market, and John Lovell's attempt to monopolize the cheap library, the aging giants of the publishing industry reversed course to support international copyright. International copyright would cut off the supply of new texts to rambunctious upstart publishers, regulate the market, and reduce competition. Publishers in 1837 opposed international copyright, but by the end of the century, the piratical publishers of mid-century had become the establishment. This change of heart by publishers was one of the essential elements of the passage of the international copyright bill.

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<sup>117</sup> "Loopholes in the International Copyright Law." *Chicago Daily Tribune* April 17, 1891. 4.



## ***Passage of the International Copyright Bill***

On a practical level, the 1891 passage of the International Copyright Act was a product of extremely messy politics. The enormously unpopular McKinley Tariff had made the 1890 election a disaster for the Republican Party – that November, they lost ninety-three seats and majority status in the House of Representatives.

In the spring, after this bloodbath, final passage of the International Copyright Act was one of the very last acts of the lame duck outgoing Congress. If not passed in these waning moments, serious reconsideration of the Act would have had to wait quite some time – the incoming Democratic House of Representatives was much less sympathetic to international copyright and had other political priorities.

Buried in the press of last-minute business, the actual passage of the Act was quite confused. The final applicable vote – a motion to reconsider – actually took place hours after the nominal end of the 51<sup>st</sup> Congress.<sup>118</sup>

Passage of the bill was widely reported. New York-based *Current Literature* even went so far as to print the full text of the bill.<sup>119</sup> Reaction in the pro-copyright press was generally celebratory. For example, the semi-monthly *Dial* – a determined Midwestern advocate for staid prose and international copyright – was frankly gleeful.<sup>120</sup> The bill was “a great triumph,” “a just reward,” and “a triumph of conscience and good morals”<sup>121</sup>

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<sup>118</sup> The clock had been ordered stopped. For one succinct summary of the political maneuvering, see George Haven Putnam, “Contest,” especially 54-63. Putnam attributes the last-minute passage of the bill through the House largely to the parliamentary maneuvering of then-Representative Henry Cabot Lodge (1824-1950), Republican of Massachusetts.

<sup>119</sup> “International Copyright Bill.” *Current Literature* 6:5 (1891), 484-9.

<sup>120</sup> Although reformed later, nineteenth century *Dial* found little to like in “bilge” by Henrik Ibsen, Walt Whitman, or Stephen Crane, preferring paeans to such timeless classics as *Elsie Venner* by Oliver Wendell Holmes. See Mott, *History of American Magazines*. Vol. 3, 539-543.

<sup>121</sup> “International Copyright a Fact.” *Dial: A Semi-monthly Journal of Literary*

One common motif connected copyright and civilization. In *Dial*, for example, passage of the bill was framed as “a man’s rights to the products of his own mental labor,” which principle was essential for “civilization.”<sup>122</sup> The absence of “author’s property” had encouraged foreign ideas about “our crudeness and provincialism.”<sup>123</sup> Thus, for *Dial*, the passage of the bill was “at once a promise of brighter days for American literature and a triumph for civilization.”<sup>124</sup>

Other publications took a similar stance. The triumph-of-civilization motif was shared by other publications. For example, *Century*, for example, described the bill as “in the interest of the whole country and of a higher civilization.”<sup>125</sup>

Other publications portrayed passage of the Act as the long-overdue recognition of a natural literary property right, or, alternatively, as a compromise by authors of these sacred principles. The latter examples claimed authors took the best deal they could get, and hoped for later improvements. These assorted examples of celebration and spin presumably served the agendas of the authors, but had no measurable impact upon the actual passage of the bill.

## ***Manufacturing Clause***

In Congress and in the press, the politics of the International Copyright Act were *not* primarily about policy abstractions like the benefits of international coordination, imperial ambition, the balance of trade, or a shift towards natural-rights conceptions of copyright. Instead of a compromise by authors – who had demonstrated their political impotency on the issue for decades – practical passage of

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*Criticism, Discussion, and Information*. March, 1891. 354. The appended summary of the bill contains errors about the manufacturing clause.

<sup>122</sup> Ibid.

<sup>123</sup> Ibid.

<sup>124</sup> Ibid., 355.

<sup>125</sup> “International Copyright Accomplished.” *Century Illustrated Magazine*. May, 1891. 148.

the International Copyright Act was a result of compromise by politically potent workers and publishers.

The essential component of this compromise was the protectionist manufacturing clause. Books, photos, chromos, and lithographs would have to be manufactured in the U.S. to qualify for copyright.<sup>126</sup>

Some later commentators express particular dislike for the manufacturing clause. William Patry calls it “a reactionary return to the monopolistic days” of the Stationer’s Company, protecting printers, not authors.<sup>127</sup> Marjorie McCannon writes it “bound authors to a sort of servitude,” continuing, “ironically, it was against printers that the Statute of Anne, on which our copyright law was based, purported to protect printers.”<sup>128</sup> However valid, these criticisms implicitly rely upon a romanticized idea of the importance of authors to the development of copyright. In the development of copyright law, authorial influence has usually been more smoke than fire – even the fundamental characteristics of copyright in Anglo-American law were determined through legal conflicts between booksellers.<sup>129</sup>

The idea of a manufacturing clause was as old as the movement for international copyright. Henry Clay included one in the first serious international copyright proposal, back in 1837.<sup>130</sup> The clause proved enduring, as well – some version of a manufacturing clause lingered in U.S. copyright law until 1986.<sup>131</sup>

In the 1891 International Copyright Act, inclusion of the manufacturing clause was a matter of political necessity. Putting

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<sup>126</sup> The manufacturing clause did not apply to engravings, cuts, music, or drama. See McCannon 1127-1130.

<sup>127</sup> Patry, *Copyright Law*. 48.

<sup>128</sup> McCannon 1125

<sup>129</sup> E.g. *Millar v. Taylor* (1769) and *Donaldson v. Beckett* (1774).

<sup>130</sup> McCannon 1128; Clark 43-4.

<sup>131</sup> Gradually narrowed in scope, by the 1980s the clause only applied to U.S. authors of some material who sought a U.S. copyright. Political support remained strong as late as 1982, when President Ronald Reagan vetoed an extension of the clause, but was overridden by Congress. Drahos and Braithwaite, 130-131.

together an early version of the bill, Senator Jonathan Chace, Republican of Rhode Island, actively sought the support of unions in the printing trades, lest their friends kill the bill in the House of Representatives.<sup>132</sup> And the support of the printers required both a manufacturing clause and some protectionist restrictions on imports.

Now opposed to cheap books, long-time opponents from the publishing world were ready for compromise. The relevant language of the bill was even written by one of the Philadelphia Obstructionists, publisher and historian Henry Charles Lea.<sup>133</sup> Lea, who had pointedly opposed the earlier Dorsheimer bill only a few years earlier, generally had good relations with the unions.

## ***Unions and International Copyright***

Support from the printing unions was very important to the passage of the bill.<sup>134</sup> After a manufacturing clause and import restrictions were included, Congress was flooded with union support for the Chace approach. Petitions were submitted to Congress.<sup>135</sup> The 140 delegates (including two women) of the 1890 annual meeting of the International Typographical Union endorsed the Chace plan “in strong terms.”<sup>136</sup> Even American Federation of Labor President Samuel Gompers declared his support.<sup>137</sup>

Like that of the established publishers, the support of unions for international copyright was a product of domestic competition.

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<sup>132</sup> Putnam “Contest.” 52.

<sup>133</sup> Putnam “Contest.” 53; Seville 232-236.

<sup>134</sup> There is very little written about the relationship between labor and international copyright. However, for pointers to some useful primary sources, see Meredith McGill, *American Literature and the Culture of Reprinting*, 296 n 21.

<sup>135</sup> McCannon 1130.

<sup>136</sup> “Printers at Atlanta.” *Washington Post*. June 10, 1890. 1. The International Typographers Union was founded in 1852, and is famously the subject of *Union Democracy: the Internal Politics of the International Typographical Union* by Seymour Martin Lipset, Martin Trow, and James S. Coleman (1956).

<sup>137</sup> “Eight Hour Movement.” *Washington Post*. Dec. 9, 1890 1. The AFL was largely made up of skilled trades, and the ITU was an influential member.

Aubert Clark attributes the protectionist movement among unions to the use of “cheap, female, non-union labor,” especially for cheap reprints.<sup>138</sup> Competition from rural or Western printers also motivated the union membership. Catherine Seville notes this letter from printer A.W. Hammond:

The robbery of English authors by the American publisher has resulted in bringing into the cities a large number of printers from the rural districts, who cannot correctly be called printers at all [...] A copyright law would enable us to gradually get rid of them, and for this reason it would be greatly welcomed by 9/10 of the Union.<sup>139</sup>

Fear of being undercut by cheap British printers had been supplemented by fear of domestic competition. In their view, the manufacturing clause would insure U.S. jobs, and international copyright would limit the competitive pressure at home.

Competition from other regions could come from both deskilled typesetters and from underemployed but mobile printers. For example, master printers imported printers from other regions to break an 1887 strike by Typographical Union No. 6, in New York.<sup>140</sup> One result of the strike was to move considerable typesetting from New York to New Jersey or Connecticut.<sup>141</sup> Another was to increase union support for international copyright.

With a manufacturing clause, printing unions were convinced supporters of international copyright. Tired of competing with the cheap libraries, established publishers were supporters. Authors, who might have been expected to make grand gestures of moral principles to literary property, were in no position to insist that a

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<sup>138</sup> Clark, 100-101.

<sup>139</sup> A.W. Hammond to Barnett [letter] quoted in Seville, *Internationalisation* 234 n268. Ellipsis in Seville.

<sup>140</sup> Tebbel, *History of Book Publishing* Vol. 2, 48-9.

<sup>141</sup> *Ibid.*, 49.

manufacturing clause was poison. The Philadelphia Obstructionists were either satisfied, or dead.<sup>142</sup> Cheap books and regional objections were overborne, and international copyright became U.S. law.

## Conclusion

Only months after the passage of the bill, Henry Holt commented for *Forum* on the anticipated effects of international copyright.<sup>143</sup> Among other effects, Holt looked to international copyright to resolve the apparently eternal crisis in bookselling. According to Holt, under the influence of cheap books and nontraditional distribution channels, “bookstores, except in favored spots, have suffered in number and quality.”<sup>144</sup> Holt continued:

The average American citizen’s source of intellectual pabulum is now the “news stand.” It and the toy shop with piles of pamphlet “libraries” at one end have too generally succeeded the bookstore. The old habit of dropping into the bookstore and buying the latest good thing [...] is now indulged in by few.<sup>145</sup>

Bookstores, as ever, were in crisis, but the new law would restore all.

A few years later, George Haven Putnam took a *Forum* turn at evaluating the law.<sup>146</sup> Noting that he was working without reliable statistical evidence, he considered the effect of the law on authors, readers, and publishers. More pessimistic than Holt, Putnam’s

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<sup>142</sup> An intellectual leader of protectionism, economist Henry Charles Carey died in 1879. Firebrand pamphleteer Roger Sherman died in 1886. Powerful protectionist Congressman William “Pig Iron” Kelley died in 1890.

<sup>143</sup> Henry Holt, “Our International Copyright Law.” *Forum* June, 1891. 438-445.

<sup>144</sup> *Ibid.*, 440.

<sup>145</sup> *Ibid.*, 441.

<sup>146</sup> Putnam, “Results of the Copyright Law.” *Forum*, Jan. 1894. 616-23. This essay was reprinted in Putnam’s *The Question of Copyright*.

evaluation mixes economics and snobbery.

Authors, according to Putnam, had benefited little. American authors had received less than they expected from England, and British authors were disappointed in their expectations of vast fortunes from “millions of American readers.”<sup>147</sup> International Copyright had not lived up to authorial hype.

Readers, continued Putnam, had benefited from the replacement of fifteen cent editions with those that cost fifty cents. In Putnam’s view, cheap literature, “bought for railroad reading” and “thrown away at the end of the journey” were hardly books at all – and a “decently printed half-dollar novel” was “a much better value for its cost.”<sup>148</sup> For Putnam, preserving the moral and aesthetic status of the conventional book form was more important than the price.

Putnam was also much more comfortable with a somewhat staid publishing industry. Without the competitive pressures of free reprinting, “editorial work can be done with proper deliberation” and publishers could take the time to provide “the best material in a satisfactory and attractive form.”<sup>149</sup> Chaos was prevented, and the pressures to innovate were muted.

Among elite readers who addressed the administration of the new law, the most common criticism concerned the effects of the law on books by French and German authors. Under the terms of the International Copyright Act, the U.S. edition had to be published simultaneously with the foreign one. This requirement created particular difficulties for books in languages other than English. Thus, readers hoping international copyright would lead to improved U.S. availability of texts in foreign languages were disappointed.

Other commentators focused on the problems the law caused for publishers. These critics found the language of the law sloppy, and the manufacturing clause full of loopholes. For example, *Musical Visitor* reprinted an 1893 call by the *New York Herald* for revision of the law. As written, the law was resulting in absurd fines, the *Herald*

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<sup>147</sup> Ibid., 618.

<sup>148</sup> Ibid., 619.

<sup>149</sup> Ibid., 621.

complained, with “ridiculously large damages being claimed for republishing a production of small value.”<sup>150</sup> The absurd fines and sloppy legal language led to “the expense and annoyance of abusive litigation.”

Problems with the existing copyright law led Congress to consolidate and extend the law in 1909.<sup>151</sup> Although the provisions for registration and deposit were little changed, there were some major changes. Congress, urged on by appeals from Mark Twain for the protection of literary property, extended the renewal term of copyright from fourteen to twenty-eight years.<sup>152</sup>

Faced with new technologies for recording sound, Congress also negotiated issues of control and monopoly by including in the new law provisions for a compulsory royalty.<sup>153</sup> Under the terms of this law, once the owner of a sheet-music copyright permitted any one manufacturer to mechanically reproduce the sound – by a wax cylinder or paper piano roll, for example – other people could freely record competing versions, as long as they paid the copyright holder a royalty of 2¢ per unit.<sup>154</sup> Coin-operated devices were exempt.<sup>155</sup>

Finally, the 1909 Act reiterated the terms of international copyright. Citizens of other nations who complied with the terms of the Act continued to be eligible for a U.S. copyright, provided their home nation granted similar protections to U.S. citizens.<sup>156</sup> Manufacturing, including, typesetting, printing, and binding, still had to take place in the U.S.<sup>157</sup> And the import of materials covered by a

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<sup>150</sup> “International Copyright Abuses.” *Musical Visitor: A Magazine of Musical Literature and Music*. Oct. 1893. 268.

<sup>151</sup> Act of 4 March, 1909. 60<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 35 Stat. 107.

<sup>152</sup> For a good summary of Twain’s approach, see Vaidhyathan, *Copyrights and Copywrongs*. 55-80.

<sup>153</sup> One superb article is Lisa Gitelman, “Reading Music, Reading Records, Reading Race: Musical Copyright and the U.S. Copyright Act of 1909.”

<sup>154</sup> Act of 4 March, 1909. §1e

<sup>155</sup> Ibid. This is sometimes called the “jukebox exception.”

<sup>156</sup> Ibid., §8.

<sup>157</sup> Ibid., §§15-16.



U.S. copyright was still restricted.<sup>158</sup>

These legal provisions of nineteenth-century copyright law lingered well into the twentieth century. Some, though much-changed, are still in effect today. The ideological elements lingered as well, but without the same political potency. In 2007, for example, few people (other than a few copyright activists) would think to connect copyright policy with a tax on knowledge, monopoly in the media industry, the high price of textbooks, or the maintenance of a democratic society. Such connections would have been much closer to the surface in the nineteenth-century United States.

People thought about copyright in complex and varied ways in the nineteenth century. These ways of thinking often had little or nothing to do with how authors thought about copyright, and might be completely unconnected from copyright law. For all that, the ideas described in this dissertation were widely held at various times. Twenty-first century copyright debate seems prone to losing this nuance and diversity. However, unpacking popular ideas about copyright in the nineteenth century might be quite useful for the people of the twenty-first century, as these older ideas may suggest creative approaches for thinking about contemporary copyright issues.

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<sup>158</sup> Ibid., §§31-33.





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A note on sources: Because of my need to get the broadest possible sample of copyright-related materials, I largely relied upon searchable electronic full-text databases for magazine and newspaper research. The advantage of this approach is that, for a skilled researcher, it quickly yields an extremely broad selection of relevant articles. The titles listed in this section are those that provided materials useful to this project.

*African Repository*  
*Albion, A Journal of News, Politics, and Literature*  
*American Almanac and Repository*  
*American Journal of Pharmacy*  
*American Jurist and Law Magazine*  
*American Law Review*  
*American Literary Gazette and Publisher's Circular*  
*American Monthly Magazine*  
*American Phrenological Journal*  
*American Publisher's Circular and Literary Gazette*  
*American Quarterly Review*  
*American Whig Review*  
*Appleton's Journal of Literature*  
*Arthur's Home Magazine*  
*Arcturus*  
*Atkinson's Saturday Evening Post*  
*Atlantic Journal*  
*Atlantic Monthly*  
*Ballou's Dollar Monthly Magazine*  
*Ballou's Pictorial Drawing Room Companion*  
*Baltimore Monthly Visiter* [sic]  
*Banner of the Constitution*  
*Baptist Quarterly Review*  
*Boston Cultivator*  
*Brother Jonathan*  
*Campbell's Foreign Monthly*  
*Century Illustrated*  
*Century: A Popular Quarterly*  
*Christian Examiner*  
*Church's Musical Visitor*

*Congressional Globe*  
*Continental Monthly*  
*Corsair*  
*Critic and Good Literature* [name varies]  
*Current Literature*  
*DeBow's Review*  
*Dial*  
*Eclectic Magazine*  
*Forest and Stream*  
*Forum*  
*Frank Leslie's Popular Monthly*  
*Galaxy*  
*Gentleman's Magazine*  
*Godey's Magazine and Lady's Book*  
*Graham's Lady's and Gentleman's Magazine*  
*Harper's Monthly*  
*Harper's Weekly*  
*Home*  
*International Magazine of Literature, Art and Science*  
*International Review*  
*Journal of the American Geological Society of New York*  
*Ladies Literary Cabinet*  
*Law Reporter*  
*Liberator*  
*Liberty (Not the Daughter but the Mother of Order)*  
*Lippincott's Monthly Magazine*  
*Literary Union: A Journal of Progress*  
*Literary World*  
*Literature: An Illustrated Weekly Magazine*  
*Littell's Living Age*  
*Magazine for the Million*  
*Magnolia; or Southern Apalachian* [sic]  
*Maine Monthly Magazine*  
*Manufacturer and Builder*  
*Medical News*  
*Medical and Surgical Reporter*  
*Merchants' Magazine*  
*Monthly Religious Magazine*  
*Musical Visitor*  
*National Era*  
*New England Historical and Genealogical Review*  
*New England Telegraph and Eclectic Review*  
*New Englander and Yale Review*

*New Mirror*  
*New Princeton Review*  
*New York Mirror*  
*New World*  
*New York Legal Observer*  
*New York Literary Gazette*  
*New York Review*  
*New York (Daily) Times*  
*New – Yorker*  
*Nile's National Register*  
*North American Magazine*  
*North American Review*  
*Ohio Medical and Surgical*  
*Old Guard*  
*Oliver Optic's Magazine: Our Boys and Girls*  
*Overland Monthly*  
*Pathfinder*  
*Political Science Quarterly*  
*Princeton Review*  
*Puck*  
*Putnam's Magazine*  
*Putnam's Monthly*  
*Round Table: A Saturday Review of Politics, Finance, Literatures, Society and Art.*  
*Sargent's New Monthly Magazine*  
*Saturday Evening Post*  
*Scientific American*  
*Scribner's Monthly*  
*Southern Literary Messenger*  
*Southern Quarterly Review*  
*Southern Review*  
*Spirit of the Times: A Chronicle of the Turf, Agriculture, Field Sports, Literature and the Stage*  
*United States Democratic Review*  
*United States Magazine*  
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