

# ALL CHANGE FOR THE DIGITAL ECONOMY: COPYRIGHT AND BUSINESS MODELS IN THE EARLY EIGHTEENTH CENTURY

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### I. INTRODUCTION: ANALOGUE AND DIGITAL WORLDS

In 1998, the United States Congress labelled the current era the “digital millennium” when it passed a copyright act of that title.<sup>1</sup> Eleven years later, the United Kingdom echoed that language when the Department for Culture, Media and Sport published the Digital Britain Report in June 2009.<sup>2</sup> The Report examines the country’s communications infrastructure, public sector broadcasting, broadband access and take-up. It also addresses the effect of digitization on the “creative content industries,” wherein lies its specific relevance to the law of copyright. In light of the Report, the

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1. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

2. DEP’T FOR CULTURE, MEDIA & SPORT & DEP’T FOR BUS. INNOVATION & SKILLS, DIGITAL BRITAIN FINAL REPORT, Cm 7650 (2009) [hereinafter DIGITAL BRITAIN FINAL REPORT], *available at* <http://www.culture.gov.uk/images/publications/digitalbritain-final-report-jun09.pdf>.

Government introduced the Digital Economy Bill, which passed into law in April 2010, just days before Parliament was dissolved in preparation for the next General Election.<sup>3</sup>

The Digital Britain Report opens with an “inspirational” quote from the then British Prime Minister, Gordon Brown: “Only a Digital Britain can unlock the imagination and creativity that will secure for us and our children the highly skilled jobs of the future.”<sup>4</sup> Where the Prime Minister looked forwards, Lord Carter’s<sup>5</sup> foreword to the Report looked backwards, beginning with an historical comparison:

On 26 August 1768, when Captain James Cook set sail for Australia, it took 2 years and 320 days before he returned to describe what he found there.

Yesterday, on 15 June 2009, 20 hours of new content were posted on YouTube every minute, 494 exabytes of information were transferred seamlessly across the globe, over 2.6 billion mobile minutes were exchanged across Europe, and millions of enquiries were made using a Google algorithm.<sup>6</sup>

In the analogue world, information traveled slowly and was dependent on physical means of transport and human agents; in the digital world, it moves instantaneously, through wires, sea beds and air waves. The scope of the technological changes can hardly be over-emphasised, but their impact on copyright laws requires further investigation. The assumption frequently made, by legislators and others, is that this brave new digital world requires brave new copyright laws, because the terrain has shifted and the parties involved have changed.

In his recent book, *Moral Panics and the Copyright Wars*,<sup>7</sup> William Patry advances the thesis that the debates over copyright (or “copyright wars,” as he evocatively calls them) are essentially the product of outdated business models being threatened by innovators. The success of these innovators, he argues, is resented by the established copyright industries, which then turn to the courts and the legislature<sup>8</sup> to seek protection against the newcomers. Patry focuses on litigation as a means of protection, considering it “a poor

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3. Digital Economy Act, 2010, c. 24 (U.K.).

4. DIGITAL BRITAIN FINAL REPORT, *supra* note 2, at 7.

5. Lord Carter is the former Minister for Communications, Technology and Broadcasting.

6. DIGITAL BRITAIN FINAL REPORT, *supra* note 2, at 3.

7. WILLIAM F. PATRY, *MORAL PANICS AND THE COPYRIGHT WARS* (2009).

8. For more on the role played by interest groups and the legislature in the last century, see JESSICA LITMAN, *DIGITAL COPYRIGHT* (2001).

long-term strategy, serving only to delay the inevitable failure of the old business model.”<sup>9</sup> Patry notes that the Copyright Wars began in the United Kingdom with the Battle of the Booksellers in the 1730s and finished in 1774. The Wars presumably ended with *Donaldson v. Becket*,<sup>10</sup> the landmark decision of the House of Lords which rejected the existence of a common law copyright and asserted the primacy of the Statute of Anne. However, Patry’s central concern is with the most recent fifty or so years, and, his implicit assumption is that this is a new, or at least a much more serious problem, today. Citing statements made by Lord Macaulay in 1841, he calls for a return to the “correct” and fundamental purpose of copyright law, which is to further the interests of the public.<sup>11</sup>

The purpose of this Article is to argue that, in fact, this struggle between competing economic interests and different business models has existed since before the Statute of Anne was passed. Contrary to Patry’s argument, this tension is not a new aspect of copyright law or litigation. Likewise, contrary to the assumptions of legislators and policy-makers, technological change has not altered the fact that copyright law is a site of contest between market incumbents and new entrants. Rather, technological change has merely created new opportunities for the latter and threats to the former. However, the object of this Article is not to critique Patry’s thesis, but to extend it backwards to an earlier time period. By taking a very small slice of copyright’s history, I want to examine some of the ways that these “battles” were conducted at the birth of copyright and in its infant years. Cases brought before the Court of Chancery in the early to mid-eighteenth century reveal the ways in which those with vested interests in the established system of regulating the market for printed books sought to use the law as a tool to attack new market entrants. While use of the law to attack new market entrants might be seen as unfortunate, it is important to recognize that it is a constant element in the development of copyright law that continues to the present day. This, in turn, should lead us to be wary of claims that legislation introduced to address perceived problems raised by new technologies (and lobbied for by those with interests in furthering or suppressing such technology) will provide simple solutions or produce more coherent copyright laws. Before turning to consider these cases, it is useful to consider the social and economic background against which they arose.

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9. PATRY, *supra* note 7, at 2.

10. *Donaldson v. Beckett*, [1774] 1 Eng. Rep. 837 (H.L.).

11. PATRY, *supra* note 7, at 37.

## II. THE ECONOMY AND THE BOOK TRADE IN THE EIGHTEENTH CENTURY

Like the twenty-first century, the eighteenth century was a period of great social and economic change for Britain. Demographic change began slowly. At the start of the century the population was static at slightly over six million; by 1756 it had risen to a little over five million (17% in sixty years); in the following fifteen years it grew another 15%, and from 1791 through the first three decades of the nineteenth century it grew at a rate of 1.32% per year (compared with 0.2% between 1681–1741).<sup>12</sup> As Michael Suarez has pointed out, in book trade terms, this meant that the number of potential buyers for books was increasing six times faster in the early nineteenth century than at the start of the eighteenth century.<sup>13</sup> The population growth was accompanied by equally remarkable economic growth. Between 1680 and 1820, the British Gross Domestic Product rose approximately 246%.<sup>14</sup> During a similar period, 1700 to 1830, literacy rates also steadily increased. Accounting for population growth, by 1830 the adult reading public had grown by 234.8%.<sup>15</sup>

Other factors also stimulated the growth of the book market during this period. Foremost amongst these were improvements in transport networks. Overland transport became faster, cheaper, and more reliable due to improvements in road quality, coach and wagon design and the breeding of more reliable horses. London booksellers could supply the provinces faster and more effectively, lowering transaction costs and possibly assisting in making credit arrangements more reliable. Although the railways did not begin their march across the countryside until the early nineteenth century, canals and other navigable waterways became important elements of transport infrastructure in the mid-eighteenth century.<sup>16</sup>

The improvement in transport networks directly affected the growth of the Post Office, which expanded considerably during the century. Improved delivery networks and faster mail coaches assisted in distribution throughout the countryside. Moreover, the franking system provided further incentives for distribution.<sup>17</sup> The Six Clerks of the Road had franking privileges and

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12. Michael F. Suarez, *Introduction* to *THE CAMBRIDGE HISTORY OF THE BOOK IN BRITAIN VOLUME V: 1695–1830*, at 1, 3 (Michael F. Suarez S.J. & Michael L. Turner eds., 2009).

13. *Id.* at 3–4.

14. *Id.* at 4.

15. *Id.* at 12.

16. *Id.* at 12–15.

17. The franking system allowed post to be sent for free. *See id.* at 15–16.

could therefore send newspapers for free to provincial postmasters who paid them and were, in turn, allowed to sell or circulate newspapers for their own gain.<sup>18</sup> Other networks of distribution included chapmen (itinerant sellers of cheap books),<sup>19</sup> religious groups, and the popular and ubiquitous coffee-houses, where men would gather to discuss news, business, and politics, as well as to purchase and exchange books.<sup>20</sup>

Prior to the late seventeenth century, only the wealthiest could afford to spend money regularly on the purchase of such luxury items as books. However, book possession and collection in personal and domestic libraries increased during the 1690s, and even more so after the 1740s. Demand grew fastest amongst the middling classes.<sup>21</sup> Despite the fact that there were no major technological developments in printing until the early decades of the nineteenth century, the scale of production of books increased exponentially over the eighteenth century. Fairly crude estimates indicate that publications grew annually by about 2% per annum from 1740 to 1800.<sup>22</sup> Moreover, the second half of the eighteenth century saw a remarkable growth in conspicuous consumption, and print played a significant role in the creation of this “consumer society.”<sup>23</sup> Not only did books promote consumerism through printed advertisements of consumer goods, but books themselves became desired commodities and ornaments. James Raven contends that during this period, books began to be treated as market commodities by both traders and buyers.<sup>24</sup> Historians have observed that the eighteenth century heralded a “consumer revolution.”<sup>25</sup> It was not the desire to spend that was new, but the ability to do so.<sup>26</sup> The effects on the book trade were significant, and it is not hard to see parallels with the effects of the new technologies of the late twentieth century on the print media of today.

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18. *Id.*

19. *Id.* at 18.

20. *Id.* at 18–24.

21. James Raven, *The Book as a Commodity*, in *THE CAMBRIDGE HISTORY OF THE BOOK IN BRITAIN: VOLUME V, 1695–1830*, at 85, 86 (Michael F. Suarez, S.J. & Michael L. Turner eds., 2009).

22. Before 1700, about 1,800 titles were produced annually; by 1830 it was up to 6000. *Id.* at 92.

23. See *THE BIRTH OF A CONSUMER SOCIETY: THE COMMERCIALIZATION OF EIGHTEENTH-CENTURY ENGLAND* (Neil McKendrick, John Brewer & John Harold Plumb eds., 1983).

24. Raven, *supra* note 21, at 85.

25. Neil McKendrick, *Introduction* to *THE BIRTH OF A CONSUMER SOCIETY: THE COMMERCIALIZATION OF EIGHTEENTH-CENTURY ENGLAND 2* (Neil McKendrick, John Brewer & John Harold Plumb eds., 1983).

26. *Id.* at 2.

As new sections of the population became increasingly able and willing to purchase books, new markets opened up for the print trade. How did the booksellers react to this transformation of their familiar world? To answer this question, it is necessary to take a brief excursion back to 1695 and the final lapse of the Licensing Act of 1662.

### III. THE PASSAGE OF THE STATUTE OF ANNE AND CHANGES IN ECONOMIC CONTROL OF THE BOOK TRADE

Events occurring in the late seventeenth century and early eighteenth century brought about substantial changes in the control of the book trade in Britain. Prior to 1695, printing had been regulated by the mutually advantageous relationship between the Stationers' Company, a London guild, and the Crown.<sup>27</sup> The Crown's objective was to control print media and, in so doing, control political and religious dissent.<sup>28</sup> The Stationers' Company's objective was to regulate the trade and concentrate power among its members.<sup>29</sup>

The two objectives were enforced by numerous legislative instruments, including decrees of the Star Chamber. In 1662, Charles II's Restoration Parliament passed a Licensing Act which, like the Star Chamber decrees, provided for pre-publication censorship.<sup>30</sup> This Act shored up the position of the Stationers' Company in the trade, by providing that: all books had to be entered in the Company's register,<sup>31</sup> that only members of the Company could enter the book trade,<sup>32</sup> that no printing presses could operate without permission of the Company,<sup>33</sup> that the number of master printers, presses and apprentices and other employees would be restricted,<sup>34</sup> and that the Stationers' Company had the power to carry out searches of premises suspected of housing unauthorized printing and binding.<sup>35</sup> Parliament

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27. See Michael Treadwell, *The Stationers and the Printing Acts at the End of the Seventeenth Century*, in *THE CAMBRIDGE HISTORY OF THE BOOK IN BRITAIN: VOLUME IV, 1557–1695*, at 755, 756 (John Barnard & D.F. Mackenzie eds., 2002).

28. *Id.*

29. *Id.*

30. Licensing of the Press Act, 1662, 3 & 4 Car. 2, c. 33 (Eng.).

31. *Id.* § 3.

32. *Id.* § 8.

33. *Id.* § 10.

34. *Id.* §§ 11–13.

35. *Id.* § 14.

renewed the Act several times before William III's second Parliament allowed it to lapse in 1695.<sup>36</sup>

The Stationers' Company lobbied for new legislation to protect their interests, but made little progress.<sup>37</sup> One significant source of opposition flowed from a general and widespread distrust of monopolies. By the time of James I, the royal use of monopolies had become one of Parliament's main grievances.<sup>38</sup> This distrust was intensified in the first two decades of the seventeenth century, when the economy sank into a deep recession that many blamed on patents and monopolies.<sup>39</sup> In 1624, Parliament passed the Statute of Monopolies, which declared patents void but made exceptions for inventions and printing.<sup>40</sup> Notwithstanding this measure, anti-monopoly feeling extended to the book trade. A temporary financial downturn in the 1690s intensified concerns that the Stationers' Company was abusing its power through the use of State-granted patents.<sup>41</sup> A group of independent booksellers, printers and bookbinders presented a petition to Parliament in February 1693, complaining that the Act prevented them from exercising their trades.<sup>42</sup> Thus, while the Stationers may have been lobbying for legislation to protect their interests after 1695, other members of the book trade were clearly less favorably disposed to the Licensing Act's renewal.<sup>43</sup>

The lapse of the Licensing Act in 1695 is sometimes presented as giving birth to the "public domain"—a halcyon period when all were "free to do with the work as they wished."<sup>44</sup> However, this view overlooks the practical operation of the book trade at the time, and the strength of the non-statutory

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36. See Ronan Deazley, *Commentary on the Licensing Act 1662*, in PRIMARY SOURCES ON COPYRIGHT (1450–1900) (L. Bently & M. Kretschmer eds., 2008), available at [http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabeCom/"uk\\_1662"](http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabeCom/).

37. RONAN DEAZLEY, ON THE ORIGIN OF THE RIGHT TO COPY: CHARTING THE MOVEMENT OF COPYRIGHT LAW IN THE EIGHTEENTH CENTURY (1695–1774), at 1–30 (2004).

38. MARK KISHLANSKY, A MONARCHY TRANSFORMED: BRITAIN 1603–1714, at 98–99 (1996).

39. *Id.* at 99.

40. Statute of Monopolies, 1623, 21 Jac. 1, c. 3 (Eng.). For more on the role of monopolies, see Oren Bracha, *Owning Ideas: A History of Anglo-American Intellectual Property* (June, 2005) (S.J.D. dissertation, Harvard Law School), available at <http://www.obracha.net/oi/oi.htm>.

41. JAMES RAVEN, THE BUSINESS OF BOOKS: BOOKSELLERS AND THE ENGLISH BOOK TRADE 1450–1850, at 86 (2007).

42. Raymond Astbury, *The Renewal of the Licensing Act in 1693 and its Lapse in 1695*, 33 LIBR. 296, 301 (1978).

43. Treadwell, *supra* note 27, at 770.

44. RONAN DEAZLEY, RETHINKING COPYRIGHT: HISTORY, THEORY, LANGUAGE 162 (2006).

mechanism that shored up the booksellers' monopolies. While the lapse of the Licensing Act may have further eroded the power of the Stationers' Company, there was no sudden throwing open of the gates of culture and learning. Instead, a new structure emerged, replacing the established authority of the Stationers' Company. This system was based on a form of trade organization known as "congers."<sup>45</sup> A contemporary definition of a conger was "a Set or Knot of Topping Book-Sellers of London who agree . . . that whoever of them Buys a good Copy, the rest are to take off such a particular number . . . in Quires, on easy Terms."<sup>46</sup> In other words, the leading London booksellers would meet to discuss problems and further projects for the book trade, including the purchase and ownership of the most valuable copyrights, which they would then own cooperatively in shares.<sup>47</sup>

The congers were a response to changes in the book trade, particularly to the uncertainty over its future regulation.<sup>48</sup> Conger membership overlapped significantly with the senior ranks of the Stationers' Company, demonstrating that although the organizational power base may have changed, those holding the power had not.<sup>49</sup> Because ownership of copyrights and books was shared between conger members, there would be fifteen or sixteen victims if a conger work was pirated.<sup>50</sup> The conger could then retaliate by refusing to supply the pirate with books or purchase from him. These actions

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45. The word "conger" is sometimes claimed to derive from the conger eel, which swallowed up all the smaller fish. A. S. COLLINS, *AUTHORSHIP IN THE DAYS OF JOHNSON: BEING A STUDY OF THE RELATION BETWEEN AUTHOR, PATRON, PUBLISHER AND PUBLIC, 1726–1780*, at 19 (1927) (quoting the late seventeenth and early eighteenth century bookseller John Nichols). More recent commentators suggest it is more likely to derive from the word "conjure," or sworn agreement, of the kind which guilds had used to preserve their "mysteries" or trade secrets. WILLIAM ST CLAIR, *THE READING NATION IN THE ROMANTIC PERIOD* 95 (2004).

46. NORMA HODGSON & CYRIAN BLAGDEN, *THE NOTEBOOK OF THOMAS BENET AND HENRY CLEMENTS (1686–1719): WITH SOME ASPECTS OF BOOK TRADE PRACTICE* 67, 76, 86 (1956).

47. *Id.* at 67–68.

48. *Id.* at 76–77. Booksellers were not alone in seeking to manage trade instability in this period. Other industries were also developing risk sharing schemes, such as simple insurance against fire and marine disasters, and joint stock companies were also appearing on the scene. *See* Treadwell, *supra* note 27, at 773–74.

49. This is revealed by an examination of the dates upon which the various members became free of the Stationers' Company (indicating their seniority), given in HODGSON & BLAGDEN, *supra* note 46, app. 12, at 215, as well as by comparing these lists of conger members with the lists of the Masters and Wardens of the Stationers' Company in D.F. MCKENZIE, *STATIONERS' COMPANY APPRENTICES 1701–1800*, at 403–05 (1978). However, it is also the case that the precise history of the congers and their membership remains somewhat uncertain and incomplete. *See* HODGSON & BLAGDEN, *supra* note 46, at 80–100.

50. *Id.* at 77.

could cause considerable damage to an individual business, and possibly even close it down.<sup>51</sup> Congers also provided other benefits to their members. Given the high risk levels associated with printing ventures, due to factors such as the costliness of paper and lack of market awareness, the system of shared ownership practiced by the congers was effective in spreading and minimizing the risk to participants.<sup>52</sup> Additionally, congers helped to create stability in the book trade by controlling prices.<sup>53</sup>

Although the congers gave the leading booksellers economic control over the London book trade, they had less control over provincial piracy, or the importation of reprints printed in Continental Europe. The booksellers therefore continued to lobby Parliament for new legislation, emphasizing trade regulation rather than censorship.<sup>54</sup> In 1710, their efforts were rewarded by the passing of an Act that famously became known as the Statute of Anne.<sup>55</sup> The main features of this Act were to: sever the relationship between censorship and trade regulation, by only concerning itself with the latter; to open up the trade to non-members of the Stationers' Company by providing that *anyone* could print a book;<sup>56</sup> to provide that books were to be registered at the Stationers' Company, but that the clerk could not refuse to register any title;<sup>57</sup> and to mandate that copies of all published books had to be delivered to certain libraries.<sup>58</sup> Most significantly, it limited the periods of protection for such printed books to fourteen years, plus another fourteen years if the author should still be living at the expiry of the first period.<sup>59</sup> The statute thus revolutionized the legal conditions under which the booksellers operated.

However, while legal standards changed dramatically, it seems that in the years following its enactment the statute had little effect on the book trade. After an initial period of compliance with the registration and library deposit

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51. *See id.* If as a group, conger members refused to supply to and buy books from an offender “they would have fashioned an economic weapon which was almost irresistible.” *Id.*

52. *Id.* at 85, 97–98.

53. *Id.* at 70–74, 80.

54. JOHN FEATHER, PUBLISHING, PIRACY AND POLITICS: AN HISTORICAL STUDY OF COPYRIGHT IN BRITAIN 56–60 (1994); LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 142–43 (1968); MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 35–36 (1993).

55. An Act for the Encouragement of Learning (Statute of Anne), 1710, 8 Ann., c. 19 (1710) (Gr. Brit.).

56. *Id.* § 2.

57. *Id.* §§ 2–3.

58. *Id.* § 5.

59. *Id.* § 11.

provisions, both activities declined.<sup>60</sup> While some authorial contracts recognized the new limited period of fourteen years,<sup>61</sup> many did not.<sup>62</sup> Nor does it appear that the prices offered and paid for shares of books amongst the booksellers changed in response to the fixed period of duration of the right.<sup>63</sup> The booksellers could afford to ignore the Statute of Anne due to the stabilizing effect the Congers had on the book trade at that time.

Although the membership of the congers and their duration cannot be precisely mapped due to a lack of historical evidence, it seems that the original congers continued in operation into the early decades of the eighteenth century.<sup>64</sup> Other new congers also existed, some of which were concerned with specialist books, such as law books.<sup>65</sup> Historians speculate that by the second half of the century, the term “conger” had come to be used loosely as a synonym for partnership.<sup>66</sup> Thus, during the time period with which we are concerned, namely, the first half of the eighteenth century, the book trade was dominated by a small number of wealthy and powerful booksellers, almost all of whom were wholesalers who did not necessarily run retail operations.<sup>67</sup>

The conger system has been criticized for its monopolistic tendencies.<sup>68</sup> However, despite the strong hold it exercised over the trade, the conger system can be seen as a realistic response to prevailing market conditions. Printing and bookselling served a luxury market which was particularly vulnerable to vicissitudes of fortune among its customers, and therefore to unstable economic and social conditions. The eighteenth century economy revolved around delicate webs of credit between producers, distributors, consumers, masters and apprentices.<sup>69</sup> In good times this was unproblematic,

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60. DAVID MCKITTERICK, *CAMBRIDGE UNIVERSITY LIBRARY: A HISTORY: THE EIGHTEENTH AND NINETEENTH CENTURIES* 29 (1986).

61. For example, Alexander Pope's contract for the sale of *The Iliad*, entered into in 1713 or 1714, was expressly limited to “such time and terme of years as he or his heirs enjoyed such rights.” See ST CLAIR, *supra* note 45, at 92; Lionel Bently & Jane C. Ginsburg, “*The Sole Right . . . Shall Return to the Authors*”: *Anglo-American Authors' Reversion Rights from the Statute of Anne to Contemporary U.S. Copyright*, 25 *BERKELEY TECH. L.J.* 1475 (2010).

62. For examples, see ST CLAIR, *supra* note 45, at 94.

63. Cyrian Blagden, *Booksellers' Trade Sales 1718–1768*, 5 *LIBR.* 243, 255 (1951).

64. HODGSON & BLAGDEN, *supra* note 46, at 85, 91, 94–96.

65. *Id.* at 95–96.

66. *Id.* at 96.

67. TERRY BELANGER, *BOOKSELLERS' SALES OF COPYRIGHT: ASPECTS OF THE LONDON BOOK TRADE, 1718–1768*, at 1–3 (1970).

68. ST CLAIR, *supra* note 45, at 106.

69. John Brewer, *Commercialization and Politics*, in *THE BIRTH OF A CONSUMER SOCIETY: THE COMMERCIALIZATION OF EIGHTEENTH-CENTURY ENGLAND* 205 (Neil McKendrick, John Brewer & John Harold Plumb eds., 1983).

but when the bubble burst, as in the South Sea case,<sup>70</sup> major liquidity crises ensued.<sup>71</sup> In such cases, tradesmen, shopkeepers and retailers would be hardest hit, because they found it most difficult to realize their assets.<sup>72</sup> In the days before high street banks, an economy based on credit depended on individual relationships of trust.<sup>73</sup> Those who could demonstrate such relationships were best served in such a financial atmosphere, and it was beneficial for others to be associated with them.<sup>74</sup> The congers created such relationships and thus brought advantages to their members as well as those dealing with them. Conger groupings also aided distribution of books, as each share-owner received a certain number of copies, which he could then sell himself, pass on to retailers, or exchange for the books of other retailers and other conger groups.<sup>75</sup>

One response of the book trade to changes in economic and social conditions was, then, to turn to greater levels of trade cooperation and the formation of ad hoc monopolies. Another response was to seek first legislative, and then judicial, confirmation of the booksellers' view that their rights to print their books, or shares of books, were perpetual, rather than limited to a maximum of twenty-eight years as the Statute of Anne suggested.<sup>76</sup> These efforts culminated in the well-known cases of *Millar v. Taylor*,<sup>77</sup> and *Donaldson v. Becket*,<sup>78</sup> with the House of Lords holding in the latter case that there was no perpetual common law copyright. The London booksellers' response to the reprint or pirate book trade has been well documented and analyzed elsewhere, in particular by Ronan Deazley,<sup>79</sup> so it will not be discussed in any further detail here. Instead, this Article will

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70. *Id.* at 209. Speculation in the South Sea Company led to an economic bubble that famously collapsed in 1720, causing financial ruin for many investors. *See, e.g.*, JOHN CARSWELL, *THE SOUTH SEA BUBBLE* (1960).

71. Brewer, *supra* note 69, at 205.

72. *Id.* at 209–11.

73. James Raven, *The Book Trades, in* BOOKS AND THEIR READERS IN EIGHTEENTH CENTURY ENGLAND: NEW ESSAYS 1, 10 (Isabel Rivers ed., 2001).

74. *Id.*

75. HODGSON & BLAGDEN, *supra* note 46, at 68, 71–72, 97.

76. An Act for the Encouragement of Learning (Statute of Anne), 1710, 8 Ann., c. 19, §§ 1, 11 (1710) (Gr. Brit.).

77. *Millar v. Taylor*, (1769) 98 Eng. Rep. 201 (K.B.).

78. *Donaldson v. Beckett*, [1774] 1 Eng. Rep. 837 (H.L.).

79. RONAN DEAZLEY, *ON THE ORIGIN OF THE RIGHT TO COPY: CHARTING THE MOVEMENT OF COPYRIGHT LAW IN THE EIGHTEENTH CENTURY (1695–1774)* (2004) (tracing the various cases brought before the courts of law and equity by the London booksellers seeking to establish that they held a perpetual copyright at common law and focusing on the period between the Statute of Anne and the House of Lords' finding in *Donaldson v. Becket* that no such common law copyright existed).

examine another area of the book trade that the Statute of Anne did not address: partial or altered copying of books. In so doing, this Article seeks to highlight another area in which the booksellers sought to shape the law in a way that would further their own interests.

#### IV. PARTIAL TAKING AND THE STATUTE OF ANNE

The Statute of Anne referred repeatedly to the “copy or copies” of books and to the “right and liberty of printing such book and books,” and set out penalties for those who might “print, reprint, or import, or cause to be printed, reprinted, or imported, any such book or books without the consent of the proprietor.”<sup>80</sup> However, it made no mention of those who might print or reprint only *part* of a book, or who might print it in a slightly altered form.

By the middle of the eighteenth century, a rule had emerged from the Court of Chancery stating that an abridgement of a book would not amount to a breach of the Statute.<sup>81</sup> In the nineteenth century, the courts developed this principle to hold that certain categories of use (such as fair quotation, criticism and review) would not be infringements of copyright.<sup>82</sup> But by the mid-nineteenth century, the abridgement rule was being subjected to sustained criticism by legal treatise writers<sup>83</sup> and others.<sup>84</sup> Such critics viewed the judgments finding an abridgement to be allowable to be wrong in law. Walter Copinger, for example, writes that “[t]he rule appears very unreasonable, and has been the subject of criticism by late writers.”<sup>85</sup> George Curtis says that the abridgement rule is “wrong in principle.”<sup>86</sup> Contemporary scholars have debated whether the Statute of Anne *ought* to have been interpreted by the courts to cover abridgements and other partial takings; if

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80. 8 Ann., c. 19, § 1.

81. *Gyles v. Barlow sub nom. Gyles v. Wilcox*, (1740) 26 Eng. Rep. 489; 27 Eng. Rep. 682; 22 Eng. Rep. 586 (Ch.).

82. For further discussion of these developments, see ISABELLA ALEXANDER, *COPYRIGHT LAW AND THE PUBLIC INTEREST IN THE NINETEENTH CENTURY* 155–233 (2010).

83. See WALTER COPINGER, *THE LAW OF COPYRIGHT, IN WORKS OF LITERATURE AND ART* 36 (1st ed., London, Stevens and Haynes 1870); GEORGE TICKNOR CURTIS, *A TREATISE ON THE LAW OF COPYRIGHT IN BOOKS, DRAMATIC AND MUSICAL COMPOSITIONS, LETTERS AND OTHER MANUSCRIPTS, ENGRAVINGS AND SCULPTURE, AS ENACTED AND ADMINISTERED IN ENGLAND AND AMERICA* 269–81 (London, Maxwell & Son 1847).

84. The dramatist, Charles Reade was critical of the abridgement rule. See CHARLES READE, *THE EIGHTH COMMANDMENT* 152 (Boston, Ticknor & Fields 1860), cited in Ronan Deazley, *The Statute of Anne and the Great Abridgement Swindle*, *HOUS. L. REV.* (forthcoming 2010).

85. COPINGER, *supra* note 83, at 36.

86. CURTIS, *supra* note 83, at vii.

so, then the judges are cast as the defenders of the interests of copyright users.<sup>87</sup> If, however, the Statute was intended to cover only reprints of entire works, then the judiciary can be seen as expanding what was only a very limited right by insisting that derivative works fall into a specific category in order to be exempted from the Statute's operation.<sup>88</sup>

In order to assess the Statute's intention regarding the inclusion of abridgements, Ronan Deazley points out that it is essential to examine contemporary attitudes of the book trade concerning abridgements.<sup>89</sup> The question that must be asked is whether abridgements were perceived as a significant problem by those with an interest in the matter (such as booksellers or book purchasers) or whether they were a normal part of publishing activity. David Vaver, for example, asserts that "[o]ld practices died hard. Even after the first Copyright Act of 1710, British publishers frequently abridged one another's works without thinking to ask for anyone's permission."<sup>90</sup> Unfortunately, the question of whether booksellers were indeed accustomed to making abridgements of works owned by other booksellers, either before or after the Statute of Anne, has not been extensively examined by book trade historians. One person who has done so is William St Clair, who asserts that the decades between 1600 and 1774 saw a clamp-down on derivative works such as abridgements, translations and anthologies.<sup>91</sup> Conversely, Deazley points out that there is little corroborating evidence for St Clair's claim, and considerable evidence that undermines it.<sup>92</sup>

The emphasis of this Article is slightly different: it focuses on the actions taken by leading members of the book trade when faced with the Statute's silence on the question of partial takings. The first strategy they employed was legislative reform; the second was litigation. Before turning to discuss these efforts, however, it is necessary to consider some of the same evidence examined by Deazley and St Clair in asking whether the leading members of

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87. See, e.g., WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* (2d ed. 1995); David Bradshaw, "Fair Dealing" as a Defence to Copyright Infringement in UK Law: An Historical Excursion from 1802 to the Clockwork Orange Case, 1993 DENNING L.J. 67 (1995); James L. Oakes, *Copyrights and Copyremedies: Unfair Use and Injunctions*, 18 HOFSTRA L. REV. 983 (1990); K. K. Puri, *Fair Dealing with Copyright Material in Australia and New Zealand*, 13 VICTORIA U. WELLINGTON L. REV. 277 (1983); David Vaver, *Abridgements and Abstracts: Copyright Implications*, 17 EUR. INTEL. PROP. REV. 225 (1995).

88. See Robert Burrell, *Reining in Copyright Law: Is Fair Use the Answer?*, 4 INTEL. PROP. Q. 361 (2001).

89. Deazley, *supra* note 84.

90. Vaver, *supra* note 87, at 225.

91. ST CLAIR, *supra* note 45, at 72.

92. Deazley, *supra* note 84, at 4.

the book trade *cared* about abridgement and other kinds of partial taking and, if so, what they did about it.

There is clearly some evidence in favor of St Clair's argument. The Stationers' Company and others were conscious that derivative works could have an adverse effect on the sales of the original version and there are several records of printers being fined for printing imitation and abridgements of books owned by the Company.<sup>93</sup> In 1631, Archbishop Laud refused a license to Robert Young to publish an abridgement of John Foxe's *Book of Martyrs* on the grounds that "abridgements, by their brevity and their cheapness, in short time work out the authors themselves."<sup>94</sup> Abridgements and other kinds of partial taking were forbidden by a 1678 Company ordinance, which forbade the printing of any book "or any part of any Book" without the consent of the owner.<sup>95</sup> In 1681, a second ordinance was passed which strengthened this prohibition.<sup>96</sup>

However, there is also considerable evidence that undermines St Clair's assertion that an effective regime controlling abridgements was "fully in place" by the 1630s.<sup>97</sup> In the first decades of the eighteenth century, such popular works as *The Pilgrim's Progress*, *Robinson Crusoe*, *Moll Flanders* and *Gulliver's Travels* were all published in abridged form, many times over.<sup>98</sup> Deazley provides further examples of abridgements published during the period without any apparent complaint.<sup>99</sup> A large part of the work of "garetteers," or hired writers, consisted of identifying the works that were or would become popular, and reproducing them in altered forms.<sup>100</sup> Richard Savage, an insolvent poet and friend of the author and lexicographer Samuel Johnson, described his career as one of Edmund Curl's hired writers as such: "Sometimes I was Mr. John Gay, at other times Burnet or Addison; I

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93. For example, on 9 May 1615 John Budge was fined for "printing a booke called the mirror of Matr, taken out of the booke of Martirs w<sup>ch</sup> belonge to the Company." WILLIAM A. JACKSON, RECORDS OF THE COURT OF THE STATIONERS' COMPANY 1602-1640, at 456 (1957).

94. Arnold Hunt, *Trade Patents*, in *THE BOOK TRADE AND ITS CUSTOMERS 1450-1900*, at 33 (Robin Myers et al. eds., 1997).

95. Any person who did so was penalized by being refused admittance as a Pensioner of the Society. 1 A TRANSCRIPT OF THE REGISTERS OF THE COMPANY OF STATIONERS OF LONDON, 1554-1640, at I16 (Edward Arber ed., London, privately printed 1875).

96. *Id.* at I23.

97. ST CLAIR, *supra* note 45, at 73; *see also* Deazley, *supra* note 84, at 5-6.

98. Pat Rogers, *Classics and Chapbooks*, in *BOOKS AND THEIR READERS IN EIGHTEENTH-CENTURY ENGLAND* 27 (Isabel Rivers ed., 1982).

99. Deazley, *supra* note 84, at 5-6.

100. 2 A.S. COLLINS, *AUTHORSHIP IN THE DAYS OF JOHNSON: BEING A STUDY OF THE RELATIONSHIP BETWEEN AUTHOR, PATRON, PUBLISHER AND THE PUBLIC 1726-1780*, at 26 (1927).

abridged histories and travels, translated from the French what they never wrote, and was expert in finding new titles for old books. I was the Plutarch of the notorious thief.”<sup>101</sup>

Deazley’s examination of the royal privileges, or licenses, granted at this time is also revealing. Although a license would not be granted for a book that had already received one, an enterprising way of circumventing the controls of the Stationers’ Company was to apply for a license for an abridgement of an existing book.<sup>102</sup> Some licenses were expressly drafted to cover the right to print abridgements of the works applied for.<sup>103</sup> However, by the reign of Queen Anne, less than one third of royal licenses granted did so.<sup>104</sup>

By the early eighteenth century, a market for abridgements both existed and was being supplied. Pat Rogers observes that abridgements of books such as *Robinson Crusoe* and *Moll Flanders* enjoyed “real currency at the lower end of the market.”<sup>105</sup> The market for printed material was also changing through the growing activity in producing new types of printed works for new types of markets. Literary periodicals, such as the *Spectator* and the *Tatler* had popularized the periodical essay, and were soon joined in the market by magazines that incorporated news of the day, literature and poetry.<sup>106</sup> Although such magazines were not printed in large editions, their circulation and readership were far larger than the edition size suggested, due to the popularity of coffee houses where a single issue might find many readers.<sup>107</sup> Amongst the magazines and newspapers of the eighteenth century, the popular miscellany format required a constant stream of new material which was frequently reprinted from other serial publications or extracted from

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101. *Id.*

102. For example, in 1624 Gilbert Diglen was granted a twenty-one year patent for an abridgement of Camden’s *Britannia*. See Hunt, *supra* note 94, at 33.

103. For example on May 19, 1607 a patent was granted to Thomas Wilson and Percival Golding to print the “manie works of great volume and importance” translated by Arthur Golding and Thomas Wilson, together with any other works which Wilson might in future translate, and any abridgements of the said works. Hunt, *supra* note 94, at 42–44, 47.

104. Deazley, *supra* note 84, at 12. Of all the privileges granted by Anne, only seven (less than one third) specifically prohibited printing and sale of variant forms of the book in question.

105. Rogers, *supra* note 98, at 29.

106. James Tierney, *Periodicals and the Trade 1695–1780*, in 5 THE CAMBRIDGE HISTORY OF THE BOOK IN BRITAIN 1695–1830, at 479, 485–86 (Michael F. Suarez, S.J. & Michael L. Tuner eds., 2009).

107. RICHARD D. ALTICK, THE ENGLISH COMMON READER: A SOCIAL HISTORY OF THE MASS READING PUBLIC, 1800–1900, at 47 (1957).

novels and other popular works.<sup>108</sup> Books issued in parts on a weekly or monthly basis made large works more affordable and accessible. Newspaper circulation was also increasing. The first successful daily newspaper, *The Daily Courant*, appeared in 1702, and was soon followed by other papers. Another important agent of change was the circulating library. London had its first circulating library in 1740.<sup>109</sup> In the following decades, the number of such establishments rapidly increased, suggesting the emergence of a growing class of new readers.<sup>110</sup>

It seems likely that the emergence of new markets for different and cheaper literary materials increased pressure on the booksellers to clamp down on derivative works if they wished to retain their historic control over the trade. The leading booksellers of the day were not always averse to abridgements—if they were the ones producing them. Pat Rogers points out that the first abridgement of *Robinson Crusoe* that included all three volumes in a single book was sold by Bettesworth, Brotherton, Meadows and Midwinter, all of whom were important members of the trade.<sup>111</sup> Nonetheless, it is apparent that not all members of the book trade considered such practices to be inevitable or natural. Daniel Defoe himself complained of the harm done by the abridgements of “mercenary Booksellers.”<sup>112</sup> In 1719, when Thomas Cox had published an abridgement of *Robinson Crusoe*, Defoe’s publisher, William Taylor, printed a notice in the *St James Gazette* threatening legal action. He also included an advertisement in *The Farther Adventures of Robinson Crusoe*, warning against “pretended Abridgements.”<sup>113</sup> The suit does not appear to have progressed far (if it was ever commenced), as there is no further evidence of it. Furthermore, the flow of abridgements was unstemmed.

The leading booksellers were clearly concerned with the prospect of free-riding activity that abridgements and partial copying made possible. In the 1730s, these booksellers included clauses seeking to address the issues of partial taking, abridgements, and translations while lobbying for new

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108. See ROBERT D. MAYO, *THE ENGLISH NOVEL IN THE MAGAZINES 1740–1815*, at 11–69, 159–272 (1962).

109. CHARLOTTE A. STEWART-MURPHY, *A HISTORY OF BRITISH CIRCULATING LIBRARIES* 14 (1992).

110. IAN WAIT, *THE RISE OF THE NOVEL: STUDIES IN DEFOE, RICHARDSON AND FIELDING* 44 (1963).

111. Rogers, *supra* note 98, at 32.

112. Deazley, *supra* note 84, at 7 (citing DANIEL DEFOE, *AN ESSAY ON THE REGULATION OF THE PRESS* 27 (London, 1704)).

113. Deazley, *supra* note 84, at 8 (citing DANIEL DEFOE, *THE FARTHER ADVENTURES OF ROBINSON CRUSOE* (Taylor, 1719)).

legislation to extend the term of the rights given under the Statute of Anne. The resulting Bill of 1737 addressed both partial copying and altered copying problems<sup>114</sup> Partial taking was included in the definition of the right as applying to “any Book, Pamphlet, or Writing or any *Sheet* of such Book, Pamphlet, or Writing.”<sup>115</sup> A second clause prohibited any person from printing an abridgement or translation of a book within three years of its publication without the consent of the author or proprietor.<sup>116</sup> This clause might suggest that the drafter of the Bill considered that abridgements and translations were currently permitted by law, but that they should be prevented for long enough to give the author or owner some lead time in the market. This, in turn, indicates they were perceived as economically damaging to the booksellers’ interests. However, it is interesting to note that the draftsman did not go so far as to ban abridgements completely. The bill, however, failed to pass through the House of Lords.<sup>117</sup>

When these legislative efforts went nowhere, the booksellers turned to the Court of Chancery.<sup>118</sup> The two cases on which this Article focuses were brought before the Lord Chancellor, Lord Hardwicke, on the same day, August 7, 1739, and used the same counsel.<sup>119</sup> Both plaintiffs were groups of powerful conger member booksellers and the defendants were trade outsiders. These cases, and those following them, illustrate that litigation was a tool of the London booksellers that ultimately failed to rid the market of derivative works in the short-term, but perhaps successfully limited the scope of allowable derivative works in the long-term.

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114. GR. BRIT. PARLIAMENT, A BILL FOR THE BETTER ENCOURAGEMENT OF LEARNING BY THE MORE EFFECTUAL SECURING THE COPIES OF PRINTED BOOKS TO THE AUTHOR OR PURCHASERS OF SUCH COPIES, DURING THE TIMES THEREIN TO BE MENTION (1737) (on file with British Library and House of Lords Parchment Collection).

115. *Id.* (emphasis in original).

116. *Id.*

117. DEAZLEY, *supra* note 44, at 107–08. Deazley suggests that the failure of the bill might be due to the fact that the changes introduced by the House of Commons meant that it lost the support of the booksellers. *Id.*

118. Even before the final lapse of the Licensing Act and the decline in the power of the Stationers’ Company, the Court of Chancery had sometimes been used as an alternative venue to the Court of Assistants for dispute resolution. For a full discussion of the fora in which copyright issues were adjudicated prior to the Statute of Anne, see H. Tomás Gómez-Arostegui, *What History Teaches Us About Copyright Injunctions and the Inadequate-Remedy-at-Law Requirement*, 81 S. CAL. L. REV. 1197 (2008).

119. *Austen v. Cave*, (1739) 22 Eng. Rep. 440; C11/1552/3, m.1; C33/371, f.493<sup>r</sup> (Ch.); *Hitch v. Langley*, (1739) 22 Eng. Rep. 440; C11/1559/23, m.1; C33/371, f.493<sup>r</sup> (Ch.).

## V. THE FIRST CASES

The first defendant was Edward Cave, proprietor of the ground-breaking *Gentleman's Magazine*. Although the *Gentleman's Magazine* operated in the well-worn footsteps of the traditional historical and literary miscellanies, it was the first that sought to cover current events. By claiming it was only reprinting the news, it managed to avoid the stamp tax, giving it a significant economic advantage.<sup>120</sup> It drew its material from a broad range of sources. Despite Cave's claims to be the father of the British miscellany, the *Gentleman's Magazine* was not the only serial publication to publish extracts and pieces already published in other magazines, journals, and books.<sup>121</sup> It was, however, far and away the most successful and popular of such publications.<sup>122</sup>

Cave's offense was printing extracts from a book of four sermons by Joseph Trapp, entitled, *The Nature, Folly and Danger of Being Righteous Overmuch*.<sup>123</sup> The sermons attacked the Methodist leader George Whitefield and sparked a prolonged and bitter exchange which received considerable press attention, as well as the publication of further responses from both the Methodist and anti-Methodist camps.<sup>124</sup> It is clear why Cave would wish to publish such a newsworthy item, but he found himself the subject of a suit brought by Stephen Austen<sup>125</sup> and Lawton Gilliver,<sup>126</sup> both of whom were conger members,<sup>127</sup> and John Clark.<sup>128</sup> It is noteworthy that Clark was one of the proprietors of Cave's closest rival, *The London Magazine*, which had been set up specifically to compete with the *Gentleman's Magazine* and was itself

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120. MAYO, *supra* note 108, at 159.

121. *Id.* at 209. All of these miscellanies published "reviews" and epitomes of the latest works of fiction and other books, which sometimes increased in size to become abridgements, as well as extracts. *Id.* at 170–71, 235–53

122. *Id.* at 162, 168–69.

123. Austen v. Cave, (1739) C11/1552/3, m.1 (Ch.).

124. *Id.* It is of coincidental interest to note that Trapp was also the trial manager for Dr. Sacheverell, discussed in H. Tomás Gómez-Arostegui's article in this volume. H. Tomás Gómez-Arostegui, *The Untold Story of the First Copyright Suit Under the Statute of Anne*, 25 BERKELEY TECH. L.J. 1247 (2010).

125. Stephen Austen was a London bookseller who dealt mainly in law books and theology. HENRY ROBERT PLOMER, A DICTIONARY OF PRINTERS AND BOOKSELLERS WHO WERE AT WORK IN ENGLAND, SCOTLAND AND IRELAND FROM 1726 TO 1775, at 10 (1932).

126. Lawton Gilliver was a London bookseller, best known as being one of Alexander Pope's publishers. *Id.* at 102–03.

127. HODGSON & BLAGDEN, *supra* note 45, app. 14, at 215.

128. John Clark was a London bookseller. PLOMER, *supra* note 125, at 52.

extensively involved in copying extracts and abridgements from other magazines, newspapers and books.<sup>129</sup>

The defendant in the second case was Batty Langley, a gardener by profession who turned to architectural publishing in the 1730s.<sup>130</sup> Langley was, like William Hogarth, a vociferous critic of the popular Palladian style of architecture supported by Burlington and practiced by Inigo Jones and others.<sup>131</sup> Langley's printing operation involved drawing on his own vast collection of architectural books and prints, both old and new, to churn out books issued in parts or whole to carpenters, joiners, glaziers, masons, cabinet-makers and other members of the building trades, who eagerly snapped them up.<sup>132</sup> One of his books, *The Builder's Jewel*, ran to fourteen editions, including one in America.<sup>133</sup> Langley, like Cave, had clearly tapped a new readership market. But, he too had to answer a complaint of having printed engravings copied from two books by the prominent architect James Gibbs, another target of Langley's harsh criticism in the *Grub-Street Journal*.<sup>134</sup>

Gibbs had originally published his *Book of Architecture* in 1728 by subscription in order to advertise his own architectural work.<sup>135</sup> He obtained a royal license for fourteen years on May 19, 1732.<sup>136</sup> The book was hugely successful, earning him £1,500. His second book, *Rules for Drawing the Several Parts of Architecture*, was equally popular. In 1738, he sold the right to print both books and the plates therein to the publishers Arthur Bettesworth,<sup>137</sup> Charles Hitch,<sup>138</sup> William Innys,<sup>139</sup> Richard Manby,<sup>140</sup> John Knapton and Paul

129. Dr. Johnson described the *London Magazine* as "supported by a powerful association of Booksellers, and circulated with all the cunning of the trade." Samuel Johnson, *Edward Cave*, in *BIOGRAPHIA BRITANNICA* 313, 314–15 (Andrew Kippis ed., 2d ed. 1784).

130. EILEEN HARRIS WITH NICHOLAS SAVAGE, *BRITISH ARCHITECTURAL BOOKS AND WRITERS 1556–1785*, at 264 (1990).

131. *Id.* at 265.

132. *Id.* at 268.

133. See Eileen Harris, *Batty Langley: A Tutor to Freemasons (1696–1751)*, 119 *BURLINGTON MAG.* 327, 335 (1977).

134. Terry Friedman, *Gibbs [Gibb], James (1682–1754)*, in *OXFORD DICTIONARY OF NATIONAL BIOGRAPHY* (Oxford Univ. Press 2008) (2004), available at <http://www.oxforddnb.com/view/article/10604>.

135. HARRIS WITH SAVAGE, *supra* note 130, at 209.

136. See Shef Rogers, *The Use of Royal Licenses for Printing in England, 1695–1760: A Bibliography*, 1 *LIBR.* 133, 163 (2000) (citing SP44/363, 372–74).

137. Arthur Bettesworth was a London bookseller who specialised in divinity publications. His daughter married Charles Hitch. HENRY ROBERT PLOMER, *A DICTIONARY OF PRINTERS AND BOOKSELLERS WHO WERE AT WORK IN ENGLAND, SCOTLAND AND IRELAND FROM 1688 TO 1725*, at 34 (1922).

138. Charles Hitch was a London bookseller who was Master of the Stationers' Company in 1758. PLOMER, *supra* note 125, at 127.

Knapton<sup>141</sup> for £400.<sup>142</sup> These men were all leading booksellers and conger members and, with the exception of Bettesworth who died in 1739, were the plaintiffs in the suit against Langley.<sup>143</sup>

This was not the first case in Chancery involving Gibbs' books on architecture. In 1733, Gibbs himself brought a suit against Benjamin Cole who had given notice of his intention to print a book that Gibbs alleged would be a copy, abridgement or abstract of his *Rules for Drawing*.<sup>144</sup> Cole, who was an engraver by trade,<sup>145</sup> denied his book would be a copy, abridgement or abstract, and asserted that it was a different work, compiled from books other than Gibbs'.<sup>146</sup> After hearing affidavits, the injunction initially granted to Gibbs was made perpetual, and Cole was ordered to pay the plaintiff's costs.<sup>147</sup> Lord Chancellor Talbot held that "a small variation of the invention would not entitle the defendant to break in upon the patent," and that it was not material that some whole paragraphs of Gibbs' book had been taken from other authors.<sup>148</sup> Gibbs based his own claim on both his royal license and the Statute of Anne. Cole also argued that Gibbs had not fulfilled the Statute's conditions of registration and delivery.<sup>149</sup>

The case against Langley, however, proceeded differently. Langley's Answer engaged more directly with the scope of the rights granted in 1710. Both Langley and Cave expressed surprise in their Answers to the complaints, contending that such practices as theirs had never been considered to be a breach of the Statute of Anne. Cave began by entering a

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139. William Innys was a London bookseller who was Master of the Stationers' Company in 1747–48. *Id.* at 137.

140. Richard Manby was a London bookseller who was Master of the Stationers' Company in 1765. *Id.* at 161.

141. John Knapton and Paul Knapton were brothers who were London booksellers. John Knapton was Master of the Stationers' Company in 1742, 1743 and 1745. *Id.* at 148.

142. HARRIS WITH SAVAGE, *supra* note 130, at 211.

143. HODGSON & BLAGDEN, *supra* note 45, app. 13–14. Although Manby is not listed as a member of a specific conger, he was in partnership with Innys. PLOMER, *supra* note 125, at 161.

144. *Gibbs v. Cole*, (1734) 24 Eng. Rep. 1051; C11/261/60 (Ch.). I am very grateful to H. Tomás Gómez-Arostegui for both alerting me to the existence of this case through his database of early copyright litigation, available at <http://oldcopyrightcases.org>, and for providing images of the proceedings and the royal privilege.

145. It is noteworthy that Cole, like Langley, was involved in freemasonry, being the official engraver for the Grand Lodge of Freemasons between 1745 and 1767. *See Gibbs v. Cole*, (1734) C 11/261/60, m.1 (Ch.); PLOMER, *supra* note 125, at 56.

146. *Gibbs v. Cole*, (1734) C11/261/60, m.1 (Ch.).

147. *Gibbs v. Cole*, (1734) C33/365 f.222<sup>r-v</sup> (Ch.).

148. *Gibbs v. Cole*, (1734) 24 Eng. Rep. 1051, 1052 (Ch.).

149. *Gibbs v. Cole*, (1734) C11/261/60, m.1 (Ch.).

demurrer that challenged the complainants' title.<sup>150</sup> He then admitted that he had copied but said he had condensed thirty pages out of sixty-nine into three and one half pages and, furthermore, that he had been carrying out similar exercises for years without complaint.<sup>151</sup> He said that he did so "not with an Intent to prejudice the Proprietors of such Books or Pamphlets in the Sale of them on the Contrary this Defendant believes his Publishing such Extracts have many times if not mostly been agreeable to the Proprietors of the Books and the same hath never been Complained of by them as being contrary to the Said Act of Parliament or detrimental to them."<sup>152</sup> He also appealed to the intention of the Legislature, stating that he humbly:

[A]pprehends it was not in the meaning or intention of the said Act of Parliament to restrain any Person from Extracting any Passage or Passages out of the Works of any Author and submits it to the Judgment of this Honourable Court whether such a Construction would not be greatly prejudicial to the spreading of knowledge and learning.<sup>153</sup>

Langley also began by challenging the complainants' title, alleging that Gibbs was not the author at all, but that it was his draughtsman, John Borlack.<sup>154</sup> Like Cave, he emphasized the smallness of his copying, claiming he had taken only fourteen prints from Gibbs' book, which made up fewer than four pages of his own book.<sup>155</sup> Langley likewise claimed that his object was the education of builders, and said he had published "with a view as well to the improvement of builders and their workmen as to the Adorning this Kingdom in General with Buildings and ornaments truly beautiful and grand."<sup>156</sup> He also alleged that works such as his were not in breach of the Statute of Anne "most Especially as Compiling all Kinds of Learning have been Deemed Lawfull and Advantagious to the Community."<sup>157</sup>

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150. *Austen v. Cave*, (1739) C11/1552/3, m.2 (Ch.).

151. *Id.*

152. *Id.*

153. *Id.*

154. *Hitch v. Langley*, (1739) C11/1559/23, m.2 (Ch.).

155. *Id.*

156. *Hitch v. Langley*, (1739) C11/1559/23, m.1 (Ch.).

157. *Id.* Both Cave and Langley were passionate about their publishing ventures. The author and lexicographer, Samuel Johnson, who would become the century's best known man of letters, and whose talent Cave had spotted early, wrote frequently for the *Magazine*. He said of Cave that "his resolution and perseverance were very uncommon; in whatever he undertook neither expence [sic] nor fatigue were able to repress him." Johnson, *supra* note 129, at 315. He further noted that Cave "continued to improve his magazine and had the satisfaction of seeing its success proportionate to his diligence." *Id.* In Langley's case, his financial incentives were bolstered by his commitment to freemasonry and his devotion to the fraternity gave rise to his other activities, such as providing lessons in drawing, geometry,

Cave was unsuccessful in his Answer and the plaintiffs were granted their injunction prohibiting the printing of the book “or any part thereof.”<sup>158</sup> We have only a scrap of reasoning from Lord Hardwicke, which quotes him as saying “[i]t is not material what Title you give the Book, nor whether you print it all at once or not.”<sup>159</sup> The meaning of this is not entirely clear, but it seems to respond to the plaintiffs’ claim that Cave would print the rest of the book in future editions of the *Magazine*. Thus, it does not address the reality of the situation, which was that Cave had not printed the entire work and, moreover was extremely unlikely to do so, given the nature of the *Magazine*. Nor does it appear that the injunction had any broader effect on Cave or any other of the miscellany magazines, which continued their practice of reprinting extracts and abridgements from a wide variety of printed sources.<sup>160</sup>

Langley was appointed a counsel in forma pauperis,<sup>161</sup> but his case proceeded no further than his Answer. As his books ran to many further editions, it is possible that he reached some kind of agreement with his accusers. However, the booksellers may have taken other measures to compete with Langley on his own terms. From May 1738 they had been issuing *Rules for Drawing* in twenty-one weekly numbers at one shilling each.<sup>162</sup> A second edition of the *Book of Architecture* was printed in 1739 at the price of three guineas—one guinea lower than the previous price.<sup>163</sup>

No legal principle, then, clearly emerges from these early cases on partial taking. However, one important consequence flowed from Cave’s unsuccessful case, and this was that his cause was taken up by Samuel Johnson.<sup>164</sup> Johnson characterized Cave’s publication as an abridgement rather than an extract, and argued such abridgements should be allowed.<sup>165</sup> Johnson claimed that, once sold, copies of the book became the property of the buyer “who purchases with the book the right of making such use of it as

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architecture and garden design, as well as inspiring his self-appointment as spokesman for the Crafts. Harris, *supra* note 133, at 329.

158. *Austen v. Cave*, (1739) C33/371, f.493<sup>r</sup> (Ch.).

159. *Austen v. Cave*, (1739) 22 Eng. Rep. 440 (Ch.).

160. See MAYO, *supra* note 108, at 159–272.

161. *Hitch v. Langley*, (1739) C33/371, f.541<sup>v</sup> (Ch.).

162. HARRIS WITH SAVAGE, *supra* note 130, at 211.

163. *Id.*

164. Samuel Johnson, *Considerations [by the late Dr. Samuel Johnson] on the Case of Dr. T[rapp]’s Sermons*, GENTLEMAN’S MAG., July 1787, at 555. Although it does not appear to have been published until 1787, the editor of the magazine at the time, John Nichols, assured the reader that the article was written upon the occasion of the law suit, as “on all difficult occasions, Johnson was Cave’s oracle.” *Id.* at 555.

165. *Id.*

he shall think most convenient, either for his own improvement or amusement, or the benefit and entertainment of mankind.”<sup>166</sup> Johnson concluded that “every book, when it falls into the hands of the reader, is liable to be examined, confuted, censured, translated and *abridged*; any of which may destroy the credit of the author, or hinder the sale of the book.”<sup>167</sup>

Johnson argued that the existence of countless abridgements, and the lack of complaint prior to *Austen v. Cave*, showed that abridgements had been considered legal. As well as trade custom, reason dictated that abridgements should be allowed. The aim of an abridgement was, “to benefit mankind by facilitating the attainment of knowledge, and by contracting arguments, relations, or descriptions, into a narrow compass; to convey instruction in the easiest method, without fatiguing the attention, burdening the memory, or impairing the health of the student.”<sup>168</sup> He added that although abridgements may diminish the original author’s value and the profits of the publisher, these considerations should give way to the “advantage received by mankind from the easier propagation of knowledge.”<sup>169</sup>

Johnson’s eloquent defense was of little use to Cave, but it may have influenced subsequent defendants in emphasizing that their works were abridgements.<sup>170</sup> The first to do so was James Hodges, against whom the London printer and James Read brought a suit in April 1740 for printing a book called *The Life and Reign of Czar Peter the Great Emperor of all Russia and Father of his Country*. Read claimed this book was “almost wholly taken and copied” from his own book, entitled *The History of the Life of Peter the First Emperor of Russia*.<sup>171</sup> Unlike the previous two cases, which involved leading members of the trade taking on outsiders, both Read and Hodges were established members of the book trade. Read had been made free of the Company in 1701 and was best known for his publication, the long-running *Read’s Weekly Journal*.<sup>172</sup> Hodges was a bookseller who had made his fortune in chapbooks. He was one of the Court Assistants to the Stationers’ Company,

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166. *Id.*

167. *Id.* at 556 (emphasis added).

168. *Id.*

169. *Id.*

170. However, this argument depends on the extent to which Johnson’s article was circulated at the time of its writing.

171. *Read v. Hodges*, (1740) C11/538/36, m.1; C33/374 f.153<sup>v</sup>, f.250<sup>v</sup>, f.255<sup>v</sup>, ff.275<sup>v</sup>–276<sup>r</sup> (Ch.).

172. MCKENZIE, *supra* note 49, at 378; Michael Treadwell, *London Printers and Printing Houses in 1705*, 7 PUB. HIST. 5, 35–36 (1980).

and was knighted in 1758.<sup>173</sup> The book had been sold to many well-known London booksellers and may have been a conger book.<sup>174</sup>

Read claimed that Hodges' aim was to undercut his market by selling the work more cheaply.<sup>175</sup> Hodges countered by claiming that his book was an abridgement, that only a small amount had been taken, and that not one page appeared without variation. Hodges also sought to separate the parts of the work that might belong to Read from that to which he could not lay claim, pointing out that much of the book consisted of tracts, manifestos and public papers which had been in print before Read's book was compiled.<sup>176</sup> Hodges claimed that his book targeted a different audience, "of more ordinary and mean readers."<sup>177</sup> Finally, he argued that his book was not a piracy because "it is not the same as the Plaintiff's book on History but it is of a different Nature and humbly insists that it is in the Nature of an Abridgement."<sup>178</sup> The case was referred to a Master, who considered Hodge's answer sufficient, and the initial injunction was dissolved. Read, however, immediately sought a further injunction from Chancery, disputing Hodge's claim that his book was an abridgement. This injunction was granted and continued until the hearing of the cause.<sup>179</sup> The case continued through several more phases, before finally coming to rest in Read's favor.<sup>180</sup>

The following year, a similar case came before Lord Hardwicke LC.<sup>181</sup> Fletcher Gyles and two other booksellers sought an injunction in respect of Sir Matthew Hale's *Pleas of the Crown, or Historia Placitorum Coronae*, against Wilcox (a bookseller), Nutt (a printer), and Barlow (the alleged compiler). Barlow's counsel conceded that the plaintiff would be entitled to claim

173. 3 JOHN NICHOLS, LITERARY ANECDOTES OF THE EIGHTEENTH CENTURY 406 (London, Nichols, Son and Bentley 1812).

174. Hodges stated in his answer that he sold the book for two shillings six pence to those who bought a number of copies at once, and three shillings for retail. Those who had bought the book included Charles Hitch, Thomas Longman, John Brotherton, the Knaptons and Stephen Austen. *Read v. Hodges*, (1740) C11/538/36, m.1 (Ch.).

175. *Id.*

176. *Read v. Hodges*, (1740) C11/538/36, m.2 (Ch.).

177. *Id.*

178. *Id.*

179. *Read v. Hodges*, (1740) C12/1796/41; C33/374 f.299<sup>r-v</sup> (Ch.).

180. Hodges was served with a subpoena, but Read died before the matter could progress further, and the cause abated. Read's widow, Mary, having been granted probate, then brought a bill to Chancery requesting that the injunction be revived, pending hearing of the cause. *Read v. Hodges*, (1740) C12/1796/41 (Ch.). When Hodges made no answer, the Master of the Rolls revived the injunction, and the matter does not appear to have been continued. *Read v. Hodges*, (1740) C33/374/379 (Ch.).

181. *Gyles v. Wilcox*, (1740) C33/375 ff.274<sup>v</sup>-275<sup>r</sup>; 26 Eng. Rep. 489; 27 Eng. Rep. 682; 22 Eng. Rep. 586 (Ch.).

property in Hale's book if he had made a "transcript" of the whole or "great part" of it.<sup>182</sup> However, Barlow claimed that he had made an abridgement that contained new material.<sup>183</sup> Wilcox also claimed that the book, in which the French and Latin quotations were translated into English, was an abridgement, stating: "[t]he Defendant never understood such Abridgements or Translations were within the words and meaning of the Act or were understood or construed to be."<sup>184</sup> It was in this case that Lord Hardwicke enunciated the principle that an abridgement was not a breach of the Statute of Anne rights.<sup>185</sup> The Lord Chancellor stated "where the second Book has been an Abridgement of the former, it has been understood not to be the same Book, and therefore to be out of the Act."<sup>186</sup>

Therefore, the practice of partial taking and abridgement continued, and objections continued to be made. In 1743, Cave was again the defendant in litigation when Francis Cogan sought an injunction against him for printing parts of a book that was currently causing a scandal in society.<sup>187</sup> Cave claimed he had published an abridgement and the injunction was dissolved.<sup>188</sup> Cave's Answer echoed the claims of Samuel Johnson's polemic, arguing that:

as he is the Author and Composer of the said Abridgment the same is no Injury to the Complainant's Title if any he had to the said Book and that he this Defendant hath a Right to print and

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182. *Gyles v. Wilcox*, (1740) C33/375 f.274<sup>v</sup> (Ch.).

183. *Id.*

184. *Gyles v. Wilcox*, (1740) C33/375 ff.274<sup>v</sup>–275<sup>v</sup> (Ch.).

185. *Gyles v. Wilcox*, (1740) 26 Eng. Rep. 489, 490; 27 Eng. Rep. 682, 682 (Ch.).

186. *Gyles v. Wilcox*, (1740) 27 Eng. Rep. 682, 682 (Ch.).

187. *Cogan v. Cave*, (1743) C12/2204/24 (Ch.). The book told the sensationalized story of James Annesley, kidnapped by his uncle and sent to America in order to inherit his peerage. Annesley returned to claim his peerage, but died before the case was resolved. JAMES ANNESLEY, *MEMOIRS OF AN UNFORTUNATE YOUNG NOBLEMAN* (London, printed for J. Freeman 1743). The book was sometimes attributed to James Annesley as the author, but if Cogan is correct in his Complaint, the actual author was Eliza Haywood, an actress and prolific author of scandalous memoirs, as well as novels and periodicals. *Cogan v. Cave*, (1743) C33/2204, m.1 (Ch.). However, since J. Freeman is clearly a pseudonym, it seems that neither Cogan nor Haywood was prepared to put their names to the edition. Cave argued in his Answer that he could not have been expected to be aware of copyright claims in the absence of correct authorial or printing attribution and noted that the book had not been entered at Stationer's Hall. *Id.* at m.2. In the absence of a reasoned decision, it is not possible to know for certain whether the injunction was dissolved for this reason, or because the abridgement argument persuaded the court.

188. *Cogan v. Cave*, (1743) C33/379 f.547<sup>r</sup> (Ch.); *see also* *Tonson v. Walker*, (1752) 36 Eng. Rep. 1017, 1019 (Ch.).

publish the said Abridgment without being accountable to or hindered by the Complainant.<sup>189</sup>

In 1759, when Samuel Johnson's *The Idler* had been appearing for several months in the *Universal Chronicle*, the publishers of that publication lost patience and inserted a notice stating:

The Proprietors of this Paper having found their Essays, entitled *The Idler*, are inserted in the News-Papers and Magazines with so little Regard to Justice or Decency, that this Chronicle, in which they first appear, is not always mentioned, think it necessary to declare to the Publishers of those Collections, that however patiently they have hitherto endured these Injuries, made yet more Injurious by Contempt, they have determined to endure them no longer.<sup>190</sup>

*The Idler's* publishers threatened to start seizing copies of the offending publications, reprinting them in whole, selling them, and using the profits to support "Penitent Prostitutes."<sup>191</sup>

Two years later, Samuel Johnson was again the victim of abridgement by another serial publication, the *Grand Magazine of Magazines*. A suit was brought by Dodsley, assignee of his copyright against the magazine's publisher Kinnersley for printing extracts from *Rasselas, Prince of Abyssinia, a Tale*.<sup>192</sup> Jacob Tonson and two other booksellers presented evidence that the sale of the book had been prejudiced by its appearing in the magazine, while the defendant argued that it was usual in the trade to print extracts of new books in magazines without asking permission of the authors.<sup>193</sup> He also pointed out that the plaintiffs had published a larger extract of the same book in the *Annual Register* and the *London Chronicle*. The Master of the Rolls, Sir Thomas Clarke, took heed of this evidence. He observed that "[t]he Court must take notice of the springs flowing from trade; and though they cannot regard customs of the trade as binding, yet will consider the consequences of them."<sup>194</sup> He considered it material that the plaintiffs had published an abstract and refused the injunction.

It appears, then, that if we were to characterize the London booksellers as setting out to rid the market of derivative works like abridgements and the monthly miscellanies by bringing selected cases before the Court of

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189. *Cogan v. Cave*, (1743) C12/2204/24, m.2 (Ch.).

190. MAYO, *supra* note 108, at 398 n.1.

191. *Id.* at 399 n.1.

192. *Dodsley v. Kinnersley*, (1761) 27 Eng. Rep. 270 (Ch.).

193. *Id.*

194. *Id.* at 271.

Chancery, the London booksellers clearly failed in such an objective. They were, however, frequently successful in obtaining interim injunctions that applied not just to reprinting an entire book, but also to printing “any part thereof.”<sup>195</sup> While the specific category of abridgement may have been acceptable, the booksellers did manage to extend the Statute of Anne’s prohibition on printing and reprinting to cover partial reprinting in other cases. We can therefore view Chancery litigation as one of a range of tools that the booksellers employed in their endeavors to drive their rivals from the market, or, at the very least, to make it more expensive for them to operate. The leading London booksellers wished to partake in the new opportunities offered by the new markets that were opening up, but they were not always the first to identify them. While they may not have succeeded in exercising complete control over the market for derivative works in the short term, their success in limiting the kinds of permissible derivative uses of books may appear over a longer time frame. The cases brought by the booksellers during the mid-eighteenth century can be seen as beginning the long process of leading the courts to develop an approach to infringement that went beyond the literal meaning of the Statute of Anne, and required defendants not just to prove that they were not reprinting the entire book, but that their work fitted a particular category of use.<sup>196</sup>

## VI. CONCLUSION

Having given a very small snapshot of copyright law at a particular point in the early eighteenth century, one might well be tempted to quote, if somewhat tritely, “the past is a foreign country: they do things differently there.”<sup>197</sup> That is of course quite true. But while none of us would feel at home in the early eighteenth century, certain similar conditions as well as social and economic pressures appear very familiar. Numerous commentators have observed the present-day tendency of copyright owners to join together and use both litigation and legislative lobbying to alter copyright laws in ways that favor their own interests.<sup>198</sup> Similar tactics can be identified in the years immediately before and after the passing of the Statute of Anne. Today it may be less about social and economic changes than

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195. *See* *Walthoe v. Walker*, (1736) C33/368 f.127<sup>r</sup> (Ch.); *Austen v. Cave*, (1739) C33/371 f.493<sup>r</sup> (Ch.); *Hitch v. Langley*, (1739) C33/371 f.493<sup>r</sup> (Ch.); *Cogan v. Cave*, (1743) C33/379 f.485<sup>v</sup> (Ch.).

196. *See also* Burrell, *supra* note 88; ALEXANDER, *supra* note 82, at 155–233.

197. L.P. HARTLEY, *THE GO-BETWEEN* 1 (1953).

198. *See, e.g.*, PATRY, *supra* note 7; *see also* PETER DRAHOS WITH JOHN BRAITHWAITE, *INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY?* (2002); LITMAN, *supra* note 8.

technological advancement that causes copyright owners to feel under pressure. However, their responses are the same. And it is not just the film and music industries that are under threat, but also traditional print publishing—as is evident in the opposition of some book publishers to Google Books.<sup>199</sup>

As noted at the start of this article, the United Kingdom Parliament recently enacted the Digital Economy Act which provides for the obligation of policing copyright infringement to be placed upon internet service providers.<sup>200</sup> The bill was subject to considerable discussion in the House of Lords, before being hastily pushed through the House of Commons in the pre-election “wash-up.”<sup>201</sup> Some of the discussion in the Lords focussed on what it was that the Government was seeking to achieve by such legislation. One exchange involved the complaints regarding downloading of the recently-released blockbuster, *Avatar*. To quote Lord Lucas, a Tory peer, is instructive:

My Lords, I suspect that we are not going to agree on “Avatar.” It seems to me that the industry is being peculiarly stupid about it—it got 300,000 free advertisements. “Avatar” is something that you cannot consume sensibly on a small screen: you need the big-screen experience to appreciate all the work that they have put into it. The immediate consumption of it created an enormous demand for going to the cinema, which has benefited the film enormously. That is the fundament of this—we must get the industry to see this as *an opportunity and not as a threat*.

We must get the industry to be in there selling these downloads. If the industry had been in there selling at a dollar a time, it would be better off for it and it would still get the advertising. Its refusal to deal with the way that the world has moved on and with what technology makes possible, and its attempt to stick to old ways of doing things and to the idea that you can release a film in the United States today and wait six months to release it in the UK, is a *looking-backwards attitude* which we should not support through legislation.<sup>202</sup>

The point this Article has sought to make is that “the copyright industries,” whether they are printers, booksellers, publishers or record and film companies, have long taken a “looking backwards attitude” and sought

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199. See Pamela Samuelson, *Google Book Search and the Future of Books in Cyberspace*, MINN. L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1535067>.

200. Digital Economy Act, 2010, c. 24, §§ 2–18 (U.K.).

201. This is the name given to the last few days in which Parliament sits after an election has been called but before it is officially dissolved.

202. 76 PARL. DEB., H.L. (5th ser.) (2010) 1309 (U.K.) (emphasis added).

to fight off new innovators with both litigation and legislation. New markets may be discovered by new entrants, and the existing players struggle to catch up. Copyright law has, therefore, always been just as much, if not more, about struggles between competing economic interests, or clashes of business models, as it is about public interest or encouraging creativity. That is not to say that the public interest and creativity are not important, nor that they should not be the central organizing principles of copyright law: in my view, they should be. However, it is important to recognize that litigation will inevitably arise when business models clash, and that the courts hearing such disputes will be constrained by the context of such disputes and the ways that the facts are presented to them. Moreover, since new copyright legislation is always a combination of what has gone before, combined with some tweaking for new conditions, we need to be aware that by focussing solely on resolving tensions between different business models created, or exacerbated, by the rise of new technologies, we may be moving ever further away from that goal.

