International Forum of the Centennial of Chinese Copyright Legislation

October 14-15 2010

Beijing, China

Copyright in Historical Perspective, or *Six Observations in Search of an Act* [*]

Prof Ronan Deazley

University of Glasgow

INTRODUCTION

This prestigious event – the *International Forum of the Centennial of Chinese Copyright Legislation* – has been organised by Renmin University to mark the centenary of China's first copyright law (under the Qing Dynasty): the Copyright Act 1910. This year also happens to coincide with the tercentenary of the passing of the so-called Statute of Anne 1710. The Statute of Anne was the first piece of copyright legislation enacted in Great Britain. As one of the stated themes of this conference concerns the history and the theoretical study of the copyright regime, in this paper I would like to present you with a set of six personal reflections upon the Statute of Anne. My hope, as an historian of the British copyright regime, is that these six reflections will serve to prompt broader questions about the nature of copyright, about the various competing interests which the copyright regime attempts to accommodate, about the way in which the contemporary copyright regime strikes a balance between those competing interests, and about the importance of grounding our understanding of the current copyright regime within a broader historical perspective.

The subtitle of my paper, *Six Observations in Search of an Act*, is taken from Luigi Pirandello's play *Six Characters in Search of an Author*. Nor am I the first within the copyright community to draw upon Pirandello. David Nimmer, in his lengthy article on "Copyright in

[*] A version of this paper was first published in *Global Copyright: Three Hundred Years since the Statute of Anne, from 1709 to Cyberspace*, ed. by L. Bently, U. Suthersanen, and P. Torremans (Cheltenham: Edward Elgar Press, 2010).

the Dead Sea Scrolls", presented "Six Case Studies in Search of an Author".[1] More recently, Jane Ginsburg elaborated "Six Principles in Search of an Author", while at the same time alerting us to the fact that "[r]eferences in copyright scholarship to Pirandello risk becoming trite".[2] While heedful of Prof Ginsburg's warning, I would nevertheless like to play out the use of Pirandello one more time. Indeed, I would tentatively offer a number of synergies between this paper and Pirandello's play.

First: Those familiar with *Six Characters* will be aware that not all of the Characters are realised with the same level of sophistication or depth, and purposefully so. The FATHER and STEPDAUGHTER are more fully realised than the MOTHER and the SON, whereas the BOY and the CHILD remain altogether more ambiguous and lacking in definition. Similarly, you will find that my six observations are not all drawn with an equal hand.

Second: Even those familiar with the play may not be aware that *Six Characters* had a number of previous incarnations before its final embodiment as a dramatic work.[3] Indeed, the practice of self-plagiarism lies at the heart of much of Pirandello's writing and method. Pirandello's novel, *Suo Marito* [*Her Husband*] was first published in 1911. It is a work primarily concerned with the process of artistic creation, and with notions of originality and authorship. Silvia Roncella, the novel's central character, is a writer who bears all the hallmarks of the classic conceit of the romantic author. Indeed, she even insists on giving her work away for free, a practice designed to frustrate her husband's attempts to appropriate and (economically) exploit the same. However, the works that are attributed to

---

[1] D. Nimmer, "Copyright in the Dead Sea Scrolls: Authorship and Originality", *Houston Law Review* 38 (2001-02): 1-217 (16-23).

[2] J. Ginsburg, "The Concept of Authorship in Comparative Copyright Law", *DePaul L Rev* 52 (2002-03): 1063-92 (1071 n.34, and 1072-91).

[3] For example, in *La Tragedio d'un personaggio* [*A Character's Tragedy*], a short story first published in 1911, Pirandello (as narrator) gives audience to characters that he may wish to write about at a future date. Dr Fileno, a character from a book which the narrator had been reading the previous night, complains about the way in which he has been written and asks the narrator to re-write his story. The parallels between *A Character's Tragedy* and *Six Authors* are compounded by the fact that passages of text from the former are later repeated word for word in the latter. About *Six Characters*, Ann Caesar writes: "[T]he theatre becomes the last resort for a group of characters at loggerheads with Pirandello, who has refused to take up their case after they have been ill-served by another writer. The breakdown in their relationship is re-enacted, not only on stage, but also in three short stories that were written before the play and a twenty-page preface added later. On each of these occasions Pirandello presents the events from a different point of view"; A. Hallamore Caesar, *Characters and Authors in Luigi Pirandello* (Oxford: Clarendon Press, 1998), 19.

Sylvia within the novel are actually re-cycled re-presentations of some of Pirandello's earlier texts. That is, Pirandello presents Sylvia as the author of Pirandello's own previous work. The boundaries between quotation and original text are blurred in the novel in a manner that encapsulates and problematises the extent to which Pirandello himself confused copying and creation throughout his literary career.[4] In many respects, this paper follows in that particular tradition.

Third: Pirandello's play ends in some considerable confusion, with the audience left trying to differentiate between artifice and reality: are the children actually dead?, was the action played out by the characters real or a fiction?, and so on. The bewilderment of the audience is foreshadowed within the work itself. In the opening scene, THE MANAGER bemoans that he is reduced to "putting on Pirandello's works, where nobody understands anything, and where the author plays the fool with us all". Now, I don't intend to play the fool with anyone who might take the time to read this paper, but I do wonder, by the time you have finished, you might share THE MANAGER'S sense of confusion, exasperation, and irritation.

In any event, let me turn to the first of my observations.

OBSERVATION 1

That an absence of copyright protection can often be beneficial in facilitating the emergence of new audiences, new markets, and the production of new cultural content …

The Statute of Anne 1710 provided the authors of "any book or books already composed and not printed and published or that shall hereafter be composed" with "the sole liberty of printing and reprinting such book and books for the term of fourteen years to commence from the first publishing the same and no longer".[5] Moreover, the Act also provided that, if

[4] For a discussion as to the significance of *Suo Marito* within Pirandello's work, see C. O'Rawe, *Authorial Echoes: Textuality and Self-Plagiarism in the Narrative of Luigi Pirandello* (London: Legenda, 2005), 107-46.

[5] An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, During the Times therein mentioned (the Statute of Anne) 1710, 8 Anne c.19, s.1.

the author the work was still alive after the expiration of that fourteen year period, then he or she would be granted an additional fourteen year period of protection in relation to the same.[6] Much of the copyright debate and litigation in Britain throughout the eighteenth century concerned the duration of the copyright term – whether it was bound by the finite times set out within the Statute of Anne or whether it was perpetual in duration at common law. This litigation culminated in the two landmark decisions of *Millar* v. *Taylor* (1769) and *Donaldson* v. *Becket* (1774). In *Millar*, a divided King's Bench, led by Lord Mansfield, concluded that copyright was a creature of the common law and as such lasted in perpetuity. In *Donaldson*, however, the House of Lords held that, whether copyright existed at common law or not, the duration of copyright in published material was limited to the periods of protection set out within the statute.[7]

Opinions differ as to the impact which the decision had upon the book trade. William St Clair, for example, describes *Donaldson* as "the most decisive event in the history of reading in England since the arrival of printing 300 years before";[8] it was, he writes, "a decisive moment for the whole subsequent development of notions of intellectual property, for the price of books and of access to texts, for the progress of reading, and for the subsequent course of the national culture widely defined".[9] After *Donaldson*, he notes, the market was characterised by a surge in published output, a rise in the annual growth of book titles, as well as a rise in the growth of provincial booksellers, book publishing, and circulating libraries.[10] At the same time, the price of works that were no longer copyright-

---

[6] Ibid., s.11.

[7] The exact nature of the decision in *Donaldson* still remains a matter of some controversy. For relevant commentary see: H. Abrams, "The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright", *Wayne Law Review*, 29 (1983): 1119-91; R. Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth-Century Britain (1695-1775)* (Oxford: Hart Publishing, 2004), 191-220; M. Rose, *Authors and Owners. The Invention of Copyright* (London: Harvard University Press, 1993), 92-112; J. Whicher, "The Ghost of Donaldson v Beckett: An Inquiry into the Constitutional Distribution of Powers over the Law of Literary Property in the United States", *Copyright Society of the USA*, 9 (1961-62): 102-51, 194-229.

[8] W. St Clair, *The Reading Nation in the Romantic Period* (Cambridge: Cambridge University Press, 2007), 109.

[9] Ibid., 111.

[10] Ibid., 118. The book trade, he estimates, experienced a four-fold increase in output during the last quarter of the eighteenth century; ibid.

protected dramatically decreased and a new low-cost and high-volume market developed, as these works became affordable, for the first time, for a new body of consumers.[11]

James Raven, on the other hand, downplays the significance of *Donaldson*. The decision has, he writes, "gained an importance in histories of the trade quite in excess of its true worth".[12] While not dismissing the relevance of the decision entirely, he suggests that the increased output of the late eighteenth century book trade is more appropriately explained by a complex set of factors impacting upon that trade from the 1740s onwards: the rise of the middle class and an increased importance of leisure time and leisure pursuits; the arrival of the novel as a literary genre; new promotional strategies, the cultivation of niche markets, financial and organisational restructuring within the trade itself, and so on.[13] That is, for Raven, *Donaldson* does not represent the kind of watershed moment that St Clair would have us believe.

It may be that Raven is right, that changes within the market and within the organisation of the book trade itself might well account for the increased output which the book trade experienced within the latter quarter of the eighteenth century. However, *Donaldson* almost certainly did have an impact upon the *type* of material produced, and in particular, upon the production of new work that was explicitly concerned with, and drew upon, the existing literary canon. In this regard, I want to consider the impact of the decision on the production of editions of James Thomson's *The Seasons*, the work at the centre of the *Donaldson* litigation.

James Thomson began publishing extracts from *The Seasons* in 1726 (*Winter, A Poem*), and a collected edition of the work in its entirety was first published in 1730 by John Millan. However, Andrew Millar, who initiated the action that would culminate in the *Donaldson* decision, first published the definitive (a revised and expanded) version of Thomson's work in 1744.[14] If we regard the publication of the 1744 edition of *The Seasons* as a new work – as I

---

[11] St Clair also notes, however, that the price of new copyright-protected works significantly increased; ibid., 120-21.

[12] J. Raven, *The Business of Books: Booksellers and the English Book Trade* (New Haven and London: Yale University Press, 2007), 231.

[13] Ibid., 131.

[14] About the 1744 edition, Campbell writes: "During 1743 and early 1744, Thomson worked on an elaborately revised and expanded edition of The Seasons, apparently with the assistance of his patron

think we should – then, as Thomson died in 1748, under the 1710 Act, the statutory copyright in that work would have expired by the end of 1758. It is no coincidence that from 1758 onwards a spate of 'unauthorised editions' were published in Dublin, Glasgow and Edinburgh (one of which included Alexander Donaldson's first impression of the work in 1761).[15] The emergence of these 'unauthorised editions' almost certainly prompted Millar, in 1759, to petition for and secure a Royal licence for "the sole printing & publishing" of a new edition of *The Whole Works of James Thomson* for an additional fourteen years.[16] When this 'Royal Quarto' edition first appeared in 1762, it was edited, and contained an introduction to the life and works of Thomson, by Patrick Murdoch.

Millar himself died in 1768. Between 1744 and 1768, Millar published and republished *The Seasons* at least nineteen times in various formats.[17] During this twenty-four year stewardship of *The Seasons* portfolio, Murdoch's essay (and his editing of the text) was the only innovation that Millar initiated in relation to the same. However, in the twenty-four years after the decision in *Donaldson*, the proliferation of competing versions of *The Seasons*

George Lyttleton. This enlarged edition of The Seasons was published in mid-July, 1744, in an edition of 1500 copies. Here Spring has 1173 lines; Summer has 1796 lines; Autumn has 1375 lines; and Winter has 1069 lines. Altogether, Thomson here expanded The Seasons from the 1730 edition by more than 1000 lines". Hilbert H. Campbell, *James Thomson (1700-1748): An Annotated Bibliography of Selected Editions and the Important Criticism* (New York & London: Garland Publishing, 1976), 13.

15 At least three unauthorized editions were published: (Dublin: 1758); (Glasgow/Dublin: 1760); (Edinburgh: Donaldson, 1761). Before 1758, the only time that *The Seasons* appears to have been published outside of London was in a two-volume edition of *The Works of James Thomson*, published by John Exshaw in Dublin in 1751, sandwiched between Millar's two four-volume editions of the same (in 1750 and 1752).

16 The terms of the Royal Licence extended to "forbidding and prohibiting all our subjects within our kingdoms of Great Britain & Ireland, & other Our Dominions, to reprint or abridge the same, either in the like, or any other volume or volumes whatsoever, or to import … any copies of the same, or any part thereof, reprinted beyond the seas, within the said term of fourteen years without the consent or approbation of the said Andrew Millar"; The National Archives (hereafter: TNA), SP/44/374, 78-80.

17 Millar published three editions of *The Works of James Thomson, in Four Volumes* (in 1750, 1752 and 1766), as well as two two-volumes editions of Thomson's collected works (in 1744 and 1762), one one-volume edition (in 1768), and at least one three-volume edition, all of which contained *The Seasons*. In addition, he published at least eleven editions of *The Seasons* as an individual work in its own right (these were published in 1744, 1746, 1752 [2], 1757, 1758 [2], 1762, 1766, 1767, and 1768). Of these single-volume editions, the last four editions (published in 1762, 1766, 1767, and 1768) each contained the introductory essay by Murdoch.

was considerable. Between 1775 and 1799, at least 75 different editions were published in Britain, four times more than had been published by Millar between 1744 and 1768.[18]

There was, naturally, considerable variation in these post-1774 editions. In the first place, a number of cheap editions were published without any introductory material or any accompanying illustrations.[19] Others were published without any introductory commentary but with new illustrations.[20] New editions containing Murdoch's introductory essay were published in a number of formats: some were published as they had been in 1762,[21] some omitted Millar's original illustrations,[22] and some incorporated new illustrations.[23] Others were published with a modified (an extended) version of Murdoch's essay, which itself had been first published in Kincaid, Bell and Robertson's (unauthorised) four volume edition of Thomson's works (in 1768). This extended version drew heavily upon Murdoch's original essay, but was expanded to include some additional biographical material largely taken from Robert Shiels' essay on Thomson in Theophilus Cibber's *The Lives of the Poets* (first published in 1753).[24] Again, as with the editions that reproduced Murdoch's essay in its original form, editions containing this expanded Introduction were published both with and without (existing and new) illustrations.[25]

Of particular interest, however, was the fact that a number of post-1774 editions were published with new *paratextual* material. In 1776 John French (and others) published an edition with "Notes, Illustrations, and a Complete Index" by George Wright. In 1779 John Murray published an edition with an introduction by the physician and writer John Aikin. Between 1789 and 1793 there were four other new editions of note. The first, published in

---

[18] Between 1800-24 another 83 editions of *The Seasons* would be printed in Britain (figures taken from R. Cohen, *The Art of Discrimination. Thomson's The Seasons and the Language of Criticism* (London: Routledge & Kegan Paul, 1964), Appendix I, 472-507).

[19] See for example: (Edinburgh and Glasgow: Adam and Wood, 1775); (London: Oxdale, 1776).

[20] See for example: (London: Wenman, 1790); (Edinburgh: Imray, 1797).

[21] See for example: (Edinburgh: Darling, 1775); (London: For the Booksellers, 1792).

[22] See for example: (Glasgow: Chapman & Duncan, 1775); (London: Taylor, 1790).

[23] See for example: (Edinburgh: Ross, 1795).

[24] T. Cibber, *The Lives of the Poets*, 5 vols (London: Griffith, 1753), 5: 190-218.

[25] For those with illustrations, see: (London: J. Donaldson, 1776); (Edinburgh: G. Alston); (London: E. Dilly, 1783); (London: William Lane, 1791). For those without any illustrations, see for example: (Berwick: Phorson, 1786).

Edinburgh, contained new illustrations and an introductory preface by the journalist and author Robert Heron.[26] Heron also contributed "an original life of the author, and a critical essay on the Seasons" to a subsequent edition published in Perth.[27] The third boasted "sixteen elegant engravings, designed by C[harles] Ansell" and included fourteen pages of new "Notes" on the work (by an unnamed contributor).[28] And, the fourth contained an index, glossary, and notes by the poet Percival Stockdale, as well as "plates engraved from paintings by Thomas Stothard and Henry Singleton".[29]

Whatever other political or cultural forces may have contributed to the rise in Thomson's popularity during the latter part of the eighteenth century,[30] it seems relatively uncontroversial to suggest that the dramatic proliferation of Thomson's work was due, in part at least, to the decision in *Donaldson* and the enforcement of the limited term of copyright protection set out within the Statute of Anne. Had the decision in *Donaldson* come down on the side of the London monopolists, one wonders whether any of this new content might have been produced at all. Or in other words, without the competition that the decision in *Donaldson* brought to the market, would any version other than Millar's 1762 Royal Quarto edition (ever) have been produced?

OBSERVATION 2

That the presence of a copyright regime need not necessarily impede the production of new, derivative, cultural goods …

In his work *The Eighth Commandment* the author and playwright Charles Reade railed against a number of "swindles" by which authors were being deprived of their just desserts. These included: the *adaptation swindle* (concerning the publication of works in translation); the *novel-dramatizing swindle*; the *drama-novelizing swindle*; and the *abridgment swindle*. That an author had no legal redress against another producing a fair abridgment of his or her work was, for

[26] (Edinburgh: Hill, 1789).

[27] (Perth: Morison and Son, 1793).

[28] (London/Edinburgh: Strachan, Stewart and Hill, 1792).

[29] (London: Hamilton, 1793).

[30] See R. Terry, ed., *James Thomson: Essays for the Tercentenary* (Liverpool: Liverpool University Press, 2000).

Reade, "[m]onstrous, idiotic, heartless, illegal, and iniquitous".[31] In short, England was "an author-swindling nation".[32]

The propriety of abridging another author's work was certainly an issue to which the public and parliament's attention had been drawn prior to the passing of the 1710 Act. The author and journalist Daniel Defoe touched upon the point in his *Essay on the Regulation of the Press* in 1704,[33] and returned to it the following year in the Preface to his *Second Volume of the Writings of the Author of the True-Born Englishman.*[34] The Statute of Anne, however, only prohibited the unauthorised "printing and reprinting" of books. Read literally, the adaptation or abridgement of protected works did not seem to fall within its remit. Was this an intentional omission on the part of the legislature?

It is well known – by historians of copyright in Britain at least – that the legality of abridging a copyright-protected work was first authoritatively pronounced upon in *Gyles* v. *Wilcox* (1741).[35] *Gyles* concerned an abridgement of a two-volume edition of Sir Matthew

---

[31] C. Reade, *The Eighth Commandment* (Boston: Ticknor and Fields, 1860), 152.

[32] Ibid., 132.

[33] Defoe complained that when "[a]n Author prints a Book, whether on a Civil or Religious Subject, Philosophy, History, or any Subject, if it be a large volume, it shall be immediately abridg'd by some mercenary Bookseller, employing a Hackney-writer, who shall give such a contrary Turn to the Sense, and such a false Idea of the Design, and so huddle Matters of the greatest Consequence together in abrupt Generals, that no greater Wrong can be done to the Subject; thus the sale of a Volume of twenty Shillings is spoil'd, by perswading People that the substance of the Book is contained in the Summary of 4*s.* price, the Undertaker is ruin'd, the Reader impos'd upon, and the Author's perhaps 20 Years Labour lost and undervalued"; D. Defoe, *An Essay on the Regulation of the Press* (London: 1704), 26. He continued: "[N]o Man has a Right to make any Abridgment of a Book, but the Proprietor of the Book; and I am sure no Man can be so well qualified for the doing it, as the Author, if alive, because no Man can be capable of knowing the true Sense of the Design, or of giving it a due Turn like him that compos'd it"; ibid., 26-27.

[34] Here Defoe complained that "Piratick Printers or Hackney Abridgers fill the World, the First with spurious and incorrect Copies, and the Latter with imperfect and absurd Representations, both in Fact, Stile, and Design", and continued that "'Tis in vain to exclaim at the Villany of these Practices, while no Law is left to punish them"; D. Defoe, *A Second Volume of the Writings of the Author of the True-Born Englishman* (London: 1705), Preface. Of course, both piratical printers and hackney abridgers (to use Defoe's parlance) would, in time, set upon Defoe's most popular and enduring work: *Robinson Crusoe*. For details, see: H.C. Hutchins, "Two Hitherto unrecorded Editions of Robinson Crusoe", *The Library* (1927): 58-72; H.C. Hutchins, *Robinson Crusoe and its Printing 1719-1731: A Bibliographical Study* (New York: Columbia University Press, 1925), 129-40; P. Rogers, "Classics and Chapbooks", in I. Rivers, ed., *Books and their Readers in Eighteenth Century England* (Baskerville: Leicester University Press, 1982), 27-45.

[35] *Gyles* v. *Wilcox* (1741) 2 Atk. 141, Barn. C. 368, 2 Eq. Ca. Abr. 697. For details, see: The National Archives at Kew, London (hereafter: TNA), C33/375/274 and C11/1828/27, m.1-4. For a previous

Hale's *Pleas of the Crown* first published by Fletcher Gyles, Thomas Woodward and Charles Davis in July 1736.[36] The litigation commenced in November 1737 when Gyles submitted his bill of complaint to the Court of Chancery about a work that was being prepared for publication by John Wilcox under the title *A Treatise of Modern Crown Law*. Before the resolution of the case, other bills of complaint that touched upon the question of abridgement were also lodged with the Chancery Court, in both *Austen* v. *Cave* (1739)[37] and *Read* v. *Hodges* (1740),[38] however neither action elicited a meaningful ruling from the Lord

---

discussion of *Gyles* by this author see: R. Deazley, "Commentary on Gyles v. Wilcox (1741)", in *Primary Sources on Copyright (1450-1900)*, ed. by L. Bently & M. Kretschmer (2008), www.copyrighthistory.org.

[36] Sir M. Hale, *Historia placitorum coronæ: The History of the Pleas of the Crown*, 2 vols (London: Gyles, Woodward and Davis, 1736).

[37] In *Austen* v. *Cave* (1739) the proprietors of Dr Joseph Trapp's book, *The Nature, Folly, Sin and Danger of Being Righteous Overmuch*, complained that Edward Cave was publishing the whole of their work by installment in the *Gentleman's Magazine*. Cave, who has generally been credited with 'inventing' the magazine format, entered a demurrer and answer to Austen's bill of complaint, denying that he ever intended to print Trapp's work in its entirety. Rather, he explained that for "several years last past" he had printed in his magazine "short extracts, parts of books, pamphlets or other writings newly published on various subjects" without any intent "to prejudice the proprietors" of those works. Indeed, he continued that the publication of such extracts "have many times if not mostly been agreeable to the proprietors of the books", and added that "the same hath never been complained of by them as being contrary to the said Act, or detrimental to them". As to the extent of his use of Austen's work, he set out that, while Trapp's book ran to around sixty-nine pages, he had only drawn upon thirty, and even then "several pages" were "wholly omitted" as well as "great parts of other pages" so that the material used occupied only three and a half pages of his magazine. Such use, he argued, was never intended to be prevented by the *Statute of Anne* 1710, as to hold otherwise would be greatly prejudicial to the spread of knowledge and learning. Lord Chancellor Hardwicke decided that Cave's demurrer was insufficient, and Cave was given additional time to resubmit his pleadings. No such pleadings were ever submitted. The only printed report of the case records that Lord Hardwicke rejected Cave's suggestion that the 1710 Act did not extend to the use of extracts from a work, commenting that "[i]t is not material what title you give a book, nor whether you print all at once or not". For details, see: *Austen* v. *Cave* (1739) 2 Eq. Ca. Abr. 522, and TNA, C33/371/493, 535, 586, C33/373/41, 224, 415, 535, and C11/1552/3, m.1-2. For a recent discussion of this case, see: I. Alexander, "All Change for the Digital Economy: Copyright and Business Models in the Early Eighteenth Century", *Berkeley Technology Law Journal* (*forthcoming*).

[38] In *Read* v. *Hodges* (1740) James Read had published a three-volume edition of John Motley's work *The History of the Life of Peter the First Emperor of Russia*, before James Hodges published the work in one volume (*The Life and Reign of the Czar Peter the Great*). Read filed a bill of complaint with the Court of Chancery claiming that Hodges's work was "[r]eally and truly the very same" as his own, and that it did not "materially differ" from his own work "except that some of the public memorials and copies of records are left out and omitted… merely with Intent and Design to reduce the bulk of the said Book so that he might be able to sell the same at an under rate". On 29 April 1740 Hodges submitted an answer responding to the bill of complaint in three principle ways. First, Hodges disputed that the plaintiff has been to "very great expence, industry and pains" in preparing the book, given that a "[g]reat part of the book is transcribed from and composed of several public tracts,

Chancellor.[39] In *Gyles* however Lord Chancellor Hardwicke set out a general point of principle concerning the legality of abridgements in the following terms:

> Where books are colourably shortened only, they are undoubtedly within the meaning of the Act of Parliament and a mere evasion of the statute, and cannot be called an abridgement. … But this must not be carried so far as to restrain persons from making a real and fair abridgement, for abridgements may with great propriety be called a new book, because, not only the paper and print, but the invention, learning and judgment of the author is shewn in them, and in many cases are extremely useful.[40]

Just over thirty years later, in *Strahan* v. *Newbery* (1774), Lord Chancellor Apsley followed suit commenting that: "[T]he act of abridgement is an act of understanding, employed in carrying a large work into a smaller compass, and rendering it less expensive, and more convenient both to the time and use of the reader". For Apsley, an abridgement was "not an act of plagiarism upon the original work, nor against any property of the author in it, but an allowable and meritorious work".[41]

---

memorials, and translations of papers … and particularly that no less than 108 pages [of the third volume] are transcribed with little or no variation of phrase from a book entitled The Present State of Russia (1722)". Second, he set out that he had "complied, printed and published an Abridgement" of the plaintiff's work in which there was "not one whole page of the complainants said book transcribed … without variation or abridging the same". Third, he argued that in any event his work was not the same work "but is of a different nature": it was "in the nature of an abridgment". He conceded that the two works must consist of the same "matter and substance" but continued that this "must be in the nature of things were an abridgment is fairly made". An injunction was granted by Lord Chancellor Hardwicke "until the hearing of the case" however the matter progressed no further. For details, see: *Read* v. *Hodges* (1740) TNA, C33/374/153, 250, 255, 275-76, 299 and C11/538/36, m.1-2. See also: Alexander, "All Change for the Digital Economy" (*forthcoming*).

[39] When *Read* v. *Hodges* was cited to Lord Hardwicke in the later case of *Tonson* v. *Walker* (1752) 3 Swans 672, 679, he is reported to have commented that he had considered Hodges's publication "an evasive abridgment" and so had allowed the reinstatement of the injunction until hearing. However, in *Gyles* itself, Lord Hardwicke remarked that the decision in *Read* had been "upon a motion only, and at the time I gave my thoughts without much consideration (and therefore shall not lay any great weight upon it)"; *Gyles* (1741) 2 Atk. 142.

[40] *Gyles* (1741) 2 Atk. 143.

[41] *Strahan* v. *Newbery* (1774) Lofft 775, 775-76. For a useful discussion of the background to this case, and the decision itself, see: M. Leeming, "Hawkesworth's *Voyages*: The First "Australian" Copyright Litigation", *Australian Journal of Legal History* (2005): 159-73. For another judicial pronouncement upon the legality of abridgement during this period, see: *Dodsley* v. *Kinnersley* (1761) Amb. 403.

Both *Gyles* and *Strahan* attracted much criticism throughout the latter part of the nineteenth century, from the American jurist Curtis (in 1847),[42] from the English jurist Copinger (in 1870),[43] and, of course, from Charles Reade himself. Reade considered *Strahan* to be an "idiotic and inhuman" decision, and complained that "[t]he property of authors is governed by judges' law, not by the Acts of the realm".[44] Reade's implication here is that, but for the intervention of the judiciary, the unauthorized abridging of copyright-protected works would (or should) have been caught by the Statute of Anne. And, this is certainly a reading of *Gyles* that many contemporary commentators would not seek to contest.[45] But, is this allegation of (unwelcome) judicial meddling fair?

One of the first royal printing privileges granted during Anne's reign was to William Delaune, then Vice-Chancellor of the University of Oxford, in relation to the University's three-volume edition of Clarendon's *History of the Rebellion and Civil Wars in England*. The first volume was first published in 1702, after which an abridged version (of that first volume) was issued by John Nutt the following year. It seems likely that the appearance of Nutt's abridgment prompted Delaune to petition the Queen for protection and, on 24 June 1703, a fourteen-year privilege was granted to the University "forbidding all our subjects to reprint *or abridge* the said history, or any part of it".[46]

---

[42] Curtis rejected the jurisprudence of the English courts on this issue, contending instead that the exclusive right to print and publish a book included "the whole book and every part of it", as well as "the style, or language, and expression; the learning, the facts, or the narrative; the sentiment and ideas, as far as their identity can be traced; and the form, arrangement and combination which the author has given to his materials". He continued: "These are, or may be, all distinct objects of the right of property; and in every work of originality, likely to be abridged, they are all important aspects of that right"; G.T. Curtis, *A Treatise on the Law of Copyright* (Boston: C.C. Little and J. Brown, 1847), 273.

[43] Copinger considered the principle established in *Gyles* to be "very unreasonable", and suggested that "[t]he law with reference to abridgements might … with justice receive some modification"; W.A. Copinger, *The Law of Copyright in Works of Literature and Art* (London: Stevens and Haynes, 1870), 36, 101-02.

[44] Reade, 152.

[45] Burrell and Coleman, for example, regard *Gyles* as an instance of judicial activism wherein it was first recognized that "there are circumstances in which the reproduction of part of another work without the copyright owner's consent is justified" as being in the public interest; R. Burrell and A. Coleman, *Copyright Exceptions: The Digital Impact* (Cambridge: Cambridge University Press, 2005), 254.

[46] The privilege forbids "all our subjects to reprint or abridge the said history, or any part of it, or to import, buy, vend, utter, or distribute any copies of the same, or any part thereof reprinted beyond

However, this type of privilege was not typical of its kind. Between the Restoration and the end of the seventeenth century, the majority of royal privileges simply prohibited printing, selling, and importing the work in question,[47] a trend that was continued throughout Anne's reign. Indeed, of the privileges granted by Anne,[48] only seven (or less than a third) specifically prohibited the printing and sale of variant forms of the work in question, whether by abridgment or translation.[49]

---

the seas within the said terme, without the consent and approbation of the said University"; TNA, SP/44/350, 354-55 (emphasis added).

[47] See for example the privileges granted to: John Ogilby for his versions of Homer's *Iliad* (in 1660), Aesop's *Fables* (in 1665), and the works of Virgil (in 1665). See also: H. Bond, *The Longitude Found* (London: Godbid, 1676); G. Burnet, *The Memoirs of the Lives and Actions of James and William, Dukes of Hamilton and Castlehead* (London: Royston, 1677); J. Spotswood, *The History of the Church and State of Scotland* (London: Royston, 1677); S. Lee, *A Collection of Names of the Merchants Living in and about the City of London* (London: Lee, 1677); R. Wallis, *London's Armory* (London: Wallis, 1677); E. Coles, *A Dictionary, English-Latin and Latin-English* (London: Parker, 1679); J. Browne, *A Complete Treatise of the Muscles as they appear in [the] Humane Body* (London: Newcombe, 1681); J.S. Weidenfeld, *Secretis Adeptorum* (London: Hills, 1684); D. Newhouse, *The Whole Art of Navigation* (London: Newhouse, 1685); F. Sandford, *The History of the Coronation of James II* (London: Newcombe, 1687); *The History of the Famous Edict of Nantes* (London: Dunton, 1694). For examples of late seventeenth century privileges that did prohibit the abridgement of the protected work, see: E. Ashmole, *The Institution, Laws & Ceremonies of the most Noble Order of the Garter* (London: Brooke, 1672) (the privilege prohibits printing the book "or any part thereof, or any Abridgment of the Laws or Ceremonies therein contained"); *Britannia, or A Geographical Description of the Kingdoms of England, Scotland, and Ireland* (London: Blome, 1673) (the privilege prohibits "epitomizing the work"); F. Sandford, *A Genealogical History of the Kings of England* (London: Newcomb, 1677) (the privilege prohibits printing the book "or any Part thereof, or any Abridgement of the [work]"); G. Collins, *Great Britain's Coasting Pilot* (London: Collins, 1693) (the privilege prohibits the printing of the work "or any part thereof, or to Epitomize the same … or any part thereof under the same, or any other Title or Name whatsoever"); J. Slezer, *Theatrum Scotiæ* (London: Swalle, 1693) (the privilege prohibits printing the books "or any of them, or any Abridgment, or any part of any of them").

[48] For a complete list of the privileges granted during this period, see S. Rogers, "The Use of Royal Licences for Printing in England, 1695-1760: A Bibliography", *The Library* (2000): 133-92.

[49] In addition to the privilege granted to Delaune, six other privileges were granted as follows: to Richard Blome for *Britannick Empire* (forbidding subjects "to epitomize the same in any volume, or in any language of speech whatsoever"), TNA, SP/44/353, 99; to Jacob Tonson for Lawrence Echard's *Complete History of England* (forbidding subjects "to reprint or abridge the said History or any part thereof"), TNA, SP/44/353, 118; to Richard Smith for *Ezechielis Spanhemii Liberi Baronis* (forbidding subjects "to reprint, translate, or abridge the said work or any part of it"), TNA, SP/44/354, 183; to John Chamberlayne for *Magna Britannia Notitia, or, The Present State of Great Britain* (forbidding subjects "to reprint, translate, or abridge the said work, or any part of it", TNA, SP/44/354, 341; to William Nichols for *A Comment on the Book of Common Prayer and Administration* (forbidding subjects "to reprint or abridge the said work or any part of it"), TNA, SP/44/353, 416; and to Egbert Sanger, Edmund Curl and John Pemberton for Sr Bulstrode Whitlocke's *Memorials of the English Affairs from the suppos'd Expedition of Brute to this Island to the End of the Reigne of King James the First* (forbidding subjects "to

The variation in the language and substance of these printing privileges provide an interesting context within which to reconsider the text of the Statute of Anne. A minority of them are obviously explicit about the issue of abridgment in a way that the legislation itself is not, and that specificity may provide an insight into the intended scope of the legislation. Abridgments published prior to the Statute of Anne (as well as those published afterwards) routinely justified their existence in a number of standard ways: they were meeting a need in relation to works that had become scarce in their original format;[50] they were opening the work up to a new audience that might otherwise find it inaccessible whether by virtue of content or, as was more often the case, by virtue of the price of the original;[51] or, they were improving the original work in excising mistakes, obsolete material, and long (unnecessary) digressions from the text.[52] So, in not explicitly extending the scope of the legislation to prohibit the production of abridgments and so on, can we divine an intention on the part of those drafting the legislation to encourage or facilitate the production of works of this nature? Perhaps the decisions of Hardwicke and Apsley need not smack of judicial activism

---

reprint or abridge the same either in the like or in any other volume or volumes whatsoever"), TNA, SP/44/353, 456.

[50] The preface to *The History of Scotch-Presbytery, being an Epitome of The Hind Let Loose, by Mr Shields* (London: Hindmarsh, 1692) notes that the original book "itself is not easily got".

[51] The preface to *The Novum Organum of Sir Francis Bacon, Epitomiz'd for a Clearer Understanding of his Natural History* (London: Lee, 1676) suggests that the work "might be of a singular use to such vertuosi amongst us, as are not perfectly acquainted with the Latine Tongue". See also the prefacatory remarks in: H. Bralesford, *The Poor Man's Help* (London: R. Clavell, 1689); E. Stacy, *The Whole Duty of Man Epitomiz'd for the Benefit of the Poor* (London: Lawrence, 1700); *An Answer to the Dissenters Pleas for Separation, or an Abridgment of the London Cases* (Cambridge: University Press, 1700); *Camden's Britannia Abridg'd, with Improvements and Continuations to the Present Time* (London: J.B. and Joseph Wild, 1701).

[52] The preface to Lawrence Echard's *Abridgment of Sir Walter Raleigh's History of the World* (London: Gelliflower, 1698) sets out that Raleigh had "not been without some considerable imperfections in respect to his History, which he has shewn in his too frequent and long digressions, and observations". Echard continues that: "All I have done, besides the expunging and shortening of some passages, is the correcting and altering of the style, which in most places was too obsolete". John Savage, who abridged *The Turkish History* (by Richard Knolles and Paul Rycaut) in 1701, explained that "by weeding out the superfluous embellishments of their stiles, cutting off excrescencies, and avoiding unnecessary digressions" he was able to "couch the matter more concisely" and give the reader "a nearer sight, and a clearer understanding of things, than when they are darkened with foreign additions, foisted in to no other purpose than to humour the author's ambition, in seeing their names in the title pages of large folios"; J. Savage, *The Turkish History* (London: Cleave, Roper, Bosville, and Basset, 1701), Preface. See also: *The Works of the Learned and Valiant Josephus* (London: Roper and Basset, 1699); *An Answer to the Dissenters Pleas for Separation*; *Camden's Britannia Abridg'd.*

at all. Perhaps they should be read as decisions that were in tune with both the spirit and the literal language of the legislation itself.

OBSERVATION 3

That an absence of copyright protection need not necessarily prevent the profitable exploitation of a work by the author …

One obvious point to make about the Statute of Anne is that, when compared with the current copyright regime, it provided a relatively thin and narrow form of copyright protection. By contrast, copyright today is a much distended construct. Copyright's expansion of late has been driven, in part, by arguments to the effect that "[a] rigorous and effective system for the protection of copyright and related rights is *necessary* to provide authors and producers with a reward for their creative efforts".[53] I don't want to discredit that claim entirely, but, when we get embroiled in the rhetoric of the need for legal protection to secure financial reward, we tend to overlook that authors can, and do, exploit their works, often with great success, even in the absence of a legal regime securing *de jure* protection for the same. Here, I turn to another author who, like Defoe, was particularly interested in copyright matters: Charles Dickens.

As is well known, Dickens wrote about, and lobbied for, international copyright protection on a number of occasions, but most famously (and for the first time) during his 1842 tour of America.[54] The media backlash that Dickens endured during that tour and its impact upon him (provoked by his position on the question of international copyright)

---

[53] *Copyright in the Knowledge Economy*, COM(2008) 466 final, 4 (emphasis added). These sentiments, of course, echo a number of the recitals to the *Information Society Directive* 2001/29/EC.

[54] See: Lawrence H. Houtchens, "Charles Dickens and International Copyright", *American Literature* 13 (1941): 18-28; K.J. Fielding, *The Speeches of Charles Dickens* (Oxford: Clarendon Press, 1960), 22-26; Alexander Welsh, *From Copyright to Copperfield: The Identity of Dickens* (Cambridge, Massachusetts: Harvard University Press, 1987); Gerhard Joseph, "Charles Dickens, International Copyright, and the Discretionary Silence of *Martin Chuzzlewit*", in *The Construction of Authorship: Textual Appropriation in Law and Literature*, ed. by Martha Woodmansee and Peter Jaszi (Durham NC: Duke University Press, 1994), 259-70; U. Suthersanen, "*Bleak House* or *Great Expectations*?", in *Copyright and Other Fairy Tales*, ed. by H. Porsdam (Cheltenham: Edward Elgar, 2007), 40-60; Larisa T. Castillo, "Natural Authority in Charles Dickens's *Martin Chuzzlewit* and the Copyright Act of 1842", *Nineteenth-Century Literature* 62 (2008): 435-64. See also Michael Slater, ed., *Dickens on America & the Americans* (The Harvester Press, 1979).

bubbles into the first novel that he wrote upon his return, *Martin Chuzzlewit*, which provided his readers with a particularly unflattering portrayal of both America and Americans.[55] It is not difficult to see in Colonel Diver and Jefferson Brick (who are responsible for the *New York Rowdy Journal*) a satirical take on the editors of the 'mammoth' newspapers that flourished in America between 1839 and 1844, which papers largely relied upon pirated material for their content.[56]

However, in 1868 when Dickens published a new postscript to *Chuzzlewit* his attitude to America had noticeably softened.[57] Having toured the US for a second time in late 1867 and early 1868, Dickens declared himself astounded by the changes that he had seen during that visit: "changes moral, changes physical, changes in the amount of land subdued and peopled, changes in the rise of vast new cities, changes in the growth of older cities almost out of all recognition, changes in the graces and amenities of life, [and] changes in the Press, without whose advancement no advancement can take place anywhere".[58] No doubt part of the explanation for this shift in attitude lay in the warm reception that Dickens enjoyed during this second tour (Dickens was careful to avoid any public discussion of copyright during this visit),[59] but there was another reason for his new-found affection for America. It was neatly captured by Dickens himself in *Chuzzlewit*, when, during young Martin

---

[55] With the exception of the good natured Mr. Bevan, the Americans that young Chuzzlewit encounters are a thoroughly dislikeable bunch who, as Castillo observes, invoke an ethic of natural right and independent self-interest to countenance "injustice[s] as diverse as slavery, suppression of free speech, slander, fraud, and [literary] piracy"; Castillo, 446. See also Welsh, 29-42.

[56] Houtchens, 23.

[57] The postscript itself was a modified version of an address that Dickens gave at a public dinner held in his honour by the New York Press Association on 18 April 1868, at the end of his second tour of the States. That speech is reproduced in full in Slater, 242-45. For the postscript, see Charles Dickens, *Martin Chuzzlewit*, ed. by Margaret Cardwell (Oxford: Clarendon Press, 1982), 855-56.

[58] Ibid., 855. Dickens continued by promising his American hosts a legacy, his personal commitment to record "that wherever I have been, in the smallest places equally with the largest, I have been received with unsurpassable politeness, delicacy, sweet temper, hospitality, consideration, and with unsurpassable respect for [my] privacy"; ibid. Moreover, this personal testimony, he suggested, would be republished as a postscript to *Chuzzlewit* "so long as my descendents have any legal right in my books"; ibid., 856. This passing reference to the "legal right" in his works was the only time that Dickens chose to publicly broach the question of copyright during his second visit to the States. A subtle *quid pro quo* was being offered by Dickens here: so long as his estate retained control over the circulation of his work, then Dickens's personal tribute to the qualities of American life, morals, and manners would remain in public circulation. In general, see: Castillo, 436; Slater, 62-64.

[59] Slater writes that his reception was so rapturous "it would make even the tremendous demonstrations of affection and delight he had experienced at home seem quite mild"; Slater, 52.

Chuzzlewit's first night in New York, he finds that the conversation of his dinner companions invariably turns to one subject: "All their cares, hopes, joys, affections, virtues, and associations, seemed to be melted down into dollars".[60]

To put it crudely: Dickens made an enormous amount of money. Since April 1858, he had been giving professional Readings of his own work in Britain, an initiative that had proved to be particularly lucrative,[61] and it was clear that he thought much might be gained by giving readings in the States.[62] That intuition proved correct. During the four and a half months that Dickens was in America, he gave 76 Readings in all, accumulating nearly £20,000 in the process,[63] over twice the figure that he had anticipated earning.[64] Moreover,

---

[60] Dickens continues: "Whatever the chance contributions that fell into the slow cauldron of their talk, they made the gruel thick and slab with dollars. Men were weighed by their dollars, measures gauged by their dollars; life was auctioneered, appraised, put up, and knocked down for its dollars. The next respectable thing to dollars was any venture having their attainment for its end. The more of that worthless ballast, honest and fair-dealing, which any man cast overboard from the ship of his Good Name and Good Intent, the more ample stowage-room he had for dollars. Make commerce one huge lie and mighty theft. Deface the banner of the nation for an idle rag; pollute it star by star; and cut out stripe by stripe as from the arm of a degraded soldier. Do anything for dollars! What a flag it is to *them!*" (266).

[61] On Dickens's Public Readings, see: Kate Field, *Pen Photographs of Charles Dickens's Readings. Taken from Life* (Boston: Loring, 1868); Charles Kent, *Charles Dickens as a Reader*, reprint edition with an Introduction by Philip Collins (England: Gregg International Publishers Limited, 1971); George Dolby, *Charles Dickens as I Knew Him: The Story of the Reading Tours in Great Britain and America (1866-1870)* (London: T. Fisher Unwin, 1887); Raymond Fitzsimons, *The Charles Dickens Show: An Account of his Public Readings, 1858-1870* (London: 1970); Philip Collins, ed., *Charles Dickens: The Public Readings* (Oxford: The Clarendon Press, 1975); Robert Woodall, "The public readings of Charles Dickens", *Blackwood's Magazine*, 326 (1979), 511; Martha L. Brunson, "Novelists as Platform Readers: Dickens, Clemens, and Stowe", in *Performance of Literature in Historical Perspectives*, ed. by David W. Thompson (Lanham: University Press of America, 1983), 651-82; Paul Schlicke, *Dickens and Popular Entertainment* (London: Allen & Unwin, 1985), 226-48; Helen Small, "A pulse of 124: Charles Dickens and a pathology of the mid-Victorian reading public", in *The Practice and Representation of Reading in England*, ed. by J. Raven, H. Small and N. Tadmor (Cambridge: Cambridge University Press, 1996), 263-90; Malcolm Andrews, *Charles Dickens and His Performing Selves: Dickens and the Public Readings* (Oxford: Oxford University Press, 2007).

[62] When he wrote to William Wills, his personal secretary, about the possibility of touring, Dickens was clear that "there *should* be something large, to set against the objections"; "the likelihood of making a very great addition to one's capital in half a year" was naturally "an immense consideration"; Dickens to W.H. Wills, 6 June 1867, *Letters*, xi, 377.

[63] Dickens to John Forster, April 1867, *Letters*, xii, 101: "We had great difficulty in getting our American accounts squared … my profit was within a hundred or so of £20,000. Supposing me to have got through the present engagement in good health, I shall have made by the Readings, *in two years*, £33,000: that is to say, £13,000 from the Chappells, and £20,000 from America … These figures are of course between ourselves; but don't you think them rather remarkable?" Dickens's earnings would have been even higher had he not insisted on exchanging dollars for gold before

Malcolm Andrews has calculated that Dickens' income from his writings averaged around £2,900 per year during the last 25 years of his life.[65] So, his Readings in America generated almost as much income as he would have earned from his publications throughout the last seven years of his life.[66] In short, the time that Dickens spent on tour in the States proved to be the most financially lucrative period of his long and successful career.[67]

Now, I'm not ashamed to admit that I am a fan of Dickens, but perhaps I should be ashamed to admit that and I spend too much of my time thinking about what Dickens might have thought about the current copyright regime. What would Dickens think about the phenomenon of P2P file sharing?, or about the Google Books Library Project?, or about the problem posed by so-called orphan works? That might some as bizarre, but I was pleased to discover recently that I'm not the only one who engages in such thought-experiments. During the parliamentary debates on the recently (and hastily) enacted *Digital Economy Act* 2010, for example, Lord Lucas observed that: "If Dickens had been alive today, he would look at the iPhone not as a threat but as a wonderful opportunity to get out there with drama in ways that no one had ever thought of before".[68]

---

returning to Britain. As the tour manager George Dolby recounts: "Supposing gold to have been at par, it will be seen from the figures named that the profits of the enterprise would have been nearly £38,000; but as Mr. Dickens had no faith in American securities at that time, he preferred to convert the currency we received into gold, paying the difference 39½ per cent., and an addition ¼ per cent. for the banker's commission"; Dolby, 332. See also Kent, 78-79.

64 Dickens wrote as follows: "If you were to work out the question of Reading profits here [in Britain], with [George] Dolby, you would find that it would take years to get £10,000. To get that sum in a heap so soon is an immense consideration to me – my wife's income to pay – a very expensive position to hold – and my boys with the curse of limpness upon them"; Dickens to W.H. Wills, 6 June 1867, *Letters*, xi, 375-77.

65 As Andrews notes, in 1867, the year in which he commenced his second American tour, Dickens could exceed the amount he earned from the publication of his works in that year by giving just over 50 two-hour Readings; Andrews, 45.

66 Nor was he unabashed about the same. Andrews relates how Dickens "gloated in detail on [the] sensational earnings" he amassed by his Readings; Andrews, 45. Similarly, Peter Ackroyd notes, "his correspondence in this period is rendered almost wearisome by [Dickens's] constant emphasis on the sums acquired and the sums expected"; Peter Ackroyd, *Dickens* (abridged version) (London: Vintage, 2002), 530.

67 Kent summed up the success of Dickens's American tour as follows: "In a single tour … he had appeared before upwards of 100,000 persons, earning at the same time, over 200,000 dollars within an interval of very little more than four months"; Kent, 89.

68 Hansard, *Digital Economy Bill*, Committee (House of Lords), 6 January 2010, column 160.

In any event, Dickens provides a particularly interesting spirit to try and channel in this regard. He was an author, an entertainer, an innovator, and a raconteur of the highest order. To be sure, he was acutely preoccupied with money and the accumulation of wealth. But, he was also a social reformer, and he believed in the importance of encouraging and democratizing access to culture. Everyone, he argued, had a "right to be amused".[69] He was an advocate of entertainment for entertainment's sake, but was also convinced in the virtues of marrying entertainment with education,[70] and he was particularly interested in promoting the benefits of education for both children in poverty and the adult working class.[71] Moreover, his belief in the role that education might play in the prevention of crime has been well documented.[72]

Without doubt, the general preoccupation which many Victorian middle class reformers had with advocating different forms of 'rational recreation' for working class

---

[69] C. Dickens, 'The Amusements of the People (Part 2)', *Household Words*, 1 (1850): 58.

[70] See, for example, his fictional account of the Dullborough Mechanics' Institute, printed in *The Uncommercial Traveller*, he gently lampooned the tendency of such institutions to offer dry and uninteresting fodder: "On referring to lists of the courses of lectures that had been given in this thriving Hall, I fancied I detected a shyness in admitting that human nature when at leisure has any desire whatsoever to be relieved and diverted … Thus, I observed that it was necessary for the members to be knocked on the head with Gas, Air, Water, Food, the Solar System, the Geological periods, Criticism on Milton, the Steam-engine, John Bunyan, and Arrow-Headed Inscriptions, before they might be tickled by those unaccountable choristers, the negro singers in the court costume of the reign of George the Second. Likewise, that they must be stunned by a weighty inquiry whether there was internal evidence in Shakespeare's works, to prove that his uncle by the mother's side lived for some years at Stoke Newington, before they were brought-to by a Miscellaneous Concert"; C. Dickens, 'Dullborough Town', in *The Uncommercial Traveller* (London: Chapman & Hall Ltd; and Humphrey Milford, 1902) (first published, 1861).

[71] Dickens was, throughout his life, active in supporting a number of orphanages and charity schools (or 'Ragged Schools') that provided free education (and very often food and clothing) for working class and poverty-stricken children; Philip Collins, *Dickens and Education* (London: MacMillan & Co, 1964), 3. In terms of his support for adult education, he presided as President of the Chatham Mechanics' Institution for thirteen years, giving no less that six (charitable) Public Readings to generate funds for the same. Indeed, most of the charitable readings that he gave in his later career were in support of Mechanics' Institutes and similar organisations. See: Philip Collins, "Dickens and Adult Education", *British Journal of Educational Studies* (1955) 115-27 (116-117); Andrews, 268-69. On Dickens's attitudes to education in general, see: James L. Hughes, *Dickens as an Educator* (New York: D. Appleton and Company, 1901); John Manning, *Dickens on Education* (Toronto: University of Toronto Press, 1959); Collins, *Dickens and Education*; Collins, "Dickens and Adult Education"; Philip Collins, *Dickens and Adult Education* (Leicester: University of Leicester, 1962).

[72] On the explicit link that Dickens made education and the prevention of crime, see in particular: Collins, *Dickens and Education*, v, 6, 72-73.

people,[73] from a twenty-first century perspective, appears both paternalistic and self-serving. We can certainly read such endeavours as the activities of "an interested ideology anxious to secure a disciplined future labour force",[74] and Dickens is not immune from this critique. But, his particular views on the nexus between culture, education, and crime, provide an interesting set of relationships and concerns through which to explore various contemporary copyright issues.

OBSERVATION 4

That one can be pro-author without being pro-*Author's Rights* …

It is sometimes the case that I am accused of being anti-author, and anti-copyright, or as one colleague so neatly put it, of "wanting to tear down the copyright house". Well, let me set the record straight: I am neither anti-author, nor am I anti-copyright. Indeed, I regard myself as being both a pro-author and a pro-copyright kind of person. And, this leads me to my fourth observation: that one can be pro-author without being pro-*Author's Rights*. Here, I'm using the term *Author's Rights* as a clumsy shorthand for the concept that authors, musicians, artists, and so on, have (and have always) enjoyed natural proprietary rights in the intangible cultural goods which they create – music, the image, and the text. That is an argument that lies at the heart of much of the debate and discussion throughout the eighteenth century as to the meaning and significance of the Statute of Anne, and it is an argument that I would reject. Absent the intervention of the legislature, no such thing as copyright exists. Copyright is no more or less than an institutional (legislative) fact. Or, to put it another way: Copyright is, and always has been, about policy, not property.

When parliament bowed to the lobbying of the book trade in passing the Statute of Anne, I don't think they were legislating in recognition of *Author's Rights*,[75] but I do think

---

[73] On working class recreation, and the concept of 'rational recreation', see: P. Bailey, *Leisure and Class in Victorian England: Rational recreation and the contest for control, 1830-1885* (London and New York: Methuen, 1978); James Walvin, *Leisure and Society 1830-1950* (London: Longman, 1978); Brad Beaven, *Leisure, citizenship and working-class men in Britain, 1850-1945* (Manchester: Manchester University Press, 2005).

[74] Walvin, 50 (Walvin, however, rejects any attempt to interpret the activities of the social and moral reformers of this period in such a one-dimensional manner).

[75] For further discussion, see Deazley, *On the Origin*, 40-42.

they made some choices that were pro-author in nature and intent. With the Statute of Anne there is clear evidence of an attempt to upset certain anti-competitive conventions and practices within the book trade, just as there is evidence of an attempt to recognise and empower the author as a significant figure in the production of "useful books". For the first time since the incorporation of the Stationers' Company in 1557 one no longer needed to be a member of the Company to register, publish, and sell books, and at least some authors, such as John Gay, took advantage of that fact.[76] More importantly perhaps, section 11 of the Act provided that, after the expiration of the fourteen year period of protection for new books (that is, books first published after 10 April 1710), "the sole Right of printing or disposing of Copies shall return to the Authors thereof, if they are then living, for another Term of Fourteen years". As we shall see, it seems entirely likely that this provision was intended to prioritize and promote the interests of the author, as opposed to those of the bookseller or the printer who might have purchased and first published the work in question.[77]

OBSERVATION 5

That just because the book trade (or indeed any creative industry) suggests that they are acting in the best interests of authors, doesn't mean that they always are …

When, towards the end of the seventeenth century, the book trade petitioned parliament for a reintroduction of the *Licensing Act* 1662, they did so with reference to the importance of

[76] John Gay published *Polly* (his sequel to *The Beggar's Opera*) by subscription with the help and support of a number of his aristocratic patrons, and, in particular, Catherine Douglas, the Duchess of Queensberry. Whereas Gay had sold his copyright in both *The Beggar's Opera* and his first collection of *Fables* to the publisher Jacob Tonson and the printer John Watts for 90 guineas, the decision to publish *Polly* in his own name would prove to be far more lucrative. Burgess, for example, estimates that as a result of publishing the work, Gay amassed something in the region of £1200; C.F. Burgess, ed., *The Letters of John Gay* (Oxford: Clarendon Press, 1966), 79, n.3. For additional commentary, see R. Deazley (2008), "Commentary on *Baller* v. *Watson* (1737)", in *Primary Sources on Copyright (1450-1900)*, ed. by L. Bently & M. Kretschmer <www.copyrighthistory.org> (hereafter: *Primary Sources*). For examples of other authors who successfully published their own work during this period, see Sher, 216-24. Moreover, in a review of 360 Scottish Enlightenment books published between 1746 and 1800, Sher has calculated that almost 40 per cent were entered at Stationers' Hall at least once, and that of those works nearly one-third (or 43 titles) were registered in the name of the author or the editor of the work, and not the publisher; Sher, 243.

[77] For further discussion, see Deazley, *On the Origin*, 42-43. See also the commentary in *The Observator*, Vol.IX, No.6 (11-15 February 1710), 1, discussed in more detail below.

securing both the State and the Church (ideologically speaking), as well as their own long-standing properties.[78] At this time, little mention was made of the interests and concerns of authors. Indeed, it was only after it became clear that parliament was unwilling to re-introduce the *Licensing Act* (or indeed any system of censorship that might, at the same time, also serve the economic interests of the book trade), and after Defoe had published his *Essay on the Regulation of the Press*, that the booksellers began to change their rhetorical tack.

From 1706 onwards, petitions and pamphlets prepared on behalf of the trade no longer called for a revival of the 1662 Act, but instead placed the author at the centre of their arguments for new legislation.[79] Not only was it reasonable that an author "should have all the advantages that may possibly be allowed him for his writings",[80] but, without a secure property in books, no bookseller would be able to "give a consideration even for the most valuable copies of books: By which means, learned men will be wholly discouraged from propagating the most useful parts of knowledge and literature".[81] In addition, there was also an author's family and dependants to consider. As one pamphlet put it: "Regularity in Property of Printing, is equally beneficial to every body exercising the Trade; the Poor and the Weak, that happen to be favour'd by an Author, enjoy the benefit of this Order as much as the Rich and the Strong; whereby a Copy may be (and in Fact has often been) the Support of a Widow and Children".[82]

---

[78] See for example *Reasons humbly offer'd to the consideration of the Honorable House of Commons, shewing the great necessity of having a Bill for the regulating of Printing and Printing-Presses*, Lincolns Inn Library, MP102 Fol.311.

[79] See: Rose, 34-36; Deazley, *On the Origin*, 31-34.

[80] *Reasons Humbly Offer'd for the Bill for Encouragement of Learning, and for Securing the Property of Copies of Books to the Rightful Owners thereof*, Lincolns Inn Library, MP102 Fol.100.

[81] *Reasons humbly Offer'd for a Bill for the Encouragement of Learning, and Improvement of Printing*, Lincolns Inn Library, MP102 Fol.312.

[82] *The Case of the Booksellers Right to their Copies, or sole Power of Printing their respective Books, represented to the Parliament* (1709), Lincolns Inn Library, MP102 Fol.103. See also the comments of Joseph Addison in *The Tatler*, 1 December 1709 ("The most eminent and useful Author of the Age we live in, after having laid out a Princely Revenue in Works of Charity and Beneficence … would have left the Person in the World who was the dearest to him in a narrow Condition, had not the Sale of his immortal Writings brought her in a very considerable Dowry"), and of Daniel Defoe in his *Review*, 6 December 1709 ("To print another Man's Copy, is much worse than robbing him on the Highway; for the Thief takes only what he finds about him, but the Pyrate Printer takes away his inheritance – An elaborate Work, a long studied Treatise, a painfully collected History; it both is and ought to be the Due, not of the Author only, but of his Family and Children").

But, regardless of this rhetorical posturing on the part of the booksellers, it is important to keep in mind that the 1710 Act was, first and foremost, lobbied for and secured by the book trade in the pursuit of its own interests. Consider, for example, the discussion about the proposed reversionary copyright term (what would become s.11) in *The Observator*, the journal founded by John Tutchin in 1702. "[D]esign'd as a Kindness to us Authors", it was suggested that the proposal might provide:

> [A] Security to Authors against being ill treated or impos'd upon by Booksellers, who run away with the Profits of their Labours, which sometimes happens to be very considerable, when Books take and become of standing use, or admit of several impressions in a little Time … so that Authors not being able to foresee this, because Copies are like Ships put to Sea, whose prosperous or unfortunate Voyage is not to be foreseen, they have nothing more that their first Copy-Money, let the Book sell ever so well.

The Observator however was not well-disposed to that point of view. The editor conceded that such a clause "looks with a kind Aspect towards Authors", but continued that "in the Event 'twill prove detrimental to them, as well as to Buyers".[83] For one thing, if booksellers were to be tied to the first fourteen year term, they would "only give Copy-Money in proportion". But in any event, he continued, "if a Book happen to be of standing use, the Bookseller will print so many before his Time expire, as will make the Reversion of little or any Profit to the Author or his Assignees".[84] Authors, the editor suggested, would be better to rely upon

---

Members of the book trade were often keen to emphasis that they had their own dependants that were reliant upon the existence of a secure property in books. For example, in *The Booksellers humble address to the Honorable House of Commons, In behalf of a Bill for Encouragement of Learning* the petitioners set out that: "[B]y refusing this Bill [the 1710 Act] innumerable inconveniences will ensue, such as the depriving many thousand mechanics and shopkeepers of their livelihood, destroying the paper manufacture in this nation, [and] reducing widows and children who at present subsist wholly by the maintenance of this Property to extreme poverty"; Bodleian, fol.w.666(227).

[83] Although it remains unclear as to who was responsible for the content and editing of *The Observator* after Tutchin's death in 1707, it appears that George Ridpath had assumed editorial control of the journal by 1709 (and continued as editor until *The Observator* ceased publication in 1712); W.R. McLeod and V.B. McLeod, *A Graphical Directory of English Newspapers and Periodicals, 1702-1714* (Morgantown: West Virginia University, 1982), 38.

[84] *The Observator*, Vol.IX, No.6 (11-15 February 1710), 1.

contractual relations rather than the suggested proviso to secure their interests in this regard.[85]

That the interests of the book trade might not always be in perfect alignment with the interests of authors is an obvious but an important point to reiterate. That authors might suffer as a result of the exploitative activities of their publishers is an idea that chimes with much contemporary scholarship upon the operation of the book trade in the eighteenth century, and in particular with the notion that authors were often very poorly paid for their work.[86] To be sure, some authors could and did retain control of their own copyright by self-publishing, by entering into profit-sharing arrangements with their publishers, and so on,[87] but in general, these arrangements tended to serve the interests of the booksellers as much as they did the authors themselves. For the most part, however, booksellers would simply purchase an author's copyright outright,[88] including the author's reversionary interest set out

---

[85] "Authors may easily prevent the former Inconvenience, by agreeing for so much for every future Impression, or according to the Number of the first, which he may know by having Access to the Printers, Publishers, and Booksellers Accounts, and may make that Liberty Part of his Bargain"; ibid.

Interestingly, the unsuccessful *Copyright Bill* of 1737, which proposed to grant "the sole right of printing books" to authors (their executors, administrators, or assigns) for the duration of their life plus eleven years thereafter (Clause 1), also provided that no author would be able to sell, assign or transfer his copyright to any other person for any period longer than 10 years (except by testamentary disposition) (Clause 15). As the preamble to this clause made clear, it was intended to address the fact that "the true worth of books and writings is, in many cases, not found out till a considerable time after the publication thereof, and authors, who are in necessity, may often be tempted absolutely to sell and alienate the right which they have to the original copies of the books which they have composed, before the value thereof is known, and may thereby put it out of their own power to alter and correct their compositions, upon maturer judgement and reflection". The increased control that authors would have enjoyed over the ongoing exploitation of their work as a result of this proposal would, in terms of eighteenth century author-publisher relations, have been quite revolutionary. See: *An Act for the Encouragement of Learning by the more Effectual Securing the sole Right of printing Books to the Authors thereof* (the 1737 Bill), British Library, BM 357.c.7.(41); 'Booksellers' Bill (1737)', in *Primary Sources*.

[86] See for example Raven, 230 ("Many authors were paid paltry sums for their initial surrender of rights to works which booksellers knew were very unlikely to be reprinted or to return much profit in their own right. Sometimes such cheap initial purchases proved to have a surprisingly long-term value at the auctions of reprint rights … but the majority of titles published did not reach a further edition.").

[87] In general, see: V. Bonham-Carter, *Authors by Profession*, 2 vols (Los Altos, CA: William Kaufmann, 1978), 1: 25-28; St Clair, 161-68; Sher, 195-261.

[88] See: J. Hepburn, *The Author's Empty Purse and the Rise of the Literary Agent* (London: Oxford University Press, 1968), 7 ("[U]ntil nearly the end of the nineteenth century, most reputable writers sold their work outright. The publisher took all the monetary risk, and above his costs, he kept all the profit for himself, whether it was meager or huge. There are recorded cases of virtuous publishers

within s.11 of the Statute of Anne.[89] For example, when James Thomson sold *Summer*, *Autumn*, and *Winter*, to John Millan in July 1729, he transferred "the Intire Right and Property to [Millan] and his Heirs Executors and Administrators *forever*".[90] Moreover, the legality of this practice was eventually affirmed in *Carnan* v. *Bowles* (1786) when the court ruled that an assignment of an author's "interest" in his work necessarily included both the initial and the contingent fourteen-year terms set out in the legislation.[91]

As Richard Sher makes clear, however, we must be wary of indulging in overly broad generalisations when considering author-publisher relations at this time.[92] Indeed, *The Observator* pointed out that "if Booksellers be generous, and Men of Substance, it seldom happens that they don't consider the Author according to the Currency of his Book, over and above the Agreement",[93] and there are many examples of publishers making *ex gratia*

---

who spontaneously gave additional sums to authors of profitable books; but most such authors had to be content with fame and perhaps a better price on the next book"); Bonham-Carter, 1: 25 ("[E]ven after the [*Statute of Anne*] the practice of selling copyright outright remained the general rule"); Raven, 333 ("[M]ost writers in early modern and eighteenth-century England, and certainly most first-time writers, considered only outright copyright sale (even if some were able to restrict it to one edition) or full self-financing (thus acting as publishers themselves)").

[89] Of course, selling all rights in a work in advance of publication, in exchange for a guaranteed fixed sum, was also an attractive option for many authors who were uncertain as to whether their work might prove successful, or who simply wanted to avoid the trouble of having to negotiate with their publisher. As David Hume said of the sale of his first two volumes of his *History of England* to Andrew Millar in 1757: "It is chiefly in order to avoid the Trouble and Perplexity of such Schemes that I desire at once to part with all the Property"; quoted in Sher, 244.

[90] "Thomson's Assignment of Copyright to John Millan" (18 July 1729), in *James Thomson (1700-1748): Letters and Documents*, ed. by A.D. McKillop (Lawrence: University of Kansas Press, 1958), 63-64 (emphasis added). Similarly, when Millan subsequently sold the copyright in these poems to Andrew Millar, the contract re-iterated that "John Millan now stands vested with the sole property and Right of printing publishing disposing of and assigning the said Coppys and the Right of printing and publishing the same for ever"; "John Millan's Assignment of copyright to Andrew Millar" (16 June 1738), ibid., 121.

[91] *Carnan* v. *Bowles* (1786) 2 Bro.C.R. 80, 83-84 (Lord Chancellor Thurlow: "[I]t strikes me that the contingent interest must pass by the word interest in the grant. He conveys all his interest in the copyright: the assignment must have been made upon the idea of a perpetuity; and it is probable not a syllable was said or thought of, respecting the contingent right. They merely followed the old precedents of such conveyances. It must, I think, be considered as conveying his whole right. If he had meant to convey his first term only, he should have said so").

[92] "Publishers could be strikingly devious but also remarkably generous in their dealings with authors, and the terms of publication varied enormously from book to book, and sometimes from volume to volume and edition to edition"; Sher, 214-15.

[93] *The Observator*, Vol.IX, No.6 (11-15 February 1710), 1.

payments to their authors whenever a publication proved to be particularly successful to support this claim.[94] Andrew Millar, of course, was famously lauded by Samuel Johnson as the man who had "raised the price of literature",[95] and, it is certainly true that some publishers, such as Millar and William Strahan, played an important role in increasing the payments received by authors for their work such that authorship became an increasingly viable profession in its own right. Moreover, in addition to the copy money that authors received for their works, publishers often supported their authors in other ways, in providing and arranging hospitality and entertainments, in brokering advantageous social or political introductions, or by underwriting major publishing projects such as Johnson's *Dictonary* or John Sinclair's *Statistical Account of Scotland* which projects might not otherwise have been undertaken.[96]

And, just as some publishers might prove to be very generous towards, and supportive of, their published authors, conversely, the behaviour and demands of authors could often prove to be troublesome and unreasonable. As Sher notes, publishers such as Millar and Strahan "were not always comfortable in the new world they had created".[97] In the early 1770s, for example, Strahan had encouraged his two Edinburgh co-publishers, John Balfour and William Creech, to establish a coalition which, he suggested, "would be of great use in future Purchases, and prevent Authors from raising their Demands to the enormous Heighth they have done of late".[98] And, to return to *The Observator*, the editor was keen to draw attention to the fact that authors often acted in ways that undermined the interests of both booksellers and the public: "[I]n Justice Booksellers ought also to be secured against the Frauds of Authors, some of whom have been known to sell the same Thing to others, under Pretence of Additions or Emandations, which makes the first Impression useless, both to Booksellers and the Buyers". He continued that care should be taken "to prevent

---

[94] Hepburn, 7 ("There are recorded cases of virtuous publishers who spontaneously gave additional sums to authors of profitable books; but most such authors had to be content with fame and perhaps a better price on the next book").

[95] J. Boswell, *Life of Johnson*, ed. by R.W. Chapman, with an Introduction by Pat Rogers (Oxford: Oxford University Press, 1980), 205-06.

[96] Sher, 197-99, 424-28.

[97] Ibid., 346.

[98] Quoted in ibid., 344 (in general, see Sher, 325-61).

such Frauds, and that Additions or Emandations should be printed separately for the Benefit of Buyers, and that the first Proprietor should have the Proffer of 'em, before others, and if they think fit to reuse them, the Author is then at liberty to do as he pleases with them".[99]

And yet, even if we concede that sometimes publishers could be generous towards their authors, and that sometimes authors could be unscrupulous and demanding, on balance it would seem that authors, as a profession, did have reason to be resentful about the way in which booksellers, as a profession, conducted their business. As Raven writes, at the end of the eighteenth century, "[t]he unpopularity of booksellers with authors and with the public testified to the commercial success of so many manufacturers and sellers of literature – and precisely because, at least in the general perception, success too often came at the expense of writers' livelihoods and readers' purses".[100]

* * *

So far, throughout the course of this paper I have tried to do little more than begin to identify and pick at various threads of research that, in their different ways, might assist in deepening our understanding and appreciation of the Statute of Anne. But why bother? Within the context of the current digital environment, why bother with history at all? This brings me to my final observation.

OBSERVATION 6

That writing the history of copyright is an important but an impossible task …

It is not the case that in studying the past we can hope to unearth any necessary or essential truths about copyright law or policy, or about the role that the law plays in shaping and influencing creative endeavour and output, or indeed about the human condition. In general, history can do little more than provide a lens through which we might better examine and contemplate our current situation and our future decisions. As John Arnold neatly puts it,

---

[99] *The Observator*, Vol.IX, No.6 (11-15 February 1710), 1.

[100] Raven, 351. See also Sher, 213 ("[B]ooksellers as a whole were to be regarded with suspicion because they stood on the other side of the divide separating authors from their books. / Authors usually expressed these suspicions among themselves, not wishing to alienate those responsible for putting their words into print".)

"[t]o study history is to study ourselves", and "to think differently about oneself … is also to be made aware of the possibility of doing things differently".[101] Much of the value of historical analysis lies in the fact that it can often provide us with both the tools and the vocabulary with which to engage in oppositional ways of thinking, while at the same time reminding us about the potential and possibility for implementing change. So, that writing the history of copyright *matters*, I take to be uncontroversial. There is, I would suggest, much to be gained from continuing to excavate and explore the substance, the contemporary impact, and the legacy of the 1710 Act.

Indeed, in the last thirty years, the history of copyright has been transformed from a subject of interest to a few book historians into a field of study engaging the interest and attention of scholars drawn from across the breadth of the humanities. What's more, this burgeoning interest in copyright's history has also clearly revealed that writing the history of copyright can be a highly contested and a highly politicised activity.[102] The various competing histories and interpretations of past events that have emerged in recent times will no doubt continue to jumble alongside one another, vying for attention and influence, and that is as it should be. It is crucial to remember however that there can be no such thing as *the* history of copyright, just as there can be no definitive understanding or reading of the Statute of Anne. To claim otherwise is to deceive – either oneself, or one's audience, or both.

But to finish, I'd like to return to Pirandello. His six characters present themselves to THE MANAGER as the subject of a compelling drama still waiting to be written. When their story is taken up by the actors, however, the actors' performances inevitably fail to capture the interior life and the immutable essence of the characters themselves. The characters quickly realise that their story can never be accurately told or presented on stage, but that it can only be approximated at best.[103] THE MANAGER puts it as follows: "Acting is our business here. Truth up to a certain point, but no further". So it is with writing the history of copyright: Truth up to a certain point, with conjecture and perhaps bias for the rest.

---

[101] Arnold, J., *History: A Very Short Introduction* (Oxford: Oxford University Press, 2000), 122.

[102] K. Bowrey and N. Fowell, "Digging up fragments and building IP franchises", *Sydney Law Review* (2009): 133-58.

[103] Bassanese, 102.