Fictions of Copyright: Charles Dickens and American Trade Courtesy

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This essay may seem somewhat anomalous in a volume on narrative and law, since my subject is really neither law, legally speaking, nor narratology, theoretically speaking.[1] Rather, it concerns a system of informal norms by which American publishers fashioned a rough approximation of copyright law during the nineteenth century, to compensate for the legislatively decreed lack of U.S. copyright protection for non-U.S. authors that extended from 1790 into the 1890s, and long afterward in less overt forms.[2] This system of professional norms, called *courtesy of the trade* or *trade courtesy*, was a loosely cartelized agreement among publishers to treat each other's foreign books as if they enjoyed actual legal protection. The practice of courtesy became so cohesive and reliable that it allowed publishing houses, with fair regularity, to pay reprinted foreign authors or their publishers honoraria, royalties, or other sums.

There were two dimensions to trade courtesy: a horizontal axis on which publishers recognized each other's informal claims to foreign works, cooperat-

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[2] The text of the 1790 U.S. copyright act – the first federal copyright statute in the United States – expressly excluded foreign authors' works from protection. See Act of 31 May 1790, ch. 15, § 5, 1 Stat. 124, 125. The 1790 act did this in two ways, by providing a strict definition of qualified rights-holders and by openly immunizing American piracy. First, copyrights were available only to "a citizen or citizens of these United States, or residents therein" (Act of 31 May 1790, ch. 15, § 5, 1 Stat. 124, 124). Second, the statute provided that "nothing in this act shall be construed to extend to prohibit the importation or vending, reprinting or publishing within the United States, of any map, chart, book or books, written, printed, or published by any person not a citizen of the United States, in foreign parts or places without the jurisdiction of the United States" (Act of 31 May 1790, ch. 15, § 5, 1 Stat. 124, 125). Later U.S. copyright acts perpetuated these legal disabilities for foreign authors. See Act of 3 February 1831, ch. 16, § 8, 4 Stat. 436, 438; Act of 8 July 1870, ch. 230, § 103, 16 Stat. 198, 215.

ed with each other, sometimes disputed each other's claims, and punished misbehaving publishers; and a vertical axis on which publishers negotiated with foreign authors, acquired reprint rights to desirable titles, and, when possible, remunerated foreign authors or their publishers. Courtesy was a shared fiction that was crafted over several decades to fill the copyright vacuum for foreign works in nineteenth-century America.

Thus, this essay is about a "legal fiction" in a sense quite different from the way Stern (2017) and others use that term. Courtesy claims were "as-if copyrights," agreed fictions of literary property with which publishers sought to fill a negative space within U.S. intellectual-property law (Rosenblatt 2013). That these fictions were self-conscious and sometimes unstable was a natural consequence of their extralegal, purely customary status in a property-less space created and condoned by U.S. law. Temptations to reprint popular, unprotected books by Charles Dickens, George Eliot, Alfred Tennyson, and many other British writers were just too great to be consistently resisted in favor of such a fragile, consensual fiction of property. Courtesy's narrators – advocates such as publishers Henry Holt and the Harpers – were unreliable ones, not because they did not promote and adhere to courtesy, but because courtesy norms could never command the degree of obedience paid to adjacent copyright laws. Formal copyrights – existing only for citizens or permanent residents of the United States – operated alongside the informal norms of courtesy, authorizing legal monopoly practices that the adherents of courtesy strove to imitate in their private ordering.

1. A Brief History of Trade Courtesy

The aggressive reprint trade in America, fed by foreign works that were daily entering the premature public domain created by U.S. law, threatened to destroy a sustainable market for those works. If one publisher could reprint an uncopyrighted novel, so could another, and houses often undercut each other's prices in a scrimmage that one historian likened to a "Hobbes-like State of nature" (Barnes 1966, 36). Realizing that a code of self-regulation would be more profitable than unrestrained competition, publishing firms began to work together to stabilize the public domain through a communal fiction that was variously called the "usage of the trade," "etiquette," "good faith," or the "laws of honor." Most often, however, these practices were referred to as "courtesy of the trade," "trade courtesy," or simply "courtesy."[3]

[3] For contemporaneous names for courtesy, see Harper (1912, 358) ("law of courtesy"); "Note Respecting Harper & Brothers' Edition of Reminiscences by Thomas Carlyle" (316) ("trade usage"); "Charles Scribner's Sons Publish the Authorized Edition of Reminiscences. By Thomas Carlyle" (322) ("the courtesy of the trade"). Trade courtesy was

In its most basic form, courtesy was premised on an intuitive prior-rights logic: the first firm to announce (often in a trade journal) its plans to publish a foreign book had a monopoly claim to that book and sometimes also to later books by the same author (Spoo 2013, 37–38). In time, this custom grew along with the field of American publishing. For example, Publisher A would publicly claim the latest novel by Charles Dickens; Publisher B would recognize that claim so long as its own association with Wilkie Collins was respected; and Publisher C would, ideally, acknowledge the claims of both A and B if its entitlement to the sole reprinting of George Eliot went unchallenged. By means of such horizontal arrangements and understandings, publishers, within and between the publishing centers of Philadelphia, New York City, and Boston, averted a public-goods problem and resultant market failure for this lucrative foreign resource (30–32). With courtesy, one hand washed the other. Rivals became *pro tanto* partners, and earnings on reprints of foreign titles climbed.

Publishers could also acquire courtesy title to a foreign work by making a contract with the author or his or her publisher, or by paying the author for early proof sheets of the work, or by engaging in some combination of these acts. As courtesy took firmer root, publishers adopted procedures for securing options on a foreign author's subsequent writings and for associating authors with their firms on an exclusive basis (37–42). These practices became so widely shared that publishers were able to pay honoraria or even royalties to foreign authors; many authors benefited from payments, large or small, solicited or unsolicited, from courtesy-abiding houses. Payments were typically modest (£10 or £15), but some publishers paid their British authors handsome sums, even though no law (and perhaps no enforceable contract) compelled them to do so. Sir Walter Scott received £75 for advance proof sheets of each of the *Waverley* novels, and £300 for his *Life of Napoleon Bonaparte* (Sheehan 1952, 62). Harper & Brothers paid Dickens £360 for magazine rights to *Bleak House*, £250 for *Little Dorrit*, £1000 each for *A Tale of Two Cities* and *Our Mutual Friend*, £1250 for *Great Expectations*, and (probably) £2000 for the never-finished *The Mystery of Edwin Drood* (Madison 1966, 26).[4] One publisher in 1876 reported that courtesy payments for proof sheets ranged on average between £25 and £100; and dutiful publishers sometimes even turned sums over to deceased authors' estates.[5]

sometimes called the "Harper Rule," from the role that the powerful New York firm Harper & Brothers played in establishing courtesy rules (Johns 2009, 300–301).

[4] According to the U.K. National Archives' currency converter, £2000 in 1870 (the year in which magazine serialization of *The Mystery of Edwin Drood* began) would have the buying power of £125,218 in 2017 (https://www.nationalarchives.gov.uk/currency-converter/, visited 7 October 2021).

[5] For a discussion of courtesy payments, see *Minutes of the Evidence Taken Before the Royal Commission on Copyright Together with an Appendix* (1878, 63, 91).

To enforce courtesy's rules, participating houses fashioned penalties for reprinters who trespassed on other houses' recognized claims. These escalating sanctions ranged from a private protest lodged with the trespasser, to public shaming in trade journals or newspapers, to predatory pricing to match or undersell the trespasser, and climaxed, as a last and most dangerous resort, in retaliatory reprinting of one of the trespasser's own books.[6] Publishers only reluctantly employed this latter tit-for-tat strategy because it threatened a return of the disorder that courtesy had been forged to replace: an unregulated scramble for copyright-free works that often drove book prices down so far that no one could turn a profit. Courts were useless in courtesy disputes; they did not recognize these unfamiliar claims as literary property or business assets.[7] Publishers' concessions often made courtesy sanctions unnecessary, however. A publisher might cede a profitable British title to a rival, not so much out of fear of reprisal as because he had not secured the work under courtesy principles, and pursuing his claim would be, quite simply, discourteous.[8] Courtesy was to be earned, not stolen.

Thus, publishers responded in one of two ways to the American commons of foreign works: by engaging in lawful piracies or by observing informal, extralegal courtesies. Here were two distinct business ethics. One claimed justification under the letter of U.S. copyright law; the other operated according to a spirit of fairness in publishing, a moral imperative described by one Philadelphia publisher in the 1830s as the "rules that govern gentlemen."[9] Courtesy required interpersonal trust, seemly behavior, and voluntary forbearance. Without formal law to restrain appetites, there was always the possibility of a return of the savage scrum. Courtesy practices were a frail barrier against renegade houses or unpledged newcomers, even at the best of times.

Though there is evidence of proto-courtesy arrangements as early as the 1820s (Groves 2007, 141), and the rules of the courtesy game were systematically laid down, it is believed, in the mid-1830s during a series of clashes between two powerful firms, courtesy's golden age was probably between the 1850s and 1870s (Johns 2009, 295–302; Spoo 2013, 32–36). The system was, in essence, an improvised monopoly for sustaining prices at profitable levels and for inducing the type of artificial scarcity that copyrights create as a matter of legal right.

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[6] For overviews of trade courtesy, see Everton (2011, 44–47, 125–127); Harper (1912, 110–11); Johns (2009, 295–302); Sheehan (1952, 61–62); Vaidhyanathan (2001, 52–55); Groves (2007, 139–148); Holt (1888, 27–32).

[7] See *Sheldon v. Houghton*, 21 F. Cas. 1239, 1241–1242 (C.C.S.D.N.Y. 1865) ("[Courtesy can] hardly be called property at all – certainly not in any sense known to the law.").

[8] For a discussion of the moral, religious, and customary underpinnings of nineteenth-century American publishing, see generally Everton (2011).

[9] Letter from Carey, Lea, & Blanchard to Harrison Gray, 27 April 1835, Lea & Febiger Records, ms. 227B, Letterbook, Carey, Lea, & Blanchard, 17 June 1834 to 2 September 1835, 336–337, Historical Society of Pennsylvania.

Courtesy was a carefully wrought communal fiction that substituted self-serving monopoly for self-destructive competition.[10]

By the late 1870s, changes in the publishing world shifted the ground on which courtesy had stood. The expansion of book manufacturing; the vogue for cheap fiction; the influx of new publishers lacking allegiance to the older houses; competition from Canadian publishers to whom the ethic did not apply; and the rise of literary agents who encouraged friction rather than cooperation among publishers, thus undermining the paternal treatment of authors which courtesy boasted – all these developments sapped the stability of the system of trade courtesy (Spoo 2013, 53–64). Changes in the legal landscape also disrupted courtesy practices. By the 1890s, with calls for trust-busting growing more strident, insurgent publishers outside the courtesy comity began accusing its adherents of engaging in anticompetitive practices and erecting barriers that prevented newcomers from entering the trade (53–58). Finally, Congress's passage of the 1891 Chace Act gave foreign authors a path to obtaining U.S. copyright, but only if they could comply with stringent statutory requirements. Not all authors could, and courtesy would continue into the twentieth century as an implicit code, a quiet doctrine of amity, observed by respectable houses (59–64).

2. *Trade Courtesy as Relational Copyright*

Trade courtesy might be thought of as a system of *relational copyright*. I model this concept in part on the theory of *relational contract* advanced by Ian Macneil, Stewart Macaulay, and others, who noticed that many businesspersons treat legal contracts as little more than a basis for "creating good exchange relationships," a vehicle for sustaining and nurturing long-term economic interactions, rather than as formal documents for defining and enforcing discrete bargains (Macaulay 1963, 64). A business contract, on this view, is a ground for a relationship, a context for the fluid pursuit of mutual opportunities, and only in extreme, irretrievable disputes the basis for a lawsuit, "since a contract action is likely to carry charges with at least overtones of bad faith" (65). A relational contract is not an isolated agreement that is treated by the parties as something "formed once and for all"; rather, it is "more like an ongoing motion picture," a medium for supporting change and flexibility (Macaulay 2000, 778). Such relationships promote solidarity, joint effort, and future collaboration; they are little concerned with full, punctual performance followed by a termination of relations. Relational contract is cohesive, not divisive; it envisions cooperation,

[10] The foregoing aspects of the courtesy system, as well as others, are described in considerable detail in Spoo (2013, 13–64).

not stand-your-ground legalism or zero-sum gamesmanship (Macneil 1980, 14–20).

Relational contracts are oriented towards futurity rather than endgames, towards ongoing, evolving obligations instead of specified rights and duties. Such contracts are supplemented and sustained by norms that shape and motivate business behavior, "intricate interlinkings of habits, custom, internal rules, social exchange, expectations respecting the future, and the like" (65). As Macneil shows, relational norms enhance role integrity, preservation of relations, and harmonization of relational conflict. As contractual relations grow, they "take on more and more the characteristics of minisocieties and ministates" (70). Relational contracts thus foster complex cohabitation within a structure of expectations, and encourage participants to imagine their interactions as a product of ethical choices and acts, rather than as merely commanded by enforceable promises exchanged at a particular moment in time, induced by legal consideration, and insusceptible of modification without a fresh exchange of definite, consideration-backed promises. Relational contract reflects mutual need. Even litigation does not necessarily destroy relationality. Longtime business partners who have sued each other sometimes resolve their dispute after lengthy litigation; they might even do so in ways that surprise their attorneys, who are accustomed to pursuing zero-sum victories for their clients. All the while that the attorneys were competing, their clients were quietly seeking a return to the *status quo*.[11]

Courtesy practices among American publishers in the nineteenth century also thrived on norms of relationality, what we might call relational copyrights.[12] Ordinary copyright law is a field for unplanned encounters between strangers – a copyright owner and an unauthorized user. Strict liability is the standard, so that intent to infringe a copyright, or reasons for the unauthorized

[11] Richard Hix, an experienced business litigator in Oklahoma, has observed this phenomenon of unexpected cooperation between litigants on several occasions. If a lawsuit has not irreparably damaged a business relationship, it can serve as a sort of "lovers' quarrel" that ends in reunion, in some cases even after one of the parties has been assured of legal victory in the case (interview, 30 September 2021).

[12] My use of the term "relational copyright" differs from that of other scholars. I do not employ it here to suggest some alternative to the traditional possessive-individualist model of copyright ownership, or to offer an imagined restructuring of "relationships between authors and users, allocating powers and responsibilities amongst members of cultural communities, and establishing the rules of communication and exchange" (Craig 2007, 263). Nor do I employ "relational copyright" to redefine the rights and responsibilities of authors and users of intellectual property, or to reframe the interests of the various contributors to creativity (Shi & Fitzgerald 2011). Rather, I use "relational copyright" to characterize a set of norms shared by competing American publishers and sometimes extended by them to the foreign authors whose otherwise unprotected foreign works they reprinted. The relational copyrights of trade courtesy were different from ordinary copyrights, but they did not redefine traditional notions of authorship. Publishers recognized them as a means of promoting self-interest and private ordering.

use of a protected work, are usually irrelevant.[13] Of course, copyright combatants sometimes know each other – a songwriter might sue her record label; a screenwriter might threaten his movie company – but copyright law presupposes mostly unsought encounters, discrete disputes, and adjudicated endgames, as much of tort law does (Radin 2013, 197). In relational copyright as practiced by courtesy publishers, however, a close-knit community employed its shared fiction to form business relationships and to grow them over time, rather than to meet and clash in brief, single combats. Courtesy sought to make pacts between rival houses, sustain those alliances, and keep the publishing peace.

Moreover, the relational copyrights of trade courtesy inaugurated business alliances that would not have existed if foreign titles had been treated as public-domain works available for unchecked appropriation. The shared norms of courtesy were the opposite of the self-maximizing impulses of piracy. When publishers ignored or defied courtesy, they were regarded by participating publishers as "cheap Ishmaelites of the trade" (Kellogg 1897, 914). Ishmaelite, renegade, outlaw – the pirate was a thing to be pitied or scorned, an "outside barbarian" whom Holt (1908) contrasted with those "men of exceptional character" who operated within the rules of courtesy (523). The publishing firm of Ticknor & Fields once referred to pirates as "keen-scented rascals, our friends in the *Craft*" (quoted in Groves 2007, 143 [original emphasis]).

Courtesy's relational copyrights allowed publishers to treat foreign works as the basis of a kind of idealized community of better businessmen. It is difficult to think of ordinary copyrights in quite this way, as giving rise to voluntary associations of competitors. Statutory copyrights typically preexist business relationships and form the basis of hierarchized licensing arrangements. Instead of encouraging cooperative equilibrium, statutory copyrights preserve order among publishers by threatening mutual assured litigation. Although the threat of courtesy sanctions played an important role in maintaining order among publishers, relational copyrights achieved, in their heyday, what Holt (1908) referred to as "a brief realization of the ideals of philosophical anarchism – self-regulation without law" (522–523).

Courtesy differed from ordinary copyright in a number of other ways. For example, courtesy gave its monopoly right initially to publishers, not to authors, as copyright statutes did. In that regard, courtesy turned back the clock by recreating the type of guild privilege enjoyed by the booksellers of the Stationers' Company of London prior to the Statute of Anne of 1710. Statutes in Britain and the United States had dealt a blow to such publishing monopolies

[13] Although many courts and commentators treat copyright infringement as a strict-liability tort, some scholars have questioned whether this is, or should be, the case, particularly in light of the doctrine of fair use, which allows accused infringers to show that the character of their unauthorized use, in some cases, serves social or other productive purposes and therefore relieves them of legal liability (Hetcher 2013).

by recognizing authors as possible proprietors of their own works (Patterson 1968, 147; Rose 1992, 4, 47–48). Moreover, courtesy rights had no set duration; they endured just as long as they were practically needed, or remembered, in the book trade. Copyrights, in contrast, had fixed statutory terms which applied equally to many types of works.[14] This one-size-fits-all approach continues today in many countries and has been criticized as leading to excessively long copyrights and to the problem of "orphan works" – copyrighted works whose owners are impossible to identify or contact (Lessig 2004, 248–253). Courtesy had no orphans. Publishers adopted foreign works and held them out as their filiated property for as long as necessary to exploit their economic potential. When these works no longer had a market value, they did not remain in a limbo of putative protection, as many copyrighted works do today. Instead, they returned, after the *de facto* lapse of their relational copyrights, to the familiar public domain, from which they had been claimed originally.

3. *The Dickens Controversy of 1867*

The subject of Charles Dickens, copyright, and American piracy is a familiar one. This essay concerns the less familiar story of Dickens and American trade courtesy – specifically, a controversy in which he scandalized the book trade by declaring his loyalty to the Boston firm of Ticknor & Fields and slighting Harper and other houses that had dealt courteously with him in the past. The controversy clarified certain assumptions of courtesy as they had evolved over the decades, and showed that publishers had come to expect courteous, faithful treatment from authors they had paid, no less than from fellow publishers who were part of the courtesy league. Thus, courtesy could be demanded, though not always successfully so, on the vertical as well as the horizontal axis. Where the Dickens of 1842 had offended Americans by his strident calls for copyright justice (Seville 2006, 165–166; O'Sullivan 1843, 120), the Dickens of 1867 offended them by his casual disregard for the voluntary rough justice of trade courtesy.

Trade courtesy could not fully protect an author as prolific and popular as Dickens from the flood of unauthorized reprints in the American market. By 1864, at least twelve publishers were issuing his writings in book form (Ballou 1970, 53, 591 n.17). Several of these firms competed to place collected editions of Dickens in homes. For years, Harper & Brothers of New York had claimed,

[14] For example, the 1870 U.S. copyright act provided an initial copyright term of 28 years, with a possible renewal term of 14 years, to books, maps, charts, dramatic or musical compositions, engravings, cuts, prints, or photographs or negatives thereof, paintings, drawings, chromos, statues, statuary, and models or designs intended to be perfected as works of fine arts. Act of 8 July 1870, ch. 230, §§ 86-88, 16 Stat. 198, 212–213.

by courtesy, exclusive magazine rights in Dickens's novels. The Philadelphia publishing firm of T.B. Peterson & Brothers asserted, also by courtesy, the exclusive right to issue those novels in book form.[15] The Harpers and the Petersons recognized each other's informal claims by mutual arrangement. Their concurrent entitlements were based on payments the two firms had made to Dickens or his English publisher. As noted above, the Harpers had sometimes paid more than £1000 for early sheets of Dickens's novels; the Petersons had contributed to the Harpers' purchase money and had bought the Harpers' printing plates after serializations had ended (Ballou 1970, 52–53; Lea 1867, 36; Bracher 1976, 325 n.23; "The Dickens' [*sic*] Controversy", 69). Even though the Harpers were the ones who dealt directly for early proof sheets, the Petersons considered that their payments gave them a derivative courtesy title to the completed books (Bracher 1976, 324–325). In treating their respective courtesy entitlements as applying to different publishing media – serials and books – the Harper and Peterson firms in effect constituted themselves beneficiaries of a sublicensing arrangement. The dividing up of Dickens in America – a fragile, provisional undertaking at the best of times – was accomplished through such mutual understandings and adjustments of dominant courtesy publishers.

The salient features of trade courtesy can be observed in the dispute that broke out in 1867 over Dickens's alleged disloyalty to his American courtesy publishers. The furor arose when Dickens appeared to turn his back on the Harper and Peterson firms by negotiating a deal to make Ticknor & Fields the exclusively authorized American reprinter of his collected works. Ticknor's offer had been irresistible: a £200 advance on a ten-percent royalty on future book sales, coupled with an arranged speaking tour of America (Ballou 1970, 82–85; Tebbel 1987, 89). A gratified but impolitic Dickens was quoted in the press as saying that this arrangement would make him, for the first time in his experience of America, "retrospectively and prospectively – a sharer in the profits of [an] […] Edition of my books" (Ticknor & Fields 1867, 84).

The practice of paying authors a royalty on copies sold came later than other forms of remuneration, under both copyright and courtesy systems. Dickens himself had not accepted a royalty arrangement from his English publishers, "precisely because it deferred payments too long" (Patten 1978, 389 n.10). He had resisted royalties from American courtesy publishers as well. The gray, uncertain prospect of actually receiving a percentage of book sales was worrisome enough in any publishing relationship, quite apart from the special insecurities of transatlantic dealings. But when Ticknor offered Dickens an ongoing royalty on sales, a £200 advance, and other financial prospects, Dickens succumbed to the blend of present and future incentives (Ballou 1970, 80–81).

[15] See letter of T.B. Peterson & Brothers reproduced in "The Dickens' [*sic*] Controversy" (69).

Dickens's invidious commendation of Ticknor's "manhood, delicacy, and honor" was bad enough in the eyes of the trade (quoted in "Dickens's Dealings with Americans", 348). In another letter widely circulated in the press, he rubbed salt in the wounds of his earlier courtesy publishers by stating that "[i]n America the occupation of my life for thirty years is, unless it bears [the Ticknor] imprint, utterly worthless and profitless to me" (quoted in "The Dickens' [*sic*] Controversy", 68). The American book trade was stunned by Dickens's amnesia. Had he forgotten the houses that had paid him hundreds or thousands for serial fictions, the newspapers that had paid £1000 for a single story, the small publishers who had risked insolvency by promising him sums for reprinting his periodicals? Was this the Dickens whose fictions celebrated magnanimity, fidelity, and reward for past kindnesses? Or was this evidence of a spirit as "[h]ard and sharp as flint, from which no steel had ever struck out generous fire" (Dickens 1843, 3)?

The snub was felt keenly by the Harper and Peterson firms. Trade journals rushed to their defense. The *American Literary Gazette and Publishers' Circular* called Dickens "ungenerous, illiberal, and ungentlemanlike" in his failure to acknowledge the "voluntary liberality" of the courtesy arrangements from which he had benefited in the past ("The Dickens' [*sic*] Controversy", 69). Dickens, the *American Literary Gazette* charged, was "a flagrant violator of usage, for he or his publisher having sold advance-sheets of his latest novels to one firm, and received good pay therefor, he now seeks to transfer to another house an exclusive interest in those very works!" (69). Here, the publishing trade was turning the tables on Dickens, who had assailed American reprinters' lawful piracies during and after his visit to the United States in 1842. He had then talked of blackguards, buccaneers, and bandits. Now he himself had become a kind of pirate; he was a transatlantic Ishmaelite, a deviant from courtesy norms, and was being treated to the sanction of public shaming. If Dickens could demand copyright from Congress, American publishers could at least expect him to honor copyright's homely approximation, the friendly fiction of trade courtesy.

Dickens plainly had attained a level of celebrity that allowed him to dictate the terms of courtesy rather than remain a passive, grateful recipient of publishers' largesse. He now treated the Harpers' payments as a thing of the past, mere compensation for serial rights that imposed no further obligation after he had shipped the early sheets off to New York; he scarcely acknowledged the Petersons' claim that they enjoyed a courtesy relationship by virtue of having assisted the Harpers with their payments. These dealings among publishers were their own affair, he seemed to say; he would not allow an exclusive association to be permanently imposed on him just because it benefited publishers in their self-serving efforts to repair the defects of an unjust copyright law. In Dickens we see the restlessness of a bold free agent, a literary giant who had outgrown

courtesy's paternalism towards its authors, and now rejected a collusive practice that had sometimes excluded him from the bargaining table.

Dickens felt bound by no sentimental ties to old business partners; he had often treated contracts as ephemeral inconveniences.[16] Moreover, he evidently viewed Ticknor's collected edition of his works as a third medium of publication – different from serializations and single editions – which justified a new courtesy relationship. He now enjoyed the celebrity clout to choose his own forms of sublicensing, rather than have sublicensing thrust upon him.

In its censure of Dickens, the book trade was instinctively reaching for the remedial norms of public shaming and negative gossip.[17] These rebukes were aimed more at Dickens than at Ticknor & Fields. Dickens was the faithless and ungrateful one, even if the Boston firm had worked to alienate his affections. Meanwhile, the Petersons, who continued to issue Dickens, took out full-page advertisements with banner headings in the trade journals: "GREAT REDUCTION ON DICKENS' WORKS" ("Great Reduction on Dickens' Works", 86). The Petersons were employing price-slashing to match the Dickens editions offered by Ticknor.[18] Though courtesy's precepts had been flouted, its sanctions – predatory pricing and public shaming – survived as reminders that a great author and a prestigious publisher had behaved badly.

4. Conclusion

Scholars have estimated that direct payments to Dickens or his publishers from American firms over the years amounted to nearly £10,000.[19] This number does not include annual sums he received for reprints of his periodicals or the £20,000 he earned from packed readings and appearances during his 1867 visit to the United States (McParland 2010, 212 n.1; Patten 1978, 314, 342–343).

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[16] Dickens's friend, William Charles Macready, wrote in his diary that Dickens "makes a contract, which he considers advantageous at the time, but subsequently finding his talent more lucrative than he had supposed, he refused to fulfil the contract" (quoted in Patten 1978, 85).

[17] On the normative use of public shaming, see Ellickson (1991, 214–215).

[18] For details and prices of the Ticknor editions of Dickens, see Ticknor & Fields (1867, 84–85). In 1865, the Petersons were selling their Illustrated Duodecimo Edition of Dickens for $4.00 a copy; the Illustrated Octavo Edition for $2.50; the People's Duodecimo Edition for $2.50; and a cheap buff paper edition for 75 cents per copy (Denison 1865, advertising pages 1–2). Two years later, the Petersons reduced their Illustrated Duodecimo Edition to $3.00 per volume; the Illustrated Octavo Edition to $2.00; the People's Duodecimo Edition to $1.50; and kept the cheap paper edition at 75 cents per copy ("Great Reduction on Dickens' Works", 86).

[19] According to the U.K. National Archives' currency converter, £10,000 in 1860 (when Dickens was regularly receiving courtesy payments from America) would have the buying power of £591,292 in 2017 (https://www.nationalarchives.gov.uk/currency-converter/, visited 7 October 2021).

America's public domain, deplored by Dickens as the nation's great moral failing, had prepared these successes through cheap reprints and mammoth newspapers "circulated," as one historian put it, "in every possible format from Maine to the banks of the Mississippi" (Patten 1978, 343). The premature public domain was an asset waiting for Dickens to monetize it. His large revenues from America are almost unimaginable without the previous cheap dissemination of his works under copyright-free or courtesy-managed conditions.

The Dickens controversy of 1867 shows that the carefully evolved fiction of trade courtesy could not consistently stabilize the American public domain for an author as popular as Dickens. Temptations to cast courtesy aside for easy profits infected all parties: respectable houses, non-courtesy firms, Dickens himself. In the years after his death in 1870, collected editions of his works proliferated. Numerous publishers – D. Appleton & Co.; Harper & Brothers; Fields, Osgood & Co.; Lea & Shepherd of Boston, and others – were marketing "Household Editions."[20] The Petersons, their claim to courtesy long forgotten, continued to sell Dickens for years in their "Cheap Edition for the Million" (Lippard 1876, unnumbered advertising page). Trade courtesy proved a fragile contrivance in the face of massive sales and authorial celebrity; the close-knit community that usually upheld its norms fell into unruly skeins. The Dickens craze revealed the power and the limitations of courtesy as a communal fiction.

Works Cited

Ballou, Ellen B. (1970) *The Building of the House: Houghton Mifflin's Formative Years*. Boston: Houghton Mifflin.

Barnes, James J. (1966) "Edward Lytton Bulwer and the Publishing Firm of Harper & Brothers." *American Literature* 38.1: 35–48.

Bracher, Peter S. (1976) "Harper & Brothers: Publishers of Dickens." *Bulletin of the New York Public Library* 79.3: 315–335.

Carey, Lea, & Blanchard, Letterbook, 17 June 1834 to 2 September 1835, Historical Society of Pennsylvania.

"Charles Scribner's Sons Publish the Authorized Edition of Reminiscences. By Thomas Carlyle." *Publishers' Weekly* 19.13 (26 March 1881): 322.

Chicago Tribune (31 October 1870): 3.

Craig, Carys J. (2007) "Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law." *American University Journal of Gender, Social Policy and the Law* 15.2: 207–268.

[20] For example, anonymous notices of Household Editions of Dickens appeared in *Chicago Tribune* (31 October 1870): 3 (Fields, Osgood & Co.); *The Tennessean* (Nashville) (16 December 1871): 4 (D. Appleton & Co.).

Denison, C.W. (1865) *Illustrated Life, Campaigns and Public Services of Philip H. Sheridan*. Philadelphia: T.B. Peterson & Brothers.

Dickens, Charles (1843) *A Christmas Carol*. London: Chapman and Hall.

"Dickens's Dealings with Americans." *American Literary Gazette and Publishers' Circular* 8.12 (15 April 1867): 348–349.

Ellickson, Robert C. (1991) *Order Without Law: How Neighbors Settle Disputes*. Cambridge: Harvard Univ. Press.

Everton, Michael J. (2011) *The Grand Chorus of Complaint: Authors and the Business Ethics of American Publishing*. New York: Oxford Univ. Press.

"Great Reduction on Dickens' Works." *American Literary Gazette and Publishers' Circular* 9.3 (1 June 1867): 86.

Groves, Jeffrey D. (2007) "Courtesy of the Trade." *The Industrial Book, 1840–1880*. Ed. Scott E. Casper. A History of the Book in America 3. Chapel Hill: Univ. of North Carolina Press. 139–147.

Harper, J. Henry (1912) *The House of Harper: A Century of Publishing in Franklin Square*. New York: Harper & Brothers.

Hetcher, Steven (2013) "The Immorality of Strict Liability in Copyright." *Marquette Intellectual Property Law Review* 17.1: 1–26.

Hix, Richard, interview, 30 September 2021.

Holt, Henry (1888) "The Recoil of Piracy." *Forum* 5 (March 1888): 27–46.

Holt, Henry (1908) "Competition." *Atlantic Monthly* 102 (October 1908): 516–526.

Johns, Adrian (2009) *Piracy: The Intellectual Property Wars from Gutenberg to Gates*. Chicago: Univ. of Chicago Press.

Kellogg, D.O. (1897) "Copyright." *New American Supplement to the Latest Edition of the Encyclopædia Britannica*. Ed. D.O. Kellogg. Vol. 2. New York: Werner. 913–915.

Lea, Henry C. (1867) "American Editions of Dickens." *American Literary Gazette and Publishers' Circular* 9.2 (15 May 1867): 36–37.

Lessig, Lawrence (2004) *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*. New York: Penguin.

Lippard, George (1876) *Washington and His Men*. Philadelphia: T.B. Peterson & Brothers.

Macaulay, Stewart (1963) "Non-Contractual Relations in Business: A Preliminary Study." *American Sociological Review* 28.1: 55–67.

Macaulay, Stewart (2000) "Relational Contracts Floating on a Sea of Custom? Thoughts About the Ideas of Ian Macneil and Lisa Bernstein." *Northwestern University Law Review* 94.3: 775–804.

Macneil, Ian (1980) *The New Social Contract: An Inquiry into Modern Contractual Relations*. New Haven: Yale Univ. Press.

Madison, Charles A. (1966) *Book Publishing in America*. New York: McGraw-Hill.

McParland, Robert (2010) *Charles Dickens's American Audience*. Lanham: Lexington Books.

Minutes of the Evidence Taken Before the Royal Commission on Copyright Together with an Appendix [1878]. London: Eyre & Spottiswoode.

"Note Respecting Harper & Brothers' Edition of Reminiscences by Thomas Carlyle." *Publishers' Weekly* 19.12 (19 March 1881): 316.

O'Sullivan, John (1843) "The International Copyright Question." *United States Magazine and Democratic Review* 12.46 (February 1843): 113–122.

Patten, Robert L. (1978) *Charles Dickens and His Publishers*. Oxford: Clarendon Press.

Patterson, Lyman Ray (1968) *Copyright in Historical Perspective*. Nashville: Vanderbilt Univ. Press.

Radin, Margaret Jane (2013) *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law*. Princeton: Princeton Univ. Press.

Rose, Mark (1992) *Authors and Owners: The Invention of Copyright*. Cambridge: Harvard Univ. Press.

Rosenblatt, Elizabeth (2013) "Intellectual Property's Negative Space: Beyond the Utilitarian." *Florida State University Law Review* 40.3: 441–486.

Seville, Catherine (2006) *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century*. Cambridge: Cambridge Univ. Press.

Sheehan, Donald (1952) *This Was Publishing: A Chronicle of the Book Trade in the Gilded Age*. Bloomington: Indiana Univ. Press.

Shi, Sampsung Xiaoxiang, and Brian Fitzgerald (2011) "A Relational Theory of Authorship." *Knowledge Policy for the 21st Century: A Legal Perspective*. Ed. Mark Perry and Brian Fitzgerald. Toronto: Irwin Law. 291–312.

Spoo, Robert (2013) *Without Copyrights: Piracy, Publishing, and the Public Domain*. New York: Oxford Univ. Press.

Spoo, Robert (2017) "Courtesy Paratexts: Informal Publishing Norms and the Copyright Vacuum in Nineteenth-Century America." *Stanford Law Review* 69.3: 637–710.

Spoo, Robert (2020) "The Lawful Piracy of James Joyce's Poems." *Forgotten Intellectual Property Lore: Creativity, Entrepreneurship and Intellectual Property*. Ed. Shubha Ghosh. Cheltenham: Edward Elgar. 31–53.

Stern, Simon (2017) "Legal and Literary Fictions." *New Directions in Law and Literature*. Ed. Elizabeth Anker and Bernadette Meyler. New York: Oxford Univ. Press. 313–326.

Tebbel, John (1987) *Between Covers: The Rise and Transformation of Book Publishing in America*. New York: Oxford Univ. Press.

The Tennessean (Nashville) (16 December 1871): 4.

"The Dickens' [*sic*] Controversy." *American Literary Gazette and Publishers' Circular* 9.3 (1 June 1867): 68–69.

Ticknor & Fields (1867) "Important Announcement from Charles Dickens." *American Literary Gazette and Publishers' Circular* 9.3 (1 June 1867): 84–85.

Vaidhyanathan, Siva (2001) *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity*. New York: New York Univ. Press.

Cases Cited

Sheldon v. Houghton, 21 F. Cas. 1239 (C.C.S.D.N.Y. 1865).

Online Resources

Https://www.nationalarchives.gov.uk/currency-converter/.

Abbreviations

Stat. Statutes et Large (United States of America).