Cambridge Intellectual Property and Information Law

Fashioning Intellectual Property

Exhibition, Advertising and the Press 1789–1918

Megan Richardson
Julian Thomas

CAMBRIDGE

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Vigorous public debate about intellectual property law has a long history. In this assessment of the shifting relationships between the law and the economic, social and cultural sources of creativity and innovation during the long nineteenth century, Megan Richardson and Julian Thomas examine the 'fashioning' of the law by focusing on emblematic cases, key legislative changes and broader debates. Along the way, the authors highlight how, in 'the age of journalism', the press shaped, and was shaped by, the idea of intellectual property as a protective crucible for improvements in knowledge and progress in the arts and sciences.

The engagement in our own time between intellectual property law and the creative industries remains volatile and unsettled. As the authors conclude, the fresh opportunities for artistic diversity, expression and communication offered by new media could see the place of intellectual property in the scheme of law being reinvented once again.

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Cambridge Intellectual Property and Information Law

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For Sam and Thomas

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Preface

This book was written in a great burst of enthusiasm and without the benefit of extended leaves of absence or research fellowships at renowned institutions in countries other than our own. Unlike the authors of many of the excellent books and chapters and articles that we read in preparation for our project, we did not set out to provide the definitive study of a particular legal field. Instead we took on the equally ambitious task of providing an account of some of the wider intellectual, cultural and social circumstances in which our intellectual property law was framed in the long nineteenth century. Most of our research outside the virtual libraries accessible from our offices and homes was carried out at traditional libraries in our home city of Melbourne, Australia. (Fortunately, these possess wonderful collections dating back to the gold-rush-funded 'Marvellous Melbourne'.) The research progressed in fits and starts. We had periods of substantial help from some outstanding research assistants and research librarians and useful funding support from the Australian Research Council under the rubric of a research project into amateur media. But as often as not it was one of us who found our way to the Victorian State Library in La Trobe Street, Melbourne, or the Special Collections Library at the University of Melbourne, to read the latest discovery from a dusty volume published more than a century ago (and possibly never before read since). Similarly, when it came to writing, one six-month sabbatical along with two summer breaks and one winter break were just enough for the substantive sections to be fleshed out. The rest was done amid other tasks. In large part, then, the project was fitted around the numerous obligations and commitments making up the majority of our working lives.

There are many people and institutions that we have to thank. These include the Australian Research Council, the University of Melbourne and the Institute for Social Research at Swinburne University of Technology, Melbourne, which provided us with resources and time to do the work, and Cambridge University Press for publishing the book. In searching out material, we had vital assistance from our own and

other university libraries as well as the State Library of Victoria, the National Library of Australia, the National Library of New Zealand (incorporating the Alexander Turnbull collection) and the British Library. As to individuals, our research assistants, Louise Goebel, Jake Goldenfein, Oscar O'Bryan, Marc Trabsky and Thomas Vranken provided exemplary support and inspiration. Librarians Robin Gardner, Carole Hinchcliffe, Bernard Lyons and Alissa Sputtore were also uniformly helpful and constructive. We are grateful also to our administrative assistant Clarissa Terry for (among many other things) arranging necessary copyright clearances. We have benefited enormously from the expert advice and wisdom of friends and colleagues over many years, in the Law Faculty at the University of Melbourne, the Institute for Social Research at Swinburne and the ARC Centre of Excellence for Creative Industries and Innovation and elsewhere. In relation to the ideas and material for this book, we wish to thank especially Chris Arup, Graeme Austin, Jason Bosland, Kathy Bowrey, David Brennan, Michael Bryan, Barbara Creed, Stuart Cunningham, Melissa de Zwart, Peter Drahos, Chris Dent, Susy Frankel, Ken Gelder, Jane Ginsburg, Jock Given, Diane Hamer, Eva Hemmungs Wirtén, Lesley Hitchens, Dan Hunter, Jeannine Jacobson, Andrew Kenyon, Jessica Lake, Kathy Liddell, Kwanghui Lim, David Lindsay, Ramon Lobato, Janice Luck, Jill McKeough, Denise Meredyth, Nicole Moreham, Ng-Loy Wee Loon, Ivor Richardson, Sam Ricketson, Matthew Rimmer, Brad Sherman, David Tan, Martin Vranken, Peter Yu, Kimberlee Weatherall, Elizabeth Webster and Leanne Wiseman.

Likewise, we are especially grateful to Lionel Bently and William Cornish, Series Editors of the Cambridge Studies in Intellectual Property Rights series, for encouraging an intellectual property lawyer and media historian to join together in writing a history of intellectual property, as well as the anonymous referee who read the proposal and provided many insightful comments and suggestions. Finally, we express our gratitude to Kim Hughes, Senior Commissioning Editor at Cambridge University Press for her helpful advice and calm accommodation of the project even despite the amendments and delays.

Prologue

To FASHION *v. a* [*façonner*, French, from the noun]

1 To form; to mould; to figure.
2 To fit; to adapt; to accommodate.
3 To cast into external appearance.
4 To make according to the rule prescribed by custom.
Samuel Johnson, *A Dictionary of the English Language*, 1755[1]

That intellectual property's modern refashioning in the 'long nineteenth century' coincided with the rise of the professional press in Britain and its present and former colonies should hardly surprise. A host of powerful new technologies drove the expansion of a mass print culture in the period stretching roughly from the first days of the French Revolution to the end of the First World War.[2] These included steam printing, cheap paper production, the railway network and the telegraph which shaped the contours of distribution.[3] At the same time, the subject matter of the press expanded to include a stream of literature pouring off the printing presses, both legal and illicit; while the emergence of lithography, photography and other visualisation technologies enlivened the media's content for an audience that over the course of the period became and remained thrilled by the 'beauty and terror of science'.[4]

[1] Samuel Johnson, *A Dictionary of the English Language in which the Words are deduced from their Originals, and Illustrated in their Different Significations by Examples from the best Writers*, printed by W. Strahan for J. and P. Knapton; T. and T. Longman; C. Hitch and L. Hawes; A. Millar; and R. and J. Dodsley, 1755.

[2] This is the period that Eric Hobsbawm calls the 'long nineteenth century' in his foundational history of the period beginning with and following the French Revolution (although Hobsbawm himself draws the line at the beginning of the First World War): see Eric Hobsbawm, *The Age of Revolution: Europe 1789–1848*, Weidenfeld and Nicolson, 1962; *The Age of Capital, 1848–1875*, Weidenfeld and Nicolson, 1975; *The Age of Empire 1875–1914*, Weidenfeld and Nicolson, 1987.

[3] For an excellent background, see generally Asa Briggs and Peter Burke, *A Social History of the Media: From Gutenberg to the Internet*, 3rd edn, Polity Press, 2009.

[4] Nicely captured in Richard Holmes, *The Age of Wonder: How the Romantic Generation Discovered the Beauty and Terror of Science*, Harper Press, 2008.

As well, discussions of new technologies of 'rational amusement'[5] with which the public engaged first as amateurs and later on also in more professional capacities (photography being one of the leading examples) supplemented the press's normal conversations about politics, business and the proper conduct of a person's life.

The legal device of the patent monopoly supported some of these new technologies, and impeded others, raising certain questions about the relationship between this area of law and innovation in the emerging media-communications industries. By contrast, the rising value of branding for the trading operations of the mainstream press and also those of its substantial advertisers meant that there were obvious benefits to be found in the new system of registered trade mark protection introduced towards the end of the century. But the greatest transformations occurred on the supply side, a result of the eighteenth century's radically new copyright system which, instead of restricting the use of the printing press to privileged printers, permitted those who 'authored' the printing press's subject matter the freedom to find success in their markets. Beginning with the revolutionary Romantics, followed by the Victorians and later the war-centred Modernists, this was an age of unprecedented expression, especially in literary and artistic (as well as musical and theatrical) forms – with little sometimes to distinguish the creative from the journalistic voice.

The press and the domain of published writing more generally also featured prominently in wider debates about how intellectual property laws were being and should be framed during this period. In the course of little more than a century these laws developed a more systematic utilitarian 'modern' form – utility being the general principle introduced into the law by (among others) the radical rationalist legal philosopher Jeremy Bentham, writing around the time of the French Revolution, and refined and given a more nuanced liberal, humanistic and popularly democratic dimension by his errant disciple John Stuart Mill, social reformer and editor of the *Westminster Review*, in a series of remarkable writings on utility, liberty, political economy and democracy.[6] Indeed, the most vocal advocates in the intellectual property

[5] To use an expression of 'Georgian England', updated by Adrian Johns, *Piracy: The Intellectual Property Wars from Gutenberg to Gates*, University of Chicago Press, 2009, p. 250.

[6] Especially Mill's groundbreaking *On Liberty* (1859) and *Utilitarianism* (1861, 1863) collected in Mary Warnock (ed.), *John Stuart Mill, Utilitarianism, On Liberty and Essay on Bentham*, Collins, London, 1961, pp. 126 and 251 as well as numerous editions of his popular economic textbook *Principles of Political Economy* (1848, 1849, 1852, 1857, 1862, 1865, 1871), further edited and with an introduction by Sir William Ashley, Longmans, Green and Co., 1909.

debates of the nineteenth century included philosophers, essayists, poets, novelists, economists, lawyers, scientists and entrepreneurs as well as (of course) politicians. Some of them formed their own newspapers and journals, and many wrote to inform and shape public opinion – fashioning themselves as 'legislators of the age'.[7]

Their first forays were on issues of statutory copyright and the additional protection offered by the so-called common law property right unpublished works (and, some argued, albeit unsuccessfully, also to published works) which was eventually brought under the statutory rubric, although its companion action for breach of confidence lived on and later became an important basis of modern privacy protection in cases that recanvass debates from the mid-nineteenth century. Later they extended their attention to other fields, including patents. In the middle decades of the nineteenth century they brought the antiquated patent system's dysfunctional and elitist attributes to the public's attention, comparing it unfavourably to the democratic and meritocratic character of the massive international exhibitions that were in some respects the most defining features of the Victorian age. In the century's later years, with the benefit of further experience of patented inventions at the exhibitions, they supported the British patent reforms of the 1880s which helped to establish patenting in a more 'modern' democratic form. They had less to say about the rise of advertising that accompanied the success of the exhibitions and the trade mark registration system brought in to support that, their interests here perhaps too closely aligned to those of their advertisers to allow free debate in a period when there was a growing sensitivity about the real independence of 'the Fourth Estate', reliant as it was on advertising. But, as their own interests in producing and disseminating 'news' came into question, they did not hesitate to engage vocally in public discussions about whether those who collect news should be considered authors, in the same way as others used the available media to vent their own claims of 'authorship' in photography, fashion and even brands.

This book is not a complete account of the complex relationships between exhibitions, advertising, the press and intellectual property between 1789 and 1918, in Britain and the rest of the common law world. Nor indeed do we attempt a fuller survey of the modernising law pertaining to intellectual property in the period. Here William Cornish's excellent recent history of nineteenth century intellectual property's

[7] Percy Bysshe Shelley, 'A Defence of Poetry' (1821), in Mary Wollstonecraft Shelley (ed.), *Essays, Letters from Abroad, Translations and Fragments*, Edward Moxon, London, 1840, Vol. I, 1 at p. 57.

legal development is a key point of reference,[8] as is Sam Ricketson's earlier groundbreaking study of the history of the Berne Convention[9] and the current extended version co-authored with Jane Ginsburg.[10] We owe a tremendous deal also to Brad Sherman and Lionel Bently's anti-teleological study of the 'grammar' and 'vocabulary' of the law in intellectual property,[11] and to a generation of creative, revisionist scholarship, including David Saunders,[12] Mark Rose,[13] Catherine Seville,[14] Eva Hemmungs Wirtén,[15] Ronan Deazley,[16] Kathy Bowrey,[17] Justine Pila,[18] Adrian Johns[19] and Isabella Alexander.[20] We do not attempt to recanvass their ground but rather draw liberally on their historical work along with other historical and contemporary sources. If we reach different conclusions from some writers it is, in part, because we have come to see intellectual property law in our period as less a fully systematised and modern body of law, a product of particular strategies carried through to a logical conclusion by *circa* 1900 or 1910 or 1920 (and then disrupted again in later years). Rather, our impression is of law, or rather laws, throughout the period functioning as a loosely joined and

[8] See William Cornish, 'Personality Rights and Intellectual Property', *Oxford History of the Laws of England*, Vol. XIII, Oxford University Press, 2010.

[9] Sam Ricketson, *The Berne Convention For the Protection of Literary and Artistic Works 1886–1986*, Centre for Commercial Law Studies, Queen Mary College, London, 1987.

[10] Sam Ricketson and Jane Ginsburg, *International Copyright and Neighbouring Rights: the Berne Convention and Beyond*, 2nd edn, Oxford University Press, 2006.

[11] Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Law*, Cambridge University Press, 1999.

[12] David Saunders, *Authorship and Copyright*, Routledge, 1992.

[13] Mark Rose, *Authors and Owners: The Invention of Copyright*, Harvard University Press, 1993.

[14] Catherine Seville, *Literary Copyright in Early Victorian England*, Cambridge University Press, 1999 and *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century*, Cambridge University Press, 2006.

[15] Especially, Eva Hemmungs Wirtén, *No Trespassing: Authorship, Intellectual Property Rights, and the Boundaries of Globalization*, University of Toronto Press, 2004.

[16] Especially, Ronan Deazley, *On the Orgin of the Right to Copy,* Hart, 2004; and *Rethinking Copyright: History, Theory, Language*, Edward Elgar, 2006.

[17] For instance, Kathy Bowrey, 'On Clarifying the Role of Originality and Fair Use in 19th Century UK Jurisprudence: Appreciating "the Humble Grey which Emerges as the Result of Long Controversy"' in Lionel Bently, Catherine Ng and Giuseppina D'Agostino (eds.), *The Common Law of Intellectual Property: Essays in Honour of Prof David Vaver*, Hart Publishing, 2010, and (with Catherine Bond) 'Copyright and the Fourth Estate: Does Copyright Support a Sustainable and Reliable Public Domain of News?' (2009) 4 *Intellectual Property Quarterly* 399.

[18] Especially Justine Pila, *The Requirement for an Invention in Patent Law*, Oxford University Press, 2010.

[19] See Johns, *Piracy*.

[20] Isabella Alexander, *Copyright Law and the Public Interest in the Nineteenth Century*, Hart Publishing, 2010.

in some ways somewhat disconnected set of strategies that were never wholly complete, or successful, or coherent. These were strategies that were messy and subject to constant adaptation in the way one might expect of strategies for formalising, organising and systematising the many and variable transactions that may occur between authors and their readers, inventors and the users of inventions, and producers and consumers of goods, and so on.

Therefore, this book is not the story of the law on its own terms, but a story of the shifting relations within one vital area of modern law and the economic, social and cultural technologies and circumstances that surrounded it and provided its subject matter. We examine how the law fashioned, and was fashioned in turn, by this experience in a partly deliberative and self-conscious process. Our focus is on emblematic cases and legislative developments, and wider debate about the existence and shape of the law that were pursued in the context of some spectacular new forms of 'creativity' and 'innovation', expressions that should be understood in the broadest possible terms. Along the way we notice how much the long nineteenth century perception that intellectual property's protection of creativity and innovation provided a central vehicle for improvements in knowledge was a perception not only observed and reflected but actively shaped by the press in its various iterations. The engagement in our own time between intellectual property law and the communication industries remains volatile and unsettled. In our epilogue we wonder whether, capitalising on the fresh opportunities for artistic diversity, expression and communication that the new 'new media' offers, the place of intellectual property in the scheme of law will be reinvented once again.

Part I

The journalism age

Copyright law did not emerge in a vacuum and neither did the common law that grew up around it. In fact, the pivotal cases of the first hundred or so years of the long nineteenth century show that the common law as much as the statute was fashioned out of the dynamic but fractious print culture of the period. Here, in short, we see law responding to what some have called the 'journalism age'.[1]

The common law (including that part developed in the equitable jurisdiction of Chancery) was initially drawn on to fill an obvious gap that the copyright statute had left – or at least one that was obvious to an emerging category of professional writers seeking to escape dependence or the patronage of others. Their persistent interest lay in their ability to control the market for their works and their reputations as authors. Since the latter proved difficult to separate from their individual identities in an age dominated by the idea of writing as biography, their desire for control extended ultimately to the framing and understanding of their public personalities as well. While it was never possible to determine a book's reception by an audience, authors claimed a legal entitlement that included the initial act of launching the work into the public arena. In some cases this could mean deciding not to make it public, or to circulate it in a restricted 'private' domain. Eventually, around the mid-nineteenth century, a distinct claim of 'breach of confidence' developed to cover an author's privacy interests, responding to arguments that privacy was an author's right.

Such authorial concerns can also be seen as a reaction, in part at least, to those who, seeking a critical voice that did not depend on the control of original authors, before and especially after the French Revolution, produced much anxious examination of existing social hierarchies and norms. A familiar theme in the cultural history of the period is the tension between the tradition of classical rhetoric that formed part of the

[1] See Laurel Brake, Bill Bell and David Finkelstein, 'Introduction' to *Nineteenth-Century Media and the Construction of Identities*, Palgrave, 2000, 1 at p. 5.

early liberal arts education of gentlemen and, to a lesser extent, ladies, and the 'miscellaneous print world of "Grub Street" (the fictional abode of literary hacks)'.[2] In the interregnum that marked the transition from revolutionary romanticism to early Victorian ideas of professional status and control over markets, the *demimonde* of Grub Street – of squibs, satire, sedition, slander, forgery, piracy and hackery – existed in a state of volatile co-dependency with the respectable world of gentleman writers like William Wordsworth, Robert Southey and Samuel Taylor Coleridge. Eventually, a broader understanding emerged that markets might direct as much as serve authors' activities. Even from the beginning, Grub Street was an idea at least as much as a place, and one that could be hard to pin down. It encompassed notable authors, such as Samuel Johnson, who managed to occupy a place on the margins of respectability, and William Hazlitt, who wrote bitterly that:

> There is not a more helpless or more despised animal than a mere author, without any extrinsic advantages of birth, breeding, or fortune to set him off … The best wits … are subject to all the caprice, the malice, and fulsome advances of that great keeper, the Public – and in the end come to no good … Instead of this set of Grub Street authors, the mere *canaille* of letters, this corporation of Mendicity, this ragged regiment of genius suing at the corners of streets in *forma pauperis*, give me the gentleman and scholar … the true benefactors of mankind and ornaments of letters.[3]

In our readings of eighteenth- and nineteenth-century cases on letters, etchings and other biographical material, we see a new language replacing older notions of 'propriety'. First the 'property right' and then, rather later, the 'privacy right', were framed to ward off the encroachments of Grub Street. Eighty years after the Act of Anne,[4] authorial propriety was recast into a proprietorship of authored works by the professionalised authors of the post-Revolutionary decades. In the Victorian years it was refashioned again by notions of privacy and publicity, which sought to respond to the particular interests that celebrity authors claimed in controlling the extent of their public exposure. However, surprisingly enough, not everything in law was on one side. Although the concerns of 'gentlemen authors' and their publishers may

[2] Denise Gigante (ed.), *The Great Age of the English Essay: An Anthology*, Yale University Press, 2008 at xvii. Gigante suggests that these two important strains of influences 'shaped our sense of criticism and the arts' in this period: *ibid*.

[3] William Hazlitt, 'On the Aristocracy of Letters', *Table-Talk: Essays on Men and Manners*, 1822, reprinted Bell & Daldy, 1869, 284 at pp. 292–3.

[4] 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 (*Copyright Act 1710*), 8 Anne c 19 (1710).

have been the most obviously influential, ideas about the social value of free speech that were eventually dignified by the liberal utilitarian writer (and editor of the *London and Westminster Review*) John Stuart Mill also gathered a certain influence. Throughout the process, the battles between 'authors' and 'Grub Street hacks' – with the divisions between them sometimes more apparent than real – potently influenced the shape of the law.

1 Grub Street biographers

The problem of Grub Street pirating of biographical works long predated the Revolution and its Romantic literary progeny. As early as 1741, in *Pope* v. *Curl*,[1] Alexander Pope, the distinguished and celebrated poet, brought an action in copyright against notorious and despised Grub Street biographer Edmund Curll, objecting to Curll's publication of *Dean Swift's Literary Correspondence*.[2] As Mark Rose points out, because Pope had just published his own volume of letters he could rely on the Act of Anne[3] – which by its terms protected published works – although the fact that Pope's own volume had been clandestinely published and was not referred to in the Bill of Complaint already made this a marginal case.[4] Rather, Pope claimed Curll's 'surreptitious and pyrated edition' violated his statutory right of 'printing, reprinting, vending and selling', the author 'having never disposed of the copy right of such letters to any person or persons whatsoever', implicitly suggesting the Act extended to works that were not merely published as it stated but to unpublished ones as well.

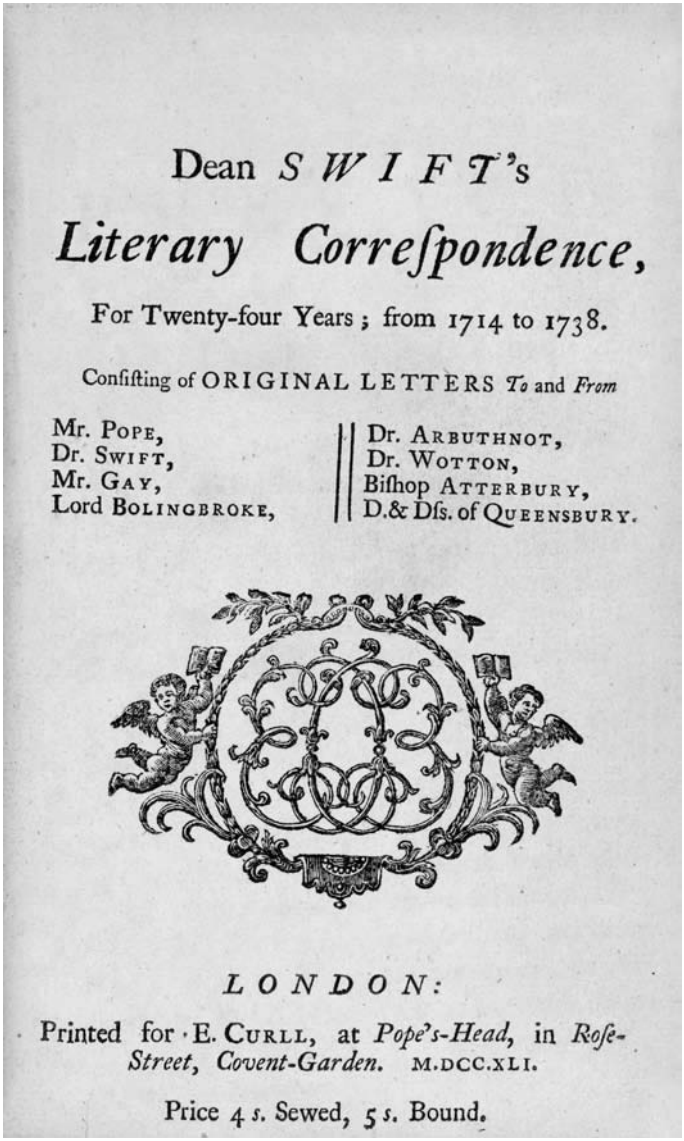
Why had the Act not contemplated the situation of unpublished works? Was it because the idea of an author's biographical writings finding a ready market had not occurred at the time it was framed? Rose characterises Pope's suit against Curll as 'an action that takes place between two worlds, the traditional world of the author as a gentleman

[1] *Pope* v. *Curl* (1741) 2 Atk 342.

[2] Although the report referred to the volume as *Letters from Swift Pope and Others*, the Bill of Complaint states it to be *Dean Swift's Literary Correspondence, for twenty-four years: from 1714–1738: Consisting of original letters to and from Mr Pope, Dr Swift, Mr Gay, Lord Bolingbroke, Dr Arbuthnot, Dr Wotton, Bishop Atterbury, Duke & Duchess of Queensbury*, printed for E. Curll, 1741. Curll's name is misspelt in the report.

[3] See Mark Rose, *Authors and Owners: The Invention of Copyright*, Harvard University Press, 1993, p. 60. The clandestine volume (which appears to have been published in London just before the Dublin edition) is *The Works of Mr Alexander Pope in Prose*, Vol. II, printed for J. and P. Knapton, C. Bathurst and R. Dodsley, 1741: see George Sherburn (ed.), *The Correspondence of Alexander Pope*, Clarendon Press, 1956, Vol. I, p. xviii.

[4] The Bill of Complaint is reproduced by Rose, *Authors and Owners*, Appendix A.


Dean *SWIFT*'s

Literary Correſpondence,

For Twenty-four Years; from 1714 to 1738.

Conſiſting of ORIGINAL LETTERS *To* and *From*

Mr. POPE,
Dr. SWIFT,
Mr. GAY,
Lord BOLINGBROKE,

Dr. ARBUTHNOT,
Dr. WOTTON,
Biſhop ATTERBURY,
D.& Dſs. of QUEENSBURY.

LONDON:

Printed for E. CURLL, at *Pope's-Head*, in *Roſe-Street, Covent-Garden.* M.DCC.XLI.

Price 4 *s.* Sewed, 5 *s.* Bound.

Figure 1 Title page *Dean Swift's Literary Correspondence for Twenty-Four Years, from 1714–1738*, printed by Edmund Curll, courtesy National Library of Australia.

and scholar [who would not stoop to publish his own letters] and the emergent world of the author as a professional'.[5] The clandestine character of Pope's own volume of letters attests to a transitional period between older propriety and newer professionalism more geared to the market. Still, propriety seemed to have a certain function. Thus Pope speaks of the common practice of illicit publication of letters as a form of '*betraying Conversation*', a 'breach of honour', an 'ungenerous, if not an immoral act'.[6] There is a sense of propriety offended in Pope's references here: of illicit publications breaching honour and entailing ungenerous and immoral acts. John Payne's respectable journal the *Universal Chronicle or Weekly Gazette* in which Samuel Johnson published his 'Idler' pieces, similarly speaks of injury to 'private reputation' as the harm suffered from intrusive journalism in the manifesto to its first issue, published on 8 April 1758, distancing itself from such grubby activities.[7] But there is little apparent interest in preserving a sphere of private intercourse in any modern sense of privacy in these statements: that was to come later. If there was anything new, Pope's publication of his own volume of letters attests to a more proprietary interest – along with his comment that Curll would have ruined 'half my Edition', if the injunction had not been obtained.[8] As to privacy, like the young Wordsworth, Coleridge and Southey who arrived in the next generation, Pope believed that 'the proper study of Mankind is Man'[9] and this was especially the poet's business:

> The Muse but served to ease some friend, not wife
> To help me through this long disease, my life.[10]

An established figure, Pope was, in William Hazlitt's estimation, content with his 'delightful unconcerned life'[11] – treating 'an author's honest fame'[12] as something that could be incorporated into his writings

[5] Rose, *Authors and Owners*, p. 62.
[6] Preface to Pope, *Letters of Mr Alexander Pope and Several of his Friends*, printed by J. Wright for J. Knapton, L. Gilliver, J. Brindley and R. Dodsley, 1737, (emphasis in original) reprinted also in Sherburn, *Correspondence of Alexander Pope*, xxxvi at p. xl.
[7] Samuel Johnson, 'Of the Duty of a Journalist', *Universal Chronicle*, 8 April 1758; reprinted in David Wolmersley (ed.), *Samuel Johnson: Selected Essays*, Penguin Books, 2003, p. 532.
[8] Pope, 'Letter to Ralph Allen', 14 July 1741, reprinted in Sherburn, *Correspondence of Alexander Pope*, Vol. IV, p. 350.
[9] Pope, 'Know Then Thyself' (1733–1734).
[10] Pope, 'Epistle to Doctor Arbuthnot' printed by George Faulkner bookseller, 1735, l 281.
[11] See 'Lectures on the English Poets', 1818, reprinted in William Hazlitt, *Lectures on English Poets and The Spirit of the Age*, J.M. Dent & Sons Ltd, 1910, at p. 78.
[12] Pope, 'Epistle to Doctor Arbuthnot', 1735, l 281.

and eventually publications. Thus he may have complained about 'betraying Conversation' as an 'immoral' act, reverting to the language of propriety, but the complaint appears to be more directed at the surreptitiousness of the method than at the private content of what was being exposed. And overall the predominant concern in the legal action appears to have been one of preserving a property interest. Thus his argument that his 'property' in the letters gave him as the author a full right to print, reprint, vend and sell his letters 'as he should think fit', meaning for his own purposes and on his own terms.

However we construe Pope's motivations in launching *Pope* v. *Curl*, the final words belong with Lord Hardwicke LC, who neatly sidestepped the question of whether an author could rely on any property in unpublished letters, whether by the Act or otherwise, and simply accepted the complaint on the ground of the statutory copyright applicable to published writings. The Lord Chancellor emphasised the new Act's social, essentially utilitarian, purpose as reflected in its title: the law was enacted for 'the encouragement of learning'.[13] And in response to Curll's argument that the Act was for the purposes of protecting literature and did not extend to letters not written with a view to publication, Lord Hardwicke pointed out that a book of personal letters may be as much for the encouragement of learning within the intent of the Act as any other learned work, adding:

> It is certain that no works have done more service to mankind, than those which have appeared in this shape, upon familiar subjects, and which perhaps were never intended to be published; and it is this makes them so valuable; for I must confess for my own part, that letters which are very elaborately written, and originally intended for the press, are generally the most insignificant, and very little worth any person's reading.[14]

The notion that there might be social value in private letters, especially where these were not 'elaborately written and originally intended for the press' is worth interrogating further. The eighteenth century was, Donald Stauffer observes,[15] the age of biography; and the press that had so much to gain from the practice was influential in formulating the culture. The popular magazines of the day not only reviewed biographies but published their own life-sketches and obituaries, 'thereby increasing, or creating, the demand for timely and exact biographical information'.[16]

[13] *Pope* v. *Curl* (1741) 2 Atk 342 at 342.
[14] *Ibid*.
[15] Donald Stauffer, *The Art of Biography in Eighteenth Century England*, Princeton University Press, 1941.
[16] *Ibid*., at pp. 507–8.

Samuel Johnson developed the thesis in articles in the *Rambler* and *Idler* between 1750 and 1759 that

> there has rarely passed a life of which a judicious and faithful narrative would not be useful. For, not only every man has, in the mighty mass of the world, great numbers in the same condition with himself, to whom his mistakes and miscarriages, escapes and expedients, would be of immediate and apparent use; but there is such an uniformity in the state of man, considered apart from adventitious and separable decorations and disguises, that there is scarce any possibility of good or ill, but is common to human kind.[17]

Johnson concluded that 'he that sits down calmly and voluntarily to review his Life for the admonition of Posterity, or to amuse himself, and leaves this account unpublished, may be commonly presumed to tell Truth'.[18] In a climate where personal anecdotes and private letters were seen as illuminating the minutiae of everyday lives and thoughts, it was a small step to conclude that such materials should be valued, perhaps even more highly, precisely because they were – apparently – not calculated for publication when they were conceived.

At the same time, there is a certain ambiguity in Lord Hardwicke's comment that 'no more works have done more service to mankind, than those which have appeared in this shape, upon familiar subjects, and perhaps were never intended to be published'. Is the Lord Chancellor implying that these works, socially valuable as they are, should be open to publication if the author demurs? Certainly, Pope seemed to think that Curll's publication would 'doubtless' go ahead clandestinely notwithstanding the injunction.[19] And Stauffer's copious study of eighteenth-century biography shows that there was a ready market for unauthorised biographies. Indeed, it suggests that the major public criticism of unauthorised publications, in the press as elsewhere, had less to do with authors' interests in maintaining privacy and control than with a narrower concern that, being outside the author's control, they tended to be of poor quality material.

So 'proper' authors were distinguished from their 'improper' Grub Street counterparts, who not only published without their subjects' consent, but, it was argued, without any genuine interest in the truth of the information they were putting before their audience. Curll especially was a ready subject of critical commentary and parody. In *The Life of John Dennis Not Written by Mr Curll*, published in 1734, its anonymous writer claims to

[17] *Rambler* for 13 October 1750. [18] *Idler* No. 84, 24 November 1759.
[19] Letter to Ralph Allen, in Sherburn, *Correspondence of Alexander Pope*, Vol. IV, p. 350.

follow the Mode and Fashion of the present Times, and, as far as our poor Abilities will permit us, to imitate the admired Writings of some of the choice Spirits of the Age, who do endeavour so much to vary from the Subject they first set out upon as, many times, almost, and sometimes quite to forget it.[20]

Another example is *Remarks on 'Squire Ayre's Memoirs of the Life and Writings of Mr Pope*. In *A Letter to Mr Edmund Curl*, published in 1745 and revealing another skirmish with Pope, the author (in Stauffer's paraphrasing) tells Curll that

[i]t appears wonderful … 'that you did not, as you might assuredly, with equal Justice, introduce Memoirs of the Life, &c of every Friend, and every Enemy of Mr Pope's; and by that Means, have swelled your Work into twenty Volumes in Folio … Nay, you have, in one Instance, even outgone this large Allowance [of comparing Pope's verses with those of others], bringing in, by Head and Shoulders, a Dialogue from the Craftsman, for no other Reason in the World but because it was not Mr Pope's.[21]

Nevertheless, the fact that there was still an audience for Curll's publications suggests that even truthfulness was not quite so important to the general audience as these comments might suggest.

Given the public's enthusiasm for biographical publication, it is perhaps understandable that Lord Hardwicke did not go so far as to endorse outright an author's right to control publication of his or her unpublished literary productions – even apart from the fact that this would require development of the law either under or outside the Act which by its terms was apparently limited to published works. Pope argued that an author's writings should be viewed as 'property vested in the author',[22] and Lord Hardwicke did not rule out the possibility of there being some property in unpublished letters. In response to Curll's argument that a letter is in the nature of a gift to the receiver, Hardwicke remarked that 'at most the receiver [of a letter] has only a joint property with the writer', which did not give a licence to publish without the writer's consent.[23] But the existence of any such property was not confirmed and its nature and effect were left unelaborated.

It would take some decades for the courts to determine authoritatively that an author might enjoy more than simply a limited statutory right to control printing and reprinting of published writings by virtue of the Act, and it was not really until well after the leading case of *Donaldson* v. *Beckett*[24] that the point was treated as settled. It did not help that the

[20] See Stauffer, *Art of Biography*, p. 532.
[21] *Ibid*.
[22] See his Bill of Complaint in Rose, *Authors and Owners*, Appendix A.
[23] *Pope* v. *Curl* (1741) 2 Atk 342 at 342.
[24] *Donaldson* v. *Beckett* (1774) 4 Burr 2408.

reports of what was decided in this case were rather ambiguous, offering little more than a record of proceedings (and one that was possibly inaccurate, besides, in respect of the position of one of the judges called on to advise the House – judging by contradictory records in the contemporary press).[25] Moreover, the actual decision came down to a series of votes on five questions designed to determine whether any property right could be found in published works that subsisted after the expiry of the statutory term of protection. The House voted against this, so refused the injunction. But as Isabella Alexander notes, 'we can never know from a mere vote precisely what motivated the Lords to decide *Donaldson* v. *Beckett* as they did – whether they considered that there was no common law copyright, that there was a common law copyright but that it was lost on publication, or that upon publication it was limited by the Statute of Anne'.[26] Nevertheless, later decisions treated the case as having authoritatively established the existence of a common law property right in an unpublished work – although its full development came from the Courts of Chancery. Drawing also on Lord Mansfield's influential judgment in *Millar* v. *Taylor*,[27] the right was fashioned as a right of first publication of works supplementing the protection the statute offered to already published works, giving to the author effectively the right to control this publication.

Once the common law property right was admitted, certain consequences were found. Neither *Millar* v. *Taylor* nor *Donaldson* v. *Beckett* was about personal letters let alone unpublished ones. Both in fact concerned illicit productions of James Thomson's 'much-loved' *The Seasons* – a traditional eighteenth-century pastoral which had long been published and was one of the most popular poems of the time.[28] But Lord Mansfield evidently had unpublished writings in mind in the former case when he observed that the property right was by justice an author's right to 'reap the pecuniary profits of his own ingenuity and labour' but also to protect 'his name' as the author by deciding

> when to publish, or whether he ever will publish … not only choos[ing] the time, but the manner of publication; how many; what volume; what print … [and] to whose care he will trust the accuracy and correctness of the impres-

[25] See Rose, *Authors and Owners*, Appendix B. And see also Ronan Deazley, *Rethinking Copyright: History, Theory, Language*, Edward Elgar, 2006, p. 17 and *passim*.
[26] Isabella Alexander, *Copyright Law and the Public Interest in the Nineteenth Century*, Hart Publishing Ltd, 2010, p. 37.
[27] *Millar* v. *Taylor* (1769) 4 Burr 2303.
[28] See Richard Holmes, *The Romantic Poets and Their Circle*, National Portrait Gallery Publications, 2005, p. 7.

sion; in whose honesty he will confide, not to foist in additions: with other reasonings of the same effect.[29]

Lord Mansfield did not vote in *Donaldson* v. *Beckett*. But echoes of his ideas about the justice of acknowledging a personal property right in unpublished writings can be found in the opinions of other Law Lords as well as scholars of the day – and they were ideas that seemed rather different from the utilitarian premise of the Statute of Anne.

In particular, William Blackstone's *Commentaries* published between 1765 and 1769 developed the idea that authority for the property right in an author's literary compositions derived from natural law.[30] Notwithstanding the growing influence of the utilitarians throughout the long nineteenth century, the Blackstonian notion of a natural right of property continued to compete and eventually combine with a more utilitarian sense that the law should only recognise such a right in conformity with social welfare. Perhaps initially, the idea that a property right could be based on natural law was inimical to utilitarian ways of thinking. To counter such an idea, the reformist lawyer and political philosopher Jeremy Bentham in 1776 published his own *Fragment on Government*[31] where he attacked the *Commentaries* and argued for utility as the foundation of all law – and he followed this up in 1789, the year of the storming of the Bastille in France, with his *Introduction to the Principles of Morals and Legislation*[32] where he laid out the groundwork of his legal philosophy in a more fully systematic form. Later his disciple John Stuart Mill commented that Bentham 'expelled mysticism from the philosophy of law, and set the example of viewing laws in a practical light, as a means to certain definite and precise ends'.[33] By 1838 Mill could say with confidence that 'the work is in progress, and both parliament and the judges are every year doing something and often something not inconsiderable'.[34]

Be that as it may, the change was gradual, especially in areas already coloured by natural law forms of reasoning. And at the end of it all, the latter retained influence. Lord Mansfield's idea of the individual

[29] *Millar* v. *Taylor* (1769) 4 Burr 2303 at 2398.
[30] William Blackstone, *Commentaries on the Laws of England*, Clarendon Press, 1765–1769, Book 2, pp. 405–6.
[31] Jeremy Bentham, *A Fragment on Government; Being An Examination of What is Delivered, on the Subject of Government in General, in The Introduction to Sir William Blackstone's Commentaries*, printed for T. Payne, P. Elmsly and E. Brooke, 1776.
[32] Jeremy Bentham, *Introduction to the Principles of Morals and Legislation*, printed for T. Payne, and son, 1789.
[33] John Stuart Mill, 'The Works of Jeremy Bentham', *London and Westminster Review*, Vol. 29, 1838, 467 at p. 494.
[34] *Ibid*., p. 495.

as the focal-point was not lost entirely but rather combined with utilitarianism, entering the rather individualistic and humanistic conception of utility that was eventually embraced. In part, when it came to copyright law and property rights in unpublished works (the law of authors), there was some inspiration from Romantic authors who in the post-Revolutionary age promoted their own ideas of individual self-fashioning.[35] In part, the explanation may also have been simply legal. For even if the reasoning of Lord Mansfield in *Millar* v. *Taylor* was no longer persuasive into the next century, a precedent was established which carried some authority when it came to deciding later cases. By 1818 the law's apparent acceptance of an author's natural dominion over personal unpublished writings was arguably sealed with the observation of Lord Eldon LC in *Gee* v. *Pritchard*[36] that, on the principle laid down in existing cases, 'this Court has been accustomed, on the ground of property, to forbid publication' of unpublished writings – even if, as in that case, the writings would therefore not be published. It might be wondered what utility could be found in supporting the plaintiff's claim that her private letters written to her nephew over a period of years should not be made available for the public delectation, despite the nephew's desire to include this 'interesting correspondence' in his memoir advertised in the *Morning Post*.[37] There was nothing immediately evident to suggest such utility in Lord Hardwicke's language in *Pope* v. *Curl* (and it would take another forty years for Mill to articulate the utility of individuality in terms of human flourishing and social progress).[38] On the other hand, the fact that the cases cited as authority in *Gee* v. *Pritchard* included the distinctly utilitarian *Pope* v. *Curl* and unfathomable *Donaldson* v. *Beckett* might suggest that there were other reasons, of a more or less utilitarian character, at the heart of Lord Eldon's insistence on the common law property right. The tension was to continue well into the century.

Perhaps more had changed by 1818 than the attitudes of authors and discourses of lawyers. Stauffer suggests that practices of biography had also shifted in the last decades of the eighteenth century, becoming more geared to the satisfaction of the public's 'impertinent' and 'malignant' curiosity.[39] If so, in this post-Revolutionary age – 'emphatically,

[35] As Martha Woodmansee and Peter Jaszi, among others, have argued: see our further discussion in Part III.
[36] *Gee* v. *Pritchard* (1818) 2 Swans 403 at 426.
[37] See *ibid.* at 404.
[38] See John Stuart Mill, *On Liberty*, 1859, reprinted in Mary Warnock (ed.), *John Stuart Mill, Utilitarianism, On Liberty and Essay on Bentham*, Collins, 1961, 126, ch. 3 especially.
[39] Stauffer, *Art of Biography*, p. 538.

the age of personality!', as Coleridge wryly noted[40] – it was not just control over publication but control over professional reputation and personal self-fashioning that were being contested. Professionalising authors as well as publishers were coming to see that they would benefit from their positive reception by 'that great keeper, the Public', as Hazlitt said, but the difficulty was that the Public was not always receptive to their control. Letters written by Wordsworth and Coleridge, authors of *Lyrical Ballads*, suggest that these early Romantics saw themselves embarking on some deeply experimental practices of authoring, which required careful handling of the timing and process of publication if profits were to follow and reputation were to be established, providing a means of financial support for themselves and their families – and even so this was by no means guaranteed.[41] The commercial risks associated with unwanted publication were therefore very high. Moreover, since authors were personally invested in their semi-autobiographical writing, at the same time as their growing reputations drew them to the public's attention, they were also personally vulnerable to the consequences of uncontrolled and unguarded revelation and gossip.

The insightful Coleridge remarked on the dangers of the prevailing spirit of 'gossip' in his essays on politics, morals and religion published as *The Friend* in 1818.[42] Nevertheless, the Romantic authors differed on the question of whether greater authorial control should be exercised. A number of them, conservative and radical, worked as journalists, ranging across a vibrant, democratising press. So it is not surprising that their ideas would have some sway – although precisely how, and what those ideas were, needs still to be considered.

[40] Samuel Taylor Coleridge, *The Friend: A Series of Essays, in Three Volumes, to Aid in the Formation of Fixed Principles in Politics, Morals and Religion, with Literary Amusements Interspersed*, Printed for Rest Fenner, 1818, Vol. II, Essay 2, 301 at p. 305.

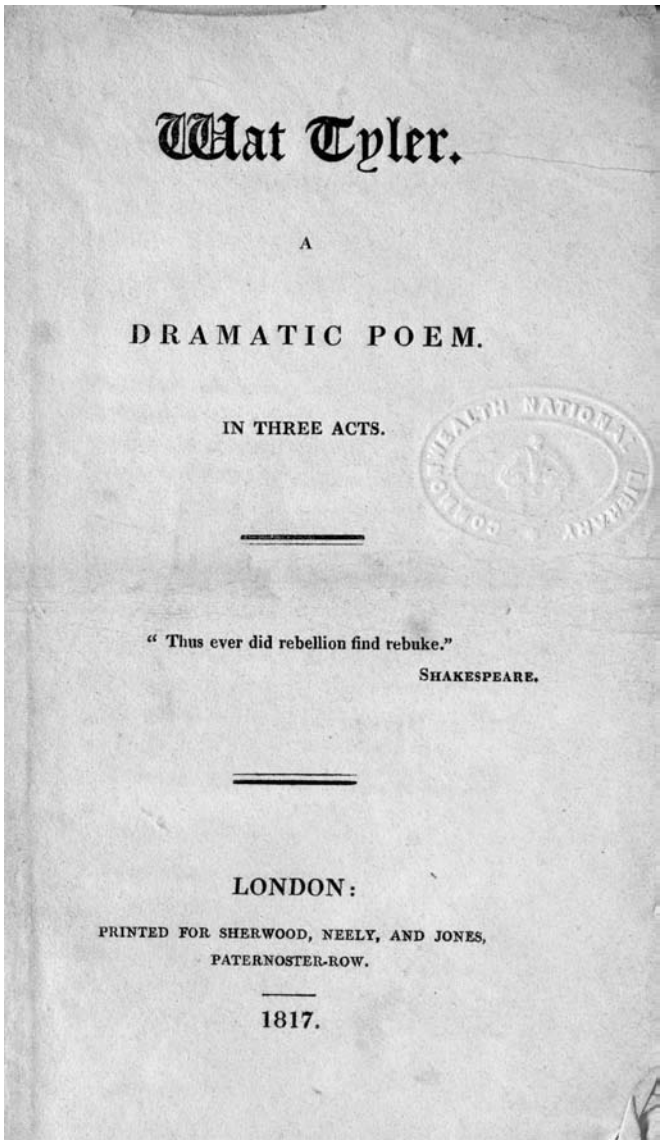
[41] See, for instance, William Wordsworth, letter to Messrs Longman and Rees, 23 December 1800, reprinted in G.L. Little, 'An Important Unpublished Wordsworth Letter' (1959) VI *Notes and Queries*, 313 at p. 314, and Coleridge, letter to William Godwin, 4 June 1803, reprinted in Earl Griggs (ed.), *Collected Letters of Samuel Taylor Coleridge*, Clarendon Press, 1956, Vol. II, p. 948.

[42] See Coleridge, *The Friend*.

2 Author-journalists

Coleridge's friend, brother-in-law and fellow Romantic author, Robert Southey, had directly encountered the dangers of gossip. In 1817 Lord Eldon was called on to consider the case of *Southey* v. *Sherwood and Others*.[1] It concerned an unauthorised publication of Southey's revolutionary poem *Wat Tyler*, written twenty-three years earlier at the height of the Treason Trials that had swept up some of the leading publishers of the 1790s.[2] Southey, its author, was not the person he became. Lately a radical student at Oxford, he sympathised with the peasant Wat Tyler's attempt to have the King's unpopular poll tax revoked, and he did not hesitate to find a personal connection with the Tyler side of his family. 'I am writing a tragedy', Southey wrote to his brother, 'on my Uncle Wat Tyler, who knocked out a tax-gatherer's brains, then rose in rebellion'.[3] Many years later, when *Wat Tyler* finally came to the public's attention, Southey was Poet Laureate and an outspoken commentator on public affairs in the conservative *Quarterly Review*.[4] He was a vigorous defender of what he took to be the British institutions, and argued for their retention in the face of reformist liberals such as Whig politician Henry Brougham and journalists Hazlitt and Leigh Hunt (editor of the *Examiner*). That the surprise publication of *Wat Tyler* occurred in the same weeks that Southey published an especially trenchant article in the *Quarterly* lends support to his and his supporters' claims that the publication was a deliberate attack mounted by his enemies designed to show him as a renegade.[5]

[1] *Southey* v. *Sherwood and Others* (1817) 2 Mer 435.
[2] See Jonathan Wordsworth's 'Introduction' to Robert Southey, *Wat Tyler*, reprint of the W. Hone Edition of *Wat Tyler*, published originally in 1817, Woodstock Books, 1989.
[3] *Ibid*.
[4] For a useful discussion of the background of the case see Frank Hoadley, 'The Controversy Over Southey's "Wat Tyler"' (1941) 38 *Studies in Philology* 81.
[5] *Ibid*., at 81–82. The article on 'Parliamentary Reform' was published in *Quarterly Review*, Vol. 16, October 1816, 225.



Wat Tyler.

A

DRAMATIC POEM.

IN THREE ACTS.

" Thus ever did rebellion find rebuke."

SHAKESPEARE.

LONDON:

PRINTED FOR SHERWOOD, NEELY, AND JONES,
PATERNOSTER-ROW.

1817.

Figure 2 Title page from Robert Southey's *Wat Tyler* published by Sherwood, Neely and Jones in 1817, courtesy National Library of Australia.

Southey proved a tougher nut than his critics might have expected, surmounting his difficulties to help instigate a reformist agenda on copyright law that some lawyers might have been proud of (that he was initially trained as a lawyer may have had something to do with this as well). But the initial irony of Southey's position, not lost on his more radical critics, was the fact that, along with his friends Wordsworth and Coleridge, he had begun his adult life as a radical poet and essayist, supporter of the French and American Revolutions, and reader of Rousseau[6] – at one stage even planning with Coleridge to move to Pennsylvania to establish a utopian Pantisocracy based around communitarian principles. In literary circles, it was known that he was the author of some fiery works of a revolutionary nature from his youth.[7] Wordsworth's words about his own youthful experience, in his autobiographical *Prelude*, written between 1799 and 1805 but not published until after his death showed equal early Jacobin sympathy:

> Like others, I had skimmed, and sometimes read
> With care, the master pamphlets of the day;
> Nor wanted such half-insights as grew wild
> Upon that meagre soil, helped out by talk
> And public news; but having never seen
> A chronicle that might suffice to show
> Whence the main organs of the public power
> Had sprung, their transmigrations when and how
> Accomplished, giving thus unto events
> A form and body; all things were to me
> Loose and disjointed, and the affections left
> Without a vital interest.[8]

In Southey's case the *Wat Tyler* furore served to bring the information into the wider public sphere. Moreover, since others including Coleridge joined the fray on Southey's side they had their own share of public criticism from Southey's detractors. As Byron put it bluntly in his epic poem *Don Juan*, published with its satirical dedication in 1818, 'Although, 'tis true that you turn'd out a Tory at/Last – yours has lately been a common case'.[9] Thus Sherwood, Neely and Jones's

[6] See Jean Raimond, 'Southey's Early Writings and the Revolution' (1989) 19 *Yearbook of English Studies* 181, giving particular instances at 182, 185, 187, 190.

[7] See, for instance, reviews published in *Scourge* and *Eclectic Review* at the time of Southey's Laureateship, reproduced in Lionel Madden (ed.), *Robert Southey: The Critical Heritage*, Routledge, 1972, pp. 196, 198. Shelley also wrote to William Godwin in January 1812 that 'Southey the Poet whose principles were pure & elevated once, is now the servile champion of every abuse and absurdity': *ibid*., pp. 155–6.

[8] William Wordsworth, *The Prelude, or Growth of a Poet's Mind; An Autobiographical Poem*, Edward Moxon, 1850, Book Nine, p. 243.

[9] See Madden, *Robert Southey*, p. 261.

unauthorised publication became a rallying cry for a widespread public challenging of the moral authority of the older Romantics.

Later biographers suggested that Southey's decision to take legal action against the publishers Sherwood, Neely and Jones was motivated by a sense of privacy, specifically a desire to protect himself from the 'gossip mongers'[10] fomenting the '*succès de scandale*' that eventually ensued.[11] It was also hinted that he was troubled by the possibility that the poem, which gave a sympathetic account of the peasants' rebellion against the poll tax in 1381, would be found seditious in a year of public unrest when habeas corpus was suspended in response to Luddite machine-breaking and protests. Neither suggestion is completely convincing. Southey may have been concerned about the prospect of violence at a time when the public's 'appetite for rebellion … is at present so sharp set'.[12] But criminal proceedings for sedition were not that common against authors (as opposed to publishers) in the early decades of the 1800s, and Southey as a friend of politicians was one of the least likely to be targeted. Moreover, as Hazlitt pointed out, Southey was more typically trenchantly and publicly opinionated than privately reserved.[13] Indeed, there is plenty to suggest that Southey's motivating concern lay less with preserving his privacy than his public reputation as a writer of high-quality scholarly historical works and commentator of conservative opinion – and that, as to be expected from someone accustomed to spirited participation in public debates, he chose to act in the most public way possible, by launching legal action. Although Southey complained of the disruption to his quiet country existence in which 'it would have been my choice to have remained',[14] and waited until he was identified in the press as the true author of *Wat Tyler* before commencing proceedings, once the step was taken he vigorously defended his right to control publication, in court and subsequently.

Southey's affidavit in the case of *Southey* v. *Sherwood* confirms that asserting his interest as a professional author in the matter of *Wat Tyler* was a predominant concern, albeit perhaps not his only one. Unfortunately, his account of the circumstances of the case seemed

[10] See Edward Dowden, *Southey*, Macmillan & Co., 1888 p. 169.
[11] See Jack Simmons, *Southey*, Collins, 1945, p. 158.
[12] As Southey put it in a letter to his friend, politician Charles Wynn, a few months later: Letter to C.C. Wynn, Esq, MP, 22 July 1819, reprinted in Charles Cuthbert Southey (ed.), *The Life and Correspondence of Robert Southey*, Longman, Brown, Green and Longmans, 1849, p. 356.
[13] See William Hazlitt, 'Southey', in *The Spirit of the Age*, 1825, reprinted in *Lectures on English Poets and The Spirit of the Age*, J.M. Dent & Sons Ltd, 1910, p. 244.
[14] Southey, *Letter to William Smith, Esq, MP*, John Murray, 1817, p. 11.

rather hard to believe especially since he was not present before the court to substantiate or elaborate in more detail. The affidavit stated that in 1794 he arranged for delivery of the manuscript to radical publisher James Ridgway, through a friend, in the hope it would be published and later called on Ridgway in Newgate Prison, but realised when no proofs were sent that Ridgway had no interest in publishing. At that point, Southey acknowledged, the project was abandoned; but he insisted that he had never assigned the property in the work and the defendants therefore had 'no right to publish without his consent or privity'.[15] The affidavit was supported by further affidavits to the effect that Ridgway and his deceased partner Henry Symonds asserted no property in *Wat Tyler* and a letter in the defendant Sherwood's hand stating the manuscript had come to him through a third party. (The third party was thought to be the radical minister William Winterbotham who was also at Newgate Prison during Southey's visit.)

The response of Lord Eldon to Southey's revived claim of ownership over *Wat Tyler* after twenty-three years' lapse was sceptical. This was, as Lord Eldon said, a 'very extraordinary case'. It was also one which tested the boundaries of the property right in unpublished works, and showed that it could only be drawn on to 'punish or to prevent injuries done to the character of individuals' in circumstances fitting the confines of 'the use of that, which is the exclusive property of another'.[16] As to the latter, the Lord Chancellor intimated, speaking practically, there must be limitations to an author's ownership of his or her unpublished works. In particular, given the change alleged to have taken place in Southey's opinions in the intervening twenty-three years, it was incredible that 'there should be nothing stated to account for [the manuscript's] having been left by him in Mr Ridgeway's hands to the present time, but that Mr Southey forgot it'; and '[i]t is impossible that Mr Southey could have forgotten it. There must have been some other reason.' In short, Southey, having failed to enquire about his manuscript during twenty-three years, 'can surely have no right to complain of its being published at the end of the period'.[17] The injunction was accordingly denied.

Some have wondered why such a politically servile judge would not have sided with the Poet Laureate's assertion of property in his unpublished poem. Could it be that, as Hazlitt says, Lord Eldon had 'too much at stake [and] recollected the year 1794, though Mr Southey had

[15] See *Southey* v. *Sherwood and Others* (1817) 2 Mer 435 at 435–6.
[16] *Ibid*., at 438. [17] *Ibid*., at 438–9.

forgotten it!'?[18] The Lord Chancellor's further comment that an injunction would not be granted in support of 'a work which is, in its nature, calculated to do injury to the public'[19] might suggest this. But the judgment as recorded by the reporter John Merivale concludes:

> In the case now only before the Court, the application made by the Plaintiff is on the ground of his civil interest; … I shall say nothing as to the nature of the book itself, because the grounds upon which I am to declare my opinion render it unnecessary that I should do so … Taking all these circumstances into my consideration, and after having consulted all the cases which I could find at all regarding the question … it appears to me that I cannot grant this Injunction until after Mr Southey shall have established his right to the property by an action.[20]

For an audience of lawyers, as Alexander notes, Lord Eldon seems thus to have based his decision on acquiescence, or waiver of rights, or possibly abandonment of the property itself.[21] Certainly, the language 'I shall say nothing as to the nature of the book itself, because the grounds upon which I am to declare my opinion render it unnecessary' suggests a careful circumventing of any final decision on the poem's possible seditiousness and its consequences. That is what readers of Merivale's *Reports of Cases Argued and Determined in the High Court of Chancery* would have read. But the legal niceties of the Lord Chancellor's reasoning were lost on the popular press, which recorded simply that Southey lost his case because *Wat Tyler* was a seditious performance.[22] Their accounts of the case were blunter and shaped the public's perception of what was decided in a way the professional law report aimed at lawyers could not. It did not help that even the more serious journals, the *Quarterly Review* and *Edinburgh Review*, for instance, persisted in treating *Southey* v. *Sherwood* as a case that had more to do with the supposed limits on the property right in unpublished works on account of their alleged injurious tendencies than anything else.

Southey took his case no further after the judgment of Lord Eldon was handed down. However, in response to William Smith MP's attack on him in Parliament, a long letter in defence of his position was written for the *Courier* in March 1817, and published eventually in a pamphlet form by John Murray in April. There, in a fine description of an author's evolving personality, Southey argued that:

[18] William Hazlitt, 'Lord Eldon' in *The Spirit of the Age*, 307 at p. 311.
[19] *Ibid*., at 439. [20] *Ibid*., at 440.
[21] Isabella Alexander, *Copyright Law and the Public Interest in the Nineteenth Century*, Hart Publishing Ltd, 2010, p. 71.
[22] See, for instance, *Morning Chronicle*, 19 March 1817 and *The Courier*, 20 March 1817: and further Appendix A.

For the book itself I deny that it is a seditious performance … Wat Tyler is full of errors, but they are the errors of youth and ignorance; they bear no indication of an ungenerous spirit, or of a malevolent heart.[23]

He added:

Were I now to dramatise the same story, there would be much to add … [and] I should write as a man, not as a stripling; with the same heart, and the same desires, but with a ripened understanding and competent stores of knowledge.[24]

If Southey's aim here was to assert his propriety in the *Wat Tyler* affair (and the impropriety of his detractors) this was in vain, for his detractors continued to voice their criticisms. Preserving his privacy also could not have been his purpose in engaging in such a self-publicising action. If anything, the pamphlet's publication gave the dispute a fresh public controversy just as it was dying down – as perhaps Southey desired by then. In the end, Frank Hoadley concludes after a thorough survey, 'politicians, newspapers, reviews, and literary men lined up for battle'.[25] And to satisfy the public demand for *Wat Tyler* some 60,000 copies were reportedly sold in many editions, becoming cheaper as time went on.[26] The original publishers eventually determined not to publish more copies, 'in deference to the Lord Chancellor's opinion of its mischievous tendency'[27] – but not until they had sold off the existing ones with a lively account of the dispute in their introductory 'Advertisement', where they described their efforts as a 'literary *jeu d'esprit*, calculating to check presumption and chastise apostasy'.[28] Finally, Southey himself included a version of *Wat Tyler* in a later collection of his works[29] – and left the full story of the case and its aftermath to be told by his son, complete with details, in a six-volume edition of his letters and other personal documents.[30]

Given the public outcry over the publication of *Wat Tyler*, it is not surprising that, in the following year, the Lord Chancellor in *Gee* v. *Pritchard* would be sensitive to the possibility that there would be some

[23] Robert Southey, *Letter to William Smith*, p. 6.
[24] *Ibid*., p. 15.
[25] Hoadley, 'Controversy Over Southey's "Wat Tyler"', at 96.
[26] *Ibid*., at 85. And see William St Clair, *The Reading Nation in the Romantic Period*, Cambridge University Press, 2004, p. 318, Table 16.1 for a list of pirated editions.
[27] See, Hoadley, 'Controversy Over Southey's "Wat Tyler"', at 85, quoting from the *Morning Chronicle*, 28 March 1817, and *Courier*, 29 March 1817.
[28] See *Wat Tyler*, printed for Sherwood, Neeley and Jones, 1817, 'Advertisement to the Remaining Copies'.
[29] See *The Poetical Works of Robert Southey*, Longman, Orme, Brown, Green and Longmans, 1837–38, Vol. II, p. 21.
[30] Charles Cuthbert Southey, *Life and Correspondence*.

authors who for reasons of privacy would prefer not to see their works published, and might wish to see the property right in unpublished works used to accommodate this position. As indicated in that case, authors might wish to be spared the public embarrassment of the airing of their private thoughts and ideas. In this way the property right in unpublished writings was fashioned as more than just a right for the protection of an author's professional reputation and livelihood. At the same time, Lord Eldon continued to maintain that authors would do well to guard their property and keep it under their control within their means if they wanted protection from unwanted publications, for courts would not assist them otherwise.[31] As to comments made in *Southey* v. *Sherwood* that courts would not lend their assistance in any event (irrespective of the author's guarding) to material considered injurious to the public, there were statements to that effect in later cases, including one brought by Lord Byron against the Grub Street publisher William Dugdale to stop the pirating of *Don Juan*, where the alleged injury lay not in sedition or other threat to public safety but in the poem's 'licentious' and 'immoral' character.[32] In these cases, we see a rather clumsy attempt by Lord Eldon to rein in the property right, using the spuriously utilitarian ground of preventing injury to the public – spurious because as William Cornish succinctly states, 'the weapon was a boomerang', since denying legal assistance to an author intent on suppressing an unauthorised publication actually worked against the suppression of these so-called injurious works.[33]

As Southey might have hoped, authors themselves did not hesitate to point this out. A few years after *Southey* v. *Sherwood* an article appeared in the *Quarterly Review*, criticising the Chancery Court's approach to the award of injunctions, including its treatment of supposedly 'injurious' texts left free to be published in 'unlimited abundance and at a price scarcely more than nominal' – with *Wat Tyler* and *Don Juan* (and other instances) offered as examples.[34] In a further article published in the *Edinburgh Review*, the Lord Chancellor was excoriated as having

[31] *Gee* v. *Pritchard* (1818) 2 Swans 403 at 424.

[32] See *Byron* v. *Dugdale* (1823) 1 LJ Ch 239 and also earlier cases of *Murray* v. *Benbow* (1822) Jac 474 (Byron's *Cain*) and *Lawrence* v. *Smith* (1822) Jac 471 (William Lawrence's *Lectures on Physiology, Zoology and the Natural History of Man*). The latter two were Lord Eldon judgments and although judgment in the first was issued by Sir John Leach VC it was under advice from Lord Eldon as Lord Chancellor: for an extensive discussion of these and other cases see Alexander, *Copyright Law*, pp. 71–9.

[33] William Cornish, 'Personality Rights and Intellectual Property', *Oxford History of the Laws of England*, Vol. XIII, Oxford University Press, 2010, 845 at p. 898.

[34] See 'Cases of *Walcot* v. *Walker*; *Southey* v. *Sherwood*; *Murray* v. *Benbow*; and *Lawrence* v. *Smith*' (1822) 27 *Quarterly Review* 123.

denied authors 'a temporary refuge against common robbers' on the strength of a new principle, of which he was 'the parent … and sole authority', while at the same time as the press was being indirectly censored without a full and final judgment.[35] These articles were not only read by their usual audiences but were cited in legal textbooks and the judicial biographies written by lawyers that flourished in the middle years of the century, which had their own legal influence.[36] Not surprisingly, the notion that a work might be denied a remedy against infringement on the grounds of its injurious tendency, as assessed by a court, was all but abandoned after the conservative Lord Eldon retired in 1827, to be replaced by a more liberal Lord Chancellor.[37]

One interesting side-effect of the success of this lobbying effort in the aftermath of *Southey* v. *Sherwood* was a heightened interest by authors in the shape and scope of the common law right in unpublished works and the contiguous statutory right in published works. In the wake of *Wat Tyler*, Southey wrote a further article on copyright for the *Quarterly Review*,[38] noting the Court of Chancery's support for a property right in unpublished works in cases such as *Southey* v. *Sherwood* and *Gee* v. *Pritchard*, and questioning the limitations on the property right in unpublished works imposed by *Donaldson* v. *Beckett*. He also objected to the limited term of statutory copyright, arguing that there was no 'public good' to be found in depriving authors of 'a

[35] 'Literary Property: Late Judgments of the Chancellor', *Edinburgh Review*, Vol. 38, May 1823, 251 at 283 and *passim*.

[36] For instance, Robert Maugham, *A Treatise on the Laws of Literary Property: Comprising the Statutes and Cases relating to Books, Manuscripts, Lectures, Dramatic and Musical*, Longman, Rees, Orme, Brown and Green, 1828, p. 96; Horace Twiss, *The Public and Private Life of Lord Chancellor Eldon: with Selections from his Correspondence*, John Murray, 1844, Vol. III, p. 421; William Townsend, *Twelve Eminent Judges of the Last and of the Present Century*, Longman, Brown, Green and Longmans, 1846, Vol. II, p. 431. There were also American textbooks which followed the debate: for instance, George Ticknor Curtis, *A Treatise on the Law of Copyright*, Charles Little and James Brown, 1847, p. 165 and Joseph Story, *Commentaries on Equity Jurisprudence as Administered in England and America*, Hilliard, Gray and Company, 1836, p. 213 and *passim*.

[37] Although for a brief revival in another conservative period, see *Glyn* v. *Weston Features Film Company* [1915] 1 Ch 261, where popular author Elinor Glynn's Decadent novel *Three Weeks* (which had sold over a million copies since its first publication in 1907) was held unsupportable in copyright law against the defendant's burlesque, inter alia on the basis of its being 'grossly immoral in its essence, in its treatment and in its tendency and indeed nothing more or less than a sensual adultuorous intrique'. The judge went on to say that '[i]t may well be that the Court in this matter is now less strict than it was in the days of Lord Eldon, but the present is not a case which in the public interest it ought, as it seems to me, to be at all anxious to relax its principles … no protection will be extended by a Court of Equity. It rests with others to determine whether such a work ought not to be altogether suppressed': Younger J at 269.

[38] Robert Southey, 'Inquiry into the Copyright Act' (1819) 21 *Quarterly Review* 196.

perpetual property in the produce of their own labours, when all other persons enjoy it as their indefeasible right – a right beyond the power of any earthly authority to take away'. And he pointed to the penury of the heirs of Shakespeare and Milton as examples of the injustice of the present system.[39] Despite the language of 'public good' and more ambiguous references to natural rights, Southey's concern was distinctly prosaic. In a letter to his friend John Rickman, he said: 'I have written shortly about the Copyright question in the QR, and put in a word without any hope of change in my time, upon the absurd injustice of the existing laws'. He thought such arguments might acquire more influence in time, as, 'according to all appearances, my copyrights will be much more valuable property after my death than has ever proved'.[40]

In his later years Southey joined Wordsworth and Coleridge's son and executor in supporting Thomas Talfourd's bill for revision of the Copyright Act, including a longer term of protection for authors (although his health was failing and he stopped short of providing a petition to Parliament, leaving his main contribution to his earlier actions).[41] The Act of 1842,[42] extending the term to the author's lifetime plus seven years, or forty-two years from publication, whichever was longer, remained in force until the comprehensive Act of 1911, which it also substantially inspired. As Catherine Seville says, the 1842 Act was seen as a tremendous achievement by and for 'the literary world' – although later there would be more concerns voiced as to the precise 'balances' drawn in the Act (which some saw as favouring authors) and the influence of authors in legislation that directly affected their concerns.[43] William Bridges Adams prefigured this when he noted in the *Fortnightly Review* of August 1865,

> [The Act] has done much to secure to writers their mental property in books; and probably one effective reason has been that book-writers being masters of language, have been enabled to plead their own cause and influence the public, and moreover they have sat at good men's feasts and associated with those who made laws, before the laws were made in their favour. And of those who dealt

[39] *Ibid*., at 212–3.
[40] Southey, Letter to James Rickman, Esq, 11 December 1818, reprinted in *Life and Correspondence*, Vol. IV, 331 at pp. 332–3.
[41] See Catherine Seville, *Literary Copyright Reform in Early Victorian England*, Cambridge University Press, 1999, for a full discussion of the role of Southey, Wordsworth and other Romantic authors in the copyright reform movement.
[42] An Act to Amend the Law of Copyright 1842, 5 & 6 Vict, c 45.
[43] Seville *Literary Copyright Reform*, pp. 193 and 210 and *passim*.

with books, the most influential were interested in copyright in opposition to the mere reprinting of old works.[44]

Perhaps because of the Act's success, the efforts of authors to enlarge their right of first publication into a full right of control over material, unpublished or otherwise, were less concerted. Although Lord Eldon's restrictions on injurious writings fell away, the other limitation pointed to in *Southey* v. *Sherwood* and *Gee* v. *Pritchard* continued to apply, namely the author's need to maintain as much control as they could over the work, or risk abandoning it to the public. Possibly, also, some authors could see the benefits in less than absolute rights over an unpublished composition. Hazlitt, especially, favoured open airing of viewpoints, notwithstanding the criticisms he received at the hands of his enemies, commenting in *The Spirit of the Age* that '[l]iberty, in our opinion, is but a modern invention (the growth of books and printing) – and whether new or old is not the less desirable'.[45] And Lord Byron, despite his problems with pirating, suggested to John Murray that Southey's treatment by his enemies reflected the intolerance of an intolerant culture which he himself had fostered in the treatment he gave to other authors in the press:

> Opinions are made to be changed, or how is truth to be got at? We don't arrive at it by standing on one leg, or on the first day of our setting out, but, although we may jostle one another on the way, that is no reason why we should strike or trample. Elbowing's enough. I am all for moderation, which profession of faith I beg leave to conclude by wishing Mr Southey damned – not as a poet but as a politician.[46]

Byron's statement of free expression as a path to understanding in a tolerant culture was also one that the youthful John Stuart Mill – admirer of Wordsworth and Coleridge, critic of the later Southey's 'bitter opinions',[47] and author of the semi-autobiographical *On Liberty*[48] – could accept. If the *Wat Tyler* affair shows how even men of free opinions and high social status may feel the potentially stifling effects of intolerant

[44] Williams Bridges Adams, 'The Political Economy of Copyright' (1865) 2 *Fortnightly Review* 227 at 229.
[45] See William Hazlitt, *Lectures on English Poets and The Spirit of the Age*, J.M. Dent & Sons Ltd, 1910, p. 307.
[46] Byron, Letter to John Murray, 9 May 1817, reprinted in Madden, *Robert Southey*, p. 242.
[47] Mill, Letter to John Sterling, 20–22 October 1831, reprinted in Madden, *Robert Southey*, pp. 386–7.
[48] John Stuart Mill, *On Liberty*, 1859, reprinted in Mary Warnock (ed.), *John Stuart Mill, Utilitarianism, On Liberty and Essay on Bentham*, Collins, 1961, 126.

public criticism and debate,[49] this was even more apparent in the next case – decided when, Lytton Strachey says, 'the last vestige of the eighteenth century had disappeared; cynicism and subtlety were shrivelled into powder; and duty, industry, morality, and domesticity triumphed over them … The Victorian Age was in full swing.'[50]

[49] See *ibid*., p. 130 and *passim*, adding that if anything social opinions were a greater source of constraint in the current English climate where laws were relatively liberal and the more stringent ones were rarely enforced.

[50] Lytton Strachey, *Queen Victoria*, 1921, reprinted by Chatto and Windus, 1948, pp. 116–17.

3 Agitators and dissenters

In 1849 the case of *Prince Albert* v. *Strange*[1] came before the courts of Chancery in London. The Lord Chancellor suggested that '[t]he importance which has been attached to this case arises entirely from the exalted position of the Plaintiff, and cannot be referred to any difficulty in the case … [whose] facts clearly fall within the established principles'.[2] Why the Lord Chancellor was determined to maintain the impression that the law was not being changed here is worth another discussion. It may have had a great deal to do with the fact that the plaintiff in this case, a royal of highly contrived celebrity status, was seeking to exert control over some well-known representatives of the nineteenth-century popular press at a time when freedom of speech was a serious topic of public discussion, including in the press. For his part, Prince Albert's action against the publisher William Strange, and involving also the journalist Jasper Judge, was an attempt to expand the author's property right in unpublished works into a fully-fledged right of privacy. To an extent the argument succeeded. At the same time, however, the Lord Chancellor's reasoning had a more utilitarian air than either the claimant or defendants might have expected.

The proceedings were launched as soon as it became evident that Strange and his as yet unnamed confederate – later identified as Judge – intended to mount a public exhibition, complete with a descriptive catalogue, of etchings made by Prince Albert and Queen Victoria in the imagined privacy of their royal apartments. The precise manner by which the etchings had come into the defendant's hands was as yet unknown: it was initially thought that since the plates were kept under lock and key and copies were themselves kept in the private apartments, this must have been the result of some surreptitious and improper obtaining. Subsequently the bill was amended to claim that an employee of a local printer given the plates for the purposes of making limited copies

[1] *Prince Albert* v. *Strange* (1849) 1 H & Tw 1.
[2] *Ibid*., at 18–19.

for private use and enjoyment had passed the etchings to Judge.[3] The exhibition had already been advertised in *The Times* and other newspapers in September 1848,[4] and a package containing the catalogue had allegedly been left at the palace on 11 October.[5] The Press's interest continued throughout the proceedings. *The Times* carried several detailed reports on the case, and *Punch* also offered its own report, where it suggested 'the shabby knave who stole the royal property, making unauthorised use of the Queen's plate has, without intention, done good service' and included a selective list of the etchings, among them 'fifteen portraits of the eldest born'. Its author added, 'we shall never again see Victoria, whether in cottage bonnet or pony chaise, or in diamond frontlet in the House of Peers, without thinking of those fifteen portraits – the tender work of a tender mother's hand of the PRINCESS ROYAL'.[6]

In the plaintiff's application for an interlocutory injunction begun on 20 October, it was argued on behalf of Prince Albert and Queen Victoria, whose interests he represented along with his own, that the etchings were 'private' etchings of a domestic nature made for the royal couple's own 'amusement' and kept for that purpose, with a few copies 'given occasionally (and very rarely) to some of their personal friends, one to one friend and one to another', and moreover that this privacy extended equally to the etchings' descriptions in Strange's catalogue.[7] The language of privacy is indeed redolent throughout the plaintiff's arguments in the case. It features also in the Vice-Chancellor's judgment in the plaintiff's favour and (albeit to a lesser extent) in the Lord Chancellor's judgment on the defendant's unsuccessful appeal. Although the etchings, depicting domestic scenes of the Royal family, the children along with their parents, appeared innocuous and hardly revealing, the case displays a Victorian insistence on retaining a sphere of non-public activity – concerning, as John Stuart Mill said later (in another context), 'the whole detail of private life'.[8] Along with all the new talk of privacy, however, there are hints still of some ongoing authorial concerns both in relation to the etchings which the Queen and Prince Albert had made, and in relation to their (carefully fashioned) public reputations. On the other side, there is also evidence of

[3] *Prince Albert* v. *Strange* (1849) 2 De G & Sm 652 at 655–6.
[4] *The Times* announced the exhibition on 7 September 1848, col. g.
[5] *Prince Albert* v. *Strange* (1849) 2 De G & Sm 652 at 655.
[6] 'The Royal Etchings', *Punch*, Vols. 14–15, 1848, 212.
[7] *Prince Albert* v. *Strange* (1849) 2 De G & Sm 652 at 652–5.
[8] John Stuart Mill, *Utilitarianism*, 1861, reprinted in Mary Warnock (ed.), *John Stuart Mill, Utilitarianism, On Liberty and Essay on Bentham*, Collins, 1961, 251 at p. 303.

the growing power and authority of the popular Victorian press in the journalists' and publisher's insistence on their right to publish information contained in their catalogue, even after it was conceded that they had no right to exhibit the etchings themselves.

More details of the case can be found in Clare Jerrold's unauthorised biography of Queen Victoria published in 1913.[9] By itself, as Jerrold notes, there was little to explain the royals' strong reaction in launching proceedings to stop the exhibition. Still Jerrold, no great sympathiser with the royals, comments that they must have found irksome the publicising attentions of Strange and Judge. Earlier in 1849 Strange had published a detailed pamphlet, also written by Judge, entitled *Sketches of Her Majesty's Household, Interspersed with Historical Notes, Political Comments and Critical Remarks*,[10] recording numerous details of the royal establishment including salaries and emoluments. At the end it offered several pages of advice as to how Her Majesty's Civil List of £385,000 per annum could fruitfully be reduced 'without depriving the Sovereign of one domestic comfort'.[11] Judge was, Jerrold says, a 'cantankerous' individual who before the case had already established an uncomfortable relationship with the royal household.[12] He also had a history of alleged scandal-mongering, being a regular contributor to the *Weekly Dispatch* and *Morning Herald*, which in the 1840s catered to the public taste for 'scandalous, fashionable gossip' as well as 'more sensational items'.[13] And Judge and Strange's readiness to assume the royals' tacit approval of their exhibition, after receiving notice, was evident from their statement in the catalogue that:

> Every purchaser of this Catalogue will be presented (by permission) with a fac-simile of the autograph of either Her Majesty or of the Prince Consort, engraved from the original, the selection being left to the purchaser. Price Sixpence[14]

This was followed by some words attributed to Shakespeare:

[9] Clare Jerrold, *The Married Life of Queen Victoria*, G. Bell & Sons Ltd, 1913, ch. 10. Jerrold also includes an alleged example etching, depicting Prince Albert and Queen Victoria dressed up as 'gothic peasants' but there is no obvious correspondence to the list of etchings from the catalogue as reported in *The Times*, 7 November 1848, p. 6.

[10] [Jasper Judge], *Sketches of Her Majesty's Household*, William Strange, 1848.

[11] *Ibid*., p. 143 and *passim*.

[12] See Jerrold, *Married Life*, p. 284.

[13] See Ivon Asquith, 'The Structure, Ownership and Control of the Press, 1780–1855' in Boyce, Curran and Wingate (eds.), *Newspaper History From the 17th Century to the Present Day*, Constable, 1978, 98 at p. 107.

[14] See *Prince Albert* v. *Strange* (1849) 2 De G & Sm 652 at 653.

> You must not be the grave of the deserving: England must know
> The value of her own. 'Twere a concealment
> Worse than theft, no less than a traducement,
> To hide your doings.[15]

Given the carefully manufactured veneer of authenticity and propriety, as Jerrold says, they may have been surprised at the fact that, instead of the royals going along, proceedings were issued in Chancery.

Twentieth-century royal biographers have periodically commented on the heavily censoring hand of these royal celebrities who, on the one hand, courted publicity and, on the other hand, resented adverse expressions of opinion in the press and sought to shape the public perception of themselves to their own ends. Jerrold says that '[i]t was an ignoble quarrel upon small matters', the Queen and Prince taking the opportunity to exact revenge on 'a poor journalist' whom they found would 'not be guided by reverence for them' – 'going to law on a frivolous pretext to crush a fly'.[16] Robert Rhodes James observes that Prince Albert was 'a meticulous reader of newspapers journals and cheap broadsheets' and 'intensely resented public criticism or mockery'.[17] Margaret Homans notes that in the early years of married life Queen Victoria sought to 'handle ideological contradiction by holding apart in their separate spheres yet conjoining the roles of good woman and concerned ruler', carefully commissioning public images to create this effect.[18] And for those looking from the outside, it is easy to draw the conclusion that the royals' sole concern in Prince Albert's proceedings against the printer Strange and journalist Judge was with control over their public image. But a more sympathetic reading suggests that the publication of these intimate etchings – which were not only executed by Queen Victoria and Prince Albert but were centred on domestic subjects, showing themselves and their children in a more informal, even playful, mode than they were used to publicly revealing in their formal pictures, ready as they were to promote themselves publicly for all kinds of purposes – was seen as crucial to their ability to maintain a margin of personal control over their private personalities and interrelations, in the face of a lively and critical press.

It was by all accounts a lively and hyper-critical press. As noted by H.D. Boynton in the *New York Times*, reviewing Jerrold's book,

[15] *Ibid*. (quoting loosely from Coriolanus, Act 1, Sc. IX).
[16] Jerrold, *Married Life*, p. 284.
[17] Robert Rhodes James, *Prince Albert: A Biography*, Knopf (distributed by Random House), 1984, p. 154.
[18] Margaret Homans, *Royal Representations: Queen Victoria and British Culture, 1837–1876*, University of Chicago Press, 1998, p. 32.

[r]eaders of the present book will be surprised, perhaps, to find that in the period which it is just now the fashion to think of as rather tame and silly, to dispose of as 'mid-Victorian', there was a license of the press in England not to be excelled in our own yellow journalistic day.[19]

And if the early years of the nineteenth century had seen a battle between respected authors and their pirates for control over the markets for books, supplemented by an expanded interest in biography, authorised or not, the middle years began a period of battle for control of public discourse over the character and personality of those who might previously have been thought immune.[20]

A practical difficulty was the limited choice of legal tools available to those who sought to perpetuate their control in the late 1840s. In the end it came down to privacy (even more than propriety – the rules on which were already being rendered more fluid by the royals themselves). But although 'privacy' was a well-recognised concept, featuring for instance in Samuel Johnson's dictionary of 1755,[21] the doctrines themselves were more restricted. In particular, the property right in unpublished works, although well-established by the end of Lord Eldon's tenure of the Lord Chancellorship through cases such as *Southey* v. *Sherwood* and *Gee* v. *Pritchard*, seemed the least well-adapted to the rather novel purpose of preventing publication of, say, a *description* of works rather than the works themselves. And although it could be easily imagined at the time of *Gee* v. *Pritchard* in 1818 that an author's desire to keep information outside the public domain for reasons of privacy might extend beyond the scenario of unauthorised publication of unpublished writings to information of a more broadly biographical character, the proposition was not seriously tested until Prince Albert's case was launched in 1848. Certainly the conservative Lord Eldon had steered away from the prospect. Despite some suggestion in the celebrated case of *Abernethy* v. *Hutchinson* in 1825 that a surgeon's unwritten lectures might be protected from unauthorised publication on the same basis as unpublished works, Lord Eldon appears to have avoided reaching any firm conclusion on the point. He relied on the emerging

[19] H.D. Boynton, 'Queen Victoria: An Iconoclast Describes her Married Life', *New York Times*, 12 October 1913.

[20] See Asquith, 'Structure, Ownership and Control', p. 116 (given the power of the press and its diverse reading public, by the 1850s, neither government nor politicians could exert much control).

[21] Samuel Johnson, *A Dictionary of the English Language in which the Words are deduced from their Originals, and Illustrated in their Different Significations by Examples from the best Writers*, printed by W. Strahan for J. and P. Knapton; T. and T. Longman; C. Hitch and L. Hawes; A. Millar; and R. and J. Dodsley, London, 1755, Vol. II, 'privacy', 'private' (adjective and noun), 'privity' and 'privy'.

action for breach of confidence to grant an injunction when Abernethy wanted to stop publication of the lectures delivered to a private audience of students at St Bartholomew's hospital in the (then radical journal) *The Lancet*.[22] Nevertheless, the case was cited in *Prince Albert* v. *Strange* and became part of the rubric around which the progressive Lord Cottenham LC built the conclusion that the property right had the scope there claimed.

Indeed, the arguments on both sides in *Prince Albert* v. *Strange* were of a progressive rather than conservative character, reflecting perhaps what Asa Briggs calls the prosperous and optimistic 'mood of the period'.[23] Neither plaintiff nor defendant limited himself to the question of the property right's traditional scope as established in earlier cases. Even Strange (who had most on his side when it came to established doctrine) sought to argue that the public had a demonstrable interest in knowing about the royal etchings, and 'the law does not give an action for such things of delight' as a catalogue which merely describes information.[24] Prince Albert's argument, also utilitarian in flavour, asserted that in the interests of preserving the 'private enjoyment' of works the property right should be read as precluding not only their public distribution but also the publication of ancillary information about their character and contents.[25] Notably, the latter argument does not go as far (at least explicitly) as to suggest a more general legal claim in privacy, which might have applied more broadly to information that was not associated with authored works, for instance. Rather, it was intimated, the protection here being claimed was simply analogous to that already clearly available to a property right in unpublished works and on the same ground of fostering the works' private use and pleasure.

To demonstrate further the utility of the property right thus fashioned, the argument went on with 'a view of the case which is not without its value'. It was not beyond the bounds of possibility that

> 'Her Majesty and Prince Albert, struck with the great importance and value of some charitable institution, or moved by some national distress, and desiring to effect everything in their power for the amelioration of the evil, should be induced, by the promptings of benevolent feelings, to overcome the repugnance against unnecessary publicity which had governed them in the present transaction.

[22] *Abernethy* v. *Hutchinson* (1825) 1 H & Tw 28.
[23] Asa Briggs, *Victorian People: Some Reassessment of People, Institutions, Ideas and Events 1851–1867*, Odhams Press Ltd, 1954, p. 16.
[24] *Prince Albert* v. *Strange* (1849) 1 H & Tw 1 at 12.
[25] *Ibid*., at 13–14.

If that were the situation, the property or value would have been materially deteriorated by the catalogue's 'premature circulation which had tended to satiate the public interest in the circumstance'.[26] Even worse, the defendant's remarks about authorisation in the catalogue would give a false impression to future as well as present audiences that the royal pair had approved the exhibition – a consent that could not only harm the image they were seeking to project of themselves of avoiding 'unnecessary publicity … in the present transaction', but would make doubly difficult any use of their name motivated by 'benevolent feelings' for an authorised exhibition at a later date.

That such exhibition might take place at a future stage, under more carefully contrived circumstances, was certainly not beyond the bounds of possibility. A supremely 'public personage', to use Strachey's words, Prince Albert 'was devoted to art, to science, to philosophy; and a multitude of subsidiary activities showed how his energies increased as the demands upon them grew'.[27] Rhodes James likewise remarks that Prince Albert 'believed passionately that the glories of art and music should be open to the public'.[28] In 1848, the year the proceedings in *Prince Albert* v. *Strange* were commenced, he was in his fifth year as a highly active and devoted President of the Society of Arts, and had been instrumental in organising numerous exhibitions for the Society – including of the works from the royal collection at Kensington Palace, to which the public was invited, and the results of a fresco competition which were shown at Westminster Hall in 1843. The competition was accompanied by a sixpenny pamphlet as well as an abridged penny pamphlet for 'the million' – an 'an early experience of the skill at popularisation which always marked Prince Albert's team … [and was] related to his own tendency to impart information at the drop of a hat', according to Winslow Ames.[29]

The Society's most ambitious and successful project was to be the Great Exhibition of 1851, already being conceived by Prince Albert and his friend Henry Cole in 1849.[30] Prince Albert was minutely involved in the planning and organisation of the Exhibition from its first inception.

[26] *Prince Albert* v. *Strange* (1849) 2 De G & Sm 652 at 676–7.
[27] Lytton Strachey, *Queen Victoria*, 1921, reprinted by Chatto and Windus, 1948, pp. 112 and 153.
[28] Rhodes James, *Prince Albert*, p. 193.
[29] Winslow Ames, *Prince Albert and Victorian Taste*, Chapman and Hall, 1968, p. 52.
[30] See, for instance, 'Art-Gossip' in *The Literary World* (1849) Vol. 5, p. 318: 'The grand exhibition of Arts and Manufactures open to the whole world, which will be held in London in the Spring and Summer of 1851, is now beginning to be the subject of much conversation [and] to Prince Albert … we may fairly say we shall be indebted for the realization of the vast project contemplated in 1851.'

And when the doors were opened in May 1851 to the first group of the six million who came to see it from Britain, Europe, the colonies and even more exotic locations, the display included articles from the royals' art collections as well as at least one example of Prince Albert's own work, a silver centrepiece made to his design. Ames thought it 'was loaded with ideas but lacking in *flair*'.[31] But contemporary opinion was more along the lines of 'Helix' in the *Westminster Review*, who observed uncritically that Prince Albert was one of a community of 'original-minded men, upon whom the onward progress of the nation wholly depends', who 'discover and give continually, to all mankind, whether in philosophy, literature, art, chemistry, or mechanics', and whose knowledge is 'above all price, and they cannot hire it out' (at least on normal principles).[32]

Against that backdrop and potential future, it is not surprising that Lord Cottenham LC in *Prince Albert* v. *Strange* would seek a basis on which to accept Prince Albert's arguments for an extended reading of the old property right in unpublished works, notwithstanding Strange's argument that the greater public benefit lay in his free expression. Nor that the Lord Chancellor would turn to the well-established property right in unpublished works to do so. But now this had to be reread as extending outside its traditional function of conserving an author's right simply to determine whether, when and on what terms his or her works should be published to capture the situation of conserving information about the works which an author might prefer not to publish. Since the utilitarian value of property lies in its use and enjoyment, Lord Cottenham suggests, a preference for 'private use and enjoyment' explains why it may not be published (the author's entitlement acknowledged in cases such as *Gee* v. *Pritchard*) – and logically this extends also to information about the work. There is a certain obscurity in the reasoning. But, as Mill noted in 1838,[33] obscurity was customary in the common law and this was not entirely gone by 1849 (nor would it be after). In the words of the Lord Chancellor:

> The property of an author or composer in any work, whether of literature, art or science, such work being unpublished and kept for his private use or pleasure cannot be disputed, after the many decisions in which that proposition has been affirmed or assumed … It being admitted that the Defendant could not publish a copy – that is, an impression – of the etchings, how in principle does a

[31] Ames, *Prince Albert*, p. 90.
[32] 'Helix', 'Industrial Exhibition' (1851) 55 *Westminster Review* 346 at 357. And see below, Part II, Chapter 6.
[33] John Stuart Mill, 'The Works of Jeremy Bentham', *London and Westminster Review*, Vol. 29, 1838, 467 at 492.

catalogue, list or description differ? A copy or impression of the etchings could only be a means of communicating knowledge and information of the original; and does not a list and description do the same? The means are different, but the object and effect are similar; for in both the object and effect is to make known to the public, more or less, the unpublished works and compositions of the author, which he is entitled to keep wholly for his private use and pleasure, and to withhold altogether, or so far as he may please, from the knowledge of others.[34]

There was another basis put forward as well – one that ultimately proved to have greater longevity than the property right in unpublished works. The equitable action for breach of confidence averted to in Abernethy's case might have been originally designed for the protection of trade secrets and the like – but its use in the latter case showed it was already expanding to cover other scenarios of confidential information which through the disloyal actions of a trusted recipient had come to the public's attention including through the hands of a third party. As Lord Eldon put it in *Abernethy* v. *Hutchinson*, if there was a breach of contract by one of Abernethy's students, or a breach of trust by an intruder in the lecture room, 'I should not hesitate to grant the injunction' and similarly with respect to a third party, 'I think it very difficult to tell me that that should not be restrained which is stolen, if you would restrain that which is a breach of contract or, of trust.'[35] It was arguably a small step for Lord Cottenham in *Prince Albert* v. *Strange* to extend this reasoning to the breach of 'trust, confidence or contract' committed (in all likelihood) by a disloyal printer's employee in passing on etchings to Judge and through him Strange for public exhibition – for

if … the compositions were kept private, except as to some given to private friends and some given to Mr Brown [the printer], for the purpose of having certain impressions taken, the possession of the Defendant [Strange], or of his partner Judge, must have originated in a breach of trust, confidence or contract in Brown, or in some person to whom copies were given, which is not to be supposed, but which, if it were the origin of the possession of the Defendant would be equally a breach of trust, confidence or contract.[36]

As this language shows, the breach of confidence action could be designated as an explicit privacy-conserving action not tied to the 'private use and enjoyment' of a work but rather premised on breach of trust or confidence in the use of confidential information of a private character. As such it reflected contemporary understandings of 'privacy'

[34] *Prince Albert* v. *Strange* (1849) 1 H & Tw 1 at 21–22.
[35] *Abernethy* v. *Hutchinson* (1825) 1 H & Tw 28 at 37–38.
[36] *Prince Albert* v. *Strange* (1849) 1 H & Tw 1 at 23–24.

as effectively 'secrecy', as in Johnson's *Dictionary*.[37] We might wonder why breach of confidence was not the sole basis for decision in *Prince Albert* v. *Strange*. One explanation is that Lord Cottenham desired to ensure the actions available to a claimant in such a case would be broad enough to capture the situation of outright theft which initially had been thought to lie behind Strange's possession of the royals' etchings, and could easily be contemplated as occurring in the future. Although the plaintiff's statement in his affidavit to the effect that the etchings must have been 'surreptitiously and improperly obtained' was alluded to in discussing the action for breach of confidence, there was a risk that it may be considered a novel extension of an action traditionally premised on breach of confidence by a trusted recipient to extend it to broader scenarios of surreptitious obtaining, in contradiction with the Lord Chancellor's stated premise that the law was not being changed here.[38] Thus the possibility that surreptitious obtaining might be embraced by breach of confidence was merely hinted at, left for later cases to resolve (indeed it has taken a century and a half for courts to clearly accept the position).[39] In the meantime, the property right in unpublished works provided an alternative basis for the remainder of the century, unsatisfactory as it might now seem to denote a property right in unpublished works, originally characterised by Lord Mansfield in *Millar* v. *Taylor* as a right to determine 'when to publish, or whether he ever will publish … [and] to whose care he will trust the accuracy and correctness of the impression; in whose honesty he will confide, not to foist in additions', as a basis for precluding, possibly forever, publication of unpublished information.

Curiously, the particular circumstances of *Prince Albert* v. *Strange* were almost immediately superseded. Etchings were the subject of Prince Albert's case in 1849. But the new technologies of photography were introduced to the public eye at the Great Exhibition two years later. They took the world by storm – with Prince Albert and Queen Victoria at the vanguard. The craze for recording and sharing personal images

[37] Johnson, *Dictionary*, 'privacy' defined as '1. state of being secret; secrecy'; 'private' as '1. not open; secret'. This was the 1755 edition. An American 1844 edition edited by Henry Todd was to similar effect: *Johnson's English Dictionary Improved by Todd, and Abridged by Chalmers; with Walker's Pronouncing Dictionary Combined*, Griffith & Simon, 1844, p. 724.

[38] Similarly there was only a hint at a position being adopted in Lord Eldon LC's passing comment that 'I should not hesitate to grant the injunction' against an 'intruder' in *Abernethy* v. *Hutchinson* (1825) 1 H & Tw 28 at 37.

[39] See Megan Richardson and Lesley Hitchens, 'Celebrity Privacy and Benefits of Simple History' in Andrew Kenyon and Megan Richardson (eds.), *New Dimensions in Privacy Law*, Cambridge University Press, ch. 10.

that ensued seemed to have nothing to do with privacy considerations talked about in 1849 but rather with an 'indescribable joy' that was produced at each new stage of photography's development, from the first daguerreotypes and calotypes from the 1840s to the *carte de viste* technology used for visiting cards and celebrity portraits of the 1850s and 1860s and beyond.[40] The royals embraced photography. They became the first patrons of the Royal Photographic Society in 1853, and supported its activities. They also authorised multiple images of royalty for public circulation including early *carte de viste* portraits. According to Helmut Gernsheim, these helped to launch the 'cartomania' craze in Britain in the 1860s.[41] Even some of the photographs of the royal family taken originally for private use, such as those by royal photographer Roger Fenton, President of the Photographic Society, including intimate depictions of the family, were later released into the public sphere.[42] The Queen became, it is said, the most photographed woman of her age, and the images circulated in her lifetime and after her death ensuring that 'the face of their sovereign would be recognisable to her 500 million subjects' not only within Britain itself but also throughout the Empire[43] – including far-flung Australia and New Zealand, places she never actually visited although she reigned as monarch for some sixty years.

Authors themselves, generally articulate in their desires to control readers' access to their work, reflected the general delight with photography in their own behaviour. Although Oscar Wilde wrote in the *Fortnightly Review* of the intrusiveness of the press, complaining of the 'tyranny that it proposes to exercise over people's private lives',[44] he was apparently unaware of the irony of his posing for a series of intimate staged portraits by celebrity photographer Napoleon Sarony in New York in 1882 – the portraits sold upwards of 85,000 copies including in pirated versions (despite Sarony's attempts to enforce his copyright over 'his' authorial creations).[45] The adeptly self-publicising Wilde was not the only professional-celebrity author to pose for easily reproducible

[40] See below, Part II, Chapters 6 and 7.

[41] Helmut Gernsheim, *A Concise History of Photography*, revised edition, Thames & Hudson, 1971, p. 55.

[42] See Frances Dimond and Roger Taylor, *Crown and Camera: The Royal Family and Photography 1842–1910*, Viking, 1987; and generally, John Plunkett, *First Media Monarch*, Oxford University Press, 2003, p. 147.

[43] Robin Muir, *The World's Most Photographed*, National Portrait Gallery Publications, 2005, p. 28.

[44] Oscar Wilde, 'The Soul of Man Under Socialism', 49 *Fortnightly Review*, February 1891, 292.

[45] See *Burrow-Giles Lithographic Company* v. *Sarony* 111 US 53 (1883), and below, Part III, Chapter 10.

Figure 3 Queen Victoria and family, photographed by Roger Fenton, *c.* 1854, courtesy Victoria & Albert Museum, London / The Bridgeman Art Library.

and distributable *carte de viste* portraits after the patented technique was made publicly available in 1854. Others included Charles Dickens before him, and fellow Irishman George Bernard Shaw, who also appreciated early on the camera's unique ability to capture in 'authentic portraits' all the multiple aspects of personality in a single sitting.[46]

In this context it might have seemed churlish for the new celebrities to insist on their right of privacy, invoking the authority of *Prince Albert* v. *Strange*, at the same time as they sought the camera's unique publicity – although the intrusion of photography was particularly remarked on by Americans Samuel Warren and Louis Brandeis in 1890, arguing for

[46] As quoted by John Falconer and Louise Hide in *Points of View: Capturing the 19th Century in Photographs*, The British Library, 2009, p. 109.

privacy protection against the 'yellow press'.[47] And they failed to notice that George Eastman had just launched his first hand-held Kodak cameras, advertised to the world under various versions of the slogan 'you push the button, we do the rest', which would further exacerbate the problem of a celebrity's control over the taking and uses of personal image.[48] Nor were they in time to notice the ways in which the press could feed off the public's intolerance of difference, as exemplified by Oscar Wilde's 1890s trials and punishments in Britain for 'unnatural acts'; but even Wilde himself did not go this far, submitting to his ordeal.[49] It was only much later on that celebrities would commonly argue for their legal rights to control in the name of privacy when others sought to exploit their image without authorisation, while at the same time seeking to maintain their position in the public eye employing especially the agency of photography.

The fact that celebrities could so easily swap between their privacy and publicity positions provides an extreme example of the complex and sometimes conflicted desires that people generally can experience in their idiosyncratic pursuits of happiness.[50] In this regard, also the early royal celebrities Prince Albert and Queen Victoria can be seen at the vanguard of a broader social movement. A decade later John Stuart Mill supported the individual's idiosyncratic choices, regarding these as preferable to the more standardised choices that others may make on their behalf when he observed in *On Liberty* that:

> [a] man cannot get a coat or a pair of boots to fit him unless they are either made to his measure, or he has a whole warehouse to choose from: and is it easier to fit him with a life than a coat, or are human beings more like one another in their whole physical and spiritual conformation than in the shape of their feet? … Such are the differences among human beings in their sources of pleasure, their susceptibilities of pain, and the operation on them of different physical and moral agencies, that unless there is corresponding diversity in their modes of life, they neither obtain their fair share of happiness, nor grow up in the mental, moral and aesthetic stature of which their nature is capable.[51]

[47] Samuel Warren and Louis Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193.

[48] Although the camera was patented, Eastman's novel method was one of mass advertising and mass production: see Vrinda Kadiyali, 'Eastman Kodak in the Photographic Film Industry: Picture Imperfect' in David Rosenbaum (ed.), *Market Dominance: How Firms Gain, Hold or Lose it and the Impact on Economic Performance*, Praeger Publishers, 1998, ch. 6.

[49] For the case, its social circumstances and its aftermath fully documented, see Richard Ellmann's excellent *Oscar Wilde*, Penguin Books, 1987.

[50] See Richardson and Hitchens, 'Celebrity Privacy', ch. 10 at pp. 263–9.

[51] John Stuart Mill, *On Liberty*, 1859, reprinted in Mary Warnock (ed.), *John Stuart Mill, Utilitarianism, On Liberty and Essay on Bentham*, Collins, 1961, 126 at p. 198.

Mill was a great supporter of free speech, although no great friend of the newspaper press, which he said was too inclined to do people's thinking for them.[52] But here he was, fashioning an argument for the utilitarian benefits associated with privacy, that would in some quarters take precedence over his liberal-utilitarian arguments for freedom of speech.

[52] *Ibid*., p. 195 ('At present individuals are lost in the crowd … The only power deserving the name is that of masses … This is as true in the moral and social relations of private life as in public transactions … [and] the mass do not now take their opinions from dignitaries in Church or State, from ostensible leaders, or from books. Their thinking is done for them by men much like themselves, addressing them or speaking in their name, on the spur of the moment, through newspapers').

4 End of the property right

Both the property right in unpublished works and the action for breach of confidence would continue to be relied on after *Prince Albert* v. *Strange*, along with contract when it was feasible to construe one – although these cases usually had more to do with commercial interests than the biographical and privacy interests talked about there. Indeed, it was often difficult to discern which action was operating since they blended into each other.[1] If anything, contract was the preferred mechanism in the traditional scenario of information imparted in confidence. So in the commissioned photograph case of *Pollard* v. *Photographic Company*[2] – one of the very few privacy cases of the latter nineteenth century – the court found an implied contract term that the negative belonged to the plaintiff.[3] Thus the photographer was not free to include Mrs. Pollard's portrait on Christmas cards displayed in his shop window (no matter how beautiful or pleasant she was to look at). It was a decision of which the newspaper press apparently approved – the *Daily Chronicle* in a statement quoted extensively in other newspapers commenting that 'law and common sense are not always synonymous' but in this case it was apparently so and 'if it were otherwise the thing would be monstrous'.[4] Alternatively, where contract was not available

[1] See *Morison* v. *Moat* (1851) 9 Hare 241, Turner VC at 255: 'Different grounds have indeed been assigned for the exercise of that jurisdiction. In some cases it has been referred to property, in others to contract, and in others, again, it has been treated as founded upon trust or confidence … but, upon whatever grounds the jurisdiction is founded, the authorities leave no doubt as to the exercise of it.' And see William Cornish, 'Personality Rights and Intellectual Property', *Oxford History of the Laws of England*, Vol. XIII, Oxford University Press, 2010, 845 at pp. 984–985.

[2] *Pollard* v. *Photographic Company* (1889) LR ChD 345.

[3] *Ibid*., North J at 353: although copyright is not available given the lack of registration (as then required under the Act), 'this does not deprive the Plaintiffs of their common law right of action against the Defendant for his breach of contract and breach of faith'.

[4] As quoted in 'Trafficking in a Lady's Portrait', *Southland Times*, 29 April 1889, p. 3; and to similar effect 'Singular Photographic Copyright Case', *Evening Post*, 6 April 1889.

or could not bind the defendant, the property right came more to the fore, supplementing the contract and blending into its boundaries so that where one finished and the other began was not always clear (and often both were found violated).[5]

The property right also blended with the statutory copyright action. By the end of the century it was not only common to see copyright cases such as *Pope* v. *Curl* cited in cases involving the property right in unpublished works. The common law cases, including *Prince Albert* v. *Strange*, were equally being cited in copyright cases as authority for the personal character of an author's work.[6] It was this background, along with pressures applied by British authors for still longer protection than under the 1842 Act (using much the same arguments as Wordsworth and others had employed in respect of that Act), along with the Europeanising influence of the Berne Convention of 1886[7] (which Britain joined in 1887), that set the parameters of the codifying Copyright Act of 1911.[8] The Act subsumed the property right under its rubric, in the process returning it to a simple right of first publication while leaving the action for breach of confidence intact on the basis it would be merely a residual doctrine. As it turned out, eventually, this assumption was false.[9]

[5] See, for instance, *Caird* v. *Sime* (1887) LR 12 App Cas 326; *Lamb* v. *Evans* [1893] 1 Ch 218 and the 'news' cases *Exchange Telegraph Company Limited* v. *Gregory & Co* (1896) 1 QB 147 and *Exchange Telegraph* v. *Central News* (1897) 2 Ch 48.

[6] See, for instance, *Jeffrys* v. *Boosey* (1854) 4 HLC 815, Erle J at 868 and *passim* (cf. also Lord Brougham's language at 962, 968), and generally Jane Ginsburg, 'Creation and Commercial Value: Copyright Protection of Works of Information' (1990) 90 *Columbia Law Review* 1865 at 1874, arguing that out of such cases a personality conception of copyright developed. In this chapter we have suggested the personality theory was already present in the common law property right, and was premised on utilitarian grounds (to use Mill's language) of human flourishing and social progress.

[7] *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886.

[8] Copyright Act 1911 1&2 Geo 5 c 46, s 31. See generally John Feather, *Publishing, Piracy, and Politics: An Historical Study of Copyright in Britain*, Mansell, 1994, ch. 6; see also (on the persuasions of international authors in the discussions prior to the Berne Convention at the Exposition Universelle, Paris 1878, led by 'respected internationalist' Victor Hugo), Eva Hemmungs Wirtén, *No Trespassing: Authorship, Intellectual Property Rights, and the Boundaries of Globalization*, University of Toronto Press, 2004, ch. 1.

[9] It was held to for some decades however: for instance, in one case of unauthorised photographs of the plaintiff's dog show for publication in the defendants' newspaper, it was said that they could have acquired by contract such a right as they claim, and … they failed to do so': *Sports and General Press Agency, Limited* v. *'Our Dogs' Publishing Company, Limited* [1917] 2 KB 125, Swinfen Eady LJ at 128.

The 1911 Act was to serve as a template for modern copyright statutes throughout the British world.[10] However, the template was quite different and distinct from the other intellectual property statutes, shaped more by the particular experiences and arguments of authors and publishers – and in the eyes of some it gave more than the public interest demanded. As the Conservative MP William Joynson-Hicks said, in the debates surrounding the 1911 Bill, 'the country has received far more benefit from the works of Watt or Arkwright than from the works of a large number of authors', and they also put in a great deal of work and money into perfecting their inventions, and yet received under the current Patent Laws a 'beggarly fourteen years protection' compared to the lavish fifty years from the author's death being canvassed for copyright.[11] Just why patent law was framed around such different principles from copyright law, ones that seemed beggarly by comparison, is a matter we turn to in the next part of this book.

[10] Feather, *Publishing, Piracy, and Politics*, p. 203 and *passim*.

[11] See House of Commons Debate on the Copyright Bill, 7 April 1911, Hansard, Vol. 23 col. 2605, William Joynson-Hicks. Joynson-Hicks was, Feather says, a lawyer who specialized in copyright and had been a member of the Gorrell Committee which had initially proposed codification of copyright law modelled on the Berne Convention: *Report of the Committee of the Law of Copyright Presented to Both Houses of Parliament by Command of His Majesty*, printed for London Stationery Office, 1909 (although that Committee also recommended the fifty-year term specified in the Berne Convention).

Part II

The exhibition effect

The resemblance and relationships between patents and copyright are questions rarely debated today. Patents are often seen as fundamentally different from copyright, with different rationales operating to explain and justify the system. The protection given to patents is usually explained as a reward for high inventiveness, and as encouragement for the public disclosure of material that might otherwise be kept secret. The economist Edmund Kitch suggests that patents also allow important lead time for an inventor to bring a product to market. All these rationales owe a great deal to ideas formulated by nineteenth-century economists in their extended debates over the patent system.[1] The unspoken premise of this analysis is the utilitarian value of the products and processes that form the subject matter of patents. Yet the evidence Kitch points to is interesting for another reason. He provides fifty examples of patented inventions that demonstrate the long time it may take for a new invention to achieve a commercial market. Of these, approximately one-half are directed at consumer products and one-quarter at matters of information, entertainment and appearance,[2] in other words subject matter that is also a central concern of copyright law.

The inventions forming the basis of Kitch's study are mainly British and US patented inventions from between the 1880s and the 1940s. In another study of 150 early-nineteenth-century British patented inventions the pattern is even more striking.[3] This reveals not only the

[1] Edmund Kitch, 'The Nature and Function of the Patent System' (1977) 20 *Journal of Law and Economics* 265.

[2] Including bakelite, the ball-point pen, cellophane, cinerama, fluorescent lighting, kodachrome (for colour photography), the long-playing record, nylon and perlon, radio, the self-winding wrist watch, stainless steel, titanium, television, the zip fastener: see *ibid*., at 272. Here Kitch draws his research from case studies developed in John Jewkes, David Sawyers and Richard Stillerman, *The Sources of Invention*, Macmillan, 1958.

[3] Unpublished research of Dr Chris Dent, Intellectual Property Research Institute of Australia, The University of Melbourne, 2011, on file with the authors. We are grateful to Dr Dent for drawing this research to our attention.

expected inventions relating to iron smelting, steam engines, looms and knitting machines, and so on, but also a broader array of inventions of books, buttons, calicoes, carpets, chairs, fabrics, playthings, hosiery, lace, pens, photography, printing, and more. Even the first list of classically 'industrial' innovations had obvious implications for the behaviour of large numbers of consumers. For instance, as Asa Briggs and Peter Burke point out,[4] the steam trains along the nineteenth century's proliferating networks of railway lines enabled many people for the first time to leave their immediate neighbourhoods and explore the dimensions of their entire country, a possibility eagerly embraced. 'For move you must! Tis now the rage/The law and fashion of the age', wrote Coleridge in 1824.[5] With patented inventions directly and indirectly shaping the cultural and social possibilities of the age, it is not surprising that there was so much public interest in the reform of patent law throughout the nineteenth century, with many analogies drawn to copyright.

Moreover, it is striking that one of the main impetuses for reform of the patent system was a powerful pressure for free exhibition. This lends support to the thesis recently developed by Richard Holmes that the 'beauty and terror of science' was as mesmerising for post-Revolutionary audiences as the post-Revolutionary literature, theatre and art.[6] We suggest that a critical point of the widespread public debate about the value of the British patent system in the nineteenth century was the Great Exhibition of 1851. In opposition to those arguing for an extension of the patent system so that more inventors could enjoy the benefits of the protection that patents offered, the Exhibition raised the prospect that success could be achieved in the Exhibition's market even in the absence of a patent (or registered design[7]). It was only with a further trio of international exhibitions held in the 1870s that opinions moved more clearly in support of patenting. At the 1873 *Weltausstellung* in Vienna, there were arguments advanced that patents were needed in order to encourage inventions to be introduced under controlled conditions and in a reliable manner

[4] Asa Briggs and Peter Burke, *A Social History of the Media: From Gutenberg to the Internet*, 3rd edn, Polity Press, 2009, p. 97 and *passim*.

[5] Samuel Taylor Coleridge, 'The Delinquent Travellers' (1824), reprinted in Ernest Hartley Coleridge, *The Complete Poetical Works of Samuel Taylor Coleridge*, Clarendon Press, 1912, Vol. I, p. 444.

[6] Richard Holmes, *The Age of Wonder: How the Romantic Generation Discovered the Beauty and Terror of Science*, Harper Press, 2008.

[7] Designs law currently allowed the registration of ornamental as well as useful designs under the Ornamental Designs Act of 1842, 5 & 6 Vict c 100 and Utility Designs Act of 1843, 6 & 7 Vict c 65.

'to the general knowledge of the public'.[8] And by the 1876 Centennial Exhibition in Philadelphia and the 1878 *Exposition Universelle* in Paris, it was noticed that the American exhibitors were more inventive than their British and European counterparts, attributed to their cheaper and more rigorous patent system. The US patent system became the model for the British reforms from the 1880s onwards, leading to wider reliance on the institution of patenting and at the same time acceptance of its fundamental tenet that secure rights over invention fostered individual and social welfare.

On the other side, the value of exhibition was not forgotten. The Vienna *Weltausstellung* made plain that exhibitors were by now as much concerned about their trading reputations as about any rights they could claim over the products being exhibited. Here competitors' actions in engaging in fraudulent marking (or by extension non-fraudulent confusing marking) were seen as especially insidious in the hypercompetitive and nationalistic climate of the late nineteenth century. The British report on the 1873 *Weltausstellung* commented favourably on the Austro-Hungarian trade mark law which had been relied on to protect British exhibitors' registered trade marks from imitation by foreign competitors. This provided the final impetus for the establishment of a British registered trade mark system in 1875.[9] Unexpectedly, and perhaps unforeseeably, trade marks rapidly took on a broader function than simply denoting the source of goods or services, working as language to communicate a range of qualities that post-exhibition audiences/markets expected and desired.

In all this, the press was crucial in translating the debates for public consumption and bringing the public along with lawyers, judges and politicians alongside. If in our previous chapters we saw the competition between author-journalists and Grub Street hacks actively shaping social and legal ideas about personal control over an individual's image and identity, here we see the press emerging as a critical observer of debates that were going on outside its immediate sphere of operation. This was the period in which the press, as George Boyce says,[10] was reshaping itself as the 'Fourth Estate', bolstered by the needs and desires of its readers, with limited time and expertise of their own to draw on in shaping their knowledge and opinions, and its seeming impartiality

[8] Report on the International Patent Congress of 1873, British Parliamentary Papers, 1874, p. 343.

[9] An Act to Establish a Register of Trade Marks 1875, 38 & 39 Vict, c 91.

[10] See George Boyce, 'The Fourth Estate: The Reappraisal of a Concept' in Boyce, Curran and Wingate (eds.), *Newspaper History From the 17th Century to the Present Day*, Constable, 1978, 19 at p. 23.

as social and political observer.[11] In the words of Henry Reeve, former columnist of *The Times* writing in the *Edinburgh Review* (of which Reeve had just become editor) in October 1855:

> Journalism is now truly an estate of the realm; more powerful than any of the other estates; more powerful than all of them combined if it ever could be brought to act as a united and concentrated whole … It furnishes not only the materials on which our conclusions must be founded; it furnishes the conclusions themselves, cut and dried – coined, stamped and published. It inquires, reflects, decides for us. For five pence or a penny (as the case may be) it *does all the thinking* of the nation; saves us the trouble of weighing and perpending, of comparing and deliberation; and presents us with ready-made opinions clearly and forcibly expressed.[12]

The press's purported role of helpful observer and public commentator is most evident in the patent debates of the tumultuous middle-latter decades of the century. There the press portrayed itself as both spectator-recorder of events and as representative-advocate of enlightened opinions (able somehow to put aside its own interests in having available the latest technologies of steam printing and mass distribution). The sense of great social responsibility is palpable in the pages of *The Times* and *The Economist* as they set about explaining and developing their positions. That both of these newspapers also changed their positions as political and public attitudes waxed and waned, cemented their role as close observer and shaper of public opinion in a changing time. And their final succumbing to the apparently irrefutable evidence of 'facts … nothing but facts',[13] in favour of patenting at the 1870s exhibitions only added to the sense of the press's quasi-judicial decision-making role, that Reeve had elaborated on many years ago.

However, we may question whether the press functioned in quite the same way when it came to its unqualified support for traders' advertising interests by the *fin de siècle*. Advertisers were, after all, the mainstream press's bread and butter, as W.L. Watson pointed out in an article in *Blackwood's Edinburgh Magazine* in November 1898.[14] Newspapers were, by now, essentially commercial ventures. Could a commercial

[11] As we have noted, it was a function that John Stuart Mill observed in *On Liberty* in 1859, although he at least was not entirely happy with the abrogation of individual control: see above, Part I, Chapter 3.

[12] Henry Reeve, 'The Newspaper Press' (1855) 102 *Edinburgh Review* 470 at 477–8.

[13] As Charles Dickens (critically) characterises the utilitarian spirit of reform in *Hard Times*, first published in *Household Words*, 1 April–12 August 1854.

[14] W.L. Watson, 'The Press and Finance' (1898) 164 *Blackwood's Edinburgh Magazine* 639.

venture really maintain its status as the Fourth Estate at the same time as servicing its advertisers on which it depended?[15] In *The Times*' treatment of the trade mark cases discussed at the end of this Part we see the beginning exposure of the press's myth of objectivity, even at the height of the newspaper's period of power and prestige.

[15] And see generally Boyce, 'Fourth Estate', p. 27, pointing out that the doubts were widely shared.

5 Patent inadequacies

We should begin with a patent, as Adrian Johns said,[1] and the kaleidoscope patent is the perfect example. When the notable scientist Charles Babbage in 1830 proposed 'splendid reputation' as an alternative to 'pecuniary profit' from 'intellectual exertion', and noted that the first was still more common than the second,[2] he may well have been thinking of its inventor, his friend David Brewster. Brewster obtained a patent for his 'Kaleidoscope' (the name he had also invented) in 1817.[3] But as soon as the instrument was 'exhibited to some of the London opticians' with a view to arranging commercial manufacture, the 'remarkable properties of the Kaleidoscope became known before any number of them could be prepared for sale'.[4] The kaleidoscope became a sensation, independent of its inventor's financial and personal control. In consequence, although Brewster estimated that some 200,000 instruments were sold in London and Paris during three months, and 'large cargoes of them were sent abroad, particularly to the East Indies', few of these – 'perhaps not one thousand' – were made under his licence and to his exacting scientific specification.

There is a hint in the diary Brewster's daughter later published detailing his experiences that perhaps Brewster was the author of his own misfortune in failing to meet the market. His wife's response to one of his letters from London complaining about the kaleidoscope's piracy was to pass on a desperate plea from an Edinburgh merchant for more of his kaleidoscopes to satisfy the many people wanting to buy them on a daily basis, a plea that Brewster was obviously unable to satisfy, having no

[1] Adrian Johns, *Piracy: The Intellectual Property Wars from Gutenberg to Gates*, University of Chicago Press, 2009, p. 250, and in the spirit of piracy that the book interrogates we have chosen the same example – albeit we take a slightly different angle.

[2] Charles Babbage, *Reflections on the Decline of Science in England*, B. Fellowes and J. Booth, 1830, pp. 131–2.

[3] Brewster's Patent Specification No. AD 1817, No. 4136 is reproduced at the Brewster Kaleidoscope Society webpage at www.brewstersociety.com/history.html.

[4] David Brewster, *The Kaleidoscope: Its History, Theory and Construction*, 2nd edn, John Murray, 1858, pp. 6–7.

system established for the multiple production of the instruments.[5] As a result of these combined activities, although Brewster was honoured as the kaleidoscope's inventor, he earned little money from his invention – instead suffering the 'mortification' of being told by Sir Joseph Banks and Sir Everard Home that he would have made £100,000 if the patent had been 'managed … rightly';[6] and the public was deprived of the full enjoyment of the 'creation and exhibition of beautiful forms' by his 'ocular harpsichord'.[7]

Just why Brewster was unable to control the use of his invention notwithstanding his patent is a matter of speculation. It was initially thought that the patent was declared invalid but Brewster denied this.[8] More likely, it has been suggested, the specification was inadequate to stop the piracies,[9] being expressed in language that allowed for numerous modifications in an era where even minor differences were meticulously counted.[10] That there were so many infringers, and they were often poor, without even the resources to cover the legal costs of a trial, was surely a factor as well.[11] Johns observes, in addition, that many of those who manufactured and sold the instruments, especially at the cheaper end of the market, did so 'in blissful ignorance that a patent ever existed'.[12] The kaleidoscope was an invention that was designed for and catered to a broad market for 'rational amusement'.[13] Its appeal was directly to the fashions and fancies of a mass audience unlike the more obviously 'useful' scientific inventions, such as Richard Arkwright's spinning machine and James Watt's steam engine – inventions traditionally

[5] See Margaret Gordon, *The Home Life of Sir David Brewster by His Daughter Mrs Gordon*, Edmonston and Douglas, 1870, p. 44, quoting from private correspondence.

[6] *Ibid*.

[7] See Brewster, *The Kaleidoscope*, pp. 7–8. The language of 'creation and exhibition of beautiful forms' and 'ocular harpsichord' is from Brewster's patent (see note 3).

[8] For instance, Brewster, *The Kaleidoscope*, footnote 1. See also Brewster's submission before a Select Committee of the House of Lords Appointed to Consider a Bill Intituled, 'An Act Further to Amend the Law Touching Letters Patent for Inventions'; and also the Bill Intituled, 'An Act for the Further Amendment of the Law Touching Letters Patent for Inventions' and to Report thereon to the House, Session 1851, published with the Select Committee's *Report*, ordered by the House of Commons to be printed, 4 July 1851, 320 at p. 324.

[9] For instance, Johns, *Piracy*, p. 253.

[10] For a useful discussion, see David Brennan, 'The Evolution of English Patent Claims as Property Definers' [2005] *Intellectual Property Quarterly* 361 at 372–3.

[11] Brewster certainly thought so: see his submission before the Select Committee, p. 324.

[12] Johns, *Piracy*, p. 252. And see also 'History of Dr Brewster's Kaleidoscope', 3 *Blackwood's Edinburgh Magazine*, April–September 1818, 331 at 332–3 for a contemporary account of the piracy to similar effect.

[13] *Ibid*., p. 250.

thought of as subjects for patent protection.[14]. At the same time, the fact that the patenting extended to technologies of rational amusement opened up analogies with copyright and also designs protection which offered an alternative (and somewhat more efficient) system of registration for elements of design.

Similar stories could be told of the problems of other inventors seeking to cater to fickle luxury markets in the early nineteenth century. Still, some succeeded. John Heathcote, the inventor of the Bobbinet lace-making machine, may have struggled with competition from pirates in Britain as well as France and America (despite the government's efforts to prevent exports of machinery and lace smuggling from abroad) as well as the Luddite protests of the 1810s. To an extent the tribulations provided a stimulus for Heathcote's continuing inventions and efforts to expand his business activities. The 'social events around him – the smashing of his machines by the Luddites, the fraudulent imitations of his nets, the illegal exportation of his machines' encouraged him to continually develop new and better models,[15] and also led to the granting of many licences.[16] No doubt his talents and enterprise were also important. Nevertheless, Heathcote had financial backing and practical expertise in business, having trained as a lace maker on his father's Warp Frame machines and obtaining his first patent with the help of his brother-in-law, for an attachment to Warp Frames for making thread-lace and lace mitts at the age of nineteen. As he is quoted in William Felkin's *History of Machine-Wrought Hosery and Lace Manufacture* in 1867, 'I worked for my bread, and I tried to invent'.[17] Not all inventors had Heathcote's advantages and business expertise. Brewster, for instance, had initially trained as a clergyman and then worked as an experimental scientist, subsisting off poorly paid academic posts first at St Andrews then at Edinburgh University and his editorship of the *Edinburgh Philosophical Journal* and *Edinburgh Journal of Science*, as well as numerous articles contributed to various reviews. Yet for all that, Heathcote shared with Brewster the problem of a patent system that was both hard to access and, at the same time, very limited in the scale and scope of the protection offered.

[14] Although not without their own difficulties and legal disputes: see Jenny Uglow, *The Lunar Men: The Friends Who Made the Future*, Faber and Faber, 2002, ch. 33.
[15] Pat Earnshaw, *Lace Machines and Machine Laces*, B.T. Batsford Ltd, 1986, p. 72.
[16] See William Felkin, *A History of the Machine-wrought Hosiery and Lace Manufactures*, Longmans, Green and Co., 1867, ch. 17.
[17] See Felkin, *A History*, p. 191.

Indeed, the burden and financial costs of patenting and then enforcing and defending a patent prevented many inventors from relying on the patent system for at least the first half of the nineteenth century. The fact that Brewster had obtained a patent over his kaleidoscope made him the exception rather than the rule, putting him a class closer to Heathcote than the vast majority of non-patenting inventors. The costs of a patent had to be met in advance of any commercial return, beyond the investments already incurred in developing the invention and bringing it to market. If they were to be passed on to consumers that meant prices had to be higher which meant competitors who did not face the same costs could easily undercut them. There were more general problems associated with an expensive, cumbersome and uncertain process. Brewster averted to the difficulty and expense of obtaining a patent under the current state of the law in his *Quarterly Review* review-essay on Babbage's *Decline of Science in England*.[18] There Brewster angrily described the British patent system as one based on 'vicious and fraudulent legislation, which, while it creates a facetious privilege of little value, deprives its possessor to the natural right to the fruits of his genius' – in contrast to the copyright statute which, Brewster maintained, secured the author's right without him having to pay for the privilege far more effectively than patent law did for its inventors.[19]

And Brewster was not the only one to author articles on the need for patent reform. Charles Dickens also wrote sympathetically of the burden of patenting in 'A Poor Man's Tale of a Patent', published in the October 1850 edition of the popular *Household Words*,[20] a journal he 'conducted'. As Dickens' fictional protagonist's friend concluded at the end of his tale of woe in patenting his model that took him through numerous payments in numerous offices and personages down to the 'Deputy Chaff-Wax',

> if the laws of this country were as honest as they ought to be, you would have come to London – registered an exact description and drawing of your invention – paid half-a-crown or so for doing of it – and therein and thereby have got your Patent.[21]

[18] David Brewster, '*Reflections on the Decline of Science in England and Some of its Causes by Charles Babbage*' (1830) 43 *Quarterly Review* 305.
[19] *Ibid*., at 333.
[20] Charles Dickens, 'A Poor Man's Tale of a Patent' first published in the October issue of *Household Words* 1850; reprinted in Charles Dickens, *Reprinted Pieces: Centenary Edition*, Chapman & Hall, 1911, 113.
[21] *Ibid*., p. 119.

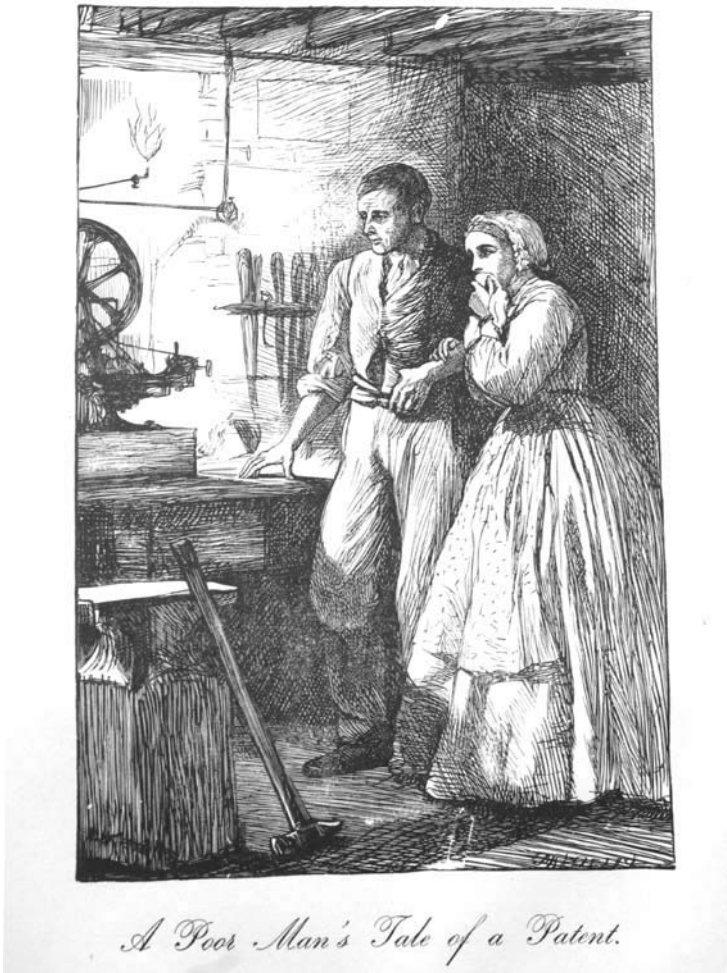


Figure 4 Fred Walker, illustration for Charles Dickens' 'A Poor Man's Tale of a Patent', first published in *Household Words* in 1850, reprinted with illustrations in Charles Dickens, *Reprinted Pieces, Centenary Edition*, 1911, courtesy University of Melbourne Library, photograph by Bernard Lyons.

Instead, as Brewster also explained to his *Quarterly Review* audience, the patent system required payment of an exorbitant £300–400 as well as multiple steps taken in multiple offices.

In 1851 there was further reporting in the press of the problems of patenting since there were public accounts of evidence being given

before a Select Committee of the House of Lords to consider two patent law reform Bills.[22] Brewster was among those who gave evidence and he supported the Bills' idea of making patents easier and cheaper, adding (in response to the question whether the reforms may over-encourage efforts at invention) that patents were generally beneficial to society because of their support and encouragement of experimental research and inventiveness, that 'even when ideas appear to be frivolous' the history of science shows they have often led to 'very great and important results', and that no distinction should be drawn here between 'science and the arts'.[23]

Also weighty in the evidence before the Select Committee was the submission of the Society of the Arts. In a publication titled *Extracts From The First Report on the Rights of Inventors*, which formed an Appendix to the Committee's report,[24] the Society argued that 'it is simply the business of the State to provide an easy means of registration of claims, which the law should regard as valid until they were proved to be otherwise'.[25] It also pointed to the useful precedent of the Utility Designs Act, which allowed a simple and inexpensive process of registration of 'forms or configuration' applied to articles of manufacture – stating that it was 'notorious' that many '[i]nventors oppressed by the patent laws' had taken refuge under the Act and that far from this leading to increased litigation it had enhanced respect for inventors' rights.[26] The Society's Committee for Legislative Recognition of the Rights of Inventors contributed further a 'Resolution on the Rights of Inventors'.[27] This provided inter alia:

> 5 That registration of inventions should be obtainable for a period of one year on payment of 5*l*, and should be renewable for four periods of five years each, on payment of 10*l* at first renewal; of 20*l* at second renewal; of 50*l* at third renewal; and of 100*l* at fourth renewal. [The principle of renewed payments is proposed as a means of testing whether an invention is in use, and of removing useless inventive rights that might otherwise be obstructive of improvements.]
>
> …

[22] See Select Committee *Report*, p. 196 (list of witnesses). For a thorough discussion of the proceedings, see Moureen Coulter, *Property in Ideas: The Patent Question in Mid-Victorian Britain*, Thomas Jefferson University Press, 1991, ch. 2.

[23] *Ibid*., 320 at pp. 321, 324.

[24] Society of Arts, *Extracts from the First Report on the Rights of Inventors*, Select Committee *Report*, Appendix C, starting at p. 404.

[25] *Ibid*., p. 406.

[26] *Ibid*., p. 407. For the Utility Designs Act 1843, see 6 & 7 Vict c 65.

[27] Resolution of the Committee for Legislative Recognition of the Rights of Inventors (Ordered by the Council of the Society of Arts to be Printed, 26 December 1850), Select Committee *Report*, Appendix D, starting at p. 408.

13 That every person desiring to register an invention should submit two copies of the specification of his claims, accompanied, in every case where it is possible, by descriptive drawings.

14 That the mode and procedure of registration should be regulated by the Board of Trade, subject to a report to Parliament.

15 That an Annual Report of all specifications registered, with proper indices and calendars, should be laid before Parliament.

16 That a collection of all specifications should be made, calendared and indexed, and deposited for public information in the British Museum.

17 That it is highly desirable that such a collection should be printed and published.[28]

The Select Committee's draft 'Inventions Registration and Protection Bill'[29] went less far than that recommended by the Society of Arts and its Committee for Rights of Inventors. Nevertheless, with the expressed aim of '[extending] the Benefits of Registration to Inventions generally', it provided for some merger of the principles of patent and design protection, including establishment of a 'Registrar of Inventions and Designs', some regulation of specifications together with provision for public access, and lower fees for patenting (beginning with 5*l* for one year, as the Society had proposed).[30] It also provided for a simplified system of provisional registration to cover the invention for a limited period before the full process of patenting was undertaken. As William Cornish points out, the argument had already been made before another Select Committee in 1829, in an earlier attempt at patent law reform, that experimenters needed security in order 'to refine their inventive ideas, in order to get their return from later putting it into practical operation'.[31] Although it was not yet being said expressly that the market might also need time to appreciate the value of their inventions – echoing Wordsworth and other Romantics' arguments that the market needed time to understand the value of their works – this could easily be seen as another benefit of provisional registration.

However, in the same way as copyright reform had been slow and hesitant, so was patent reform in the 1850s. Notwithstanding considerable support in the press, including *The Times*, for the idea of making

[28] *Ibid*., pp. 408–9.

[29] Heads of a Bill to Extend the Benefits of Registration to Inventions Generally' (Inventions Registration and Protection Bill 1851), Select Committee *Report*, Appendix E, starting at p. 410.

[30] *Ibid*., section 8.

[31] William Cornish, 'Personality Rights and Intellectual Property', *Oxford History of the Laws of England*, Vol. XIII, Oxford University Press, 2010, 845 at p. 952, referring here to evidence of 'engineer-cum-patent agent' John Farey and American machine-maker Dyer before an 1829 House of Commons Select Committee.

patents easier and cheaper to obtain, the Bill failed.[32] Instead the Patent Law Amendment Bill was introduced and passed the following year.[33] By now the initial momentum for making patents substantially cheaper had dissipated somewhat. Instead, by the terms of the new Act the initial cost was set at 25*l* and the full cost rising to a maximum of 175*l*.[34] The government had changed since the Committee's report and draft Bill, and, as Allan Gomme observes, Parliament preferred to keep patents expensive so as to discourage applications.[35] There were some important reforms nevertheless.[36] Commissioners were established to handle the process of patenting. There were rules introduced for the framing and publication of specifications. Provisional registrations were permitted. And at least some of the costs of patents were deferred until the end of the maximum term of protection, in addition to a slight reduction in the costs overall.[37] These reforms were sufficient to produce or contribute to an increase in the patent sealing rate from 455 in the year before the reforms came into effect to 2,187 in the year after, with an average sealing rate in the next decade of 2,047 per year.[38] Almost all of the registrations under the new Act, some 98 per cent, utilised the provisional registration mechanism.[39]

The politicians and others who resisted any greater democratisation of the patent system in 1852 included those who were opposed to any expansion of the system in the name of 'free trade'. John Stuart Mill called it 'the prostituted name of free trade',[40] as they included in particular 'capitalists', those investing for instance in Britain's vast and popular telegraph systems, who were users of inventions and who could see the benefit to themselves from not having to negotiate terms of use with patentees and pay licence fees. The Committee had tried

[32] For an in-depth discussion see Coulter, *Property in Ideas*, ch. 2.
[33] Patent Law Amendment Act, 15 & 16 Vict 1852.
[34] The fees are set out in a Schedule to the Act.
[35] Allan Gomme, *Patents of Inventions: Origin and Growth of the Patent System in Britain*, published for the British Council by Longmans Green and Co., 1946, p. 41.
[36] See *ibid*., pp. 35–9.
[37] Such periodic payments had the added advantage of getting 'rid of rights which are useless and not used': see evidence of Henry Cole before the Select Committee, Select Committee *Report*, 259 at p. 271.
[38] Gomme, *Patents of Inventions*, p. 40.
[39] See *Report of the Commissioners Appointed to Inquire into the Working of the Law Relating to Letters Patent for Inventions*, 1865, p. vi.
[40] John Stuart Mill, *Principles of Political Economy* (1848, 1849, 1852, 1857, 1862, 1865, 1871), further edited and with an introduction by Sir William Ashley, Longmans, Green and Co., 1909, p. 933 – the words were added in the fifth edition, 1862.

to accommodate their concerns by including provisions on licences and assignments in its draft Bill, including for compulsory licensing.[41] These did not appear in the final Act – although the fact that the Act did include provision (also anticipated in the draft Bill) for public registers of patents specifications and proprietors may have been partly directed at fostering assignments and licensing. Nevertheless, these reforms were not enough to satisfy the demands of these critics. They considered a patent in any form and on any terms as an unwarranted restriction on their freedom to trade.

Among the most vocal of the free traders was John Lewis Ricardo, a Member of the House of Commons and owner of one the early electric telegraph companies, which had taken up numerous patents from third parties to avoid the cost and trouble of litigation.[42] (It was not only the abolitionists who complained about the cost and trouble of litigation: Brewster also mentioned costs of 'one or more thousand' incurred in defending patents in court, adding cases were often lost.)[43] Before the Committee, Ricardo expressed the opinion that 'there should be no patents allowed to be taken out at all', equating the monopoly of a patent to a 'monopoly over a particular trade'.[44] In response to the Committee's suggestion that the patent system might be improved by making it cheaper and easier to access, Ricardo said:

> either the law would be inoperative and people would pay the same disregard to patents which they do pay in the United States and on the Continent generally; or the confusion and litigation would be so great that trade would be impeded to such an extent, that it would be absolutely necessary to abolish the system.[45]

Ricardo may have represented a minority opinion in 1851. But his sympathisers were represented in the Committee's deliberations on reform,[46] including remarkably enough its chair Lord Granville by the end of the process, who, as recorded by *The Times* by then had 'arrived at the conviction that the existence of this species of legal

[41] Inventions Registration and Protection Bill 1851, clauses 12–14.
[42] See 'Questions Addressed by the Committee to John Lewis Ricardo, Esquire, A Member of the House of Commons, and his Answers thereon', Select Committee *Report*, Appendix A, starting at p. 393.
[43] Brewster, '*Reflections*', at 324–5.
[44] Ricardo, in Select Committee *Report*, p. 394.
[45] *Ibid*., p. 397.
[46] Coulter calculates that eight out of the thirty-three witnesses who testified preferred abolition: *Property in Ideas*, p. 63.

property in an invention is altogether an evil and beneficial to no party at all'.[47] The anti-patent lobby was soon to attract more and wider support. Johns argues that 'it was the process of vetting the new law in 1851–52 that sparked the emergence of a movement dedicated to abolition'.[48] We suggest there was another factor as well, namely the Great Exhibition.

[47] *The Times*, 1 August 1851, p. 4. [48] Johns, *Piracy*, p. 262.

6 Exhibition fever

In the same year that Babbage published *Reflections on the Decline of Science in England*, Mill responded to William Hazlitt with his own *Spirit of the Age*.[1] 'The first of the leading peculiarities of the present age', Mill wrote in 1830, 'is that it is an age of transition' in which the public had outgrown old institutions but not yet acquired new ones:

> Society demands, and anticipates, not merely a new machine but a machine constructed in another manner. Mankind will not be led by their own maxims, nor by their old guides; and they will not choose either their opinions or their guides as they have in the past.[2]

The Great Exhibition, which opened in London in 1851, was just such a machine and it set in train an exhibition culture which lasted until the end of the century and beyond. The machinery of exhibition offered a fresh opportunity to build some splendid reputations for works that could be shown attractively to appreciative audiences and ready markets. But exhibitions also provoked serious consideration of the real costs and benefits of a patent system. And even for those who supported reform rather than abolition of the system, the experience of the Great Exhibition changed the debate from one that was previously focused on rewarding and fostering innovation as well as (via the free traders) with the use of innovation by other traders to one that was now rather more concerned with the public's enjoyment of knowledge.

Although there had been plenty of exhibitions before,[3] the Great Exhibition was the first truly international spectacle to be encountered by its audience. Designed not only as a showcase of British and colonial success, foreign exhibits were solicited as well – the balance in the end

[1] John Stuart Mill, *The Spirit of the Age*, first published in a series of essays in the 1831 *Examiner*, reprinted in Gertrude Himmelfarb (ed.), *The Spirit of the Age*: *Victorian Essays*, Yale University Press, 2007, p. 50.
[2] Himmelfarb, *Spirit of the Age*, p. 6.
[3] For a detailed history see the *Official Record of the Melbourne International Exhibition 1880–1*, Mason, Firth & M'Cutcheon, 1882, pp. xxxiii–xxxiv.

between Great Britain and the colonies and the rest of the world being 6,861 British exhibits, 520 from the colonies and 6,556 for the rest.[4] Over six million people – one-third of England's population[5] – attended in the five months it was open from May 1851, many coming from overseas. Emblematic of its spectacular style was the mansion in which it was housed. An enormous conservatory, the 'Crystal Palace', as it was dubbed by the press, was sufficiently large and high to accommodate 'some of the finest elms growing in Hyde Park'.[6] Joseph Paxton's radical new design, replacing bricks and mortar with glass and iron, became the trade mark of the Exhibition. In the words of William Thackeray:

> As though 'twere by a wizard's rod
> A blazing arch of lucid glass
> Leaps like a fountain from the grass
> To meet the sun.[7]

The press saw in the Exhibition a wonderful opportunity for extended discussion about the value of public display and expression – ensuring that an even wider audience than was actually present at the Crystal Palace could enjoy the experience and at the same time insinuating its presence and ideas through the act of reportage. *The Times* provided a vivid description of the opening, characterising it as an occasion 'celebrated by the whole human race without one pang of regret, envy or national hate', adding 'never before was so vast a multitude collected together within the memory of man'.[8] The utilitarians' *Westminster Review*, in a long article, represented the Exhibition as a 'solemn contract of peace amongst the nations, as earnest of the time when individual faculties shall have full scope, and oppression of the many by the few, or of the few by the many, shall everywhere cease'.[9] The *Illustrated London News* discovered the perfect opportunity to carry out its aim of keeping 'continually before the eyes of the world a living and moving panorama of all its actions and influences'.[10] Before the Exhibition its typical print run was 70,000–100,000, according to Richard Bellon, but nearly 200,000 copies were published for the issue covering the

[4] According to the *Official Record of the Melbourne International Exhibition*, p. xxxv.
[5] See Michael Mulhall, *Dictionary of Statistics*, George Routledge and Sons, 1892, p. 444.
[6] Asa Briggs, *Victorian People: Some Reassessment of People, Institutions, Ideas and Events 1851–1867*, Odhams Press Ltd, 1954, p. 44.
[7] See William Thackeray, *May-Day Ode*, 1851, *The Times* 30 April 1851, reprinted William Thackeray, *Ballads and Verses; and Miscellaneous Contributions to 'Punch'*, Macmillan and Co., 1904, p. 49.
[8] 'The Opening of the Great Exhibition', *The Times*, 2 May 1851, p. 8.
[9] 'Helix', 'Industrial Exhibition' (1851) 55 *Westminster Review* 346 at 347.
[10] As stated in its manifesto: 'Our Address', *Illustrated London News*, 14 May 1842, p. 1.

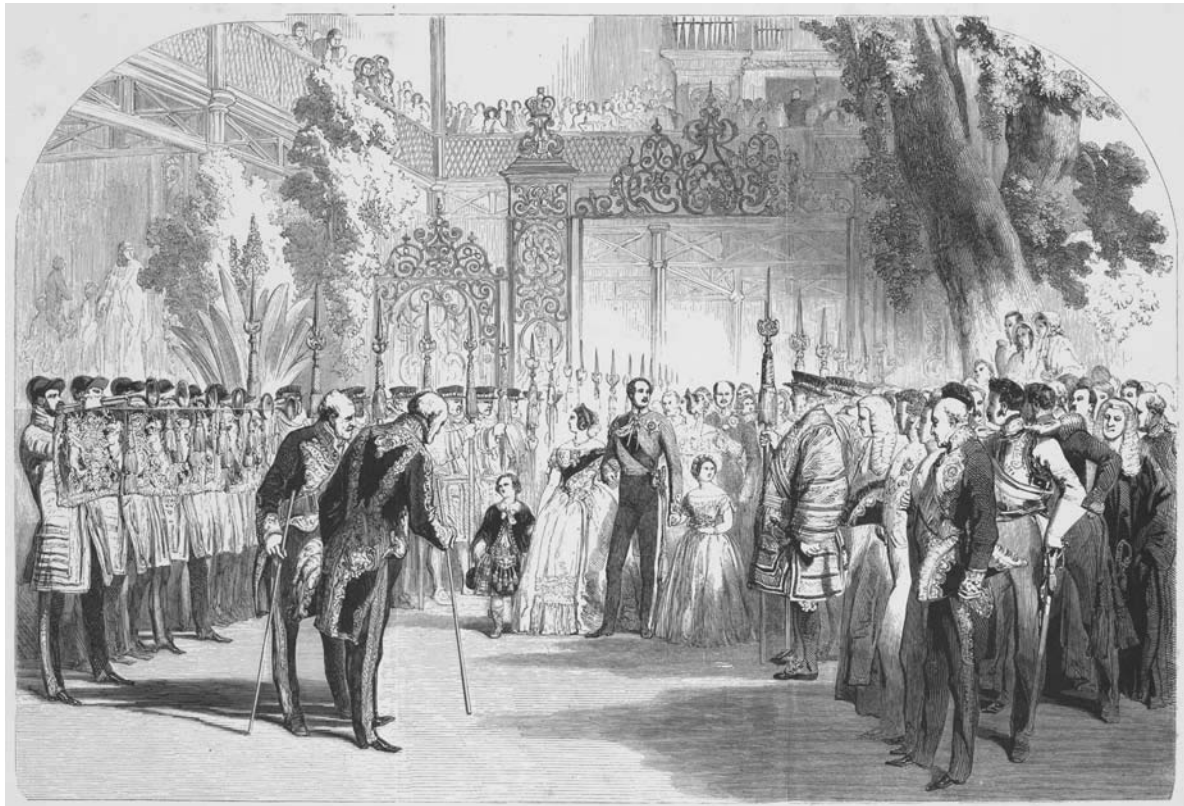


Figure 5 Prince Albert and family at the Great Exhibition, engraving from the *Illustrated London News*, 1851, courtesy State Library Victoria.

opening.[11] Sets of engravings were produced as collectors' items, including several showing Queen Victoria and Prince Albert, as the Exhibition's royal patrons, attending together with their family.[12]

Even the dry and businesslike *Economist* enthusiastically extolled the Exhibition's virtues, stating that it 'enrols all the nations of the earth under one banner, on which the words UTILITY, ART and SKILL are emblazoned', adding that '[i]ts greatest charm is the mental or moral bond by which all are avowedly made servants of one master, and employ their talents and their skill to produce that which is useful, agreeable and delightful to one another'.[13] The newspaper disclosed its free trade ideas in a more precise assessment of the Exhibition's value:

> One of the greatest advantages we expect from the exhibition is to show our different artists who have not and cannot have an opportunity of inspecting the products of other nations, what they really do, and inform them by their own senses of the probability or hopelessness of trying to surpass them, and so limiting and directing the exertions of each people to produce those things for the production of which each has a peculiar aptitude or advantages.[14]

In further support of the Exhibition's utilitarian goals (identifying these with the country's engines of work), the newspaper added that:

> As the scheme is intended for improvement and not for the gratification of dilettantism, it might well be if some separate days were set aside for different classes of workmen to inspect the different products; and if any communications be entered into between the commissioners and foreign governments, the latter might be invited to send over on some special days drafts of their selected workmen to see all that is to be seen, and learn all that is to be learned. Far from looking on it as a means of giving foreign artists advantages over our people, we regard it, on the contrary, as a means of bringing the very best productions of foreign art under the eyes of our own workmen, and enabling them, if they possess equal facilities, to rival or surpass the foreigner.[15]

The prediction that the works of all nations would be examined and compared was borne out in the behaviour of those attending, although not necessarily, or always, simply with a view to assessing fields of relative advantage and disadvantage in order to decide what fields were 'hopeless' to pursue as the newspaper had so optimistically predicted. The spirit of competition was too powerful for such ready concessions. The reality was that, as Robert Brain notes, '[d]elegations of tradesmen of all kinds examined and evaluated the methods and conditions of

[11] See Richard Bellon, 'Science at the Crystal Focus of the World', in Aileen Fyfe and Bernard Lightman (eds.), *Science in the Marketplace: Nineteenth Century Sites and Experiences*, University of Chicago Press, 2007, 301 at p. 314.

[12] As, for instance, one held by the State Library of Victoria: *Exhibition of 1851: Proof Engravings from the Illustrated London News*, 1851.

[13] 'The Exhibition of 1851', *The Economist*, 13 April 1850, 395 at p. 396.

[14] *Ibid*. [15] *Ibid*.

work among colleagues in foreign countries, producing compendia … For scientists such monographs often served, either tacitly or explicitly, as appeals for funding from home governments or other institutions for new or upgraded laboratory facilities'.[16]

Although a constant refrain of *The Economist*, under the guiding hand of its influential founder-editor James Wilson, was that the only objectors to the Exhibition were 'the Protectionists' who sought to maintain barriers to trade resisting 'the humane, just and social spirit that gives us Free Trade',[17] at the same time implying that the misguided Protectionists were the same lot who sought to extend the patent system,[18] neither of these assertions was quite true. There were plenty apart from Protectionists who were sceptical of the Exhibition's goals. They included Dickens' *Household Words* which objected to the Exhibition's organisers' 'cool, high-handed injustice of parcelling out the public property … and stopping up the public breathing space', just so that the Exhibition could be held in the metropolis,[19] and Charlotte Bronte who found the exhibits 'bewildering' and overwhelming without Brewster by her side patiently explaining,[20] and the young designer William Morris who found it all 'wonderfully ugly'[21] – although as Asa Briggs notes the attendances showed that the populace liked it and its popularity grew over time.[22] On the other hand, Mill in his writings on liberty and economics generally supported free exhibition and free trade; yet, this did not prevent him arguing in favour of patents as an 'exclusive privilege of temporary duration' over patronage by the state and thought it highly improbable that without an effective system of protection for invention 'improved processes' which required 'labours' and 'expenses' to be incurred in bringing the ideas 'into practical shape' would be freely shared, except by 'very opulent and public spirited persons'.[23] Mill, true to his individualistic liberal leanings, foresaw that

[16] Robert Brain, *Going to the Fair: Readings in the Culture of Nineteenth-Century Exhibitions*, Cambridge: Whipple Museum of the History of Science, 1993 at p. 13.

[17] 'The Exhibition of 1851', p. 395 – and in a similar vein 'The Progress of the Exhibition of 1851' *The Economist*, 22 June 1850.

[18] See, for instance, 'The Exhibition of 1851', *The Economist*, 12 October 1851, 1123 at p. 1124, rejecting the concerns of 'some parties' that 'machinery and unpatented inventions if exhibited may be pirated' and arguing against the proposal for a provisional registration system on the basis that it was against 'the progress of mind'.

[19] [Richard Horne], 'The Wonders of 1851', *Household Words*, 20 July 1850, 388 at 392.

[20] See Bellon, 'Science at the Crystal Focus of the World', p. 329.

[21] See Briggs, *Victorian People*, p. 48.

[22] *Ibid*., p. 43, adding the success was helped by 'cheap excursions'. See also for an onlooker's perspective 'The Front Row of the Shilling Gallery', *Punch*, 1851, Vol. 20, p. 10.

[23] Mill, *Principles of Political Economy* (1848, 1849, 1852, 1857, 1862, 1865, 1871), further edited and with an introduction by Sir William Ashley, Longmans, Green and Co., 1909, pp. 932–3.

without cheap patents the 'men of brains' would, 'still more than at present', be made 'the needy retainers and dependants of the men of money bags'.[24]

In reality, the Exhibition pulled in different directions vis-à-vis patents. It was based on the idea of a spectacle and a spectacle it produced, largely without the benefit of patents. But those organising were concerned also with providing a proper description and classification of the exhibits, making a scientific assessment of their quality, and giving proper attribution of those responsible – features that were later drawn into the patent system as well. Similarly its multi-volume *Official Catalogue*[25] provided a model for the 'valuable' patent office records, which its proceeds helped to fund. (Indeed, despite the complaints of Dickens and others that the government was fact-obsessed, these systematic records provided the best form of public accounting of the system that the utilitarians and others could desire).[26] Moreover, as Babbage pointed out, there were parallels to be found between the well-accepted practice of prizes at the Exhibition and patents which could now be 'considered as the [society's] purchase money of the patent'.[27] This may have seemed a more realistic response than the simple argument made by the Society of Arts in 1850 of the successful inventor's superior ingenuity[28] to the arguments on the other side of the injustice and inefficiency of patents in fields where more than one person might hit on an invention at virtually the same time.

True, the rates of patenting at the Exhibition were low, in the order of only 11–15 per cent of the British and American exhibits according to Petra Moser's meticulous analysis of the exhibition data.[29] And despite the fact that a rudimentary provisional patent system was introduced in anticipation of the Exhibition,[30] its take-up appears to have been low

[24] *Ibid*., p. 933.

[25] *Official Descriptive and Illustrated Catalogue of the Great Exhibition of the Works of Industry of All Nations*, printed by authority of the Royal Commission by Spicer Brothers, 1851.

[26] See Gomme, *Patents of Inventions: Origin and Growth of the Patent System in Britain*, published for the British Council by Longmans Green and Co., 1946, pp. 37, 40–1: the British Patent Office was the first to adopt the practice of publishing systematic and detailed patent information soon after its inception in 1852, taking over the role of technical journals such as the *Repetory of Arts and Manufactures*, *The London Journal of Arts and Sciences* and *Gill's Technical Repository*.

[27] See Charles Babbage, *The Exposition of 1851*, 2nd edn, John Murray, 1851, pp. 100–1 (suggesting that patents might be substituted by prizes, 'considered as the purchase money of the patent').

[28] Society of Arts, *Extracts from the First Report on the Rights of Inventors*, Select Committee *Report*, p. 405.

[29] Petra Moser, 'Why Don't Inventors Patent?' Stanford and NBER Working Paper, 12 November 2007, Table 2.

[30] Protection of Inventions Act, 15 & 16 Vict 1851.

as well, approximately 500 for the whole Exhibition according to one German estimate[31] – although the number may have been closer to 600, according to the Commissioners' official report on the Exhibition where the explanation for the limited use was found in the late implementation of the reform.[32] Yet not all exhibits lent themselves to patenting, those coming from the colonies for instance exhibiting more the character of their rich natural resources and traditional artistic displays than anything that might be called 'inventive' in a modern sense.[33] Also, some exhibitors made use of designs registrations, especially when it came to articles of furniture and fashion and the like.[34] Moreover, the Patent Act's rudimentary provisional registration system, introduced in anticipation of the Exhibition (and based on amendments already made to the Designs Acts in the previous year),[35] became the model for the provisional patent mechanism introduced the next year in the Patent Amendment Act of 1852 – over time becoming one of the more distinctive and successful features of the British patent system in the decades to come.

Most of all, the Exhibition offered some new lines of argument for those advocating reform of the patent system rather than complete abolition. So while Brewster in 1830 had talked of the 'justice' of inventors being rewarded for their labours, drawing analogies with 'natural' rights of authors, in the wake of the Exhibition the arguments (his own included) before the Select Committee took on a more generally utilitarian character. Thus the emphasis was now explicitly on social benefits and costs. And the Exhibition was treated as providing evidence of the need for reform. For instance, Henry Cole, friend of Prince Albert and organiser of the Great Exhibition (and a member of the Society of Arts), argued before the Select Committee:

> There has been strong evidence of the necessity of a change afforded during the last 20 years, a demand constantly recurring, but taking a peculiar urgency

[31] See Petra Moser, 'How Do Patent Laws Influence Innovation?' (2005) 95 *American Economic Review* 1214 at 1219, citing Berichterstattungs-Kommission der Deutschen Zollvereins-Regierungen, *Amtlicher Bericht über die Industrie-Austellung aller Völker zu London im Jahre 1853*, Vol. III, pp. 697–701.

[32] See *First Report of the Commissioners for the Exhibition of 1851*, printed for Her Majesty's Stationery Office, 1852, p. 44 and Appendices 22 and 23 (691 applied for, 630 certificates granted, 615 proceeding on to registration under the Protection of Inventions Act, 1851).

[33] See Megan Richardson, 'Patents and Exhibitions' (2009) *Journal of World Intellectual Property* 402.

[34] And provisional designs registrations were utilised also: the Commissioners' Report shows that 259 provisional registrations were applied for under the terms of the Designs Act, 13 & 14 Vict 1850: see *First Report of the Commissioners for the Exhibition of 1851*, Appendix 22.

[35] See Protection of Inventions Act, 1851; and further Designs Act, 1850.

at the present time, owing, I believe, to the exhibition of the works of industry of all nations.[36]

Cole also suggested that it was a particular problem that exhibitors at the Exhibition were motivated to keep their exhibits secret in the absence of effective patent protection.[37] Others were more concerned about the exhibition-impulse leading to rampant piracy at the Exhibition. Babbage, for instance, noted how unfortunate it was that

> many of those capable of improving the arts by new inventions, have no desire to secure their discoveries by patent and thus to render them profitable to themselves, but are willing to give the public the entire advantage.[38]

And Mill, who might not have considered the exhibition-effect when he published the first edition of *Principles of Political Economy* in 1848, was certainly familiar with it when his 1862 edition was produced, where he made reference to the patent controversies but reiterated his views that although the law needed 'much improvement' a patent system was still preferable to other alternatives, including the possibility that 'the law [might] set everybody free to use a person's work without his consent; and without giving him an equivalent'.[39]

On the other hand, the patent system's opponents including *The Economist* could now point to the advantages to be obtained from free exhibition in promoting international 'intercommunication', and fostering 'the diffusion of knowledge, and the progress of civilisation'.[40] They noted the incremental and sometimes questionable character of the so-called inventions at the Exhibition which in the words of the *Illustrated London News* were often incapable of 'the duties imputed to them',[41] reinforcing their arguments as to the unsuitability of much innovation for patenting. By contrast, *The Economist* was pleased to report in 1859, international trade expanded markedly after the Exhibition and even more in the wake of the Paris Exhibition of 1855, quadrupling in the four years since it was held.[42] The newspaper found inescapable the conclusion that regular international exhibitions offered opportunities for 'persons at a distance' to 'bring their articles worthy of admiration and imitation to the best market to make them known'.[43] That the arguments were tempered over time is also shown by the newspaper – which

[36] Select Committee, at p. 259.
[37] *Ibid*., at pp. 261–5. [38] Babbage, *The Exposition of 1851*, p. 137.
[39] See John Stuart Mill, *Principles of Political Economy*, p. 933.
[40] 'The Progress of the Exhibition of 1851', *The Economist*, 22 June 1850.
[41] 'Exhibition Notes No 1', *Illustrated London News*, 14 June 1851, p. 570.
[42] 'A National Exhibition in 1861?' *The Economist*, 15 January 1859.
[43] *Ibid*.

in 1850 was referring to the knowledge shared at the Exhibition as enhancing 'the progress of the mind … in freely imparting what it knows perfects and multiplies its own possession';[44] but by 1854 was observing with the benefit of hindsight that those who expect 'great social improvement' to result from exhibitions delude themselves and suggesting that exhibitions might have more to do with 'fashion' than the 'progress of civilisation'.[45] And it was not the first (or last) intimation that the value to be found in exhibitions might lie in another direction than the utility of the products that are displayed.

At the same time, the Exhibition provided some striking examples of the contemporary patent system's flaws, providing evidence of the ways in which patents might be used to constrain freedom of exhibition and all the improvements that might produce. Thus, while the strength of the sentiment against patents generally in mid-century Britain may be debated,[46] there were some fields in which its value was clearly being disputed. If the kaleidoscope was a cause célèbre of the need for reform in the 1830s, photography became a principal example of the reformed system's failings in the 1850s. Photography was a highlight of the Exhibition – described by the *Reports of Juries* as 'the most remarkable discovery of modern times' and featuring in its report.[47] Yet of the many instances of the new technology that were displayed at the Exhibition, the French and American ones were demonstrably superior. The stylish efforts produced from those countries could be attributed by those attending to the French Government's public gift of Louis Daguerre's process for the production of images in 1839, after purchasing the rights from Daguerre in exchange for a pension. Within days of this gesture, as one observer announced, '"the opticians'" shops [in Paris] were full of amateurs yearning for a daguerreotype; everywhere they were seen focussing on monuments. Everyone wanted to copy the view from his own window … The poorest attempt … gave rise to indescribable joy, so new was the process then, and it appeared truly wonderful.'[48]

[44] 'The Exhibition of 1851', *The Economist*, 12 October 1850, p. 1124.
[45] 'The Principle of Exhibitions', *The Economist*, 22 July 1854, pp. 784–5.
[46] Cf., for instance, Moureen Coulter, *Property in Ideas: The Patent Question in Mid-Victorian Britain*, Thomas Jefferson University Press, 1991 and Louise Duncan, *Privileges to The Paris Convention: The Role of the Theoretical Debate in the Evolution of National and International Patent Protection*, unpublished PhD thesis, Monash University Library, 1997, ch. 3, another very thorough exposition. See also Fritz Machlup and Edith Penrose, 'The Patent Controversy in the Nineteenth Century' (1950) 10 *Journal of Economic History* 1.
[47] *Reports by the Juries on the Subjects in the Thirty Classes into which The Exhibition was Divided, printed for the Royal Commission*, William Clowes & Sons, 1852, p. 243.
[48] Quoted in Quentin Bajac, *The Invention of Photography: The First Fifty Years*, trans. from French by Ruth Taylor, Thames & Hudson, 2002, pp. 24–5.

The craze quickly spread to the United States where the first photographic portrait studio was opened in New York in 1840.[49] But Daguerre's technology had been patented in Britain (before the French Government's so-called gift to the public) and was enforced there. And its nearest competitor, the calotype, was also held under a patent since 1841 by its gentleman-inventor William Fox Talbot. Talbot made an effort to set up in business and reluctantly licensed it in a limited manner and at exorbitant prices, commonly £100 for the first year and £150 for each subsequent year, according to historian R.D. Wood.[50] Talbot moreover applied for an extension to his patent at the end of his allotted fourteen years in 1854 citing reasons including his own lack of connection with commerce or manufacture as well as the 'large sums of money' that had to be expended in an effort to make the art of photography 'generally known and appreciated' as reasons why 'the progress … of your petitioner's said invention was for the first ten years very slow, and to this time your petitioner has never been reimbursed the sums of money he has so expended'.[51] Moreover, although the calotype's eventual successor the collotype had been made freely available to the public by its inventor, Frederick Scott Archer for several years,[52] Talbot threatened those who sought to use it with claims of infringement of his patent.[53] In the final irony for English photographers at the Exhibition the vitality of the French calotype school was unfettered by risk of patent infringement since Talbot had not taken the precaution of patenting his invention in France.[54]

In the Exhibition's aftermath Talbot was singled out in the leading photographic journal of the day, *The Journal of the Photographic Society* (later *The Photographic Journal*) for his mishandling of his patent. The complaint was not the difficulty of obtaining patents hindering the careers of professional scientists, and promoting by default only those who could be content with special reputation. The issue now was that patents themselves could be used to support the privilege of the wealthy amateur against the interests of new professionals. It did not help that, in response to a public appeal from the Presidents of the Photographic

[49] *Ibid*., p. 33.
[50] R.D. Wood, *The Calotype Patent Lawsuit of Talbot v Laroche 1854*, R.D. Wood, 1975, p. 7.
[51] The Petition was printed in full in the *Journal of the Photographic Society*, Vol. 2, 21 December 1854, pp. 99–100.
[52] See Bajac, *The Invention of Photography*, p. 49.
[53] See Wood, *The Calotype Patent Lawsuit*, pp. 6–8.
[54] Rather it seems he relied on secrecy, which was insufficient to prevent Louis-Désiré Blanquart-Evrard from fraudulently obtaining the formula and then setting about making his own improvements. As Bajac says, '[h]owever much Fox Talbot complained of piracy, there was little he could do: Blanquart-Evrard's revised and improved calotype rapidly became established in France from 1847': *The Invention of Photography*, p. 44.

Society and Royal Society, Talbot published a letter in *The Times* of 13 August 1852, stating that 'ever since the Great Exhibition I have felt that a new era has commenced for photography' and offering his patent right as a 'free present to the public'.[55] Not only was this too late for the Exhibition, but those engaged in the business of making 'photographic portraits for sale to the public' were expressly excluded from the privilege on the basis that '[t]his is a branch of the art which must necessarily lie in comparatively few hands'.[56] And it then took prolonged litigation to determine that the actions of aspiring photographic portraitists who used the collodian process (of which there were several in London) in fact did not infringe his patent.

The principal case of *Talbot* v. *Laroche*[57] was reported extensively in the *Photographic Journal* of December 1854[58] (and *The Times* also added a full account,[59] much fuller than the *Law Reports* which barely mentioned the dispute:[60] suggesting there was much going on in the courts in the mid-nineteenth century of interest to the public that was not being formally reported in the professional lawyers' media).[61] In the next issue of the *Journal*, published in January 1855, an appeal was made for a fund in support of the defendant, at the same time as the *Journal* announced the Second Annual Exhibition of the Photographic Society in London, patronised by Prince Albert, who attended the opening in person.[62] While the *Journal* cautiously concluded that '[t]he photographic world will receive with satisfaction a settlement of the vexed questions, and we trust that the circumstances which have placed so many lovers of Photography in unwilling opposition to Mr Talbot will now be forgotten',[63] its constituents might have agreed with the more forthright comments of a letter-writer that 'all true photographers should set their faces against patented inventions relating to the art. So much has been done and given by the inventors to the public, that it appears most illiberal in others to put a drag on this beautiful art by any restriction whatsoever.'[64]

[55] Letter from H.F. Talbot to Lord Rosse, 30 July 1852, *The Times*, 13 August 1852, p. 4.
[56] *Ibid*.
[57] *Talbot* v. *Laroche*, Court of Common Pleas, Guildhall, 21 December 1854.
[58] See *Talbot* v. *Larouche*, *Journal of the Photographic Society*, 21 December 1854, Vol. 2, pp. 84–95.
[59] See Court of Common Pleas, Guildhall, *The Times*, 21 December 1854, p. 11.
[60] In *Talbot* v. *La Roche* (1854) SC 2 C L R 836 (reporting on procedural aspects).
[61] See Nathaniel Lindley, 'The History of The Law Reports' (1885) 2 *Law Quarterly Review* 137 and further Appendix A in this volume.
[62] 'January 22nd, 1855' *Journal of the Photographic Society*, Vol. 2, 22 January 1855, p. 103.
[63] 'December 21st, 1854', *Journal of the Photographic Society*, Vol. 2, 22 December 1855, p. 79.
[64] 'Mr Fox Talbot's Patent of 1841', letter to the Editor of the *Photographic Journal*, 12 June 1854, published *Journal of the Photographic Society*, Vol. 1, 21 June 1854, p. 222.

7 Lessons and compromises

The anti-patent sentiment died down as quickly as it grew up. As to photography, by 1857 a salutary lesson had emerged: Archer, the inventor of the collodian process, having disclaimed a patent, had by now died in poverty. Talbot's patent had also come to an end and he abandoned his earlier decision to apply for an extension.[1] As a result the number of professional photographers working in London greatly increased, and by the early 1860s census figures suggested that some 2,800 people were earning a living from photography in England alone.[2] Intense competition among photographers ensured that they heeded the recommendations of the report of the jury of the *Exposition Universelle* held in Paris in 1855, to '[l]ower prices in order to increase considerably sales of products and, while popularising photography, increase the total amount of profit'.[3] New photographic formats after Talbot's were made subject to patents – including the popular *carte de viste* portrait-card patented by Adolphe Eugène Disdéri in 1854. But photography's patentees had also learned that a readiness to offer their inventions at lower prices and using techniques of mass production could lead to better returns than artificially restricting the uses to which the invention might be put. For instance, relying on Disdéri's low-priced patented technique, according to Quentin Bajac, millions of portraits were sold throughout the world including over 70,000 of Prince Albert in the week after his death in December 1861.[4]

The experience of photography could easily be analogised to other fields which relied also on constant innovation coupled with small-scale enterprise and often unpredictable large-scale audience-effects – for instance, fashionable garments, patterned fabrics and children's toys, pottery, glassware, metalwork and jewellery (all of which featured at the

[1] See Quentin Bajac, *The Invention of Photography: The First Fifty Years*, trans. from French by Ruth Taylor, Thames & Hudson, 2002.
[2] *Ibid*., p. 52, citing 1861 census figures.
[3] *Ibid*., pp. 54–5. [4] *Ibid*., pp. 54–6.

Exhibition of 1851 as well as the later ones). Using fabrics and toys as examples of such 'frivolities' that were yet 'objects of beauty and sources of wealth', William Bridges Adams argued in the *Fortnightly Review* of 1865 that it was difficult to see the logic in supporting copyright for authors and designs for industrial artists while opposing patents for professional inventors.[5] Bridges Adams reiterated Mill's argument that those against patents were already-wealthy individuals who used 'free trade' as a mask for 'free stealing'. Indeed, he went further to suggest that the upward mobility of British society along with its 'quietude and progress' were due to the patent system's encouragement of ingenuity, just as the designs system fostered industrial art, and the copyright system for authors allowed and encouraged professional authorship.[6] It was hinted darkly that, rather than these systems being logically kept separate, they stood to rise or fall together – for '[i]f mental property in useful things is made common, it will not be long before books and copyright in design and art will follow the same course'.[7] And so, rather than thinking of abolishing patents, the modern statesman's better course would be 'pondering … over a new law which shall make property in mental production at least as secure as property in land or chattels'. The author added: 'the current of general thought runs in this direction'.[8]

Indeed, there were numerous smaller, professionally oriented journals – the leading photographic one prominent among them – that by the 1860s were articulating the value of intellectual property rights for their concerns. It was these journals that represented the 'current of general thought' which Bridges Adams observed in the *Fortnightly Review*. At the same time, we can see a deepening channel between these specialised professionally oriented journals and the mainstream and especially the establishment newspapers. Thus *The Economist* continued to argue throughout the 1860s that patents should be abolished, and that capitalists were best placed to fund invention and bring it to market, adhering to the free-market thinking that made it so respected during Walter Bagehot's reign as editor. It issued a dramatic prediction in June 1869 that: 'it is probable enough that the patent laws will be abolished ere long'.[9] The self-styled more moderate *Times*, previously a supporter of the patent system while arguing for improvements, for its part suddenly came out against patents in 1864–5. *The Times*'

[5] William Bridges Adams, 'The Political Economy of Copyright' (1865) 2 *Fortnightly Review* 227 at 235–237.
[6] *Ibid*., 238. [7] *Ibid*., 235. [8] *Ibid*., 239.
[9] 'The Debate on the Patent Laws', *The Economist*, 6 June 1869, p. 656.

startling change of heart can be attributed to a similarly striking about-face by Lord Stanley who, as chair of a Government commission on the administration of the patent system was persuaded by industrialists Sir William Armstrong, a gun manufacturer (and inventor in his own right), and Mr (Robert) Macfie, a sugar refiner, that it would be better if patents were abolished.[10] Lord Stanley's comments were approvingly reported by *The Times*, giving its imprimatur of authority. The newspaper added that it hoped the next Parliament would establish a Committee to determine the issue and expressed confidence that 'the deliberation of a Committee can only confirm the opinion at which Lord Stanley has arrived'.[11] Nevertheless, *The Times* had sufficient public awareness to doubt whether when the article went to press, the broader 'public opinion [was] already sufficiently advanced' for such a radical step to be taken as to abolish the entire patent system.[12]

Within another eight years, the momentum of public opinion in favour of patenting was evident at the *Weltausstellung 1873* held in Vienna. In addition to the usual provisions made for the protection of inventors at the Exhibition (which the British and American Governments, among others, insisted on as a condition of their participation at the Exhibition),[13] an International Patent Congress was established to run concurrently with the Exhibition. The Congress was to consider the question of the policy of patent protection, whether in the interests of the State the claims of inventors should be recognised, and whether the existing system of giving property in such inventions 'is the best for the inventor and the state'.[14] While some abolitionists participated in the Congress their voices were outweighed by the advocates of patent protection who mounted an array of arguments in favour of patenting. In particular, in response to the abolitionists' stated concerns about patents as restraints on free trade it was argued that 'the exposition of what is new cannot be an action against freedom; that every one may be benefited thereby, and would be indirectly damaged if not allowed to obtain it'.[15] This argument was to especially impress the Congress. The report on the Congress to the British Parliament recorded the

[10] For a detailed discussion, see Coulter, ch. 5.
[11] *The Times*, 9 August 1865, p. 8.
[12] *Ibid*.
[13] Indeed, in the UK, such laws had been enacted for the protection of inventors at exhibitions since the Great Exhibition (although they were not particularly effective and provisional registration was generally preferred): see Megan Richardson, 'Patents and Exhibitions' (2009) *Journal of World Intellectual Property* 402.
[14] See *Reports on the Vienna Universal Exhibition of 1873*, printed for Her Majesty's Stationery Office, 1874, Part 1, p. 338.
[15] *Ibid*., p. 345 and Appendix R (evidence of Dr Klosterman of Germany).

conclusion that 'protection of inventions should be guaranteed by the laws of all civilised nations', inter alia, because:

> This protection affords under the condition of a complete specification and publication of the invention, the only practical and effective means of introducing new technical means without loss of time, and in a reliable manner, to the general knowledge of the public.[16]

Even *The Times* by 1874 felt forced to accept the persuasive power of the arguments being mounted now in favour of patents (for instance in debates before the Society of Arts) in reaction to 'those tendencies unfavourable to the maintenance of the Patent Laws which have appeared from time to time during the past few years'; and *The Times* appeared to acknowledge that if patents were not the only way to promote inventiveness, they had certain benefits in securing an inventor's interests and need not discourage 'real inventive faculty'.[17]

The final nail in the coffin for the abolitionists was a growing perception that British inventiveness and competitiveness had diminished or at least was less exuberant compared to America and European countries, as made evident by two international exhibitions held in the late 1870s. The latest techniques of photography, typewriters, and even a new version of the kaleidoscope 'invented' by Charles Bush of Boston (fully patented, of course) were among those inventions exhibited at the Centennial Exhibition in Philadelphia in 1876. The already-popular sewing machines were also on display, and a delegation of 4,000 employees from the Singer Sewing Machine Company attended the Exhibition, setting an example for other large employing companies.[18] The exhibition also carried a tremendous steam fire engine in actual use. The *Scientific American* magazine of 14 October 1876, reported enthusiastically on this as 'a fitting object of beauty of design and ornamentation so far as is consistent with the necessities of construction' – a 'beautiful specimen of mechanical architecture and form'.[19] But the exhibition was not merely valued for its brilliant displays. The *Scientific American* of 5 August 1876 reported further that '[a]s a market, the Centennial has proved a great success. Our people have bought out whole foreign departments and in many sections it is hardly possible to find an object not ticketed "sold"'.[20] Subsequently, Frank Norton's *Historical Register* of the *Exposition Universelle* of 1878 records that

[16] *Ibid*., p. 343.
[17] 'The Protection of Inventions', *The Times*, 9 December, 1874, p. 9.
[18] See 'The Centennial Exposition', 35 *Scientific American*, 5 August 1876, p. 81.
[19] 'Trial of Steam Fire Engines at the Centennial Exhibition', 35 *Scientific American*, 14 October 1876, p. 239.
[20] 'The Centennial Exposition'.

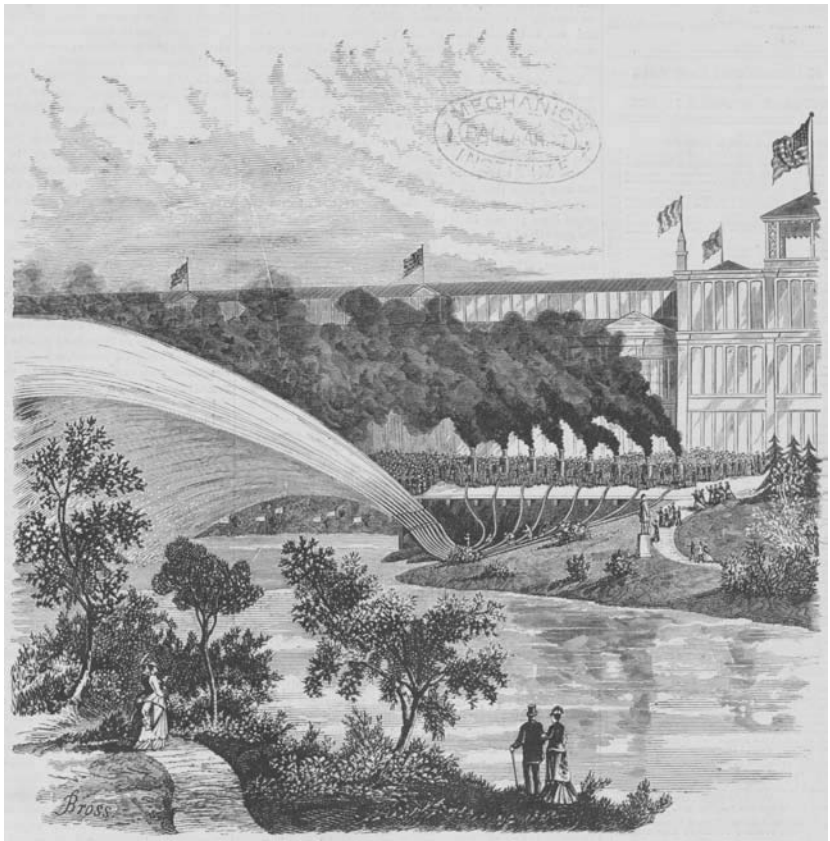


Figure 6 Steam fire engine at the Centennial Exhibition, engraving from *Scientific American*, 1876, courtesy State Library Victoria.

Thomas Edison's (no doubt patented) innovations in photography, telegraphy and electricity had received grand prizes at the exhibition.[21] The *Register* added that the standards of display at the exhibition were high and when it closed:

Very many articles had previously been sold, numbers of exhibitors having thus disposed of their entire collections, besides receiving orders for similar goods

[21] Frank Norton, *Illustrated Historical Register of the Centennial Exhibition, Philadelphia, 1876 and of the Exposition Universelle, Paris, 1878*, American News Company, 1879, p. 388.

from all parts of the world. The general sentiment in relation to the Exhibition was that it was a stupendous success.[22]

The professional and mainstream press, for their part, found irresistible the conclusion that there must be a correlation between the number of patents granted, and the intensity of inventive development. And it is true that rates of patenting were generally higher on the US side after 1851, especially compared to Britain where rates remained low until the 1880s – a fact pointed out by economic historian Zorina Khan, arguing that the more 'democratic' character of the American patent system substantially contributed to its relatively high levels of innovation.[23]

An early intimation of contemporary opinion was another article in the *Scientific American* of October 1876, reporting on an address by Sir William Thomsen, President of the Mathematical and Physical Section of the British Association, and an inventor in his own right:

> After paying a high tribute to American Science and Art in his address, as President of the Mathematical Section of the British Association, Sir William Thomsen said, speaking at the Centennial:
>
> 'I was much struck with the prevalence of patented inventions in the Exhibition; it seemed to me that every good thing deserving of a patent was patented. I asked one inventor of a very good invention, "Why don't you patent it in England?" He answered: "The conditions in England are too onerous" '.
>
> 'We are certainly far behind America's wisdom in this respect', Sir William continued. 'If Europe does not amend its patent laws (England in the opposite direction to that proposed in the bills before the last two sessions of Parliament), America will speedily become the nursery of useful inventions for the world'.[24]

Two years later, *The Times*, reporting on the *Exposition Universelle* in Paris in August 1878, asked: 'What is the secret of the inventive activity of our American cousins"?[25] Initially it was denied that patent law could have anything to do with it, the difference attributed to American

[22] *Ibid*., p. 386.

[23] See B. Zhorina Khan, *The Democratization of Invention: Patents and Copyrights in American Economic Development, 1790–1920*, Cambridge University Press, 2005, ch. 2 and especially Figs 2.1 and 2.2; and further P.J. Frederico, 'Historical Patent Statistics, 1791–1961' (1964) 48 *Journal of the Patent Office Society* 89 and Klaus Boehm and Aubrey Silberston, *The British Patent System* (I: Administration), Cambridge University Press, 1967, ch. 2.

[24] 'The Advantages of Cheap Patents' 35 *Scientific American*, 21 October 1876, pp. 256–7.

[25] *The Times*, 22 August 1878, p. 7.

labour shortages. But by September 1878, the newspaper, recalling the Philadelphia Exhibition, answered the question differently:

> [T]he principle of patents appears to be admitted too universally to leave its equity a subject for practical discussion. In this respect, the last six years have produced a curious change in opinion. Manufacturers with prospects of indefinitely increasing prosperity chafed under the restraints of patents … An abatement in prosperity, however, induced labour disputes; and these disposed masters to foster, instead of discouraging, the restless ingenuity of which the most obvious result is to economize human muscles. But it was, as our Correspondent says, the Philadelphia Exhibition which reconciled once [and] for all manufacturers and inventors … Foreign manufacturers learnt at Philadelphia how inventions may be, not exactly made, but perfected, by means of patents. By the patent law of the United States, operating in circumstances of a chronic costliness of labour, every man who works an engine sets his brain throbbing with it to learn its secret and smooth away whatever impedes its spontaneity of action.[26]

The Times went as far as to say that '[s]ince the Centennial Exhibition open hostility to patents has died away'. And indeed even *The Economist* was less vocal in its objection to patents after the Exhibition. And by 1883, as patent reform was again being debated, it openly acknowledged that Parliament's current efforts to reform patent law in the direction of reducing costs and increasing the safeguards rather than abolishing the system was a step in the right direction, adding:

> With foreign competition ever growing in intensity, cheapness, as well as excellence, of manufacture is essential, if we are to hold our own in the struggle for trade; and upon the improvement of our mechanical appliances, and the discovery and application of new processes, our productions must be largely contingent.[27]

The newspaper also observed that: 'In America a patent for seven years can be obtained for 7*l*, whereas with us the total cost of a patent for fourteen years is 175*l* … the fact remains that it is infinitely more costly to take out a patent here than in America', adding that '[o]ur fees, also, are far in excess of those charged on the Continent, and they are levied, moreover, in a much more burdensome fashion'.[28]

By way of logical extension to these discussions, in October 1883 *The Times* and *The Economist* came out in support of Mr Chamberlain's Bill for reform of the British system, which included proposals for reducing the charge payable for a provisional patent (in the first instance to

[26] *The Times*, 26 September 1878, p. 7.
[27] 'The Patent Law', *The Economist*, 3 February 1883, p. 128.
[28] *Ibid*.

4*l*) and at the same time making provision for compulsory licensing to serve the 'reasonable requirements of the public' as a safeguard of the public interest. The reforms were embodied in the Patents, Designs and Trade Marks Act of 1883,[29] which indeed did see a rapid increase in the number of applications for patents in the UK and also of the numbers of patents sealed as a result especially of the reduced 'existing price' of patenting: the numbers rising from 6,241 and 4,337 respectively in 1882 to 16,101 and 9,308 respectively in 1885.[30]

Precisely how far the international exhibitions influenced the patent debates and the reforms they produced must be a matter of speculation. Legal historians have tended to treat them as part of the backdrop for heavily propagandised debates about the reform of patent law. Economic historians, Fritz Machlup and Edith Penrose,[31] while acknowledging the propaganda-effect, find the 'best' explanation of the patent system's reaffirmation in the weakening of the free-trade movement as a result of the 1870s depression. Certainly, the financial crash of 1873 has been identified as an event that produced a complete change in the economic and social climate in the last quarter of the nineteenth century. Before it, Asa Briggs says, free trade was 'the dominant commercial philosophy of the age'.[32] After it, although workers continued to enjoy rising wages and there was no general contraction of the economy, free trade came under challenge and '[t]he clamour of sectional interest groups was stronger than the voice of the nation'.[33] Yet, as we have seen, free traders were divided on the question of patent abolition before the crash. Afterwards, residual uncertainty about the merits of the patent system continued until it was finally reformed in the direction of lower costs in the early 1880s. All the while, at the later exhibitions, the press observed and reported the growing evidence, especially from the United States, that patents appeared not to undermine but to underpin exhibitors' success in terms of products 'ticketed sold'. If we are to believe *The Times*, this evidence powerfully contributed to the conclusion that patents might help invention and need not undermine their widespread enjoyment where there were strong mechanisms in

[29] *Patents, Designs and Trade Marks Act 1883*, 46 & 47 Vict, c 57.

[30] Allan Gomme, *Patents of Inventions: Origin and Growth of the Patent System in Britain*, published for the British Council by Longmans Green and Co., 1946, p. 41 and Boehm and Silberston, *The British Patent System*, p. 34, attributing the major reason for the increase to the change in 'the existing price' of patenting: *ibid*. at p. 36.

[31] See Fritz Machlup and Edith Penrose, 'The Patent Controversy in the Nineteenth Century' (1950) 10 *Journal of Economic History* 1 at 5–6.

[32] Asa Briggs, *Victorian People: Some Reassessment of People, Institutions, Ideas and Events 1851–1867*, Odhams Press Ltd, 1954, p. 14.

[33] *Ibid*., pp. 14–15.

place for the introduction and distribution of new products to mass-markets, something exhibitions were especially well-placed to foster.

The Times had a substantial role here: not only observing and reporting on the spectacle of the nineteenth-century exhibitions, but also ensuring those spectacles were public events, with presence and impact well beyond their immediate audiences. The paper was ideally positioned to assess and remark on the sifting and filtering of opinions in the debates around these exhibitions. And these debates, of course, were also ones in which the press were active participants. It reinforces our own conclusion that the international exhibitions were more than a sideline to greater economic currents. They were a critical element in sparking the great nineteenth-century patent debates, and in their resolution.

8 Rise of advertising

There was another respect in which the experience of international exhibitions helped to change public perceptions. The Crystal Palace may have been primarily about the spectacle. But the way an exhibition audience could emblematically become the market for products was apparent in the jury's recommendation at the 1855 *Exposition Universelle* in Paris that exhibitors lower prices in order to increase sales. We can speculate that not only were exhibitions important to the patent debates but they rendered some important changes in the way the mechanisms of marketing were being conceived. Of course, licensing, distribution and advertising practices along with commodities and consumption predated them.[1] But, while it may be an exaggeration to say that the Great Exhibitions produced '[t]he first outburst of the phantasmagoria of commodity culture' which transformed modern advertising into a form where 'spectacle' was 'paramount',[2] inevitably it contributed to a refashioning of attitudes and practices and eventually of law.

The fin de siècle was the high point. Although much had already happened before – including the opening of the first Whiteley Department Store, inspired by the Crystal Palace,[3] and the publication of the first advertising manuals advocating a more systematic and orderly approach to advertising and its displays[4] – it took a change in exhibition practice to cement a new attitude to advertising itself. The sequence of exhibitions that began with the Crystal Palace and built up to the

[1] Roy Church, 'Advertising Consumer Goods in Nineteenth Century Britain: Reinterpretations' (2000) 53 *Economic History Review* 621 at 629ff.; and see also 'New Perspectives on the History of Products, Firms, Marketing, and Consumers in Britain and the United States since the Mid-Nineteenth Century' (1999) 52 *Economic History Review* 405.

[2] Thomas Richards, *Commodity Culture of Victorian England 1851–1914*, Verso, 1991, p. 21.

[3] See Asa Briggs, *Victorian People: Some Reassessment of People, Institutions, Ideas and Events 1851–1867*, Odhams Press Ltd, 1954, p. 44.

[4] See, for instance, William Smith, *Advertise. How? When? Where?*, Routledge, Warne and Routledge, 1863 and generally Richards, *Commodity Culture*.

Philadelphia and Paris exhibitions in the late 1870s was followed by more magnificent and professional *expositions* in Paris in the last decades of the century, the 1889 one leaving behind the Eiffel Tower and the 1900 one the Grand Palais and Petit Palais still used for exhibitions into the twenty-first century. The British colonies, which had contributed their own exhibits to the Crystal Palace in 1851 – the same year that gold was discovered in New South Wales and Victoria – also hosted their own international exhibitions in the 1870s and 1880s, using these as opportunities to attract new markets and to build up nascent tourist economies. Moreover, they reproduced in their 'department stores, arcades, exhibition buildings and museums [the evolutionary complex that had] developed out of the arcades and galleries of Paxton's Crystal Palace Building'.[5] The United States had its own enormous world fairs in Chicago (in 1893), St Louis (in 1904) and New York (in 1939). These events were all grand commercial-cultural moments, delineating the apparently irreversible emergence of a modern market economy.

It was an economy based on what were then new and unfamiliar systems of mass production, huge new national and apparently unfettered international markets, and the development of modern marketing and advertising practices. Modern historians of business emphasise several aspects of this evolution that occurred, especially in the later decades of the long nineteenth century. The separation between producers and consumers was as decisive as the separation between producers and distributors, the result of a long process of disaggregation through the nineteenth and twentieth centuries. It was something that the advertising men and women sought to cover over, stressing the need for manufacturers to speak directly to their consumers – 'over the shoulder' of retailers, as the Harvard Law Professor, Frank Schechter, put it in 1927.[6] By now, also, manufacturers and retailers had substantial and quite distinct interests to protect, and also enough resources to fuel the growth of what we now recognise as a new advertising industry. Both participated in sophisticated branding strategies designed 'to encourage consumers to demand *specific* branded products'.[7] And psychology – understanding the consumer – was increasingly recognised as part of a

[5] Conal McCarthy, *Exhibiting Maori: A History of Colonial Cultures on Display*, Te Papa Press, 2007, p. 17.

[6] Frank Schechter, 'The Rational Basis of Trademark Protection' (1927) 40 *Harvard Law Review* 813 at 818.

[7] See generally David Higgins, 'The Making of Modern Trade Mark Law: The UK, 1860–1914' in Bently, Davis and Ginsburg (eds.), *Trade Marks and Brands: An Interdisciplinary Critique*, Cambridge University Press, ch. 2 at pp. 44–5. Higgins points to the work of business historians A.D. Chandler and M. Wilkins in delineating the different strands of influence.

business's effective communication strategy. As Dr Walter Dill Scott, Director of the Psychological Laboratory at Northwestern University, emphasised in his 1904 advertising textbook, *Theory of Advertising*:

> I have attempted to read broadly on the subject of advertising. I have tried to talk with businessmen – manufacturers, salesmen, publishers, professional advertisers, etc, and in all that I have read, and in all these conversations, I have never seen or heard any reference to anything except psychology which could furnish a stable foundation for a theory of advertising. Ordinarily a business man does not realise that he means psychology when he says that he 'must know his customers' wants – what will catch their attention, what will impress them and lead them to buy', etc. In all these expressions he is saying that he must be a psychologist. He is talking about the minds of his customers, and psychology is nothing but a stubborn and systematic attempt to understand and explain the workings of the minds of these very people.[8]

Even so, Dill Scott acknowledged that he was merely reflecting what was already being said in the American professional advertising press. For instance, *Printers Ink*, which in 1895 was already predicting that the enlightened advertising writer would study psychology in order to 'influence the human mind'; and *Publicity*, which in 1901 added further that 'the mere mention of psychological terms – habit, self, conception, association, memory, imagination and perception, reason, emotion, instinct and will – should create a flood of new thought that should appeal to every advanced consumer of advertising space'.[9]

With these transitions came new pressures for the law's development to service the perceived needs of advertisers and brand owners. Many British traders saw little benefit in trade mark legislation when the idea was first introduced in the 1860s. The common law of passing off protected traders from the fraudulent use of their established trade names and marks by other traders. After *Millington* v. *Fox*,[10] the law in this area had become more lenient: it now being accepted in the equity courts at least (which granted injunctions) that fraud need not be established if the conduct had the same effect. As Lewis Sebastian's *Digest of Cases on Trade Marks* shows,[11] cases were still centred around the public's existing understanding of a trade mark's meaning, linked

[8] Walter Dill Scott, *The Theory of Advertising: The Simple Exposition of the Principles of Psychology in Relation to Successful Advertising*, Small, Maynard and Company, 1904, pp. 2–4.

[9] Editorial, *Printer's Ink*, October 1895 and article in *Publicity*, March 1901, quoted in *ibid*., p. 3.

[10] *Millington* v. *Fox* (1838) 3 Myl & Cr 338.

[11] Lewis Sebastian, *Digest of Cases of Trade Mark, Trade Name, Trade-Secret, Goodwill, &c Decided in the Courts of the United Kingdom, India, The Colonies and The United States of America*, Stevens and Sons, 1879.

closely to a particular individual or business's activities,[12] rather than any vague promises of future satisfactions that may be associated with trade marks in the future. Before a Select Committee established in 1862 to investigate the question of trade mark legislation,[13] some of those giving evidence asked whether, with most trade marks already having a reputation, thus looked after if not by common law then by equity, what was the need for legislation giving statutory protection to trade marks?[14] The Committee's Chairman (Mr Roebuck), for his part, wondered whether such a bureaucratic system adopted for trade mark registration as was being proposed 'would suit the habits and feelings of people of this country'.[15] The proposed Bill was set aside in favour of the Merchandise Marks Act of 1862 providing limited protection under criminal law against fraudulent marking of goods.[16] But by the time of the Vienna Congress in 1873, British traders were aware that France, Belgium, America, and even some Australasian colonies had adopted registered trade mark systems.[17] The fact that Austrian law adopted for the Exhibition had extended to trade marks and British manufacturers made use of it was noted in the Report on the Exhibition to the British Government.[18] By 1875 even the newly united Germany had legislation providing for a register of trade marks. It was a further reason for the British legislator to follow suit. Still, according to *The Times*,[19] the main difference brought by the new Trade Marks Act would be 'the cheap supply of evidence for use in this country or abroad' with trade marks now able to be established by registration rather than 'public user'.

[12] And see also, for an insightful survey, Lionel Bently, 'The Making of Modern Trade Mark Law' in Lionel Bently, Jennifer Davis and Jane Ginsburg (eds.), *Trade Marks and Brands: An Interdisciplinary Critique*, Cambridge University Press, 2008, ch. 1.

[13] *Report of the Select Committee on Trade Marks Bill and Merchandise Marks Bill, Together with the Proceedings of the Committee, Minutes of Evidence, Appendix and Index*, ordered by the House of Commons to be printed, 1862.

[14] *Ibid*., p. 129 (Mr Hindmarch, barrister and drafter of the Merchandise Marks Bill). And compare p. 49 (Mr Wright, button manufacturer – although conceding 'in the last week several cases have come to my knowledge of parties who have recently established trade marks' and commenting 'I have no doubt that among manufacturers to any extent, it will become very general, if not universal').

[15] Question put to Mr Ryland, *ibid*., p. 36.

[16] Merchandise Marks Act 1862, 25 & 26 Vict, c 88. And see generally William Cornish, 'Personality Rights and Intellectual Property', *Oxford History of the Laws of England*, Vol. XIII, Oxford University Press, 2010, p. 845, pp. 1000–1.

[17] See Amanda Scardamaglia, *A History of Trade Mark Law in Australia*, unpublished PhD thesis, 2011, copy on file with the authors.

[18] *Reports on the Vienna Universal Exhibition of 1873*, printed for Her Majesty's Stationery Office, 1874, Part 1, pp. 377–9 and Appendix T.

[19] 'The Legislation of the Session', *The Times*, 10 September 1875, p. 8.

If this was a gross underestimate of the new system's impact and operation, it was not an uncommon perception. Perhaps none of those involved in framing and promoting the new legislation could have imagined the multiple ways that trade marks would be used by traders later on in an effort to accommodate the altered advertising theories and business practices of the twentieth century. But even if we simply consider the period between 1880 and 1900 there is a sense that trade marks were not simply viewed by advertisers as mnemonic devices for the sharing of information and instruction. Rather, it is interesting to note how different the early practice under the trade marks system was compared to that anticipated by some of its founders, who were inclined to see it as a pale imitation of the patents and designs systems it was modelled on but still somewhat aligned to the confusion-minimisation ideas of the older common law passing-off system.

Initially, the most obvious effect of the trade marks system was the number of trade marks that were registered. In 1862, it was predicted that this number 'would be very few compared with the number of designs which have been registered', a design being 'an ephemeral thing; a mere creature of fashion' while 'the trade mark is a thing of value which only comes with time'.[20] In fact, there were rather many registrations even relatively soon after the Act was passed and came into operation – albeit, as William Cornish notes, always less than traders themselves would have liked.[21] The Commissioner's Report for 1882 recorded 27,336 new trade marks advertised and 23,603 registered in the seven years since its inception.[22] And the rates of registration grew even further after the Patents, Designs and Trade Marks Act 1883 – anticipating the possibility that trade mark language might be 'originated' in much the same way as a design or invention – broadened the definition of 'trade mark' in the 1875 Act to include 'a fancy word or words not in common use';[23] and again after this was further broadened in 1888 to specify 'an invented word or invented words; or a word or words having no reference to the character or quality of the goods'.[24] By the end of the First World War, registered trade marks were on a trajec-

[20] *Ibid*.
[21] Cornish, 'Personality Rights and Intellectual Property', pp. 1005–6.
[22] *Report of the Commissioners of Patents for Inventions for the Year 1882*, printed by Eyre and Spotswood, 1883, pp. 8–9.
[23] Patents, Designs and Trade Marks Act 1883, 46 & 47 Vict, c 57, s 64.
[24] Patents, Designs and Trade Marks Act 1883, s 64 as amended by the Patents, Designs and Trade Marks Act 1888, 51 & 52 Vict, c 50, s 10(1).

tory that in the course of the century would make them more popular than designs (and eventually patents as well).[25]

However, it is through the cases and their discussion in the press (which was often fuller than disclosed in the official law reports, with their tedious emphasis on legal points and minimalist discussions of the facts),[26] that we get a fuller sense of a developing practice of traders under the trade mark system in operation. *The Times* especially took on the role of furnishing many of the 'unofficial' law reports and in its review of the cases (rather tentative and muted now given it had advertising interests of its own to conserve)[27] it offers a unique microcosm of the trade marks debates of the end of the century.

Initially, *The Times* showed no great interest in trade mark cases although a steady stream emerged from the courts in the 1880s. Even the curious facts of the *Burgoyne* case of 1889,[28] involving an Australian wine importer's application to register 'Oomoo' as a trade mark for wine, did not excite any comment. The opponent, Mr Walter Pownell trading as the Australian Wine Co., used an 'Emu' label for his wine. Presumably his general concern was a competitor's adoption of an indigenous-Australian sounding term as a promotional device in a period of high Orientalism (especially vis-à-vis the colonies). In fact Mr Burgoyne was not the first to use the label. 'Oomoo' wine had been exhibited by a Mr Hardy of Adelaide at the Colonial Exhibition in 1886. And Mr Pownell also pointed out that 'oomoo' was a word in an Aboriginal language meaning 'good' or 'choice'. Nevertheless, Chitty J held that 'Oomoo' was a 'fancy word not in common use' for purposes of the 1883 Act, for 'the word, if it does mean "choice", or if it ever meant "choice" in the aboriginal language of Australia, does not mean choice to an ordinary Englishman, or to a sufficient number of Englishmen in this country to enable me to say it has any meaning'.[29] The newspaper carried a full report of the case but forbore to comment on the judge's conclusion that a word was to be regarded as meaningless if it derived

[25] See Appendix B. This also had to do with the decline of designs registrations: see Lionel Bently, 'Requiem for Registration: Reflections on the History of the United Kingdom Registered Designs System' in Alison Firth (ed.), *The Prehistory and Development of Intellectual Property System*s, Sweet & Maxwell, 1997, ch. 1.

[26] In fact, this narrow focus of the official law reports on the law was something that professional lawyers and judges appeared to approve: see Nathaniel Lindley, 'The History of The Law Reports' (1885) 2 *Law Quarterly Review* 137, noting that cases continued to be reported in newspapers which may have satisfied the public's need for knowledge but 'are worthless for purposes of reference or study': *ibid*.

[27] W.L. Watson, 'The Press and Finance' (1898) 164 *Blackwood's Edinburgh Magazine* 639.

[28] *Burgoyne's Trade Mark* (1889) 6 RPC 227.

[29] *Ibid*., at 232.

from an Aboriginal language or '[some] language used in the centre of Africa', while the adoption of 'European, &c, words' would be 'different' because 'such words had a definite meaning among the numerous persons in England who precisely understood the languages in which the words could be found'.[30]

Yet if one case drew the newspaper's attention to the issue of trade marked language it was the 1898 case of *Eastman Photographic Materials Company Ltd* v. *Comptroller-General of Patents, Designs and Trade-Marks*.[31] The applicant was inventor George Eastman, a leading American-based manufacturer of cameras and equipment, including its popular snapshot camera in 1888, marketed under the 'Kodak' brand. The case involved an application to register 'Solio' as a trade mark for photographic paper in use by amateur and professional photographers. The registration was challenged by the Comptroller-General on the basis that 'Sol' implied sun and referred to the character or quality of the goods; and by virtue of its evident meaning was not an invented term. The trial judge and Court of Appeal upheld the objection to registration. But the House of Lords in a dramatic turnaround overturned the judgment. It accepted that

> the vocabulary of the English language is common property, it belongs alike to all; and no one ought to be permitted to prevent other members of the community from using for purposes of description a word which has reference to the character or quality of goods[32]

echoing a Board of Trade Department Committee report before the 1888 reforms.[33] But, added Lord Herschell (who in fact had chaired the Departmental Committee)

> with regard to words which are truly invented words – words newly coined – which have never theretofore been used, the case is, as it seems to me, altogether different … If a man has really invented a word to serve as his trade-mark, what harm is done, what wrong is inflicted, if others be prevented from employing it, and its use is limited in relation to any class or classes of goods to the inventor?[34]

[30] See 'High Court of Justice, Chancery Division (Before Mr Justice Chitty), *In Re Burgoyne's Trade Mark*', *The Times*, 1 March 1889, p. 3.
[31] *Eastman Photographic Materials Company Ltd* v. *Comptroller-General of Patents, Designs and Trade-Marks* [1898] AC 571.
[32] *Ibid*., Lord Herschell at 580.
[33] *Report of the Committee Appointed by the Board of Trade to Inquire into the Duties, Organization, and Arrangements of the Patents Office under the Patents, Designs and Trade Marks Act, 1883*, printed for Her Majesty's Stationery Office, Appendix E, 552 at p. 556.
[34] *Eastman Photographic Materials Company Ltd* v. *Comptroller-General of Patents, Designs and Trade-Marks* [1898] AC 571, Lord Herschell at 581.

The Times, noting the controversy, worried that the 'Solio' decision would encourage dangerous 'experiments' with the established language 'for obtaining roots out of which to manufacture catch-words for soaps, lubricants and patent medicines' – and 'the problem before the enterprising manufacturer who would push his goods is here precisely that with which a certain class of men of letters is always busy', both being in search of 'novelty' in the shape of the 'invented word'.[35] This was a period when early theorists of social linguistics characterised the English language as 'an embodiment, the incarnation … of the feelings and thoughts and experiences of a nation',[36] and of the Oxford University's long programme of establishing a dictionary of the English language in a celebrated gesture to the British public.[37] The article's author showed also an appreciation that even supposedly novel language may be used for 'pushing' purposes. Nevertheless, it did not prevent the newspaper also quoting from a letter from a firm of patent agents, which it had published in full in a previous issue. Here it was argued that the most beneficial effect of the decision would be that the stringency of the Office which had previously 'led a considerable number of manufacturers to desist from even attempting to register their trade marks' would now be reversed.[38]

In any event, it was not mainly 'invented' words and imagery that would be the problem in future cases but rather the relocations of common vocabulary or imagery to new uses, another exercise in creativity but one step removed from creation of a coined word, expression or image as such.[39] An early example is the 1902 case of *Louise & Co Ltd* v. *Gainsborough*,[40] concerning a high-class milliner trading in Regent Street who had registered a trade mark consisting of an image of Gainsborough's painting the *Duchess of Devonshire* in 1882 and was now claiming infringement after discovering another milliner was exhibiting his own Duchess painting outside his business in Hanover

[35] 'The Decision of the House of Lords Today', *The Times*, 18 July 1898, p. 11.

[36] See Richard Trench, *On the Study of Words*, 7th edn, John Parker & Son, 1856, p. 24 – the book was still being published in later editions at the end of the century.

[37] A story elegantly recounted in Simon Winchester, *The Meaning of Everything: The Story of the Oxford English Dictionary*, Oxford University Press, 2003.

[38] 'The Decision of the House of Lords Today', *The Times*. The letter quoted from is Boult and Wade, Chartered Patent Agents, 'Important Trade Mark Decision', *The Times*, 18 July 1898, p. 8.

[39] Other trade marks may be considered borderline invention-adaptation, as for instance with some of the Kodak Company's later disputed trade marks 'Brownie', 'Bull's Eye' and 'Panoram': see *Kodak (Limited)* v. *London Stereoscopic and Photographic Company (Limited), Kodak (Limited)* v. *George Houghton and Sons, In Re Trade Mark of Kodak (Limited)* (1903) 19 *Times Law Reports* 297.

[40] *Louise & Co Ltd* v. *Gainsborough* (1902) 20 RPC 61.

Figure 7 Advertisement for Kodak cameras, 1893, courtesy Science Archive Oxford and Scala Florence/Heritage images.

Square (where he traded under the business name of Gainsborough). It was acknowledged that the choice of the image by the parties and large numbers of other milliners was inspired by the public fame of Gainsborough's painting. For, as an article in *The Times* pointed out, the painting, already famous for having been sold at the highest price ever paid at an auction for a painting, had become even more notorious following its mysterious theft from a Bond Street Gallery in London in 1876. And further notoriety followed after it was recovered in 1901 with the aid of a Pinkerton detective. *The Times* report of the case began with the comment that '[t]he action raises important issues as to the right of using reproductions of Gainsborough's celebrated picture of the "Duchess of Devonshire" in connection with high class millinery trade'.[41] But the irony of the case is that these important issues had nothing to do with the legal issue as posited by the court. Rather, paying strict attention to the historical meaning of 'trade mark' at the time of the 1875 Act, Farwell J insisted that the sole legal question was whether the registered trade mark distinguished Louise & Co hats from those of other traders. There was no particular logic to drawing the line there, when by now it was plain that a trade mark might signify and confuse more than simply in reference to trade source. But that the reasoning proceeded on the basis that the mark was common in the trade, not that it entailed the reuse of a famous portrait, reinforces the impression of fine lines being drawn by courts between permitted, tolerated and disallowed appropriations.

Indeed, the above cases suggest that traders not long after the trade mark system came into operation were energetically devoted to fashioning the symbolic significances of the language and signs they used, with little regard to the possibility that their meaning might not be entirely 'accurate' or even entirely of their own making – and it was something courts for a time seemed to condone (although later on they struggled to contain it).[42] Their position resembled somewhat that of other originators of works, articles and inventions who drew on existing knowledge for their inspiration and claimed their productions as their own. As we discuss in the next Part of this book, there was always a certain ambiguity in line-drawing between originality and plagiarism. But the impact for trading practices of this truism with respect to brands was profound. As Charles Wilson says, brands by the end of the century functioned as a central feature of trading activity, setting

[41] *Louise and Co (Limited)* v. *Gainsborough* (1902) 29 TLR 99 at 99.
[42] See Megan Richardson, 'Trade Marks and Language' (2004), 26 *Sydney Law Review*, 193.

Figure 8 W. McConnell, 'The Last Poster', from William Smith, *Advertise. How? When? Where?*, Routledge, Warne and Routledge, 1863, courtesy University of Texas Library, photograph by Bernard Lyons.

'new patterns and standards of social life'.[43] Thus by the 1900s, if not before, as articles of fashion and taste took their modern character of paradoxically appealing to their audience through a mix of 'innovation and conformity',[44] the same could be said of their brands.

[43] Charles Wilson, 'Economy and Society in Late Victorian Britain' (1965) 18 *Economic History Review* 191 at 191.

[44] Roland Barthes, 'Fashion, A Strategy of Desire' (round-table discussion with Jean Duvignaud and Henri Lefebvre), trans. Andy Stafford, in Andy Stafford and Michael Carter (eds.), Roland Barthes, *The Language of Fashion*, Berg, 2006, ch. 8 at p. 86.

Part III

The author–brand continuum

As we have seen in previous chapters, British lawmakers in the latter half of the long nineteenth century set about reorganising and systematising the existing categories of intellectual property law along broadly utilitarian lines. The refashioning took different forms. The patents regime was completely overhauled, once it was decided that the public benefit lay in encouraging patented activity rather than relying on free trade to foster innovation and diffusion – the experience of international exhibitions suggesting the possibility of both working together to foster innovation and dissemination of new material. In the field of trade marks, a new registration system was introduced and expanded, once it was seen as beneficial for traders, as a major engine of British enterprise, to have a ready-made mechanism for establishing trade marks rather than waiting for reputation to be accrued over time. Thus, in the words of Frank Schechter, trade marks could now be used to 'sell' goods through their promise of quality and thus satisfaction rather than representing their pre-existing already-established quality.[1] Patents and trade marks were further delineated from designs, the designs system becoming a form of residual protection for the visual features of mass-produced industrial articles, an increasingly peripheral task in the twentieth century as other elements of intellectual property system expanded.[2] In the case of copyright, the systematising tendency worked to expand and aggregate the range of copyright protection to better protect professional authors and publishers from piracy, using partly legislative reform and partly the method of judicial development of the rights that currently existed, both

[1] Frank Schechter, 'The Rational Basis of Trademark Protection' (1927) 40 *Harvard Law Review* 813 at 819.

[2] Undoubtedly, as noted in Part II, the process was affected also by the reduction in British manufacture of the kinds of articles that traditionally embodied designs, the fabrics and lace industries, for instance, virtually collapsing after the Second World War: Lionel Bently, 'Requiem for Registration: Reflections on the History of the United Kingdom Registered Designs System' in Alison Firth (ed.), *The Prehistory and Development of Intellectual Property System*s, Sweet & Maxwell, 1997, ch. 1.

under the statute and under the common law, codified in the Copyright Act of 1911.

Sherman and Bently observe that the synthesising of British and colonial copyright law produced a rather strange legal confection.[3] And it is worth interrogating further those domains that initially seemed to fall outside the mainstream British and colonial copyright systems but were later somehow brought within them, or at least were treated in an analogous fashion – as well as the rhetoric employed to justify that position in a rather compliant public press. We offer three examples in the chapters that follow. The first is of British purveyors of the new popular literature of the 1880s and 1890s (for instance *Treasure Island*'s Robert Louis Stevenson and fairy-tale translator and collector Andrew Lang) in their articles in literary journals and magazines arguing their activities fitted within the essential rubric of the copyright system. Thus they rejected any elite idea of the author-function that might exclude them, and at the same time provide a moral justification for American piracies of their works. Later we see *The Times*, the leading organ of the British newspaper press, whose activities were premised on the mechanised gathering, selection and replaying of 'news' and other material for public consumption, making an argument for control to be exercised over copying in other newspapers, with copyright as the legal mechanism. In the political environment surrounding the First World War, such arguments took on a political dimension as the mainstream newspapers became aligned with the Government's efforts to control media reporting of events about the War-effort. In America the post-War news 'misappropriation' doctrine of the *International News Service* v. *Associated Press* case had an equivalent function of enabling commercial and government control of news, gathered 'at pains and expense'.

In our third example, we see Parisian couturiers of the 1910s, part of the avant-garde of Modernism, looking rather to brand protection to maintain their claims for protection of their fashion when they observed the extent of cheap mass-produced reproductions in the great American department stores, outgrowths of the nineteenth-century exhibitions. After the War, their leader Paul Poiret engaged in a high-profile action in passing off against a British dressmaker trading using the similar name of 'Jules Poiret', relying on advertising in the British fashion press to evidence reputation and confusion. If there was a sense in this case that the Poiret name was being used as a marker of the authenticity-authorship of Poiret's articles of fashion, the law of passing

[3] Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Law*, Cambridge University Press, 1999, Part 4.

off (common law trade mark protection) deployed in lieu of copyright, it was also apparent that there was an evolving brand function. For there was a hint that Poiret's personal and professional identity was in fact the central locus of the brand's vague promise of satisfaction. This was a function that Ralph Brown would later comment on, talking about the 'psychological function of … the symbol, impregnating the atmosphere of the market with [the symbol's] drawing power' and observing the new role of the professional advertiser, employing 'threats, cajolery, emotions, personality persistence and facts in what is termed aggressive selling'.[4] In this context, Brown implies, the press along with new media was the canvas for the advertiser's task in 'fashion[ing]' illusions of 'lavishness, refinement, security, and romance'.[5] In fact, the press had that role already with respect to fashion-advertising by the 1910s and 1920s.

Indeed, the author-function itself was being read in a still more expansive way by the 1920s. After the First World War, any residual elite idea of authorship seemed to have little to do with the new wave of popular literature being published in *The Sketch* and *Strand Magazine*, the cinematic productions coming out of Hollywood and the Hepworth studio in Walton-on-Thames, the ballet and musical productions on display in the variety theatres of London and the provinces, as well as modern practices of the newspaper press, all of which assumed and relied on copyright (or in the case of the American press the equivalent news doctrine). In light of these activities, the claims of advertisers that they had their own 'creative' authoring role in 'making dreams … come true', in the words of N.W. Ayer & Son of Philadelphia,[6] did not seem so far-fetched. Thus brands could be conceived of as not just markers but sites of intellectual activity. And the way was open to reconceive modern intellectual property as a continuum, stretching across from the production (initial authoring, origination or invention) of knowledge to its branded dissemination.

[4] Ralph Brown, 'Advertising and the Public Interest: Legal Protection of Trade Symbols' (1948) 57 *Yale Law Journal* 1165 at 1165–6 and *passim*.

[5] *Ibid*., at 1181 and see also at 1187: '[brands] not only reach over the shoulders of the retailer [citing Schechter, 'The Rational Basis of Trademark Protection'– and pointing out that Schechter ascribed this 'telling phrase' to HG Wells]; they reach from a radio program on Sunday to a compulsive purchase on Monday'.

[6] Advertisement for N.W. Ayer & Son, *Saturday Evening Post*, 2 October 1920, p. 160.

9 Rethinking 'Romantic' authorship

In *The Construction of Authorship*, Peter Jaszi and Martha Woodmansee claim that the Romantic idea of the author-genius exercised 'consistent, shaping pressure' on modern Anglo-American copyright law, serving the interests of publishers and distributors rather well.[1] This is now the conventional view of the author-function in copyright law, especially American law, although it has been challenged.[2] Our review of British and colonial law also calls the conventional view into question. By the end of the nineteenth century, the line of legal reasoning being developed by English courts embodied a rather different set of authorial and publishing interests from their American counterparts, centred explicitly around a prosaic view of the modern author's contribution and entitlements. Besides, we wonder whether Romantic authors adhered strongly to the author-genius principle, let alone those who came after. Rather, we suggest, the author-genius notion was from time to time a trope for certain Romantic and Victorian authors to seek to promote and advance their interests in relation to reform of certain specific aspects of copyright law, making use of the persuasive language of advertising (even before persuasion was recognised as part of the new advertiser's role). And it was not entirely reflected either in the more utilitarian framework of the law.

Naturally, Jaszi and Woodmansee refer to that most well-known user of the author-genius trope, William Wordsworth. Interestingly, however,

[1] Peter Jaszi and Martha Woodmansee, 'Introduction' to Martha Woodmansee and Peter Jaszi (eds.), *The Construction of Authorship: Textual Appropriation in Law and Literature*, Duke University Press, 1994, 1 at p. 5 and *passim*. See also the chapters by Woodmansee, 'On the Author Effect: Recovering Collectivity' and Jaszi, 'On the Author Effect: Contemporary Copyright and Collective Creativity': *ibid*., 15 and 29. To similar effect see also Martha Woodmansee in 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the "Author"' (1984) 17 *Eighteenth-Century Studies* 425. Cf. Ronan Deazley, *Rethinking Copyright: History, Theory Language*, Edward Elgar, 2006.

[2] See especially David Saunders, *Authorship and Copyright*, Routledge, 1992 and Deazley, *Rethinking Copyright*.

even Wordsworth's choices of language in talking about authorship over the long period of his life show more flexibility than is often attributed to him in conceiving of his craft. For instance in his 'Advertisement' prefixed to *Lyrical Ballads*, when this volume of poetry was first published anonymously in 1798 – at a time when Wordsworth and his friend Coleridge, who provided some of the poems for the volume, were poets of small and rather low reputation (Wordsworth's name was 'nothing' to the audience, Coleridge told their publisher Joseph Cottle,[3] while 'mine stinks') – it is posited modestly that:

> The majority of the following poems are to be considered as experiments. They were written chiefly with a view to ascertain how far the language of conversation in the middle and lower classes of society is adapted to the purposes of poetic pleasure. Readers accustomed to the gaudiness and inane phraseology of many modern writers, if they persist in reading this book to its conclusion, will perhaps frequently have to struggle with feelings of strangeness and awkwardness … [but] while they are perusing this book, they should ask themselves if it contains a natural delineation of human passions, human characters, and human incidents; and if the answer be favourable to the author's wishes … they should consent to be pleased in spite of that most dreadful enemy to our pleasures, our own pre-established codes of decision.[4]

The Advertisement's language thus merely suggests that the aim of *Lyrical Ballads* is to capture by use of common language a culture that already exists – later it refers to the poems as not 'absolute inventions of the author' but reflecting matters personally observed by Wordsworth and his friends.[5] The characterisation, however, is a little different by the time we get to Wordsworth's enlarged 'Preface' in the third edition of *Lyrical Ballads* published in 1802, where Wordsworth identifies himself as the author of *Lyrical Ballads*.[6] There Wordsworth explains:

> The principal object, then, which I proposed to myself in these poems was to choose ingredients and situations from common life, and to relocate or

[3] See Joseph Cottle, *Reminiscences of Samuel Taylor Coleridge and Robert Southey*, Houlston and Stoneman, 1847, p. 180.

[4] William Wordsworth, 'Advertisement' to *Lyrical Ballads With A Few Other Poems*, London, printed for J. & A. Arch, 1798, pp. i–ii, reprinted in H. Littledale (ed.), *Lyrical Ballads 1798*, Oxford University Press, 1911.

[5] *Ibid*., p. iv.

[6] Wordsworth, 'Preface' to *Lyrical Ballads*, 3rd edn, 1802; reprinted (extracts) in Jack Stillinger and Deidre Lynch (eds.), *Volume D: The Romantic Period*, in Stephen Greenblatt and M.H. Abrams (eds.), *The Norton Anthology of English Literature*, 8th edn, W.W. Norton & Company, 2006, p. 263. The editors note that the wording of the enlarged Preface was 'aided by frequent conversations with Coleridge' and in the expanded version 'justified the poems not as experiments but as exemplifying the principles of good poetry': *ibid*., p. 262.

describe them, throughout, as far as possible, in a selection of language really used by men; and, at the same time, to throw over them a certain colouring of imagination, whereby ordinary things should be presented to the mind in an unusual way; and, further, and above all, to make these incidents and situations interesting by tracing in them, truly though not ostentatiously, the primary laws of our nature … [S]uch language, arising out of repeated experience and regular feelings, is a more permanent and a far more philosophical language, than that which is frequently substituted for it by poets, who think that they are conferring honour upon themselves and their art, in proportion as they separate themselves from the sympathies of men, and indulge in arbitrary and capricious habits of expression, in order to furnish food for fickle tastes, and fickle appetites, of their own creation.[7]

The latter comes closer to Wordsworth's famous statement on his authorship in his *Essay Supplementary to the Preface*, published in 1815, that '[o]f genius in the fine arts, the only infallible sign is the widening of the sphere of human sensibility. Genius is the introduction of a new element into the intellectual universe'.[8] Naturally, it is this *Essay* that Jaszi and Woodmansee rely on for their referencing of Wordsworth's Romantic conception of the author-genius.[9] And they argue that there was a special purpose to Wordsworth's statement here, forming part of the campaign for a substantial extension of the statutory copyright term in the Bill proposed by Thomas Talfourd.[10] But not all Romantic authors took the line of the genius author in the 1810s. Southey, for instance, 'the most matter-of-fact and worldly of [the Romantic] poets',[11] was more concerned with the injustice of denying authors recompense from their literary labour, using the older language of natural rights rather than any Romantic idea of genius, and pointing to their utility as well.[12] Of course, by 1815, Wordsworth – unlike Southey – was widely viewed as a genius. And, as Howard Abrams says, it suited the revolutionary purposes of the Romantic poets to claim their genius when the audience allowed this.[13] The younger ones also framed their reputations around their youthful brilliance, Byron especially

[7] *Ibid*., pp. 264–5.
[8] Wordsworth, 'Essay Supplementary to the Preface', 1815, reprinted R. Brimley Johnson, *Poetry and the Poets*, Faber and Gwyer, 1926.
[9] Jaszi, 'On the Author Effect', p. 35; Woodmansee, 'The Genius and the Copyright', at 429–30.
[10] And see above, Part I, Chapter 2.
[11] M. Howard Abrams, 'English Romanticism and the Spirit of the Age' in Harold Bloom (ed.), *Romanticism and Consciousness*, Norton, 1970, p. 44.
[12] Robert Southey, 'Inquiry into the Copyright Act' (1819) 21 *Quarterly Review* 196.
[13] Abrams notes the 'union of arrogance with humility which characterizes all poet-prophets who know they are inspired': 'English Romanticism and the Spirit of the Age', at 71.

fashioning his language, dress and portraiture to promote and perpetuate this ideal.[14] And the same could be said for the aging genius, Coleridge. In his *Biographia Literaria* in 1817 Coleridge not only talked about the genius entailed in serious authoring but distinguished serious reading from the consumption of popular literature of circulating libraries, arguing the latter was more in the nature of time-passing or time-killing, part of a genus that included 'gaming, swinging or swaying on a chair or gate, spitting over a bridge; smoking, snuff-taking, tête-à-tête quarrels after dinner between husband and wife; conning word by word all the advertisements of the *Daily Advertiser* in a public house on a rainy day, etc, etc, etc'.[15]

Wordsworth's and Coleridge's elevated idea of the author-function has something in common with the conception of some early Victorian authors. So if Wordsworth, writing in 1815, offers a certain manifesto of Romantic philosophy then Dickens does the same for Victorian authorship thirty-five years later. In his 'Preliminary Word' appearing at the beginning of the first issue of *Household Words*, launched in 1850,[16] Dickens – who by 1850 was already a famous author with a dozen best-selling books behind him and a reputation as a 'great-hearted, great-brained, great-souled writer', as James Joyce says[17] – begins by stating rather bombastically that '[t]he name we have chosen for this publication expresses, generally, the desire we have at heart in originating it [that is to] live in the Household affections and to be numbered among the Household thoughts of our readers':

> To show to all, that in all familiar things, even in those which are repellent on the surface, there is Romance enough if we can find it out; – to teach the hardest workers at this whirling wheel of toil, that their lot is not necessarily a moody, brutal fact, excluded from the sympathies and graces of imagination; to bring the greater and the lesser in degree, together, upon that wide field, and mutually dispose them to a better acquaintance and a kinder understanding – is one main object of our *Household Words* …
>
> Some tillers of the field into which we are now come, have been before us, and some are here whose high usefulness we readily acknowledge, and whose company it is an honour to join. But there are others here – Bastards of the

[14] See Richard Holmes, *The Romantic Poets and their Circle*, National Portrait Gallery Publications, 2005, pp. 8–9.

[15] Coleridge, *Biographia Literaria, or Biographical Sketches of My Literary Life*, Rest Fenner, 1817, reprinted (extracts) in Stillinger and Lynch, *Volume D: The Romantic Period*, pp. 606–7.

[16] Charles Dickens, 'A Preliminary Word', *Household Words: A Weekly Journal conducted by Charles Dickens*, 30 March 1850, 1.

[17] James Joyce, 'The Centenary of Charles Dickens', unpublished 1912, reprinted in Kevin Barry (ed.) and Connor Deane (trans.), *James Joyce: Occasional, Critical and Political Writing*, Oxford University Press, 2000, 183 at p. 183.

Mountain, draggled fringe on the Red Cap, Panders to the basest passions of the lowest notions – whose existence is a national reproach. And these we should consider it our highest service to displace.[18]

Note how Dickens distances himself from those pandering to 'the basest passions … the lowest notions'. Similarly, John Stuart Mill (reader of Wordsworth and Coleridge) distinguished the higher and lower pleasures in his essay on 'Utilitarianism' published periodically in the *Westminster Review* in 1861, arguing the higher ones were to be preferred and drawing a line between himself and the Benthamite utilitarians who argued that 'pushpin' was as good as poetry.[19] Some Victorians expressed a different view. Robert Louis Stevenson, author of *Treasure Island*, in 1884 spoke up in favour of adventure novels with their danger, passion and intrigue and 'significant simplicity', responding to the more elitist American ex-patriot Henry James.[20] As Ken Gelder says, these fin-de-siècle commentaries on high literature and popular literature 'encapsulate a set of differences between the two that remain in currency today'.[21] But Stevenson went further, questioning even James's elevation of fiction over non-fiction forms, arguing 'the art of narrative, in fact, is the same, whether it is applied to the selection and illustration of a real series of events or of an imaginary series'.[22]

For some engaged in the fin-de-siècle debates, the differences went to not only the quality of authorship but the more basic question of authorship's domain. Mill, true to his liberal utilitarianism, preferred to trust the market to decide on quality based on experience, and also saw the value for authors themselves of their activities – so it was as much through their flourishing that society would benefit as with the particular productions they produced, and as many as possible should share the experience.[23] Thirty years later, the artist-craftsman William Morris would make similar arguments for an individuated arts-and-

[18] *Ibid*., pp. 1–2.

[19] See Mill, *Utilitarianism*, 1861, reprinted in Mary Warnock (ed.), *John Stuart Mill, Utilitarianism, On Liberty and Essay on Bentham*, Collins, 1961, p. 251.

[20] Robert Louis Stevenson, 'A Humble Remonstrance' *Longman's Magazine*, 5 November 1884, reprinted in Stevenson, *Memories and Portraits*, Chatto and Windus, 1887; responding to Henry James, 'The Art of Fiction' in *Longman's Magazine*, September 1884.

[21] Ken Gelder, *Popular Fiction: The Logics and Practices of a Literary Field*, Routledge, 2004, pp. 18–19.

[22] Stevenson, 'A Humble Remonstrance', p. 279.

[23] See especially Mill, *Utilitarianism*, at pp. 258–62. Similarly, Mill drew an analogy between copyright and patents (which he equally argued should be widely available in response to inventiveness) in his *Principles of Political Economy* (1871), further edited and with an introduction by Sir William Ashley, Longmans, Green and Co., 1909, p. 933 – and generally above, Part II, Chapter 6.

craft-centred maker-user society.[24] But in the debates of the 1880s and 1890s, taking place in a period obsessed with Decadence, with its sense of the tail-end of civilisation accompanied by a falling-off in 'proper' standards of social behaviour, others might adopt a more narrowly judgemental tone. If Wordsworth and Coleridge and Dickens said the literary author's genius lay in imagination, was imagination the key to authorship, properly understood? In 1887, the popular folklorist and fairy-tale collector Andrew Lang, in a long article on 'Literary Plagiarism' in the *Contemporary Review*,[25] refuted the suggestion, arguing for the pervasiveness of imaginative authorship across a range of literature, and distinguishing only cases of outright plagiarism:

> Not the matter, but the casting of the matter; not the stuff, but the form given to the stuff, makes the novel, the novelty and the success. Now nobody can steal the form; nobody, as in the old story (or nobody except a piratical publisher), can 'steal the brooms ready-made' … On the other hand, genius, or even considerable talent, can make a great deal, if it chooses, even out of stolen material – if any of the material of literature can properly be said to be stolen, and is not rather the possession of whoever likes to pick it up.
>
> On this view of the matter the only real plagiarism is that defined in the Latin dictionaries … 'thief' is *Plagiarus* … [who] gives himself out to be the author of the book, and steals it ready-made.[26]

Who were these 'plagiarists' who steal the book ready-made? Lang does not spell out here. But he was likely not thinking of that Decadent genius Oscar Wilde, who was often accused of plagiarism (as indeed was Coleridge) and freely acknowledged his borrowing.[27] Rather, Lang's side-reference to the piratical publisher signals that for Lang as for many British authors in the 1880s and 1890s – as well as Dickens much earlier on in the century – they included especially American publishers who blatantly reprinted their works which failed to obtain the protection of US copyright law because they had not been published in America or, after the 'Chace Act' of 1891,[28] at least not in a timely

[24] For instance, in his lectures on 'The Art of the People' and 'The Beauty of Life' before the Birmingham School of Arts and School of Design in 1879 and 1880, later compiled in *Hopes and Fears for Art: Five Lectures Delivered in Birmingham, London, and Nottingham, 1878–1881*, Ellis & White, 1882.

[25] Andrew Lang, 'Literary Plagiarism' (1887) 51 *Contemporary Review* 831.

[26] *Ibid*., at 832–3.

[27] For instance, letters to Mrs Bancroft, actress, and Max Beerbohm, author, cited in Richard Ellmann, *Oscar Wilde*, Penguin Books, 1997, p. 355. And see generally Robert MacFarlane, *Original Copy: Plagiarism and Originality in Nineteenth Century Literature*, Oxford University Press, 2007, ch. 5 and Paul Saint-Amour, *The Copywrights: Intellectual Property and the Literary Imagination*, Cornell University Press, 2003, ch. 3.

[28] International Copyright Act 1891 (US) 26 Stat 1106.

fashion.[29] Even Wilde on his American tour found them bemusing in their assumption of moral entitlement.[30]

Later, Lang had his own experience of American pirating, in 1895 entering into a public skirmish with Thomas Mosher. Mosher, Arthur Sherbo says, was a respectable publisher who mainly devoted himself to reprinting poetry and prose from rare editions or forgotten sources in 'beautiful albeit inexpensive' editions but was 'not above reprinting the works of English authors who neglected to obtain American copyrights'.[31] One of those was Lang's translation of the old French tale *Aucassin and Nicolette*, published by Alfred Nutt in London as a limited edition of 500 copies in 1887. In the course of this dispute, we see Lang's views on plagiarism developing. In a letter from Lang published in the New York literary magazine *The Critic*[32] Lang makes clear that although he accepts the technical legality of Mosher's publication he objects to it as 'bad manners', complaining also about the errors and the 'ugly' photographic reproduction of the original etched frontispiece by Jacomb-Hood. The criticisms were repeated for the British audience in Lang's article 'From a Scottish Workshop' in the *Illustrated London News* of May 1896.[33] Mosher replied to Lang's article in *The Critic*, stating that 'as to the ethics of reprinting' he was 'no better than my brother pirates' in having 'simply taken what he admired', claiming he had by 'kindly overture' offered an 'emolument' to Lang's British publisher Mr Nutt while still maintaining that he was not legally obliged to do so, and insisting that he in fact performed a public service in making the book available to 'needy scholar[s]' and 'the real republic of book buyers' more cheaply than at the 'fabulous prices' demanded on 'British soil'.[34] Lang's response reveals something of the position

[29] See Catherine Seville, *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century*, Cambridge University Press, 2006, ch. 5.

[30] See Matthew Hofer and Gary Scharnhorst, *Oscar Wilde in America: The Interviews*, University of Illinois Press, 2009 p. 121.

[31] Arthur Sherbo, 'On the Ethics of Reprinting: Thomas Mosher vs. Andrew Lang' (1991) 64 *New England Quarterly* 100.

[32] Andrew Lang, letter to *The Critic*, 10 December 1895, reprinted in Sherbo, 'On the Ethics of Reprinting', at 101. Sherbo's useful article also summarises and reprints the further correspondence of Lang and Mosher in the course of the dispute, as published in *The Critic*, interposed with comments by the Editors (who supported the position of Lang over Mosher).

[33] Andrew Lang, 'From a Scottish Workshop' *Illustrated London News*, 30 May 1896, cited by Mosher in a letter to *The Critic* 26 June 1896, reprinted Sherbo, 'On the Ethics of Reprinting', at 103–4.

[34] Letters from Thomas Mosher to *The Critic* dated 21 April and 26 June 1896, reprinted Sherbo, 'On the Ethics of Reprinting', at 103 and 104–7.

of contemporary British authors on American 'pirates' – both in its implicit assumption of the value of his work in translating *Aucassin and Nicolette* and refusal to acknowledge an audience's dissatisfaction with a publishing policy based on small numbers and high prices:

> Nothing would please me more than to see 'Aucassin' a popular favourite, even in my very imperfect version, nor have I ever had any pecuniary interest in its sale. It was produced (I think at the 'fabulous price' of five shillings) in a limited edition, merely and solely because the publisher was not likely to recover his expenses in any other way …
>
> … If [Mr Mosher] does reprint anything else of mine, I have only to ask that he will spare me 'kindly overtures', 'collotypes' and other signs of a state which I regard with pain and the gloomiest apprehension, Mr Mosher poses as the friend of 'the needy scholar'. The needy scholar can read French and buy 'Aucassin' in the original at a cheaper rate than Mr Mosher vends the spoils of British authors.[35]

While Mosher did not question the value of Lang's work in merely providing a translation of the ancient *Aucassin* story, others might have. Harriet Beecher Stowe, author of the best-selling American novel *Uncle Tom's Cabin*,[36] in her earlier action (brought in the name of her husband) against her unauthorised German translator Friedrich Thomas for his serialisation of the book in his Philadelphia-based newspaper *Die Freie Presse*, presented the translator's work as of limited importance compared to her own right in 'justice' to her work.[37] Justice Grier of the Pennsylvania Circuit Court disagreed, saying that the work of translation is more than merely mechanical, requiring skill and dexterity,[38] but there was a lingering sense in American literary circles that translators' works were of little consequence – and later a more elite legal standard of copyright was to prevail in the United States carrying with it the right of translation, reflecting, Colleen Boggs says, a particularly American idea of vibrant and imaginative authorship.[39] In Britain, by contrast, Lang, one of an influential group of British folklorists, could feel justified in arguing that while he had not come up with the *Aucussin* story for the first time his contribution in giving

[35] Letter from Andrew Lang to *The Critic* dated 22 July 1896, reprinted Sherbo, 'On the Ethics of Reprinting', at 108–9.

[36] Harriett Beecher Stowe, *Uncle Tom's Cabin; or Life Among the Lowly*, John Jewett & Company, 1852.

[37] *Stowe* v. *Thomas*, Complainant's Bill (1853), *Primary Sources on Copyright (1450–1900)*, ed. L. Bently and M. Kretschmer, www.copyrighthistory.org.

[38] *Stowe* v. *Thomas* 23 F Cas 201 (1853), Justice Grier at 4–5.

[39] See Colleen Boggs, *Transnationalism and American Literature: Literary Translation 1773–1892*, Routledge 2007, pp. 146–7.

it a particular flesh was still original and important – in much the same way that his recording, translating and editing of ancient fairy stories, with the assistance of his wife and an army of volunteers, for the enjoyment of readers of his 'Rainbow' fairy books, was a contribution of mental labour for the benefit of his audience.[40] Lang and his contemporaries also had the satisfaction of knowing that British copyright law's undemanding standard of 'authorship' easily encompassed the mental labour involved in selecting, translating and editing the material.[41] (Although there was a certain incongruity in the fact that an author's copyright under the *Berne Convention for the Protection of Literary and Artistic Works* 1886, which Britain adhered to, encompassed a right of translation as well.)[42]

Disputes such as this provided the background for the further interrogation of authorship and plagiarism in the 1900 case of *Walter* v. *Lane*, discussed in the next chapter.[43] In this case the question of authorship came down to journalists' verbatim reports of public lectures delivered by the popular Liberal politician (and sometime friend of Oscar Wilde) Lord Rosebery for publication in *The Times*, which were used without authority in John Lane's compilation. At first instance, North J had cited cases of copyright being found in translations, abridgments and directories in support of a conclusion that the standard of authorship for statutory copyright law's purposes was simply one of 'independent labour'.[44] On appeal, it was observed that 'Grimm's fairy tales are said to have been taken down by the Brothers Grimm from the mouths of peasants', adding (rhetorically) '[w]as there no copyright there?'.[45] The House of Lords agreed there must be. And there was a strong thread

[40] And see Megan Richardson and David Tan, 'Sidestepping Copyright: British Fairy Tale Anthologies of the 19th Century' (2005) 12 *Texas Wesleyan Law Review* 81.

[41] In cases such as *Macmillan* v. *Suresh Chunder Deb* (1890) 17 ILR 951 (concerning an Indian 'piracy' of Francis Palgrave's classic *Golden Treasury of the Best Songs and Lyrical Poems in the English Language*, originally published by Macmillan in 1861 and running into several editions). And see Richardson and Tan, 'Sidestepping Copyright' at 87–8.

[42] There was no disagreement that authors' copyright extended to the making of translations in the UK, as provided for (in stages) by the *Berne Convention for the Protection of Literary and Artistic Works* 1886 (as further revised in Paris in 1896); and since the UK unlike the USA was a party to the Convention it was bound to accept that position: see Sam Ricketson, *The Berne Convention For the Protection of Literary and Artistic Works* 1886–1986, Queen Mary College, 1987, pp. 384–6 and *passim*.

[43] *Walter* v. *Lane* [1900] AC 539.

[44] *Walter* v. *Lane* [1899] 2 Ch 749, 757.

[45] *Walter* v. *Lane* [1900] AC 539 at 542.

of disapproval of the actions of those who would seek to 'appropriate … what has been produced by the skill, labour, and capital of others' and a correlative desire to ensure that copyright law should be 'strong enough to restrain' the 'grievous injustice'.[46] Lane's editor John Geake was unrepentant, observing in the Preface to *Appreciations and Addresses Delivered by Lord Rosebery*:

> There is … very little that is mysterious about these 'Appreciations and Addressees', unless, indeed, it be the fact that they are all so uniformly interesting. This is not in immodest praise of the Editor's discrimination in selecting these particular speeches, but a recognition of the fact that whatever Lord Rosebery says or does always is of profound interest. It is said that a politician measures his place in popular esteem by the category into which he is placed by the Press, ever ready to give the public what it wants. To be a 'one column' man is evidence of a respectable position; to be reported verbatim the sign and seal of supreme distinction. Lord Rosebery belongs to the very small and select verbatim class.[47]

The House of Lords having accepted the authorship of *The Times*' reports held an injunction could be granted restricting publication of Lane's edition – although there were also suggestions that the copyright protection here might be very limited, given the thinness of the journalists' authorship, extending only to copying of the reports themselves.[48] It was a compromise position, in other words, between the high Romantic standard of authorship which even the Romantics did not adhere to consistently, and the Benthamite utilitarian position that pushpin is as good as poetry – one that expected little of authorship (or 'original' authorship as the statute later on prescribed)[49] but also gave little to lower-quality authorship, exhibiting minimal imagination in the exercise of 'skill, labour and/or capital'.[50] But the

[46] *Ibid*., Lord Halsbury LC at 545.

[47] Charles Geake (ed.), *Appreciations and Addresses Delivered by Lord Rosebery*, John Lane, 1899, Preface pp. viii–ix.

[48] *Walter* v. *Lane* [1900] AC 539, Lord Halsbury at 549. But Lord Halsbury did not go as far in elaborating the point as Wilson J in *Macmillan* v. *Suresh Chunder Deb*, who held that copyright in a compilation extended to 'the selection already made by another': (1890) 17 ILR 951 at 961–2, citing the old case of *Longman* v. *Winchester* (1809) 16 Ves 269, Lord Eldon LC at 271.

[49] That an authored work must be 'original' was specified in the Copyright Act 1911, 1 & 2 Geo 5, c 46, s 1. In *Walter* v. *Lane* Lord Halsbury points out that 'originality' was not specified under the Act of 1842 but notes also that the fact that an importer of foreign invention was treated as having invented it for the purposes of (then) patent law suggests an analogy to the situation of those who benefit the public by 'preserv[ing] the memory of spoken words': [1900] AC at 548–9.

[50] Although as one of us has pointed out, courts in later cases did not always adhere strictly to this proposition: see Richardson and Tan, 'Sidestepping Copyright', at 88.

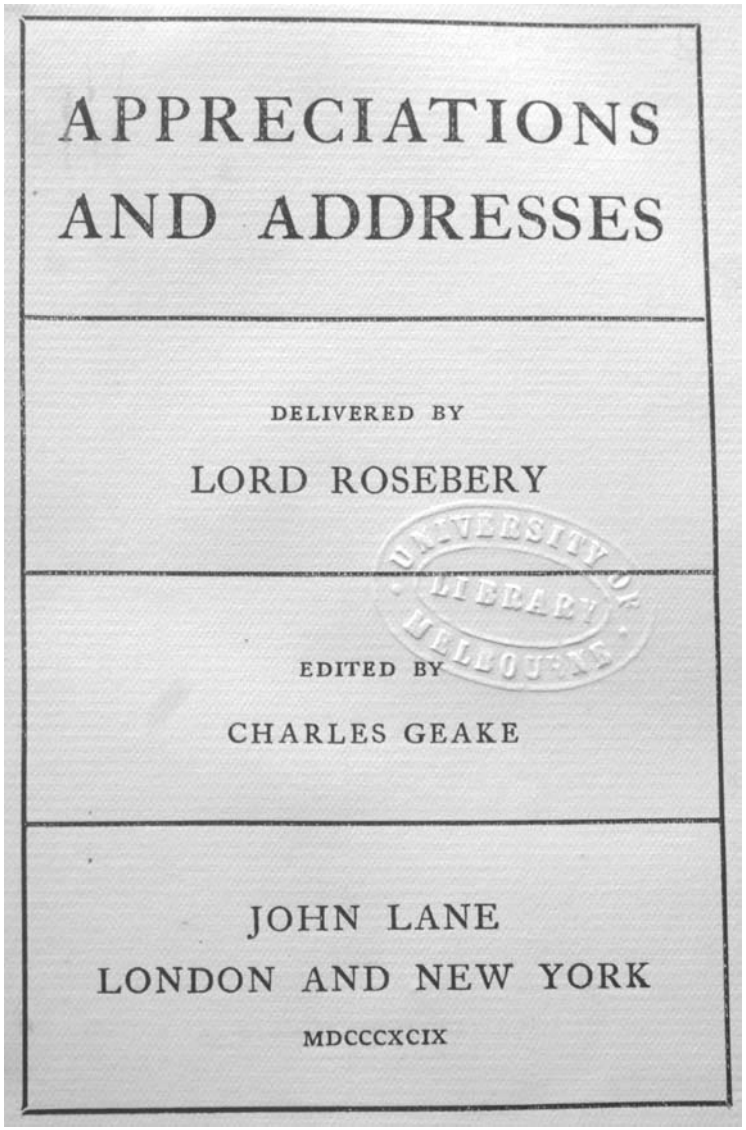


Figure 9 Title page from *Appreciations and Addresses Delivered by Lord Rosebery* (publisher John Lane), 1899, courtesy the University of Melbourne Library, photograph by Bernard Lyons.

book could be published in the United States; for *The Times* did not go so far as to argue its reporters should be treated as authors under US copyright law (even apart from the problem of complying with its formal registration process). It was a popular and well-designed book, running into several editions in America, with nobody to complain except the British *Times*.[51] And it may not surprise that US copyright law would seek to maintain a powerful public sphere of literature not subject to copyright for the benefit of Mosher's 'real republic of book buyers', including through its standard of 'Romantic' original authorship.[52]

Later there would also be the influence from Modernism. In 1909 the Italian Futurists were arguing for 'courage, audacity, and revolt' in their Manifesto of Futurism.[53] By the 1920s America embraced 'the new', with its Ford motor cars, its skyscrapers, its Museum of Modern Art, its advertising and cinema, its key cities (New York and later Chicago), and its general utopianism.[54] It was strikingly distinct from Britain with its more subtle reworkings of tradition and smaller compasses of innovation.[55] By now also the starkest differences begin

[51] Lord Rosebery himself having failed to assert any property right in his lectures could not help but note that he was the only party not to have sought to profit from them: see 'Lord Rosebery: His Appreciation and Addresses Suppressed in England for Copyright Reasons', *New York Times*, 2 September 1899.

[52] Although as Jane Ginsburg points out in an important historical review, the standard was not completely settled until the Supreme Court's judgment in *Feist Publications, Inc* v. *Rural Telephone Service Co* 499 US 340 (1991): see Jane Ginsburg, 'Creation and Commercial Value: Copyright Protection of Works of Information' (1990) 90 *Columbia Law Review* 1865 and 'No Sweat: Copyright and Other Protection of Works of Information After *Feist* v. *Rural Telephone* (1992) 92 *Columbia Law Review* 338.

[53] See F.T. Marinetti, 'The Founding and Manifesto of Futurism 1909', in Umbro Apollonio (ed.) with Robert Brain, R.W. Flint, J.C. Higgitt, Caroline Tisdall, trans., *Futurist Manifestos*, Thames and Hudson, 1973, 19 at p. 21.

[54] See Christopher Wilk (ed.), *Modernism: Designing a New World*, V&A Publications, 2006.

[55] Wilkes suggests that Modernism did not become mainstream in Britain until after the next War: see his 'Introduction: What Was Modernism?', *ibid*., at p. 14 and *passim*. Others point out that British Modernism, having toyed with and rejected Futurism before the War, developed its own more subtle (mainly literary) version of Modernism: see Glen Macloud, 'The Visual Arts' in Michael Levenson (ed.), *The Cambridge Companion to Modernism*, Cambridge University Press, 1999, ch. 8 and especially at pp. 202–4 (and Virginia Woolf's *To the Lighthouse* and James Joyce's *Ulysses* may be added to Macloud's chronicle of Ezra Pound's imagist poetry and T.S. Eliot's *Wasteland*). And there were Modernist features also to popular literature in post-(First World) War Britain: not the least being their cover designs and title pages: see Ian Christie, 'Mass-Market Modernism' in Levenson, *The Cambridge Companion to Modernism*, ch. 11, at p. 389 (Penguin book cover, launched by Allen Lane, nephew of John Lane, in 1935). John Lane's productions, exemplified by *Appreciations and Addresses*, were an important precursor.

to appear between US and British copyright law. A nation's proliferation of cultural and commercial interests does not always necessarily coincide with its law, but it is noteworthy that the diverging reasoning of the British and American cases mirrors their very different historical and contemporary social circumstances.

10 The artist in an age of mechanical reproduction

In some respects, the British copyright law's conception of the author-function that finally emerged in 1900 was even more generous in its treatment of authorship than nineteenth-century literary authors expected or desired. In the leading case, *Walter* v. *Lane*,[1] there are suggestions that, not content to simply take the standard of mental labour as discussed by Andrew Lang and his contemporaries as the standard of authorship for legal purposes, more mechanical forms of labour might be sufficient as well in framing the author-function. True, the subject matter of John Lane's book publication of *Appreciations and Addresses Delivered by Lord Rosebery* in 1899, to which *The Times* objected, was literary scholarship. Lane's book was a compilation of Rosebery's lectures on topics of 'Bookishness and Statesmanship', 'Free Libraries', 'Scottish History', 'The English-Speaking Brotherhood', 'Burke', 'Robert Louis Stevenson' and the like – being lectures that *Times* journalists had recorded, using the mechanism of shorthand, for publication in a series of articles in the newspaper. But the analogies drawn by the Law Lords in proclaiming the rights of journalists and through them *The Times*, often had more in common with the activities of photographers than with traditional author-journalists. This may reflect an important divergence in Victorian print culture. Anthony Smith observes that authors and journalists had become more distinct after the mid-nineteenth century, with the separation of roles a result, in part, of the apparent objectivity of mechanical reporting techniques.[2] In any event, *The Times* – both as the chief protagonist and as the chief public reporter on the case – did not complain that its journalists' rights (and through these *The Times*' rights) should be drawn so broadly.

[1] *Walter* v. *Lane* [1900] AC 539.

[2] Anthony Smith, 'The Long Road to Objectivity and Back Again: The Kinds of Truth We Get in Journalism' in George Boyce, James Curran and Pauline Wingate (eds.), *Newspaper History From the 17th Century to the Present Day*, Constable, 1978, 153 at pp. 162–3.

Walter v. *Lane* was the third of a series of cases instituted by *The Times* through its owner John Walter in the latter nineteenth century, in an effort to stop certain newspaper copying practices.[3] Despite its acceptance that 'news of the day' was not itself suitable for copyright (as stated expressly in the *Berne Convention* of 1888 after the Paris 1896 Revision Conference)[4] the practices extended further to the wholesale copying of *Times* reports, repeated commonly without acknowledgment in other London and provincial newspapers. *The Times* had established that, provided it registered its newspapers, as then required by British copyright law, it was not precluded from claiming authorship of articles that appeared in the newspaper;[5] and, moreover, that there was no general defence available on the basis of freedom of information or freedom of discussion for simple reuse of its authored material[6] – although 'fair use' of the material for purposes of criticism or review or reporting newsworthy matters to a new audience might still be allowed.[7] (Later in the Copyright Act 1911 these allowed uses were reframed in terms of more specific fair dealing defences.)[8]

There were also a number of other cases in the 1880s and 1890s brought by the early British news services to protect the news they had gathered at the point of publication. They were premised more vaguely on the property right in unpublished works, or alternatively breach of contract or confidence.[9] But *The Times* took no interest in the niceties of rights in unpublished material; its concern was material that had been published over which it asserted control, using copyright. The scope of copyright's conception of authorship still needed to be established, and achieving this was the purpose of the action in *Walter* v. *Lane*. That the defendant this time was not another newspaper but a book publisher

[3] See Megan Richardson and Jason Bosland, 'Copyright and the New Street Literature' in Chris Arup and William Van Caenegem (eds.), *Intellectual Property Law Reform: Fostering Innovation and Development*, Edward Elgar, 2009, ch. 10; and further the insightful Kathy Bowrey and Catherine Bond, 'Copyright and the Fourth Estate: Does Copyright Support a Sustainable and Reliable Public Domain of News?' (2009) 4 *Intellectual Property Quarterly* 399.

[4] See generally Sam Ricketson, *The Berne Convention For the Protection of Literary and Artistic Works* 1886–1986, Queen Mary College, 1987, p. 502 and *passim*. As Ricketson notes, there were subsequent amendments to what became Article 10bis of the Berne Convention at later revision conferences in Berlin and Stockholm, but the basic prohibition on copyright in 'news' remained intact.

[5] *Walter* v. *Howe* (1881) 17 Ch D 708.

[6] *Walter* v. *Steinkopff* [1892] 3 Ch 489.

[7] *Ibid*., per North J at 494–5.

[8] Copyright Act 1911, 1 & 2 Geo 5, c 46, s 2.

[9] See, for instance, *Exchange Telegraph Company Limited* v. *Gregory & Co* (1896) 1 QB 147 and *Exchange Telegraph* v. *Central News* (1897) 2 Ch 48 and generally Part I, Chapter 3.

engaging in the common practice of recording the occasional lectures given by British public figures for posterity, was by-the-by. Rival newspapers were still maintaining their freedom to reuse much of the material that was published in *The Times* on the basis that since it was recorded by mechanical means neither *The Times* nor its (anonymous) reporters could claim authorship.[10] Similarly, Lane was claiming the freedom to source material from shorthand reports of Lord Rosebery's lectures in *The Times*. Thus solving the problem of authorship in this case would have broader repercussions in clarifying the allowed scope of newspaper copying practices for now and the future.

The Times' journalists in their evidence testified as to the quality of their authorship. In the words of one, Mr Ernest Brain, they had to exercise 'judgment and skill' so as to 'represent in a form fit for publication the features of the meeting and the material parts of it, and the sense of, the speeches made at them'; and he added, '[t]his involved considerable skill and labour'.[11] In fact the speeches of Lord Rosebery reported in various articles in *The Times* read more like verbatim reports, with the audience's laughter, cheers and interjections recorded along with the principal speaker's words.[12] It may also be questioned how much mental skill and judgement was involved in the journalists' use of the by now well-known and straightforward technique of shorthand. Isaac Pitman's invention of a scientific shorthand system sixty years earlier had been a turning point in journalistic writing. When Dickens spoke of mastering the savage stenographic system for Court and Parliamentary reporting in his newspaper days, he was talking about John Gurney's 'brachygraphy' perfected in the 1750s, and republished through multiple editions over following years. This was the system used, for instance to record Tom Paine's British trial *in absentia* for sedition amid fears of Jacobinism in the 1790s;[13] and very likely also the arguments

[10] Similarly, although North J had stated in *Walter* v. *Steinkopff* that '[i]t is said there is no copyright in news' but 'there is or may be copyright in the particular forms of language or modes of expression in which information is conveyed' ([1892] 3 Ch at 495), in *Walter* v. *Lane* it was nevertheless argued for the defendant that the mere mechanical reporting was in effect a claim of copyright in 'mere news': see *Walter* v. *Lane* [1899] 2 Ch 749 at 762.

[11] See 'High Court of Justice, Chancery Division (Before Mr Justice North), *Walter* v. *Lane*', *The Times*, 15 July 1899, p. 4.

[12] See, for instance, 'Lord Rosebery on Free Libraries', *The Times*, 26 June 1896, p. 12; 'Lord Rosebery in Edinburgh', *The Times*, 11 May 1897, p. 8. It is true, however, that in the process of editing for purposes of publication (as Brain noted in his evidence), revisions were made and punctuation was added.

[13] See *The Prosecution of Thomas Paine: Seven Tracts 1793–1798*, reprinted Steven Parks (ed.), Garland Publishing Inc, 1974.

and decision in the case between *Southey* v. *Sherwood* before Lord Eldon in 1817 (the subjective judgement process in the translation required of the reporter perhaps accounting for the differences in the legal and newspaper reports).[14] But by the mid to late nineteenth century the scientific system designed by Nicholas Pitman was widely in use, and it meant that, in the words of Anthony Smith, 'a man could specialise in observing or hearing and recording with precision'; and '[t]he reporter became, as it were, the principal broker for the substantial discourse of society'.[15] Ironically, while the technique of reporting was by now a largely mechanical exercise, the fact that what was being reported was still the 'substantial discourse of society' helped to preserve at least the appearance of a more traditional form of authorship if not its reality.

It helped also that lecturers who found themselves in print rarely claimed legal ownership of their words, either as a matter of common law right, to the extent available, or under the Lectures Copyright Act of 1835,[16] which required notice in writing be given to two justices of the peace, two days at least prior to delivering the lecture. More often, Alexander Birrell says, their complaints were of 'the scantiness than with the profusion of space allotted to them in the Press'.[17] In Lord Rosebery's case there was no such complaint, for *The Times* gave a profusion of space to reports of his speeches in the 1880s and 1890s (during and after his resignation as leader of the Liberal Party). Indeed, he kept a notebook of these reports, suggesting that he found them accurate and useful. His one complaint was a simple point of factual correction – as he wrote to the newspaper in 1889: 'I am made to say in *The Times* report of my speech yesterday that the last elections for the British and Irish House of Commons took place in 1794 and 1793 respectively. The real dates, of course, were 1796 and 1797.'[18] According to the defendant's evidence, Lord Rosebery knew of Lane's intended publication, and furnished him with his notebook 'for comparison and correction',[19] implying that he considered the publication to be lawful. It was a view that others shared. For instance, Alexander Birrell, then a Member of Parliament, Queens Counsel and Quain Professor of Law at University College, London, observed in his 1899 lectures on copyright, that '[t]o

[14] See above, Part I, Chapter 2, and Appendix A.
[15] Smith, 'The Long Road to Objectivity and Back Again', at pp. 162–3.
[16] Lectures Copyright Act 1835, 5 & 6 Will IV c 6, enacted to provide a statutory solution to the problem of recorded lectures (without the lecturer's authority) in *Abernethy* v. *Hutchinson* (1825) 1 H & Tw 28: and see above, Part I, Chapter 3.
[17] Alexander Birrell, *Copyright in Books*, Cassell and Company Ltd, 1899, p. 192.
[18] Lord Rosebery, Letter to the Editor, *The Times*, 15 November 1889.
[19] See 'High Court of Justice', *The Times*; and cf. *Walter* v. *Lane* [1899] 2 Ch 749 at 750.

make a selection in book form from newspaper reports of sermons and speeches, as is sometimes done … is, if unaccompanied by the orator's permission, an act of bad taste but not illegal'.[20]

When *Walter* v. *Lane* came before the Court of Appeal in October 1889, Professor Birrell QC appeared along with T.E. Scrutton for the defendant. He expanded on the reasoning in his lectures on copyright, arguing that 'literary skill' requires more than the 'mechanical' labour of a newspaper reporter whose 'endeavour is only to present the speech to the public as it was actually delivered', even if this requires 'skill, knowledge and education'.[21] At trial, North J had taken a different line, stating that 'no doubt the reporter is not the author of the speech; but the reporter is the author of the public report of the speech, and of the writing containing the speech … [in] which copyright can exist'.[22] The decision of North J recognising *The Times*' copyright in its verbatim reports of Lord Rosebery's lectures and holding this infringed by Lane's publication of *Appreciations and Addresses* was reversed in the Court of Appeal but finally upheld by the House of Lords. Here some differences in the reasoning appeared. Lord James and Lord Brampton reasoned that it was because a reporter exercised mental skill and judgement that the status of author could be claimed.[23] However, Lord Davey disagreed as to the importance that 'memory and judgment' bear in cases involving the perfected mechanical art of stenography.[24] And Lord Halsbury LC concluded in frankly utilitarian language that the important function of the reporters in this case was to 'preserve the memory of spoken words, which are assumed to be of value to the public', holding that was sufficient for copyright.[25] Moreover, the Lord Chancellor suggested, the reporter's role in carrying out that function can be compared to that of a photographer's role in preserving the memory of a view: 'there is of course no copyright in [a photographed] view itself, but in the supposed picture or photograph there is'.[26]

The dissenting opinion of Lord Robertson speaks more clearly to the logic for copyright protection being available here. Specifically, Lord

[20] Birrell, *Copyright in Books*, p. 192.
[21] See *Walter* v. *Lane* [1899] 2 Ch 749 at 763–5.
[22] *Ibid*., North J at 755.
[23] *Walter* v. *Lane* [1900] AC 539, Lord James at 554 ('from a general point of view a reporter's art represents more than mere transcribing or writing from dictation'; more than 'mere mechanical transcribing'); Lord Brampton at 559 ('[w]ithout [the reporter's] brain and handiwork the book would never have had existence').
[24] *Ibid*., Lord Davey at 551 (also noting that this perfection has been 'attained in recent years').
[25] *Ibid*., Lord Halsbury LC at 549.
[26] *Ibid*.

Robertson argued that it would be a *reductio ad absurdum* for 'the owner of a phonogram [who] publishes [a] speech as taken down by the phonogram' to claim that 'he is the author of the report and entitled to copyright', although that was what '[t]he appellants think'.[27] If the word 'photograph' were substituted for 'phonograph' the argument might have looked just as absurd. But the problem was that photography was already the subject of copyright as a result of the Fine Art Copyright Act of 1862,[28] under the influence of the Photographic Society which lobbied for the protection of photographic works from 'piracy' in the 1850s and 1860s and had a hand in drafting the legislation.[29] After the case of *Nottage* v. *Jackson* in 1883,[30] it was accepted that a photographer, even one sent by his or her employer to take a photograph of a public scene, could be an 'author' being 'the cause of the picture which is produced'[31] and 'the man who really represents or creates, or gives effect to the idea or fancy, or imagination'.[32] If so, why then could not a reporter sent to record a Prime Minister's public lecture using the mechanical art of stenography equally be considered an author? In other words, once photography was accepted as the basis of authorship the inexorable analogy with stenography could not be avoided. Thus, despite a broad acceptance that 'news of the day' could not be protected by copyright, British copyright law through its broad treatment of authorship came close to protecting the news.

In the United States, where Lane's *Appreciations and Addresses* remained freely available for public consumption, the law had developed differently regarding photography. In the 1883 case *Burrows-Gile Lithographic Company* v. *Sarony*,[33] decided under the general terms of the

[27] *Ibid*., Lord Robertson at 561.

[28] An Act for Amending the Law relating to Copyright in Works of the Fine Arts 1862, 25 & 26 Vict, c 68.

[29] See comments of Advocate J.M. Duncan 'On the Law of Copyright as applied to Photographic Works', speaking to the Edinburgh branch of the Society, and of the Chairman, reported in the *Journal of Photographic Society* No. 79, 22 February 1859, 187.

[30] *Nottage* v. *Jackson* (1883) 11 QB 627.

[31] *Ibid*., Brett MR at 632, adding that will be a question of fact but in this case 'that man' may be supposed to be 'the principal man who was sent down to the Oval'.

[32] *Nottage* v. *Jackson* (1883) 11 QB 627, Bowen LJ at 637, adding that in consequence the 'author' for purposes of the Act would have to be 'a photographer who takes a photograph'. Cf. Cotton LJ, holding that 'it is unnecessary to decide here who is the author of a photograph when several persons are engaged in the different processes', but generally taking the view that 'author involves originating, making, producing, as the inventive or master mind, the thing which is to be protected, whether it be a drawing, or a painting, or a photograph': *ibid*., at 635.

[33] *Burrow-Giles Lithographic Company* v. *Sarony* 111 US 53 (1883).

US Copyright Act of 1874,[34] the Supreme Court accepted the photographer Sarony's own account of the basis of his authorship as lying in his creativity in conceiving, staging and executing his brilliant photographic portrait of Oscar Wilde during his American tour.[35] It was held that the Constitutional power to make enactments for the advancement of the 'science and useful arts' was broad enough to cover an Act construed as authorising copyright of photographs, so far as they are 'representative of original intellectual conceptions of the author',[36] and therefore Sarony could rightly claim to be the author for statutory purposes of his portrait.[37] The court's reasoning that the facts were sufficient to 'show this photograph to be an original work of art, the product of the plaintiff's intellectual invention, of which plaintiff is the author, and of a class of inventions for which the Constitution intended that Congress should secure to him the exclusive right to use, publish and sell [for purposes of the Act]'[38] reinforces our observation that US copyright law possessed a strand of Romantic rhetoric that British law lacked. In the 1903 case of *Bleistein* v. *Donaldson Lithographic Company*,[39] Holmes J may have held that the chromolithographic circus posters made the subject of unauthorised copying in that case 'have a commercial value – it would be bold to say they have not an aesthetic and educative value – and the taste of any public is not to be treated with contempt',[40] adding that the public (let alone its judges) may not always be well placed to make judgements of artistic quality.[41] But, Jane Gaines notes,[42] *Bleistein* is often regarded as an anomalous decision in its dealings with mechanical labour in the field of lithography and photography.

There were further repercussions of the more restrictive American treatment of authorship for copyright purposes. When the question of ownership of 'the news' came before the Supreme Court in the 1918 case of *International New Service* v. *Associated Press*[43] it was only Holmes J who argued the case could be dealt with under an extension of existing principles (specifically of the law of passing off or 'palming off' since the International News Service which not only appropriated news stories

[34] Copyright Act 1874, 18 Stat 78; Revised Statutes § 4952.
[35] As Quentin Bajac says, by the 1870s, the practice had developed of celebrity photographers portraying themselves as artists and Sarony took this 'to a height': *The Invention of Photography: The First Fifty Years*, trans. from French by Ruth Taylor, Thames & Hudson, 2002, p. 60.
[36] *Burrow-Giles Lithographic Company* v. *Sarony* 111 US 53 (1883) at 58.
[37] *Ibid*., at 56–9. [38] *Ibid*., at 60.
[39] *Bleistein* v. *Donaldson Lithographic Company* 188 US 239 (1903).
[40] *Ibid*., at 252. [41] *Ibid*., at 251–2.
[42] Jane Gaines, 'Photography "Surprises" the Law' in Jane Gaines, *Contested Cultures: The Image, the Voice and the Law*, University of North Carolina Press, 1991, ch. 2, pp. 51–2.
[43] *International News Service* v. *The Associated Press* 248 US 215 (1918).

Figure 10 Oscar Wilde as photographed in New York by Napoleon Sarony, 1882, courtesy The Stapleton Collection / The Bridgeman Art Library.

from American News Service newspapers and bulletin boards for its own newspapers but also represented the news stories as its own).[44] Brandeis J in dissent said the matter of whether the Associated Press could claim ownership of news was one for the legislature to determine, involving complex questions of balancing interests in news production and freedom of access to knowledge by newspaper readers.[45] The case at hand, after all, was essentially about news reporting during the War, after William Randolph Hearst's news service was banned by the allied countries from reporting on the War due to his alleged German sympathies,[46] and subsequently turned to stories published in Associated Press papers and bulletins to satisfy his newspapers and their readers. The majority, for its part, presented the case as raising a purely commercial issue of a news service's labour and expense deployed in gathering news for public consumption, and invented a new 'misappropriation' doctrine which it refused to align to copyright (or the property right in unpublished works) to protect that investment. Original authorship for copyright purposes, Pitney J said, would require a level of 'creation of the writer' that was not present here.[47] Nevertheless there is a hint of author-like activity in Pitney J's characterisation of the Associated Press's journalistic function:

> Complainant gathers in all parts of the world, by means of various instrumentalities of its own, by exchange with its members, and by other appropriate means, news and intelligence of current and recent events of interest to newspaper readers and distributes it daily to members for publication in their newspapers …
>
> [Defendant takes] material that has been acquired by complainant as the result of organisation and the expenditure of labor, skill and money, and which is saleable by complainant for money, and … in appropriating and selling it …

[44] *Ibid*., Holmes J at 247–8.

[45] *Ibid*., Brandeis J at 262–6. And Brandeis J also pointed out that there had been attempts to make such statutory provision in both the American Senate and House of Representatives and the British Parliaments (the latter in a bill introduced by Lord Herschell in 1898), but these had failed: *ibid*. Lionel Bently notes that news-protection bills had in fact been passed in some British colonies including India and various states of Australia: Lionel Bently, 'Copyright and the Victorian Internet: Telegraphic Property Laws in Colonial Australia' (2004) 38 *Loyola of Los Angeles Law Review* 71.

[46] And see 'America and the Censorship', *The Times*, 26 October 1914, p. 9 and 'Garbling of News: American Agency Punished', *The Times*, 11 October 1916, p. 9; 'The International News Service: Suit by Associated Press', *The Times*, 10 January 1917, p. 7.

[47] *International News Service* v. *The Associated Press* 248 US 215 (1918), Pitney J at 234. There were other problems as well with relying on statutory copyright (although they were rather more skated over), especially whether the copying amounted to 'bodily taking' of Associated Press stories, not simply the information, and also of registration of copyright: see Douglas Baird, 'The Story of *INS* v. *AP*: Property, Natural Monopoly, and the Uneasy Legacy of a Concocted Controversy' in Rochelle Dreyfuss and Jane Ginsburg (eds.), *Intellectual Property Stories*, Foundation Press, 2006, ch. 1.

is endeavouring to reap where it has not sown … … The transaction speaks for itself, and a court of equity ought not to hesitate long in characterizing it as unfair competition in business.[48]

The fact that the decision was placed outside copyright law, which continued to expand its scope during the twentieth century, meant that it received a narrow interpretation according to its particular facts in later cases, becoming in effect a news-misappropriation doctrine.[49] There was a sense also that a broad misappropriation doctrine might work in an anti-competitive fashion, so it needed to be kept limited.[50] Moreover, free speech was also a concern as in the wake of War-time censorship the First Amendment of the US Constitution received a vigorous re-reading.[51] There was still sufficient, however, in a news-misappropriation doctrine to serve as a basis for news services to control the reuse of their material not only in the press but in new media and especially radio. And although the 'reap where it has not sown' language of Pitney J in the *International News Service* case could be taken as an endorsement of a more basic natural rights reasoning, its utilitarian character premised on an assumption of a public benefit from news-gathering activities was argued for in the later cases.[52] Moreover, it was a right of limited duration, lasting only as long it was possible to maintain the utilitarian argument and also effectively to control reuse.

In *Walter* v. *Lane*, following the long tradition of British utilitarianism there was no great difficulty in assimilating the commercially valuable

[48] *Ibid*., at 229, 239–240.

[49] See especially *NBA* v. *Motorola, Inc* 105 F3d 841 (2d Circ, 1997) and generally Victoria Ekstrand, *News Piracy and the Hot News Doctrine*, LFB Scholarly Publishing LLC, 2005.

[50] Even if in the particular case there was little real concern about competition, this being a 'concocted controversy' with the parties afterwards settling their differences (the problem being the abstract level of the reasoning about misappropriation in the majority judgment, only overcome by later narrower readings): see Baird, 'The Story of *INS v AP*'.

[51] Influenced by Harvard academic Zechariah Chafee's article 'Freedom of Speech in War Time' (1919) 32 *Harvard Law Review* 932 – and see G Edward White, 'The First Amendment Comes of Age: The Emergence of Free Speech in the Twentieth Century' (1996) 95 *Michigan Law Review* 299.

[52] For instance, *National Basketball Association* v. *Motorola, Inc* 105 F3d 841, 1997, Winter J at 853 ('*INS* is not about ethics; it is about the protection of property rights in time-sensitive information so that the information will be made available to the public by profit-seeking entrepreneurs'). Richard Epstein points out that there is no reason why natural rights if based on custom might not serve utilitarian goals (in fact that may well be their logic): '*International News Service* v. *Associated Press*: Custom and Law as Sources of Property Rights in News' (1992) 78 *Virginia Law Review* 85. And note that even the more explicitly utilitarian British courts have used reaping/sowing language to explain rights in news reporting: see *Walter* v. *Steinkopff* [1892] 3 Ch 489, North J at 495.

products of a news service's or newspaper's independent labour with the utilitarian goals of copyright law on the theory from *Pope* v. *Curl* that the value of a work was to be found in its 'service to mankind'.[53] Similarly, when it came to War-time censorship it was found not only convenient but also a matter of public benefit that as a result of copyright law's generous treatment of authorship the British Government need only deal with the major news services and newspapers when it came to controlling news-reporting in the press.[54] A contrast to radio, which, still fragmented and not under government regulatory oversight, was more difficult to control (and it must have taken a great deal of time and effort on the government's part to locate and confiscate the home-produced and operated radio sets that were widely proliferated).[55] Moreover, if in *Walter* v. *Lane* the individual interests of authors were subsumed under the vaster commercial interests of the newspapers, there were other cases where judges could explore more individuated ideas about the human flourishing associated with authorship, along Millian utilitarian lines. These ideas accommodated to a certain extent Kantian and Hegelian notions of personality that some have seen in the American idea of the 'Romantic' author.[56] But in the British context the author's personality was treated far more extensively, in keeping with Mill's adage that '[a]mong the works of man, which human life is rightly employed in perfecting and beautifying, the first in importance is surely man himself'.[57]

For instance, in the Australian case of *Sands & McDougall Pty Ltd* v. *Robinson*[58] the High Court 'interpreted' the House of Lords' decision in

[53] *Pope* v. *Curl* (1741) 2 Atk 342 and see above, Part I, Chapter 1.

[54] See Colin Lovelace, 'British Press Censorship During the First World War' in Boyce, Curran and Wingate, *Newspaper History*, ch. 17.

[55] And see further Daniel Headrick, *The Invisible Weapon: Telecommunications and International Politics 1851–1945*, Oxford University Press, 1991, ch. 8.

[56] See especially Jane Ginsburg, 'Creation and Commercial Value: Copyright Protection of Works of Information' (1990) 90 *Columbia Law Review* 1865.

[57] Mill, *On Liberty*, 1859, reprinted in Mary Warnock (ed.), *John Stuart Mill, Utilitarianism, On Liberty and Essay on Bentham*, Collins, 1961, 126 at p. 188. Mill also believed that his utilitarian arguments regarding higher and lower pleasures acknowledged the value of human dignity: see especially Mill's *Utilitarianism* in Warnock, *ibid.*, 251 at p. 260. Ginsburg, of course (although not writing in a utilitarian vein) does not overlook the ways in which personality-rights theories can accommodate an expansive idea of authorship, pointing out that the British nineteenth-century common law property right cases were reread by Samuel Warren and Louis Brandeis in 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193 as supporting a dignitarian right of personality; and also that Holmes J's notions of authorship in *Bleistein* v. *Donaldson Lithographing Co* 188 US 239 (1903) can also similarly be reread in light of personality rights theory.

[58] *Sands & McDougall Pty Ltd* v. *Robinson* (1917) 23 CLR 49.

Walter v. *Lane*[59] in relation to copying of Mr Sands' meticulously prepared map of the Balkans for use in schools by the McDougall publishing company. As we are told in Isaac J's judgment:

> There can be no doubt that in one sense, and the only sense that was necessary under the [relevant] copyright law … the map was an 'original' work and the respondent was the 'author'. He had unquestionably prepared it by taking the common stock of information in Australia and, by applying to it personal, that is independent, intellectual effort in the exercise of judgment and discrimination, had produced a map that was new in the sense that, in respect of its size and outlines, its contents and arrangement and its general appearance, it presented both in its totality and in specific parts distinct differences from other existing maps.
>
> … Notwithstanding all the differences referred to [in the defendant's map], there still remained in respect of size, of draftsmanship, of style, of printing type, and geographical selection and general appearance, a manifest wholesale adoption of the individual work which the respondent had bestowed upon his map, and which had given to it its distinct characteristics and individuality.[60]

There is a sense here, as Sam Ricketson points out, that 'a later mapmaker is well advised to steer clear of all earlier publications and to begin his work from scratch'.[61] Did the High Court fail to appreciate the essentially factual character of map-making, characterised by R.V. Tooley as 'a kind of pictorial history'?[62] On the other hand, both the judges and the press reporting on the case had no difficulty locating the plaintiff's personal involvement in compiling his map for use in schools. This worthy project invites invidious comparison with the defendant's baser motivation in moving hastily to produce a cheap map of the Balkans, in anticipation of the public interest in the various theatres of the European War. Acting on this questionable impulse, the company did not produce its own map, or negotiate a licence with the plaintiff, Sands, but simply appropriated the result of his work.[63]

[59] *Walter* v. *Lane* [1900] AC 539.

[60] *Sands & McDougall Pty Ltd* v. *Robinson* (1917) 23 CLR 49, Isaacs J at 52–53.

[61] Staniforth Ricketson, *The Law of Intellectual Property*, Law Book Company, 1984, p. 210.

[62] R.V. Tooley, *Maps and Map-makers*, Batsford, 1970, p. 1. Tooley was obviously not thinking here about the more 'inventive' maps, including the Surrealist Map of the World published in the Brussels-based magazine *Variétés* in 1929: see (including a reproduction of the map) Katherine Harmon, *You Are Here: Personal Geographies and Other Maps of the Imagination*, Princeton Architectural Press, 2004, p. 118.

[63] Certainly according to Barton J at first instance, who recounts the facts in detail: *Robinson* v. *Sands & McDougall Pty Ltd* (1916) 22 CLR 125 at 128–31. See also 'Alleged Infringement of Copyright: *Robinson* v. *Sands and McDougall Proprietary Ltd*', Law Report, High Court (Before Mr Justice Barton in Original Jurisdiction), *Sydney Morning Herald*, 30 August 1914, p. 8.

At the same time there was a certain incongruity in the assimilation of the personal techniques of human authorship talked about in *Sands* v. *McDougal Press* and the more mechanised systems of production for generating information that came to be relied on in the following century, including most especially by the press. By 1936 the German philosopher Walter Benjamin could estimate in *The Work of Art in the Age of Mechanical Reproduction*[64] that by around 1900 technical reproduction had not only permitted perfect reproduction it 'captured a place of its own among the artistic processes'.[65] And this was already recognised with the incorporation of first photography and then stenography within authorship in *Walter* v. *Lane*, with cinema following logically into the copyright rubric in the 1900s (treating it in an analogous fashion to traditional dramatic works).[66] But did this mean that the idea of literary authorship as entailing some degree of imagination was gone? Benjamin, rather, may be taken to suggest that authorship in the age of mechanical reproduction had expanded further beyond the simple clothing of ideas talked about by Andrew Lang in the 1880s. Now it was evident that there could be multiple levels of authoring activity (in the same way as in the production of goods there were multiple stages between factory and shop floor). And, if there was a personal element to modern authorship, this may be found, for instance in the 'arrangements' and 'combinations' by which 'the author has given the work a personal character', as noted at the time of the Berlin Conference on the Berne Convention in 1908.[67]

However, no matter how generous British copyright law's treatment of authorship might have been, there were categories of what might be termed 'authorship' that were excluded. These included the conducts of diverse individuals not forming a single enterprise (in the way of a single newspaper or news service, for instance) whose alliances shifted and realigned with confusing regularity, whose aspirations encompassed the establishment of distinctive new styles and forms which they could then carry out in their particular projects, producing a stream of variants for multiple audiences, and who ostentatiously worked as groups engaged in common enterprises while at the same time continuing

[64] Walter Benjamin, 'The Work of Art in the Age of Mechanical Reproduction', 1936, reprinted in Hannah Arendt (ed.), *Illuminations*, Pimlico, 1999, 211.
[65] *Ibid*., p. 570.
[66] See Copyright Act 1911, s 35, treating any 'cinematograph production where the arrangement or acting form or the combination of incidents represented give the work an original character' as a (original) dramatic work for purposes of the Act.
[67] See Article 14(2) Berne Convention as revised at the Berlin Conference, cited in Ricketson, *The Law of Intellectual Property*, p. 550.

some individual activities. The conducts, that is, of the avant-garde of Modernism. Although these agents of creative disruption were often highly professionally and commercially oriented in their projects, including in theatre and fashion as well as photography and cinema, they did not initially engage directly with intellectual property law in the way of their Romantic and Victorian predecessors. They preferred to operate on the fringe. It was only when, after the First World War, they understood the importance of refashioned intellectual property rights for their business models that they set out to establish their own lines of influence over the shaping of the law.

11 From fashion to brand

In 1919 Paul Poiret, the Modernist French couturier, commenced legal proceedings in London against a local theatrical outfitter and ladies' dressmaker Alexander Nash, trading as Jules Poiret Ltd.[1] Paul Poiret claimed that he worked under his own name in Paris since 1903, that he had built up a significant business reputation in England through his clients and regular visits before the War as well as some high-profile avant-garde theatrical productions, including several at the Alhambra Theatre in London in 1913 and 1914,[2] that Nash had deliberately chosen the pseudonym 'Poiret' knowing the Poiret reputation, and that the effect of the defendant's trade was to cause confusion among customers and damage his reputation as he was seeking to re-establish his fashion house after the War. Since the Jules Poiret productions were 'positively ugly' and so 'damage my reputation', according to Paul Poiret,[3] the action might have been in defamation. Indeed, in France Poiret had been embroiled in a long dispute with the *La Renaissance Politique, Litteraire et Artistique* over its imputations that his Modernist designs were German-inspired, and had not hesitated there to threaten a defamation action.[4] But Paul Poiret chose now to bring his English action

[1] Including 'Poiret Gowns: Action for an Injunction', *The Times*, 6 July 1920, p. 5; 'High Court of Justice, Chancery Division: The Poiret Gowns, Paul Poiret v. Jules Poiret, Limited' *The Times*, 9 July 1920, p. 5; 'Chancery Division: The Poiret Gowns, Paul Poiret v. Jules Poiret, Limited', *The Times*, 10 July 1920, p. 5; 'Paul Poiret v. Jules Poiret, Limited, The Poiret Gowns: Judgment for the Plaintiff', *The Times*, 13 July 1920, p. 5. The case despite its press was not considered sufficiently important in legal terms to be reported in the mainstream legal reports but was reported in the specialist intellectual property reports as *Poiret* v. *Jules Poiret Ltd and A.F. Nash* (1920) 37 RPC 177.

[2] See *Poiret* v. *Jules Poiret Ltd and A.F. Nash* (1920) 37 RPC 177, PO Lawrence J at 184–5.

[3] 'High Court of Justice, Chancery Division: The Poiret Gowns', *The Times*.

[4] See 'Le Procès de l'Influence Allemande dans l'Art Décoratif Français et dans la Mode Français', *La Renaissance Politique, Littéraire et Artistique*, 16 October 1915, p. 17. (The allegedly Germanic design under discussion was not Poiret's dress fashion but rather that of the interior design company he had established in the name of his daughter, Martine.) The dispute was resolved after a large number of leading modern French

in passing off, presumably because he saw the case essentially as a business matter involving the use of his Poiret brand.

Still, it was a risky action. Poiret's business had been seriously disrupted by the War, when he had served in the French army and then spent some months in convalescence in Morocco. Although several former trade and private customers gave evidence that they remembered him from before the War, his Paris business had been closed and a few occasional mentions in the British Press after that eventually petered out. Besides, Poiret had never established a business in England, even when his trade there was at its peak. For his part, the Englishman Nash (a former actor or singer who had also been in business as a milliner's agent) established himself as a blouse-maker in London in February 1914, where he traded under the name 'Jules Poiret'. His name was noticed after he dressed the popular revue 'Venus Limited' which showed in London in 1915. There were photographs in *Tatler* and *Sketch* displaying the Jules Poiret dresses; and although these were initially attributed to Paul Poiret there were corrections published at Nash's instance in subsequent issues of the magazines, which Nash claimed were sufficient to help foster his separate and distinct reputation as a Poiret label. Throughout the War, Nash's business rapidly developed and by the end of the War, as P. O. Lawrence J observed, '[the defendant] had acquired a considerable connection chiefly, if not exclusively, as a theatrical costumier'.

Nevertheless, Paul Poiret's passing-off claim was upheld by P. O. Lawrence J, in a somewhat surprising decision. Conservative authority suggested that a trader needed local business activity to maintain 'goodwill' for legal purposes, and even on a liberal reading there was the issue of whether Poiret had maintained his reputation in the British market after his several-years gap in trading in the latter years of the War. The judge accepted Poiret's argument that the name 'Poiret' designated high-quality fashion in the British market, still in 1919, and that any further sales under the Jules Poiret label could generate confusion and therefore damage that reputation just when Poiret was planning to re-enter the market.[5] And it seemed to be assumed here that the general style of Nash's gowns and blouses was sufficiently close to that of Poiret to confuse the post-War British audience for fashion,

artists, literati and critics (including André Derain, Raol Dufy and Jean Cocteau) wrote in support of Poiret and others (including Igor Stravinsky, Henri Matisse and Luc-Albert Moreau) signed a petition in honour of Poiret's art: these were published in full in the magazine: see 'De L'Art Francais et des Influences qu'il ne doit pas Subir', *La Renaissance Politique, Littéraire et Artistique*, 27 November 1915.

[5] *Poiret* v. *Jules Poiret Ltd and A.F. Nash* (1920) 37 RPC 177, PO Lawrence J at 187–8.

notwithstanding Poiret's comment that Nash's gowns were 'positively ugly'. Nash's argument that Jules Poiret was by 1919 more well-known as a theatrical costumier than Paul Poiret was also given little credence. The pre-War avant-garde couturier's connections with theatre could not be so easily forgotten.[6] Moreover, there was evidence from the fashion press of confusion arising out of the defendant's use of Poiret labels on his gowns and blouses, plus testimony from the editor of *Drapers' Record* who said he had raised the matter of the likely confusion of the wider public with Paul Poiret in 1915.[7] The evidence was noted and found compelling.[8] The *Drapers' Record*, which covered the case, took some credit for Poiret's victory[9] – although not without noting its participation in earlier pre-War denunciations of publicity given to Poiret's Parisian gowns over those of British designers.[10] The line was drawn, it seems, at British productions that sought to plagiarise the Poiret reputation and style rather than rely on their own creativity.

The case is interesting also in the way it reveals the way the name 'Poiret' made a personal connection between Poiret (combining the person, the Modernist couturier, the entrepreneur) and the products to which the name was attached. Here arguably the trade mark function went even beyond the one that Schechter would point to in 1927.[11] Schechter talked about the modern trade mark as not merely reflecting a quality already associated with a given product but as 'selling' the product through its guarantee of quality. Thus 'today the trademark is not merely the symbol of goodwill but often the most effective agent for the creation of goodwill, imprinting upon the public mind the anonymous and impersonal guarantee of satisfaction, creating a desire for further satisfactions'.[12] With Poiret the satisfaction offered by the label was of a rather different kind than Schechter envisaged, being one specifically associated with the person and persona of Poiret combined with

[6] The Alhambra was especially associated with Poiret's avant-garde fashion before the War: Robert Orledge, *Debussy and the Theatre*, Cambridge University Press, 1982, p. 188.

[7] *Poiret* v. *Jules Poiret Ltd and A.F. Nash* (1920) 37 RPC 177 at 182.

[8] *Poiret* v. *Jules Poiret Ltd and A.F. Nash* (1920) 37 RPC 177, P.O. Lawrence J at 185 (noting the evidence of the editor of *Drapers' Record*) and 186 (holding that the false attribution in the *Tatler* and *Sketch* shows 'the confusion … existed in the Press', and was attributable to the defendant's use of the name 'Poiret').

[9] See 'The "Poiret" Case', *The Drapers' Record*, 10 July 1920, p. 90; 'The "Poiret" Case, *The Drapers' Record*, 17 July 1920, p. 138.

[10] Describing itself as 'an important trade paper' that 'took the matter up': 'The "Poiret" Case', *The Drapers' Record*, 10 July 1920, p. 90. And for the original article, see 'Mrs Asquith's Indiscretion' *The Drapers' Record*, 15 May 1909.

[11] Frank Schechter, 'The Rational Basis of Trademark Protection' (1927) 40 *Harvard Law Review* 813.

[12] *Ibid*., at 818–9.

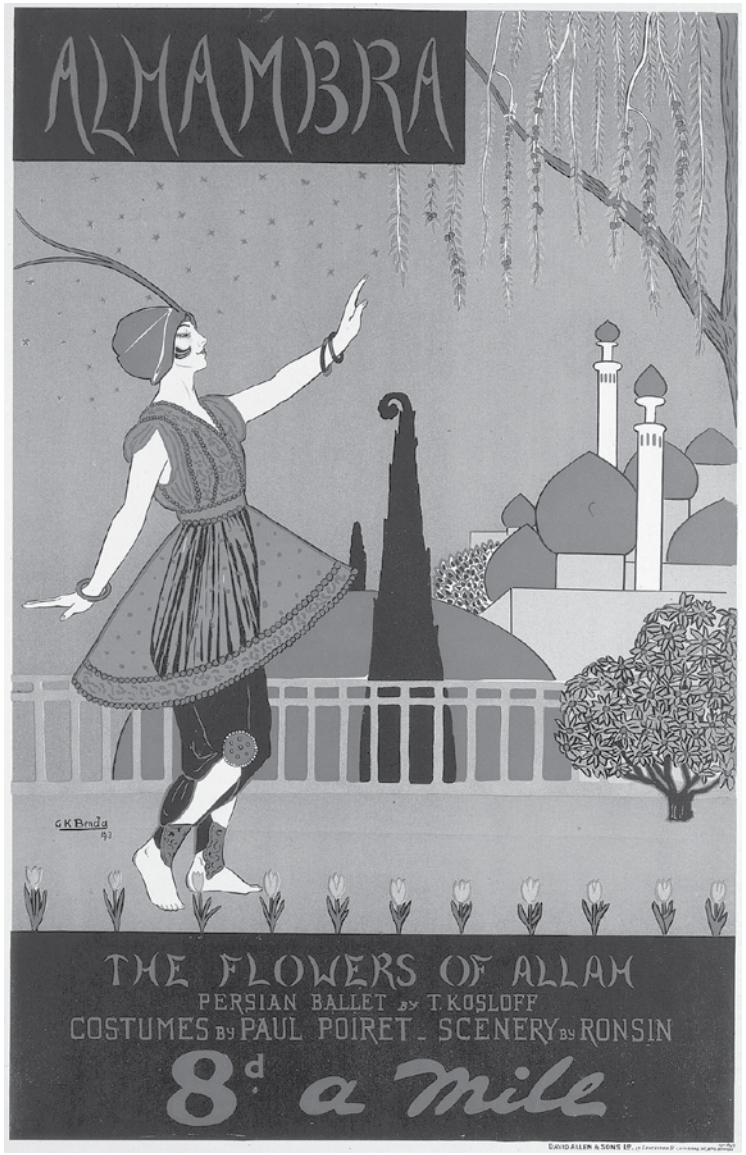


Figure 11 Poster for *Eightpence a Mile* (costumes designed by Paul Poiret), Alhambra Theatre, 1913, courtesy The Art Archive / Theatre Museum London / V&A Images.

the generic style that had come to be associated with his fashion.[13] And potentially it went further. There was a hint in P. O. Lawrence J's findings that a Poiret label attached to an article signalled 'a Poiret gown' or 'Poiret creation' and that 'the name "Poiret" when associated with gowns or dresses … [gave them] a greatly enhanced value' that it might be sufficient just to promise an association with the famous Poiret.[14] This aspect was not something that Poiret fully exploited although he made some important first steps in the direction.

Poiret adopted the practice of naming soon after he established his fashion house in Paris.[15] In early experiments with character merchandising, he also used his daughters' names as brands for his 'Rosine' perfumes and 'Martine' interior designs from 1911 and 1912 respectively.[16] Moreover, his name featured prominently in the popular fashion magazine, *Gazette du Bon Ton*, directed by Lucien Vogel, which featured fashion plates of Poiret and other couturiers drawn by a range of avant-garde artists including Georges Lepape and George Barbier.[17] Published initially in Paris from 1912, it had extended to London, New York and Buenos Aires by the time it closed for the War in 1915.[18] He was also adept at creating opportunities for sensation, drama and scandal, ensuring his name and his fashion regularly featured in the pre-War Parisian fashion and mainstream press. For instance, in *Poiret* v. *Jules Poiret Ltd*, mention was made to a controversial exhibition of Poiret gowns arranged by Mary Asquith at the Prime Minister's residence in Downing Street in 1909. The controversy surrounding her featuring

[13] An analogy might be drawn with the way that a popular author's name might be used to tell the audience that a particular work will be roughly the genre of article one might expect from that author (in the way of Conan Doyle's latest Sherlock Holmes thriller or Agatha Christie's latest Poirot mystery: see generally Ken Gelder, *Popular Fiction: The Logics and Practices of a Literary Field*, Routledge, 2004, ch. 1.

[14] *Poiret* v. *Jules Poiret Ltd and A.F. Nash* (1920) 37 RPC 177, PO Lawrence J at 184–5.

[15] Poiret used a distinctive block-letter format intertwined with a rose for his logo, designed by Paul Iribe in 1908 or 1909: see Nancy Troy's detailed historical study, *Couture Culture: A Study in Modern Art and Fashion*, Massachusetts Institute of Technology Press, 2003, p. 39 (which includes also a reproduction of the trade mark).

[16] According to Nancy Troy, 'Introduction' to Harold Koda and Andrew Bouton (eds.), *Poiret: King of Fashion*, Metropolitan Museum and Yale University Press, 2007 17 at p. 19.

[17] For a detailed account of the *Gazette du Bon Ton*, see Mary Davis, *Classic Chic: Music, Fashion and Modernism*, University of California Press, 2006, ch. 3 especially.

[18] The last pre-War issue of *Gazette du Bon Ton Art-Modes & Frivolities*, Lucien Vogel 'Directeur' in collaboration with Madeleine Chéruit, Georges Dœillet, Jacques Doucet, Jeanne Lanvin, Jeanne (Beckers) 'Paquin', Paul Poiret, John Redfern and the sons of Charles Frederick Worth, was published in Summer 1915, in Paris, London (Heineman), New York and Buenos Aires. The next issue of the *Gazette*, also directed by Lucien Vogel, and with the same original founders and collaborators, was published in January–February 1920, also in Paris and in London (The Field Press).

a French designer was said to have led to 285 articles written in 160 different newspapers denouncing the exhibition.[19] The *Drapers' Record* was among them, although it was careful nevertheless to accept 'all the virtues' claimed for Poiret's productions.[20] Poiret may have felt no need to advertise his fashion in the British press. (In fact, a great deal of advertising was done through department stores such as Whiteley and Debenham & Freebody which purchased his models wholesale,[21] advertised their store-made copies in *The Times*,[22] and sold off the models at the end of the season.[23]) However, P. O. Lawrence J observed, 'the result of these articles was one of the finest advertisements that could be given to any trader was given to *Paul Poiret*'.[24]

Indeed Poiret in the 1900s and 1910s operated in much the same way as other avant-garde Parisian couturiers in deploying his name as a signal of style and exclusivity. Effectively, they formed a group. And while they continued on some older customs, they refashioned them to suit their new agendas and invented some new ones of their own. Nancy Troy points out that the practice of couturiers sewing in labels had begun in the nineteenth century once the spread of sewing machines made industrial-level production possible, along with industrial-level copying.[25] They were not practices that were limited to French designers working in Paris and exporting their productions to Britain. The Englishman Charles Frederick Worth's fashion business, established in Paris in the 1860s, followed a longer British practice of personal marking of pottery, ceramics and cutlery in Britain when he adopted a distinctive 'Worth'

[19] *Poiret* v. *Jules Poiret Ltd and A.F. Nash* (1920) 37 RPC 177 at 182.
[20] 'Mrs Asquith's Indiscretion', *Drapers' Record*.
[21] See, for instance, 'The New Whiteleys', Display Advertising, *The Times*, 18 November 1911, p. 6, repeated 21 November 1911, p. 4.
[22] For instance, 'Negligés & Restgowns', Debenham & Freebody Display Advertising, *The Times*, 19 October 1910, p. 11; 'Paris Model Tea Gowns', Debenham & Freebody Display Advertising, *The Times*, 23 March 1914, p. 11; 'Paris Model Tea Gowns', Debenham & Freebody Display Advertising, *The Times*, 18 April 1914, p. 11 and 29 April 1914, p. 11; 'A Mantle Revival', Debenham & Freebody Display Advertising, *The Times*, 30 December 1911, p. 11; 'Copies of Paris Model Blouses', Debenham & Freebody Display Advertising, *The Times*, 5 April 1913, p. 11.
[23] For instance, 'Debenham & Freebody Stocktaking Sale', Display Advertising, *The Times*, 1 July 1911, p. 13; 'Whiteley's Winter Sale Now Proceeding', Display Advertising, *The Times*, 15 January 1912, p. 10; 'Debenham & Freebody Stocktaking Sale', Display Advertising, *The Times*, 11 July 1914, p. 11.
[24] *Poiret* v. *Jules Poiret Ltd and A.F. Nash* (1920) 37 RPC 177, PO Lawrence J at 187.
[25] Troy, *Couture Culture*, pp. 22–5. As one 'informed insider' remarked 'Counterfeiting started at the same time as haute couture, at the very moment when Worth began confecting a series of models destined for exportation': see Mary Lynn Stewart, 'Copying and Copyrighting Haute Couture: Democratising Fashion 1900–1930s (2005) 28 *French Historical Studies* 103 at 108, citing Lydie Chantrell, *Les Moires: 1895–1920*, 1978, p. 174.

label to individuate his semi-industrially produced gowns in the 1870s. Worth also learnt practices of self-promotion that the Wedgwood family had earlier employed: making himself designer to the aristocracy, exploiting opportunities to exhibit his collections,[26] and being among the first to sell his original models to department stores on the tacit understanding that they might be disseminated to a wider public than the couturier could manage.[27] These practices were continued by the couturiers of the 1900s including the by-then traditional Maison Worth conducted by Worth's sons. But in making the personalised fashion label pre-eminent as a symbol of style and personality as much as of dress and other articles of fashion, the practices were updated and extended by Poiret and his contemporaries – including some notable female couturieres, such as Jeane 'Paquin' the first female to establish a Parisian fashion house, with branches extending to New York, Madrid and Buenos Aires before the War,[28] as well as the English Lucile Duff-Gordon (sister of Hollywood writer Elinor Glynn) who was working under her personal label 'Lucile', in London, Paris and New York and later Chicago, and who in 1915 appointed a New York advertising agent Otis Wood to sell her name in America for character merchandising purposes.[29]

Here we see particularly the influence of Modernism, a movement often portrayed as anti-commercial but which was in some respects enmeshed in business and money, and which perfected the art of trading off personality to a greater extent even than the Romantic and Victorian authors and artists of the eighteenth century. It was a movement that embraced not only Henri Matisse's, Pablo Picasso's and Igor Stravinsky's innovative art and music, but also Filippo Marinetti and his group's Futurism with its explicit advertising manifestos and 'agitprop' techniques.[30] And Sergei Diaghilev's *Ballets Russes*, which functioned as a business enterprise, making capital out of its 'stars' as well as its innovative artist-costumiers including Matisse and Picasso, and its brilliant composer, conductor and choreographer Stravinsky – and which

[26] Palmer White, *Poiret*, Studio Vista, 1973, p. 51. As to Wedgwood's practices see Neil McKendrick, 'Josiah Wedgwood: an Eighteenth Century Entrepreneur in Salesmanship and Marketing Techniques' in Roy Church and Edward Wrigley (eds.), *The Industrial Revolution in Britain*, Blackwell, 1994, Vol. III, Part 5, ch. 32. And cf. Richard Smith, *A Guide to Wedgwood Marks*, Wedgwood Press, 1977 at p. 7 especially.

[27] Troy, *Couture Culture*, pp. 21–22.

[28] See Linda Watson, *Vogue Twentieth Century Fashion: 100 Years of Style by Decade and Designer*, Carlton Books Limited, 1999, p. 203.

[29] See Richardson and Tan, 'Wood v Duff-Gordon and the Modernist Cult of Personality' (2008) 28 *Pace Law Review* 379.

[30] The Futurists formed another group: see Milton Cohen, *Movement, Manifesto, Melee: The Modernist Group 1910–1914*, Lexington Books, 2004. For an account of the

travelled regularly to London, before and after the War. Lynn Garafola points out that Diaghilev's populist model combined business and art. Thus, '[i]f Russia's first ballet troupes were serf companies, it was in the twentieth-century marketplace that the Russian dancer gained his freedom as an artist and an individual'.[31] And Diaghilev's star system was integral to the *Ballets Russes*' success, 'providing international drawing cards their presence stipulated by contract … Their names, like their photographs, became commonplaces of the fashion and theatrical press'.[32] Similarly, Poiret (inspired by the *Ballets Russes*) staged his own artistic performances 'mimicking the exotic opulence of the ballet stage'[33] – in his fashion shows, his theatrical parties, his participation in the *Gazette du Bon Ton*, his 'star' models (including his wife, Denise) and his participation in the post-War *Exposition Internationale des Arts Décoratifs* in Paris in 1926. These 'theatrical and product sidelines', Garafola says, illustrated the same 'intersection' existed for fashion as for ballet 'with a celebrity-seeking consumption minded-audience'.[34] Moreover, while Poiret constantly maintained that 'I am not commercial … I am an artist',[35] his close working relationship with the fashion press, including *Gazette du Bon Ton*, and later the American *Vogue*, ensured his name was constantly before his audience and potential markets. Thus Poiret could promote himself as 'King of Fashion', the artist, the trendsetter, the entrepreneur, revolutionising fashion in much the same way as Diaghilev revolutionalised, dominated and profited from ballet.

However, Poiret and the other couturiers faced particular problems in expanding their reputations as artists, couturiers and entrepreneurs while also keeping control over their brands. As Nancy Troy points out, they were engaged in negotiating the 'dissolving boundaries between elite and popular culture' and the pressures that commerce exerted on their art, exacerbated by the rise of the department store.[36] If so, it was a dissolution that was particularly encountered in the United States.[37] Poiret on tour in America in 1913 observed the extent of piracies of French labels. America not only had 'the largest stores in the world', he observed to the *New York Times*, but it had an astounding capacity

Futurist's art and politics with archival footage, see also Lutz Becker's documentary film, *Vita Futurista: Italian Futurism 1909–44*, Art Council of Great Britain, 1987.

[31] Lynn Garafola, *Diaghilev's Ballets Russes*, Oxford University Press, 1989, p. 193.

[32] *Ibid*., p. 194. [33] *Ibid*., p. 291. [34] *Ibid*., p. 292.

[35] 'Paul Poiret Here to Tell of His Art', *New York Times*, 21 September 1913.

[36] Troy, *Couture Culture*, p. 5.

[37] They were not the only ones: Stravinsky mentions his own problems with American piracies of his popular compositions *The Firebird*, *Petroushka* and *Le Sacre de Printemps* in Robert Craft, *Stravinsky in Conversation with Robert Craft*, Penguin, 1960, pp. 224–5.

to do 'everything on a gigantic scale'[38] – including piracy. Fashion-piracies became a point of contention between the French designers and US department stores. Poiret, as the leader of the French designers, mounted a campaign to stop the piracies by boycotting department stores that refused to pay for the right to copy.[39] In his public advertisements in the American press, Poiret also warned against 'false labels imitating the use of my trade-mark with intent to deceive the wearer into believing that I made the article so labelled when I did not' and threatened legal action 'to the full extent of the law'.[40] But the boycott fizzled out after resistance from the department stores, non-participation of smaller and emerging French labels including Gabrielle (Coco) Chanel, and a critical newspaper press.[41] And there were no highly publicised legal actions by the Syndicate or its members in America. Even the most obvious legal strategy, registration and enforcement of US trade marks, was not widely employed.[42] Nor were there sustained attempts to rely on common law protection of reputation by the law of passing off – except occasionally in special cases, for instance of the New York department store Hickson Inc's fraudulent scheme of procuring the purchases of gowns and capes made by couturieres Boué Sœurs, then copying and selling these under its own label with a view to 'obtain[ing] the custom of persons seeking these styles'.[43] Similarly, Poiret's action against Jules Poiret in London can be seen as an isolated instance focused on a still controllable defendant in the British market.

Poiret, thwarted in his early efforts to control American piracy, employed a different technique, aimed at tapping into the lucrative American markets.[44] In 1917 he advertised a new line of Poiret-label limited edition ready-to wear clothing to be manufactured under his control and artistic direction by the Max Grab Fashion Company of

[38] As Poiret is quoted in 'New York Has No Laughter and No Young Girls', *New York Times*, 19 October 1913.

[39] See 'Paris Dressmakers in Protective Union', *New York Times*, 24 October 1915.

[40] Poiret, advertisement 'Warning Against False Labels' *Women's Wear Daily*, 14 October 1913, 1, reprinted in Troy, *Couture Culture*, pp. 237.

[41] See 'Predict Failure of Poiret's Plan: Other Paris Couturiers See the End of "Blacklisting" Our Buyers', *New York Times*, 15 January 1916.

[42] Poiret claimed in 1913 that his trade mark was 'now registered in Washington' ('The Specialty Shops', *Women's Wear Daily*, 14 October 1913 at 6, quoted by Troy, *Couture Culture*, p. 236), but there is no record of it in the United States Patents and Trademarks Office.

[43] *Silvie Montegut and Jeanne D'Etreillis, Doing Business as Boue Soeurs* v. *Hickson, Inc* 164 NYS 858, 1917 (NY App Div), where the defendants' action was held unlawful. Presumably the basis was inverse passing off, a ground later identified by Holmes J in *International News Service* v. *Associated Press* 248 US 215 (1918) at 247–8.

[44] See Richardson and Tan, 'Wood v Duff Gordon'.

New York.[45] It was a short-lived enterprise, but by the 1920s Max Grab had a more general lucrative business of importing French models specifically for hire to US manufacturers and department stores.[46] There were others as well who exploited the opportunities of the post-War markets – including Lucy Duff-Gordon who when her advertising agent Otis Wood failed to gain orders, bypassed him and risked damages for breach of contract to pursue her own licensing arrangement with the Sears Roebuck Company of Chicago, the 'cheapest supplier on earth'.[47] Similarly, although it would take longer, there were advertisements also for ready-to-wear lines of couturier-branded clothes in Britain. By the 1920s British department stores had desisted from advertising their store-made versions of couturiers' original models, suggesting there was no longer any understanding that they were allowed the right. However, in 1933 *The Times* carried an announcement that the Poiret fashion house joined forces with London's Liberty & Co., advertising in *The Times* that 'Monsieur Paul Poiret of Paris will design exclusively for [Liberty's] in Great Britain and consequently his models will not be obtainable elsewhere in London'.[48] By now it was plain, even in Britain, that department stores were the way of the future. As Giacomo Balla said in his post-First World War manifesto, *The Futurist Universe*:

> Any store in a modern town, with its elegant windows all displaying useful and pleasing objects, is much more aesthetically enjoyable than all those passéist exhibitions which had been so lauded everywhere. An electric iron, its white steel gleaming clean as a whistle, delights the eye more than a nude statuette, stuck on a pedestal hideously tinted for the occasion. A typewriter is *more architectural* than all those building projects which win prizes at academies and competitions. The windows of a perfumer's shop, with little boxes and packets, bottles and future-colour triplicate phials, reflected in the extremely elegant mirrors. The clever and gay modelling of ladies' dancing-shoes, the bizarre ingenuity of multi-coloured parasols. Furs, travelling bags, china – these things are all a much more rewarding sight than the grimy little pictures nailed on the grey wall of the passéist painter's studio.[49]

[45] See advertisement for Paul Poiret's collaboration with the Max Grab Fashion Company of New York in *Vogue*, 1 October 1916, 113 reproduced in Troy, *Couture Culture*, p. 303.

[46] See *Grab Fashion Co* v. *United States*, 10 Ct. Cust. 39 (1920).

[47] In the case that ensued Duff-Gordon was made to pay damages: see *Wood* v. *Lucy, Lady Duff-Gordon* 222 NY 88 (1917) and further Victor Goldberg, 'Reading *Wood v Lucy, Lady Duff-Gordon* with Help from the Kewpie Dolls' in *Framing Contract Law: An Economic Perspective*, Harvard University Press, 2006, ch. 2.

[48] Advertisement for Liberty & Co., *The Times*, 6 February 1933, p. 16.

[49] Giacomo Balla, 'The Futurist Universe 1918', in Umbro Apollonio (ed.) with Robert Brain, R.W. Flint, J.C. Higgitt, Caroline Tisdall trans., *Futurist Manifestos*, Thames & Hudson, 1973, 219.

The next generation of fashion designers, led by Coco Chanel (and including also the highly individual Madeline Vionnet, associated with futurist artist and designer Thayaht), would take these ideas much further in their fashion and perfumes and other products – and Chanel's company would also register her brands as trade marks[50] and treat them as commodities quite distinct from her, and yet still somehow connected to her personality, in the way of the modern fashion brand.[51] By the end of her professional life, Chanel's modernist logo and other brands had not only arrived at the point of promising satisfaction through some imagined feature of the goods themselves, they effectively added more: mediated through them, an element of the Chanel persona and image *augmented* the goods. Her brands were, as Ralph Brown said of brands more generally in 1948, vague promises of satisfaction,[52] with all the uncertainties and contradictions that development entailed for modern trade mark law. Moreover, whereas earlier Modernists claimed their main 'innovations' as communal enterprises, now Chanel would claim hers as her own, individually. This brought her closer to the liberal individual tradition of intellectual property that was never dispensed with (and made it easier to manage) – and helped maintain the semblance that accommodating trade mark law to her modern marketing practices would not break the system.

Of course, this took Chanel's brands a long way from any narrow function of marking goods in respect of their origin, if indeed brands had ever been limited to that function – and we have argued they were not by the end of the nineteenth century (despite what the courts said).[53] As such, Chanel was part of a broader trend in branding which reconceived advertising, drawing on Modernism's refashioning of art, literature and commerce, along with their traditional boundaries. In the inter-War era, it could be argued by advertising professionals such

[50] The 'Chanel' trade mark is recorded as registered in the US Patent and Trademark Office with respect to *inter alia* perfumes on 24 February 1925 (serial number 71205468) and dresses and petticoats on 24 November 1954 (serial number 71677201). In the UK the trade mark was registered later in the Intellectual Property Office, on 14 November 1938 with respect to perfumes (serial number 602372) and 7 July 1964 with respect to Articles of clothing for women and girls (serial number 866556).

[51] See Troy, *Couture Culture*, pp. 313ff. – and also for a brief summary of Chanel's life and business operations, *Coco de Mer Ltd* v. *Chanel Ltd* [2004] EWHC 992, Patten J at [2].

[52] Ralph S. Brown, *Advertising and the Public Interest: Legal Protection of Trade Symbols*, (1948) 57 *Yale Law Journal* 1165. See also Jessica Litman, 'Breakfast with Batman: The Public Interest in the Advertising Age' (1999) 108 *Yale Law Journal* 1717.

[53] See above, Part II, Chapter 8.

as N.W. Ayre & Son of Philadelphia that advertising involved 'creation' and 'imagination' in the same way as invention and authoring of works: that all were part of a continuum running from first conception to final branded dissemination of a finished product, together producing 'an unbroken chain of achievement'.[54] In the process, brands and their legal manifestations, trade marks, began to behave more like copyright works, inventions and designs: emulating their focus on the imaginary and mimicking their variable and conflicted ideas about creativity. And so the process of closure of an intellectual property *system* appeared virtually complete.

[54] Advertisement for N.W. Ayer & Son, *Saturday Evening Post*, 2 October 1920, p. 160.

12 Closing the categories

The problems of closure, however, are what is left out and also how strictly the boundaries are maintained. Sherman and Bently observe that one apparent consequence of the long nineteenth century's closure around the copyright, patents, designs and eventually trade marks systems was 'the exclusion of creativity and mental labour from the law's immediate horizon'.[1] But they add that the essential character of a body of law centered around 'intellectual property' is that creativity could not be forgotten: and that '[w]hether it is called essence, personality, creativity or mental labour it is clear that modern law has been unable to suppress the creative or mimetic nature of intellectual property law'.[2] If anything, we suggest, the law's creative and mimetic nature remained a central feature of its continuing development, which was never complete. Despite the apparent value of a simple, clear set of categories forming the great filing system of 'intellectual property' by the end of the century, courts continued to refashion. In particular, the working through of the new changes and transformations associated with modernism threw up new cases that were concerned with creativity, personality or mental labour, yet sat uncomfortably within the existing categories – the news being an early example, followed closely by fashion and also advertising.

The formalisation of intellectual property law around certain kinds of legal action created problems of its own. For instance, few of the popular and respected Anglo-American 'intellectual property' treatises of the early twentieth century mention the case of *Wood* v. *Lucy, Lady Duff-Gordon* in which Lucile Duff-Gordon's advertising agent, Otis Wood, sued her for breach of her contractual commitment to give him the exclusive right to place her name for merchandising purposes in her dealings with Sears. The case was referred to in the major contract

[1] Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Law*, Cambridge University Press, 1999, ch. 10 at p. 199.
[2] *Ibid.*, p. 202.

texts, especially American ones, for its appreciation of the modern character of open-ended contracts.[3] Yet it was as important for its appreciation of the modern brand-function, as revealed in the opening words of Cardozo J's judgment of the Court of Appeals of New York:

> The defendant styles herself 'a creator of fashions'. Her favor helps a sale. Manufacturers of dresses, millinery and like articles are glad to pay for a certificate of her approval. The things that she designs, fabrics, parasols and what not, have a new value in the public mind when issued in her name.[4]

And there are plenty of other examples of cases at the borderline. For instance, in Britain the case of *Hepworth Manufacturing Co Ltd* v. *Ryott*[5] was decided a year before *Poiret* v. *Jules Poiret Ltd*. This case was also treated as a contract case purely and simply in the treatises. Yet it was as much concerned with the personal and brand value associated with a star's personal name. For Hepworth, the leading British film-production company in 1919, was seeking to prevent its star Wernham Ryott using his stage name 'Stewart Rome' in other studios' productions.[6] In the treatises the case was treated as a contract rather than intellectual property case on the logic that the issue before the court was whether 'Stewart Rome' belonged to Hepworth, as specified in the employment contract. But in fact the case went well beyond any contractual understandings, devolving more broadly into understandings of who owns a brand when attached specifically to a person's identity. Hepworth said he taught Ryott his business, paid his salary, carried out filming and advertised films under the pseudonym Stewart Rome. Why should Ryott 'not agree that the goodwill in the pseudonym attached to the joint product should belong to us?'[7] The court however held that the covenant was 'unwholesome', 'injurious', 'tyrannous' and 'oppressive' for its subject.[8] As Atkin LJ put it:

[3] See further Victor Goldberg, 'Reading *Wood v Lucy, Lady Duff-Gordon* with Help from the Kewpie Dolls' in *Framing Contract Law: An Economic Perspective*, Harvard University Press, 2006, ch. 2 at p. 43.

[4] *Wood* v. *Lucy, Lady Duff-Gordon* 222 NY 88 (1917), Cadozo J at 90.

[5] *Hepworth Company Manufacturing Ltd* v. *Ryott* [1919] Ch 1.

[6] As Hawkridge points out, Hepworth came the nearest of the British filmmakers to follow the star system (especially in the 1920s): John Hawkridge, 'British Cinema from Hepworth to Hitchcock', Geoffrey Nowell-Smith (ed.), *The Oxford History of World Cinema*, Oxford University Press, 1996, 130 at p. 134. In his autobiographical *Came the Dawn*, Phoenix House, 1951, Hepworth says that he appreciated early on the benefits of publicising '[the] appearance and skills of artists' in association with films, although with the accompanying difficulty of retaining control over their goodwill: p. 81.

[7] *Hepworth Company Manufacturing Ltd* v. *Ryott* [1919] Ch 1, at 6.

[8] *Ibid*., Astbury J at 11–13.

Anything more intolerable than that young people of either sex should be compelled to enter into such agreements, giving the employer power to filch from them their identity if they should turn out to be artists of any value, I cannot conceive.[9]

What is not mentioned here is that Ryott prior to 1919 was exchanging his services for a miserable £10 per week (and now anticipated with his new employer a salary of £20 per week). By comparison, in Hollywood the salary paid to Mary Pickford, the film name of Gladys Marie Smith, increased from $175 a week in 1911 to $10,000 a week and a share of profits in 1916.[10] The comparison is even more striking if the possibility of endorsements is taken into account – by 1919 the practice of using celebrities' names, photographs and testimonials for advertising was well-established in the United States, less so in Britain.[11] No wonder Hollywood, where the money was, had a more thriving cinema industry after the war than Britain and Europe. Nevertheless, even without this extra information, *Hepworth* v. *Ryott* shows the value that may attach to a star's brand, especially once 'merged in the identity of another person' giving it a plausibly human quality. Richard Dyer calls this the star's special appeal.[12]

Later on, after the disruptions of the *International News Service* v. *Associated Press* case, with its concept of 'unfair competition' encompassing the new misappropriation doctrine, American articles and textbooks on unfair competition began to emerge which discussed the case.[13]

[9] *Ibid*., Atkin LJ at 32. Cf. Warrington LJ at 25 ('I am glad to think that by our decision that object [to bind a particular actor to a particular employer] will probably be defeated'); and see also Eve LJ at 34 (it is 'impossible' to conclude 'upon the true and fair construction' that this contract is not in restraint of trade).

[10] See Catherine Kerr, 'Incorporating the Star: The Intersection of Business and Aesthetic Strategies in Early American Film' (1990) 64 *Business History Review* 383 at 383–4 and further Tino Balio, 'Stars in Business: The Founding of United Artists', in Tino Balio (ed.), *American Film Industry*, University of Wisconsin Press, 1976, pp. 157–8.

[11] See Marlis Schweitzer, '"The Mad Search for Beauty": Actresses' Testimonials, The Cosmetics Industry, and the "Democratization of Beauty"' (2005) 4 *The Journal of the Gilded Age and Progessive Era* 255 (noting inter alia Pickford's endorsements of beauty cream from 1916).

[12] Richard Dyer, *Stars*, BFI Publishing, 1979, reissued with a supplementary chapter by Paul McDonald, 1998, p. 20.

[13] An early example is Herman Oliphant's *Cases on Trade Regulation: Selected from Decisions of English and American Courts*, West Publishing, 1923, where the case is cited at p. 474. (Curiously, the case rates barely a mention in Frank Schechter's *The Historical Foundations of the Law Relating to Trade-Marks*, Columbia University Press, 1925.) See also Zechariah Chafee, 'Unfair Competition' (1940) 53 *Harvard Law Review* 1289; Rudolph Callmann, 'He Who Reaps Where He Has Not Sown: Unjust Enrichment in the Law of Unfair Competition' (1942) 55 *Harvard Law Review* 595 and Benjamin Kaplan and Ralph Brown's *Cases on Copyright, Unfair Competition, and Other Topics Bearing on the Protection of Literary, Musical and Artistic Works*, Foundation

Similarly, American articles and textbooks on entertainment law began to emerge and these might cite *Wood* v. *Lucy Duff-Gordon*.[14] Under the influence of American Legal Realism, itself a modernist movement of law, there was an openness to legal innovations and redefining of categories in America to accommodate new 'functional' ways of thinking about the law.[15] Part of the Realists' mantra was to acknowledge the changing character of the law itself, including the law as fashioned by courts, recognising this as depending upon 'the notions of the court as to policy, welfare, justice, right and wrong' even where 'inarticulate and subconscious'.[16] Moreover, it was accepted the law might move backwards as well as forwards, as courts along with the general populace in the post-War years became more conservative and more reactionary (and at the same time less interested in and less supportive of the more progressive elements of the arts industries).

But the British (and colonial) textbooks, along with British (as well as colonial) law, entering a period of high legal positivism around the Second World War, eschewed such explicit legal innovations. Even judges themselves represented the legal boundaries of intellectual property as both formal and fixed. They started to represent intellectual property law in a stale historicising way, as about statutory copyright, designs, patents, trade marks and ancillary systems which still took their essential rationales, shape and content from their perceived eighteenth- and nineteenth-century roots, never much changing[17] – even if underneath

Press, 1960. There was also later, from the Australian side, Sam Ricketson, '"Reaping Without Sowing": Unfair Competition and Intellectual Property Rights in Anglo-Australian Law' (1984) 7 *University of New South Wales Law Journal* 1.

[14] For instance, Melville Nimmer, 'The Right of Publicity' (1954) 19 *Law and Contemporary Problems* 203 at 215 (citing *Wood* v. *Lucy, Lady Duff-Gordon*); and J. Thomas McCarthy, 'Melville B. Nimmer and the Right of Publicity: A Tribute' (1987) 34 *University of California Law Review* 1703. Kaplan and Brown's casebook, *Cases on Copyright*, also cites *Wood* v. *Lucy, Lady Duff-Gordon* although not until the later editions.

[15] See William Fisher, Morton Horwitz and Thomas Reed (eds.), *American Legal Realism*, Oxford University Press, 1993.

[16] Arthur Corbin, 'Offer and Acceptance, and Some of the Resulting Legal Relations', (1917) 26 *Yale Law Journal* 169, at 206.

[17] For instance, Dixon J in *Victoria Park Racing* v. *Taylor* (1937) 58 CLR 479 at 509 talking of the 'history of the law of copyright' and 'the fact that the exclusive right to invention, trade marks, designs, trade name and reputation are dealt with in English law as special heads of protected interest and not under wide generalization' as demonstrating that the courts of equity in British jurisdictions have not 'thrown the protection of an injunction around all the intangible elements of value, that is, value in exchange, which may flow from the exercise by an individual of his powers or resources whether in the organisztion of a business or undertaking or the use of ingenuity, knowledge, skill or labour'. And note that here there is no reference to breach of confidence as a doctrine that might embrace surreptitious obtaining although this was talked about

they refashioned the law from time to time to suit their rather conservative social purposes.[18] In the process, they forgot the utilitarian debates that lay behind their long nineteenth-century fashionings and refashionings, creating the myth of the law as always existing in some narrowly framed 'historical' form rather than – as it really was – in a constant state of flux in its efforts to deal with changing social, cultural and economic circumstances. Moreover, by designating their law 'ancillary' judges themselves were handed an explicitly residual role, far removed from their central lawmaking role in the long nineteenth century. Thus, at least it appeared for a while, intellectual property law may develop in a limited and mainly hidden way but could no longer be revolutionalised in the ways it had been earlier on. Indeed, it was denied that the law had been revolutionised. And, since the media itself had, by now, moved even more onto the sideline, in the process losing any special insight into the workings of the law, there was no one much to challenge that perception.

in nineteenth-century cases of *Abernethy* v. *Hutchinson* (1825) 1 H & Tw 28 and *Prince Albert* v. *Strange* (1849) 1 H & Tw 1 and see above, Part I, Chapter 3.

[18] And see Jill McKeough, 'Horses and the law: The Enduring Legacy of *Victoria Park Racing*' in Andrew Kenyon, Megan Richardson and Sam Ricketson (eds.), *Landmarks in Australian Intellectual Property Law*, Cambridge University Press, 2009, ch 4.

Epilogue

At the height of British legal positivism the Australian Chief Justice Sir Owen Dixon visited Yale to give a lecture on judicial method. Sir Owen talked of judgments and other legal texts as part of a 'definite system of accepted knowledge or thought', providing an 'external standard' for those who can find it, which is more useful and more 'real' than the wholesale questioning of 'assumptions' by American legal realists.[1] One wonders what the Yale Faculty, harbingers of American legal realism, made of this lecture. By the mid-1950s, Harold Lasswell and Myers McDougal were already busily developing legal realism into a full-blown sociological study of law, especially but not only of international law.[2] Some have called their broad sphere of influence the 'New Haven School'.[3] The young Guido Calabresi was a student at Yale in the 1950s. He joined the faculty in 1959 and in the 1960s and 1970s wrote some groundbreaking law and economics studies of tort law, remedies and legal method,[4] being studies that were quite different from those coming out of the Chicago School in their breadth of vision and readiness

[1] The Right Honourable Sir Owen Dixon, 'Concerning Judicial Method', lecture delivered at Yale on 19 September 1955, on the occasion of receiving the Henry E. Howland Memorial Prize, reprinted in Judge Woinarski (ed.), *Jesting Pilate and Other Papers and Addresses*, Law Book Company, 1965, p. 152, at pp. 152–8 and *passim*.

[2] Especially Harold Lasswell and Myers McDougal, *Jurisprudence for a Free Society, Studies in Law, Science, and Policy*, Martinus Nijhoff Publishers and New Haven Press, 1992. Most of this study, their colleague Michael Reisman notes, was in draft form by the 1950s (a reminder of another kind of academic life): see 'Theory About Law: Jurisprudence for a Free Society' (1999) 108 *Yale Law Journal* 935.

[3] See Mahnoush Arsanjani, Jacob Cogan, Robert Sloane and Siegried Wiessner, 'Introduction' to Arsanjani, Cogan, Sloane and Wiessner (eds.), *Looking to the Future: Essays on International Law in Honour of W. Michael Riesman*, Martinus Nijhoff Publishers, 2011, xv at xvi; and further Reisman, 'Theory About Law'.

[4] For instance, Guido Calabresi, *The Cost of Accidents: A Legal and Economic Analysis*, Yale University Press, 1970; Guido Calabresi and A. Douglas Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 6 *Harvard Law Review* 1089; Guido Calabresi, *A Common Law for the Age of Statutes*, Harvard University Press, 1982.

to appreciate that social values beyond economics provide normative foundations for law and help to guide its future. One of us was a post-graduate student at Yale in the early 1980s and still remembers the surprise and delight of being told by Professor Calabresi that law is not a closed system of legal rules but part of the broader economic, social and cultural context. Moreover, that law is not only fashioned by its broader context but fashions that context in turn, and may do so more or less self-consciously.

Of course this is standard now, as judges and other lawmakers throughout the British and broader common law world try to make sense of new media including the Internet and its progeny, new techniques of advertising and self-promotion, new business methods and models, new creative and innovation practices, new international pressures for harmonisation of law, and also new ways of thinking about law (including new human rights discourses), translating these into legal standards that have a useful and real function in a modern society. Does this explain the revived interest in the long nineteenth century's history of intellectual property fashioning, looking back to a period when legislators, judges and treatise-writers were also self-consciously shaping law in response to developing economic, social and cultural circumstances, working under the observant and critical eye of a large array of economic, social and cultural commentators who did not hesitate to air their knowledge and views in the available media? Or does the study of history have a more constant and enduring value?

The answer may itself lie in history. In 1754, a decade after *Pope* v. *Curl*, Samuel Johnson reflected on the proactive function of historical inquiry,[5] commenting that:

> As man is a being very sparingly furnished with the power of prescience, he can provide for the future only by considering the past; and as futurity is all in which he has any real interest he ought very diligently to use the only means by which he can be enabled to enjoy it, and frequently to revolve the experiments which he has hitherto made upon life, that he may gain wisdom from his mistakes and caution from his miscarriages.

So a review of the long nineteenth century should provide guidance for the future information age on which we are embarking, whether or not we accept the pre-Revolutionary rhetoric of the future and present as merely continuing the past. And we can resist the urgings of twentieth-century

[5] Samuel Johnson, 'Writers Not a Useless Generation' No. 137, *The Adventurer*, 26 February 1754, reprinted in David Womersley (ed.), *Samuel Johnson: Selected Essays*, Penguin Books, 2003, 394 at p. 394.

Modernists that '[t]ime and space died yesterday',[6] and 'let the dead past bury its dead'.[7] (It was a position that the Modernists themselves did not consistently hold to, in any event.) At the same time, Johnson himself may have underestimated the extent to which by the twenty-first century the transformations of contemporary information production, distribution and consumption would renew popular and scholarly interest in the information innovations of the past. The rapid transitions of our time, then, should also cast a new light on the high-frequency modulations of the long nineteenth century.

We have emphasised that the fashioning of intellectual property during this era did not occur in isolation from the vibrant periodic print culture of the time; and we have also seen it as part of a larger process. The development of the law was not an end in itself, but one dimension of a larger, deliberate and self-conscious project: the organisation and professionalisation of creative and technical innovation along explicitly utilitarian lines. And it was the product of a substantial debate about the appropriate character of law, which included legislators and judges, lawyers and government officials, as well as a network of other interested parties, all participating in the experience and process of reform in an active way. At the same time, other changes were going on, and their experience also fed into the reform process and became influenced by the reforms. Administrative and bureaucratic systems processed patent, designs and trade mark applications and registered copyright so long as copyright registration was required (progressively dispensed with from 1911).[8] International exhibitions promoted trade, science, invention, industry and colonialism as well as the idea of the spectacle or exhibition. National and international regulatory structures supplemented or replaced locally variable rules. And local, national and international markets emerged for books and other cultural objects, representations of fashion and other manifestations of personal identity, as well as media and information goods. Some of these objects,

[6] F.T. Marinetti, 'The Founding and Manifesto of Futurism 1909', Umbro Apollonio (ed.) and Robert Brain *et al.* (trans.), *Futurist Manifestos*, Viking Press, 1973, 19 at p. 22.

[7] H.G. Wells, *The Discovery of the Future*, lecture given to the Royal Institution, London, 1902 and published in *Nature*, No. 65, 1902; reprinted by B.E. Huebsch, New York, 1913, p. 15.

[8] The Copyright Act 1911 abolished registration, as did the International Copyright Act which became the basis, for instance, of the Australian Copyright Act 1912 (Cth): and see Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Law*, Cambridge University Press, 1999, ch. 10 (identifying 1911 as an endpoint of sorts in the apparent closure of the modernisation of the intellectual property system).

manifestations and goods, in turn, became the subject of their own regulation under the rubric of intellectual property.

Similarly, throughout the period, 'Grub Street' became an established metaphor for subversive, populist publishing. It functioned in apparent opposition to idealised forms of authorship, invention and self-presentation, as well as modern ideals of propriety, privacy and property that were built around these forms and took from them their character and justification. The political, revolutionary and pornographic section of Grub Street's 'radical underworld' was repeatedly and ruthlessly suppressed in the post-Revolutionary era up to at least the 1830s.[9] But even after the physical Grub Street had long ceased to exist the continuing fictional Grub Street lived on as the idea of a domain of irregular and semi-regulated small-scale entrepreneurship, operating in a fraught, but necessary relationship with official publishing industries – representing, as Johnson said in his famous Dictionary, 'any mean production'.[10] It was a way of characterising, for instance, the 'yellow press' of the nineteenth century as well as the much-lamented American piracies of British books, as in the wake of its Civil War the United States moved gradually to a state of lesser dependence on print imports (even so, Samuel Roth's publication of Joyce's banned *Ulysses* in *Two Worlds Monthly* in the 1920s,[11] shows American piracies did not completely die out.) Whether an expanded idea of 'Grub Street' can also be seen as the antonym for other forms of legitimised production, dissemination and consumption of information goods is something we have also hinted at in this book. As Adrian Johns' history suggests, the metaphor of 'piracy' served a comparable function and also has long roots.[12]

Our best chance of understanding the pace of change in Britain and its present and former colonies during the long nineteenth century might be to consider those societies in our own period which are changing as quickly, or even more so. If we look at Grub Street through the

[9] See Iain McCalman, *Radical Underworld: Prophets, Revolutionaries and Pornographers in London, 1795–1840*, Cambridge University Press, 1988.

[10] Samuel Johnson, *A Dictionary of the English Language in which the Words are Deduced from their Originals, and Illustrated in their Different Significations by Examples from the Best Writers*, printed by Strahan for Knapton, Hitch and Hawes, Millar, Dodsley, Longman and Longman, 1755, definition of 'Grub Street'.

[11] See Robert Spoo, 'Copyright Protectionism and Its Discontents: The Case of James Joyce's Ulysses in America' (1998) 108 *Yale Law Journal* 633, and for further details of this fascinating episode, culminating in an injunction in 1928 banning the use of Joyce's name on the publication (presumably invoking the law of passing off), see Richard Ellmann, *James Joyce*, Oxford University Press, 1959, 1982, pp. 585–7.

[12] And see also, in this vein, Lionel Bently, Jennifer Davis and Jane Ginsburg (eds.), *Copyright Piracy: An Interdisciplinary Critique*, Cambridge University Press, 2010.

lens of the economic anthropology of the recently developing world, we can recognise this domain as a quasi-informal zone, and intellectual property law in its systematising mode as one means of formalising the unruly, emergent creative industries.[13] Economists began thinking seriously about informal economic activity in the period of state building and economic development of the 1960s. There was an idea that modern states, with all their administrative and economic resources, could transform the traditional, ramshackle and fragmentary informal sectors of the developing world into modern, taxed, measured and regulated markets. By the 1990s this conception was part of the backdrop of the world trade negotiations finalised in Marrakesh, and helped to shape the standardisation of minimal standards for intellectual property rights mandated by the Agreement on Trade-Related Aspects of Intellectual Property (TRIPs).[14] The striking development, however, was that the informal sector persisted in the developing world, regardless of the strictures of TRIPs. The recent scholarship of informal economies is particularly instructive on this score, and a whole raft of assumptions has had to be reconsidered. It turns out that informal activity, far from receding, has grown alongside modern industries. It turns out that the informal economy has thrived in developed as well as developing countries, and that far from being confined to traditional occupations, casual labour and home-based work in high technology industries now stands alongside more familiar (to Western eyes) forms of day-labour in construction and agriculture.[15]

There are lessons here for the Western media economies of the present and future, where the public information networks of the new millennium have fostered innovation more rapidly and vigorously in

[13] See for example Alejandro Portes, Manuel Castels and Lauren A. Benton (eds.), *The Informal Economy: Studies in Advanced and Less Developed Countries*, Johns Hopkins University Press, 1989. For an application of the concept of the informal economy to communications law and history, see Ramon Lobato, Julian Thomas and Dan Hunter, 'Histories of User-generated Content: Between Formal and Informal Media Economies' (2011) 5 *International Journal of Communication* 899.

[14] *Agreement on Trade-Related Aspects of Intellectual Property Rights ('TRIPS')*, opened for signature 15 April 1994, 1869 UNTS 299 (entered into force 1 January 1996). Although this benevolent idea may not have been the dominant concern of TRIPs negotiators: see Carlos Correa, *Intellectual Property Rights, the WTO and Developing Countries*, Zed Books Ltd, 2000, pp. 3–5 especially; and further Peter Drahos, 'Negotiating Intellectual Property Rights: Between Coercion and Dialogue' in Drahos and Ruth Mayne (eds.), *Global Intellectual Property Rights: Knowledge, Access and Development*, Palgrave Macmillan, 2002, ch. 10.

[15] For a useful summary of the field, see Martha Chen, 'Rethinking the Informal Economy', in Basudeb Guha-Khasnobis, Ravi Kanbur and Elinor Orstrom (eds.), *Linking the Formal and Informal Economy: Concepts and Policies*, Oxford University Press, 2006, ch. 5.

the informal sector than anywhere else, disrupting business models, legal and regulatory frameworks, markets and professional structures equally.[16] Despite the extensions and aspirations of intellectual property law, Grub Street has not shrunk: multiplied and enlarged, it has become a part of every metropolis. The business of news is but one of many possible examples (others include the music, film and fashion industries). Throughout this book, we have paid particular attention to the persistently reactive dynamic of journalism and intellectual property. Journalism, we have suggested, substantially and variously contributed to the fashioning of the law. In turn, the law substantially changed journalism, defined the business of news, and provided the economic basis for the old and new media industries of which journalism was part.[17] As all this went on, we find journalism occupying an increasingly conflicted space. Journalism became much more than a set of practices for public comment and criticism of the law. If the press along with other nascent media industries of the long nineteenth century helped to fashion the law, they also became interested parties in intellectual property's fashioning: players with high stakes. Today, some news businesses believe those stakes might be lost, because – despite far-reaching expansions of the copyright protection offered under British and Commonwealth law in the twentieth century (albeit masked to an extent by the language of judicial positivism),[18] and despite the American news-misappropriation doctrine of *International News Service* v. *Associated Press* – real control of the news has eluded them. At a recent workshop on journalism and the Internet organised by the US Federal Trade Commission, media owner Rupert Murdoch railed against online news aggregators, Grub Street entrepreneurs of our time, saying '[t]heir almost wholesale misappropriation of our stories is not "fair use". To be impolite, it's theft.'[19]

The proliferation of contemporary Grub Streets raises the issue of whether further extensions of the highly adaptable grammar and vocabulary of intellectual property are a viable strategy for the creative and information industries of the future. In a recent 'Manifesto', using the technique of an avant-garde movement, James Boyle makes a useful suggestion: that lawmakers from now on should focus on finding

[16] Lobato, Thomas and Hunter, 'Histories of User-generated Content'.
[17] As Lisa Gitelman and Geoffrey Pingree say, 'all media were once new media': *New Media, 1740–1915*, MIT Press, 2003.
[18] For some observations, see Sam Ricketson, '"Reaping Without Sowing": Unfair Competition and Intellectual Property Rights in Anglo-Australian Law' (1984) 7 *University of New South Wales Law Journal* 1 at 10–13 especially.
[19] Rupert Murdoch, 'Journalism and Freedom', *Wall Street Journal*, 8 December 2009.

appropriate limits to intellectual property systems, ensuring a healthy international diversity of systems, and a vibrant public domain alongside protected content.[20] Boyle frames this suggestion in the familiar liberal normative terms of the public interest in access to knowledge, some of which may translate into new innovation. We find a distinct crucial dimension of downstream creativity and innovation.[21] If so, should it be a matter of intellectual property rights versus the public domain? Or should we be talking of balancing rights to intellectuality, existing as well as emerging (and still somewhat contingent), and with private and public dimensions – in much the same way as we talk of a balancing rights of privacy and free speech in a modern human rights discourse?[22] Intellectual property rights may play an important role in this imagined utopian future.[23] But the by-now traditional property discourse of exclusivity which is commonly associated with intellectual property rights may need to be revised in the process. Alternatively, the language of 'property' may be dispensed with in the longer term. From our perspective such lines of reasoning embody a certain legal realism. 'Intellectual property' should be recognised as an extraordinarily successful legal technology; but every successful technology may find its limits and must then be substantially further revised or even superseded.

[20] James Boyle, 'A Manifesto on WIPO and the Future of Intellectual Property', (2004) 9 *Duke Law and Technology Review* 1.

[21] Of course, we are not the first or even the only ones currently to posit a distinct important dimension of downstream creativity and innovation (broadly understood): see, for instance, Jane Ginsburg, 'Copyright and Control Over New Technologies of Dissemination' (2001) 101 *Columbia Law Review* 1613, Mark Lemley, 'Property, Intellectual Property and Free Riding' (2005) 83 *Texas Law Review* 1031 and generally Rochelle Dreyfuss, Dianne Zimmerman and Harry First (eds.), *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society*, Oxford University Press, 2001.

[22] And see Megan Richardson, 'Towards Legal Pragmatism: Breach of Confidence and the Right to Privacy' in Elise Bant and Matthew Harding (eds.) *Exploring Private Law*, Cambridge University Press, 2010, ch. 5, articulating this as an essentially utilitarian approach.

[23] Some have already noticed the ways that intellectual property and human rights may have overlapping and sometimes competing functions: see Laurence Helfer and Graeme Austin, *Human Rights and Intellectual Property*, Cambridge University Press, 2011. It is possible to go further and say that, in an imagined utopian future, even intellectual property rights may overlap and compete with each other, entering in on various sides of a dispute about the nature and scope of rights and needing to be balanced along with other rights and more general welfare considerations in the final cost-benefit assessment.

Appendix A: Law reporting in the time of *Southey* v. *Sherwood*

That there were no standardised law reports before 1865 merely contributed to a system of law reporting that was viewed by most lawyers and judges as highly deficient.[1] Law reporting followed a fragmented market-based system of competition, as with other forms of journalism. Moreover, the reporters themselves operated on a partly amateur basis, fitting their poorly remunerated reporting activities around their other more professional commitments, a matter noted by John Merivale in the Preface to Volume I of his *Reports of Cases Argued and Determined in the High Court of Chancery Commencing in the Michaelmas Term, 1815* – adding that he was forced to rely on the assistance of friends who 'from time to time favoured me with their communications' when he was otherwise engaged.[2] Fortunately, substantial amounts of material on the early cases can also be found in public sources including magazines and newspapers, reinforcing the impression of a strong public sphere of public discussion and debate about legal as well as other matters. For instance, Merivale's slim and rather dry report of *Southey* v. *Sherwood* is supplemented by fuller and more salacious reports of the Poet Laureate's controversy in popular newspapers such as the *Courier* and *Morning Chronicle*. The latter publications were no doubt more widely read than the former which were directed mainly at lawyers and judges – although as the extracts included below show the propensity for editorialising was perhaps greater.

[1] See Nathaniel Lindley, 'The History of the Law Reports' (1885) 2 *Law Quarterly Review* 137. Even then the ideal of uniform law reports was not completely realised: as Lord Lindlay notes, there remained other reports, such as *The Law Journal*, *The Weekly Reporter* and *The Law Times* (and we might add *The Times Law Reports*) which continued to be cited as authorities in the Courts: *ibid*., at 142. In addition there were still the daily law reports in newspapers, which in this learned author's view may have satisfied the public's need for knowledge but 'are worthless for purposes of reference or study': *ibid*.

[2] J.H. Merivale, *Reports of Cases Argued and Determined in the High Court of Chancery Commencing in the Michaelmas Term, 1815*, printed for J. Butterworth and Son, Fleet Street and J. Cooke, Ormond Quay, Dublin, 1817, Preface at p. iv.

From the *Morning Chronicle*, 19 March 1817

COURT OF CHANCERY

Mr Hart yesterday morning moved for an injunction to restrain Messrs Sherwood, Neely and Jones from printing and publishing the Poem of *Wat Tyler*, written by Robert Southey, Esq, the present Poet Laureate. Sir Samuel Romilly resisted the application on the ground that it was not such a publication as entitled the author to the protection of the Court. He would venture to say that a more dangerous, mischievous, and seditious publication had never issued from the press – clothed in the most seductive language, it was calculated to excite a spirit of disaffection and hatred to the Government and Constitution of the country, as well as open rebellion of the Country, as well as open rebellion against the Sovereign. – The Lord Chancellor was of the opinion that if the book deserved the character that had been given it, he certainly, as a Judge of the Court of Equity, had no right to impose, it was the province of the Attorney-General to look into it. He should take the book home with him and read it, in order to satisfy his mind whether it had the pernicious tendency ascribed to it.

From the *Morning Chronicle*, 20 March 1817

COURT OF CHANCERY

Yesterday the LORD CHANCELLOR gave his opinion in the important case respecting the Poem of 'Wat Tyler', the production of the Poet Laureate Robert Southey Esq. His Lordship said he had given some attention to prior cases on the same subject. And he found in all of them that the Court had acted on the principle of not giving protection to the author of a work which was, or must be represented in a legal sense, as immoral or seditious. He had no opinion to give on the character or merits of the publication in question, but it was a principle on which the Court uniformly acted to refuse an injunction in every case where the author could not maintain an action for the infringement of a copy-right. It was a singular feature in this case that the manuscript should have so long been neglected. With the merits of the publication, he, as a public individual, had nothing to do, as it did not lie within his jurisdiction. It was not, however, a work that he could feel himself justified in granting any protection to. The Courts of Law had the cognizance of all libellous matters and of all attacks on principle and character, but his jurisdiction as Chancellor, was solely confined to property. He trusted while he had

the honour to fill his present situation, he should do his duty faithfully and honestly to all men, and certainly the best way of doing this, was to keep his authority within its own proper sphere. Mr Southey had as yet made out not the slightest case to justify a Court of Equity in acting; and it would be exceedingly wrong to grant his right till Mr Southey had established his right in accordance with law. Property, not principle, was the object on which this Court decided; and he begged to say, that application might or might not be made to a Court of Law, as the parties chose. Meantime, he felt it his duty at once to refuse the Injunction, and therefore he did hereby dismiss the injunction for it.

From the *Courier*, 19 March 1817

LAW REPORT
COURT OF CHANCERY, March 19
WAT TYLER
SOUTHEY v. SHERWOOD AND CO

This was a motion for an injunction to restrain the Defendants, respectable booksellers of Paternoster-row, their agents, clerks, servants, &c from publishing a certain work, written by Robert Southey, Esq Poet Laureat, in the year 1794, but which had never been published by him, nor was he aware how the copy of the work came into the hands of the Defendants.

MR HART stated that the work in question was written in the year 1794, by Robert Southey, Esq Poet Laureat, at that time under twenty-one years of age, who, some years after, put it into the hands of a friend to bring up to London and get it published. After several interviews it was resolved not to publish the poem, and the copy remained in the hands of the bookseller from that time. Mr Southey had never given authority to any person to publish it, for on arriving at more mature years, he was fully convinced of the erroneous opinions he had in his youthful years held. Mr Simmons, who had died some years since, had not transferred the copy to any person, and there was an affidavit in the Court made by Mr Ridgway, which stated that he had not given or sold the copy, and disclaiming any right, title, or interest therein. There was also an affidavit of one of the Partners in the firm of Messrs Sherwood, which stated that they merely published the work for some person, but had no interest in it themselves further than the publishing, but it was not stated in the affidavit who that person was. The learned Gentleman, after quoting several cases in support of his application, concluded by observing that it was of the utmost importance that the dissemination of a work, professing such wicked and mischievous sentiments, both as it regarded the public welfare, and the character of the

individual who had long since disavowed the sentiments contained in it, should be immediately stopped.

MR SHADWELL followed on the same side, contending, at much length, on the propriety of granting the injunction, and concluded by observing, that the right of Mr Southey was unalienated.

SIR SAMUEL ROMILLY contended that it was impossible that the injunction, if granted, could stand. Mr Southey, in the bill which had been filed, had stated that 'he had not sold nor assigned, nor relinquished the Copyright': but in his affidavit, he had stated that 'he had not sold nor assigned the Copyright,' but he might have relinquished it, which though he had in the bill stated he had not done, yet in his affidavit the word relinquished was not mentioned. He quoted several authorities to prove that there were publications of such a nature as to preclude the author from coming to a Court of Equity to recover a compensation for a piracy of such a work as the present. He then read several passages to prove that the work in question was one of such a nature; and concluded by observing, that the work itself was clothed in such a seductive, and at the same time so dangerous manner, that he felt confident that his Lordship would go with him in thinking that the Court had no right to interfere.

MR WINFIELD followed on the same side, and MR HART replied.

THE LORD CHANCELLOR said, there was a material difference between an author who published an innocent work and one who was about to publish, but on mature consideration repented. It was not stated in what manner the copy had got into the publisher's hands, which would be very necessary to know, and also that it was an important feature of this case that Mr Southey, which such a change of opinions, would have suffered Mr Ridgeway to keep possession of the copy. After noting the case in its different bearings, his Lordship said he would look into the work and give his opinion on Thursday.

From the *Courier*, 20 March 1817

COURT OF CHANCERY, Wednesday, March 19
WAT TYLER
SOUTHEY v. SHERWOOD AND CO

The Lord Chancellor gave judgment in this case, and spoke to the following effect: -'I have looked into all the affidavits, and I have also read the book itself. I take the bill of injunction to be a bill which goes to the length of stating, that the work was composed in 1794, by Mr Southey; that it is his own production, and that it has been published by the defendants without his sanction or authority. The bill, therefore, seeks for its produce

the publication of the work, and an injunction for its suppression. I have examined most of the cases that I could meet with, containing precedents, for injunctions of this nature, and I find that they all proceed upon the ground of title to the property in the plaintiff. On this head there has been a distinction taken, to which more authority belongs than at first I was aware, supported as it is by the opinion of Lord Chief Justice Eyre: by whom it was expressly stated, that a person cannot recover damages for a work which is calculated to do injury to the public. In the case of Dr Walcott, as to the publication of his work under the name of Peter Pindar, the Court found, that inasmuch as he could not recover damages by action, it was therefore not bound to grant an injunction to secure to him the profits of printing. I hold the same opinion. It is very true, that in some sense it might operate so as to leave persons at liberty to multiply copies of such mischievous publications; but to this my answer is, that sitting here as a court of equity, I have nothing to do with the nature of the property, or the conduct of the parties, excepting so far as it applies to civil interests: and if the publication be mischievous, either on the part of the author or the bookseller, it is not my province to interfere. In the present instance, the party applies for his civil interests only, and this Court is the proper place for such an application. I shall say nothing upon the nature of the book itself because it appears to me, that the principle upon which I am about to declare my opinion makes it unnecessary, excepting so far as it would naturally affect my mind, upon looking at all the circumstances of the case. This is a book containing sentiments not now entertained by the author,– at least so I understand. It was composed twenty-three years ago, in 1794, and was offered by Mr Southey to two booksellers, the one of the name of Ridgeway, and the other of Simmons, for publication. They were twice consulted, and twice declined, to publish the work, for reasons not stated. So far, therefore, I must look at the book, as I am led, I may say judicially, to suspect that the nature of the book formed the principal reason for its non-publication. It has been left, then, for 23 years, and has now been published by the Defendants. Taking all these circumstances, therefore, into my consideration, having consulted all the cases I could find touching the question, and entertaining precisely the same opinion as my Lord Chief Justice Eyre, it appears to me that I cannot grant this injunction until Mr Southey has maintained his right to the property by action.

Mr SHADWELL observed, that so sensible was Mr Southey of the indecency, impropriety, and dangerous tendency of this work, that he had thought it right to undergo the disgrace of acknowledging it to be his own production, in order that it might be totally suppressed.

The LORD CHANCELLOR –Sitting, as I do, in a civil court, it is not my province to administer justice as to the character or conduct of individuals, but merely to take care of their property. During the whole course of my life, I have been most careful of this propriety, and shall continue to preserve the same line of conduct to the end of my life.

From 2 *Merivale Reports* 434–40, 1817

SOUTHEY v. SHERWOOD AND OTHERS
March 18, 19, 1817

Injunction refused to restrain publication of a work which has been left for 23 years by the Author in the hands of a Bookseller, to whom it was sent with an intention of its being published; that intention being afterwards relinquished, and the work having passed into the hands of the Defendants, who published it without the consent or privity of the Author. Property of an Author in an unpublished work, independent of the Statute. The Court will not interfere by Injunction, upon the Author's application, to restrain the publication of a work which is of such a nature as that an action could not be maintained upon it for damages.

Motion for an injunction to restrain the Defendants from printing, publishing, or selling a poem, called "*Wat Tyler*"; and from causing the same to be printed, published or sold. The affidavit of the Plaintiff in support of the motion stated that in the year 1794, when the Plaintiff was a young man under twenty-one, he composed the poem in question, which was taken to *London* by a friend of the Plaintiff's, and placed in the hands of *Ridgeway*, a bookseller and publisher, for his perusal and consideration as to printing and publishing the same. That the Plaintiff coming to *London* soon afterwards, being still under twenty-one, conferred with *Ridgeway* and one *Symonds* (deceased) on the printing and publishing the poem, and shortly afterwards returned into the country. That *Ridgeway* and *Symonds* seemed at first inclined to publish; and the Plaintiff, living in the country and being much occupied by various literary works, forgot to demand back the MS; but he had never assigned the copyright of the poem to any one, nor received any remuneration for the same, and the same was never, to the best of his knowledge and belief, printed or published by *Ridgeway*, or by any other person, till it was printed by the Defendants as after mentioned. That he had been informed and believed that the Defendants (who were booksellers and partners) had very lately, in the present year 1817, printed and published, and were then selling, an edition of the poem; and that he had in

no wise consented to the publication by the Defendants, but the same had been published by them without his privity or consent, and he was very desirous that it should not be printed or published; submitting that the copyright remained with him, and the Defendants had no right to publish without his consent or privity.

This was accompanied by an affidavit of *Ridgeway*, that the poem had been published without the privity or consent of the deponent, who had no claim to the copyright; and by another affidavit, stating that the Defendants were the successors in business of *Symonds* deceased, and proving a letter, as charged by the will to be of the hand-writing of the Defendant *Sherwood*, which letter was addressed by him to *Ridgeway*, and was as follows: "Dear Sir, – In reply to your note of yesterday, I cannot satisfy you how '*Wat Tyler*' found its way before the public. It is not our property. We sell it for another person; but this is as much as I can assure you, that it was not found among Mr *Symond*'s papers, nor do I believe that he ever had it in his possession, except on the occasion mentioned by Mr *Ridgeway*."

The bill prayed, besides the injunction, an account of profits made by the publication.

Hart and *Shadwell*, in support of the motion, said that their application was founded on *Macklin* v. *Richardson* (Amb 694), deciding that the author has a property in an unpublished work, independent of the statute (8 Ann c 19), which is capable of being protected by injunction; and that the present Plaintiff had never relinquished the property.

Sir S. *Romilly* and *Montagu*, contra, insisted that the work in question, from its libellous tendency, was of such a nature that there could be no copyright therein; and referred to *Walcot* v. *Walker* (7 Ves 1), and to the case of Dr Priestly there alluded to, which was this: The Plaintiff brought an action against the hundred for damages for the injury sustained by him in consequence of the riotous proceedings of a mob at *Birmingham*; and, among other property alleged to have been destroyed, claimed compensation for the loss of certain unpublished MSS offering to produce booksellers, as witnesses, to prove that they would have given considerable sums for them. On behalf of the hundred it was alleged that the Plaintiff was in the habit of publishing works injurious to the government of the state; but no evidence was produced to that effect; upon which Lord Chief Justice Eyre said, if any such evidence had been produced, he would have held it was fit to be received as against the claim made by the Plaintiff. Several passages were read from the work in support of the charge as to its tendency.

Hart, in reply, contended that, upon the ground last taken, the Plaintiff would be entitled to the interposition of this Court, on account of the

injury done to his reputation by the publication of a work, the sentiments of which he has now disavowed and sought to discountenance.

The Lord Chancellor [Eldon]. If this publication is an innocent one, I apprehend that I am authorised, by decided cases, to say that, whether the author did or did not intend to make a profit by its publication, he has a right to an Injunction to prevent any other person from publishing it. If, on the other hand, this is not an innocent publication, in such a sense as that an action would not lie in case if its having being published by the author and subsequently pirated, I apprehend that this Court will not grant an Injunction. The Court does not interfere in the way of Injunction to punish or to prevent injuries done to the character of individuals; but it leaves the party to his remedy at law. It is to prevent the use of that, which is the exclusive property of another, that an Injunction is granted. There is, however, a difference between the case of an actual publication by the author, which all the world may pirate, and that of a man, who, having composed a work, of which he afterwards repents, wishes to withhold it from the public. I will not say that a principle might not be found which would apply to such a case as that; but then it is necessary to take all the circumstances of the case into consideration. The circumstances of the present case are very extraordinary. I will assume that the work is of such a nature that the sending it forth into the world might have been treated as a criminal act. In view of the circumstances, I have no jurisdiction to consider its criminality. The work was composed so long ago as the year 1794. The Plaintiff's affidavit admits that, in that year, there was a serious intention of publishing it. It was sent by the Plaintiff to Mr *Ridgeway* and it is supposed to have been delivered by him to *Symonds*. The affidavit goes on to state that it was afterwards determined not to publish it. I suppose that it was not thought worth while to publish it, in a pecuniary view. Mr *Ridgeway* gives no account how it passed out of his hands; and all that is alleged concerning the subsequent disposal of it, is that Mr *Southey*, living in the country, forgot it. If the work be such as one as it has been described to be, it is extraordinary that, with the change alleged to have taken place in Mr *Southey*'s opinions, there should be nothing to account for its having been left by him in Mr *Ridgeway's* hands to the present time, but that Mr *Ridgeway* forgot it. It is impossible that Mr *Southey* could have forgotten it. There must have been some other reason. If a man leaves a book of this description in the hands of a publisher, without assigning any satisfactory reason for doing so, and has not enquired about it during twenty-three years, he surely can have no right to complain of its being published at the end of that period.

March 19. The *Lord Chancellor* [Eldon]. I have looked into all the affidavits, and have read the book itself. The bill goes to the length of stating that the work was composed by Mr *Southey* in the year 1794; but that it is his own production, and that it has been published by the Defendants without his sanction or authority; therefore seeking an account of the profits which have arisen from, and an Injunction to restrain, the publication. I have examined the cases that I have been able to meet with, containing precedents for Injunctions of this nature, and I find that they all proceed upon the ground of a title to the property of the Plaintiff. On this head, a distinction has been taken, to which a considerable weight of authority attaches, supported as it is, by the authority of Lord Chief Justice *Eyre*, who has expressly laid it down that a person cannot recover in damages for a work which is, in its nature, calculated to do injury to the public. Upon the same principle, this Court refused an Injunction, in the case of *Walcot* v. *Walker*, inasmuch as he could not have recovered damages in an action. After the fullest consideration, I remain of the same opinion as that which I entertained in deciding the case referred to. It is very true that, in some cases, it may operate so as to multiply copies mischievous publications by the refusal of the Court to interfere by restraining them; but to this my answer is that, sitting here as a Judge upon a mere question of property, I have nothing to do with the nature of the property, nor with the conduct of the parties except as it relates to their civil interests; and if the publication be mischievous, either on the part of the author, or of the bookseller, it is not my business to interfere with it. In the case now before the Court, the application made by the Plaintiff is on the ground only of his civil interest; and this is the proper place for such an application. I shall say nothing as to the nature of the book itself, because the grounds upon which I am about to declare my opinion render it unnecessary that I should do so.

[His Lordship here recapitulated the circumstances already detailed, of the original intention to publish, the subsequent abandonment of that intention, the length of time during which the Plaintiff had suffered the work to remain out of his possession without enquiry, and its recent publication by the Defendants.]

Taking all these circumstances into consideration, and after having consulted all the cases which I could find at all regarding the question, – entertaining also the same opinion with Lord Chief Justice *Eyre* as to the point above noticed, it appears to me that I cannot grant this Injunction until after Mr *Southey* shall have established his right to the property by an action.

Appendix B: Patents, designs and trade marks statistics

Charles Dickens may have parodied the nineteenth century's utilitarian obsession with 'FACTS'.[1] But the British administration's enthusiasm for collecting and recording minute detail has left behind an archive of useful information. Among the most valuable are the copious statistical records of the numbers of patents sealed and designs and trade marks registered published in the *Reports of the Commissioner of Patents for Inventions* and *Reports of the Comptroller-General of Patents, Designs and Trade Marks* from 1852 in the case of patents and 1876 in the case of trade marks and designs. These reveal a constantly increasing interest in take-up of the registered intellectual property rights after the mid-century patent debates had effectively come to an end in the light of the international exhibitions of the 1870s and especially after the legislative reforms of the early 1880s – although even before then the numbers were increasing. Published in full in the *Reports*, the information was also extracted in *The Economist*, which once it had changed its position on the benefits of patents did not hesitate to point out the benefits of the system, for instance in 1883 commenting that '[o]ut of all this business the Treasury made a handsome profit, the total receipts of the Patent Office amounting to 215,319*l*, and the total expenses to only 47,145*l*, there being thus a surplus income of 168,174*l*'.[2]

The table below, taken from *Reports* of the Comptroller-General of Patents, Designs and Trade Marks,[3] provides a summary of the trends the year following enactment of the Patents, Designs and Trade Marks Act of 1883, up to the end of the First World War. Note that these

[1] In his opening words to *Hard Times*, *Household Words*, 1 April 1854.
[2] *The Economist*, 24 March 1883, p. 6.
[3] Specifically the *Twenty-Fifth Report of the Comptroller-General of Patents, Designs, and Trade Marks, With Appendices for the Year 1907*, Printed for His Majesty's Stationery Office 1908; *Thirty-Sixth Report of the Comptroller-General of Patents, Designs, and Trade Marks, With Appendices for the Year 1918*, Published by His Majesty's Stationery Office, 1919 (both Reports containing historical statistics covering the relevant years).

figures only cover the United Kingdom[4] – although for some broader studies, reference may be made inter alia to Zorina Khan's American and European data in *The Democratization of Invention: Patents and Copyrights in American Economic Development, 1790–1920*;[5] and Amanda Scardamaglia's detailed review of nineteenth-century Australian trade mark registrations;[6] as well as P.J. Frederico's 'Historical Patent Statistics' in volume 46 of the *Journal of the Patent Office Society*.[7] Moreover, they do not provide a visual picture of the patterns that were emerging, that kind of more synthesised treatment of information being more a feature of the twentieth century. It is something however we offer at the end with our own graphic version of the trends.

	PATENTS				DESIGNS		TRADE MARKS	
		Specifications						
Year	Applications	Provisional	Complete	Sealed	Applications	Registered	Applications	Registered
	No.	No.	No.	No.	No.	No.	No.	No.
1884	17,110	15,253	5,470	3,721*	19,753	19,687	7,104	4,523
1885	16,101	13,977	9,004	9,308	20,725	20,602	8,026	4,332
1886	17,176	14,834	9,187	8,923	24,041	23,838	10,677	4,725
1887	18,059	15,502	9,559	9,226	26,043	25,314	10,586	4,740
1888	19,089	16,416	9,771	9,309	26,239	25,135	13,315	5,520
1889	21,004	17,752	10,854	10,081	24,705	23,989	11,316	5,053
1890	21,309	17,001	10,674	10,646	22,553	21,107	10,258	6,014
1891	22,878	19,361	11,072	10,643	21,950	20,880	10,787	4,225
1892	24,179	20,330	11,464	11,164	19,527	18,501	9,101	3,649
1893	25,107	21,185	11,902	11,600	19,480	18,338	8,675	3,522
1894	25,386	21374	11,991	11,699	22,255	20,847	8,013	2,905
1895	25,062	20,698	12,553	12,191	21,417	20,192	8,272	2,821
1896	30,193	25,374	13,360	12,473	22,849	21,727	9,466	2,917
1897	30.952	25,455	15,135	14,210	20,417	19,301	10,624	3,358
1898	27,650	22,380	14,167	14,063	20,049	18,830	9,767	3,437
1899	25,800	20,029	14,005	14,160	19,195	18,470	8,927	3,777
1900	23,922	18,117	13,093	13,170	16,952	16,282	7,937	3,223

[4] Note also there may be discrepancies in the figures: see Klaus Boehm with Aubrey Silberston, *The British Patent System*, Cambridge University Press, 1967, Vol. I Administration, ch. 2, pp. 33–4 especially.

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Year	PATENTS				DESIGNS		TRADE MARKS	
		Specifications						
	Applications	Provisional	Complete	Sealed	Applications	Registered	Applications	Registered
1901	26,788	20,827	13,583	13,062	16,934	16,217	8,775	3,246
1902	28,972	22,605	14,877	13,764	17,825	17,106	8,899	3,377
1903	28,854	22,210	15,831	15,718	21,104	20,426	9,467	3,748
1904	20,702	22,461	15,925	15,089	23,531	22,604	9,972	3,842
1905	27,589	19,863	18,806	14,786	23,938	23,138	10,521	4,261
1906	30,030	21,025	18,243	14,707	22,001	21,212	11,414	4,731
1907	29,040	19,630	18,893	16,272	24,928	24,039	10,796	6,255
1908	28,598	19,495	17,746	16,284	24,907	24,389	10,645	5,965
1909	30,603	21,553	18,705	15,065	26,412	25,754	10,880	6,112
1910	30,388	20,768	19,105	16,269	32,745	32,212	10,623	5,722
1911	29,353	19,524	18,662	17,164	43,057	41,581	9,743	4,868
1912	30,089	19,825	18,853	15,814	43,015	42,077	10,014	4,942
1913	30,077	19,673	19,309	16,599	40,429	39,275	9,689	5,071
1914	24,820	16,590	16,443	15,036	34,354	33,362	8,317	4,408
1915	18,191	13,242	10,461	11,457	18,130	17,390	6,057	3,241
1916	18,602	13,641	10,700	8,424	15,399	14,766	5,837	2,878
1917	19,285	13,990	11,539	9,347	13,208	12,729	5,502	2,744
1918	21,839	15,662	13,263	10,809	10,019	9,597	6,968	3,055

* Patent sealings may well have been higher than reported in this year.[8]
Source: Reports of the Comptroller-General of Patents, Designs and Trade Marks

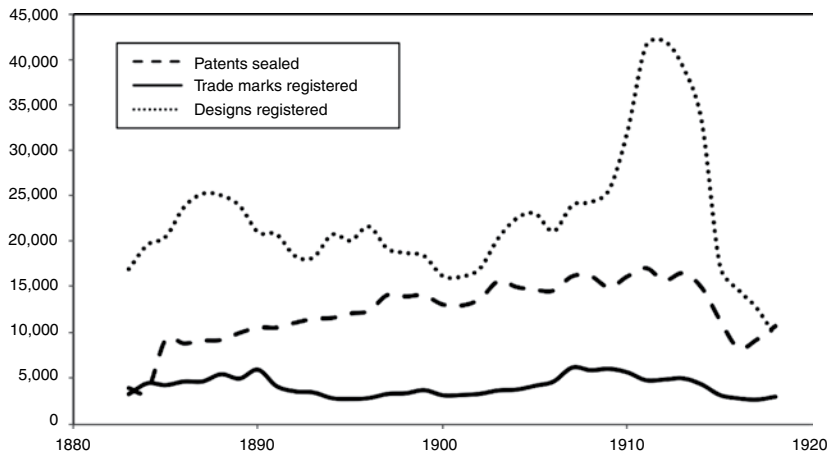

Figure 12 Patents, designs and trade marks statistics, 1884–1918

[8] See Boehm and Silberston, *The British Patent System*, p. 31.

Select bibliography

Jorge Luis Borges once said that although he had been a Professor of English Literature at the University of Buenos Aires for twenty years, he had tried to disregard as much as possible the history of literature, telling his students '[a] bibliography is unimportant … why not study the texts directly?'[1] We have also studied the texts directly – extending our research beyond the reported statutes, cases and reports to encompass contemporary biographical material as well as material of a more ephemeral character, published in journals, magazines and newspapers. (Many of these are available through collections in libraries and archives, including increasingly in digitised forms.) However, we cannot disregerd the rich array of materials on long nineteenth-century British culture, media and society and a growing and fascinating body of material on long nineteenth-century British intellectual property law, on which we have also relied. Therefore, we follow Eric Hobsbawm in noting that one problem with nineteenth-century studies is simply the dazzling array of texts, 'so vast that no attempt can be made to cover all aspects of it, even selectively'.[2] And, like Hobsbawm again, we admit to being personal and even 'fortuitous' in our selection and use of sources, as laid out in the following bibliography.

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