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Courtesy Paratexts, Informal Publishing Norms and the Copyright Vacuum in Nineteenth-Century America

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ARTICLE

Courtesy Paratexts: Informal Publishing Norms and the Copyright Vacuum in Nineteenth-Century America

Robert Spoo*

Abstract. In response to the failure of U.S. copyright law to protect foreign authors, nineteenth-century American publishers evolved an informal practice called the “courtesy of the trade” as a way to mitigate the public goods problem posed by a large and ever-growing commons of foreign works. Trade courtesy was a shared strategy for regulating potentially destructive competition for these free resources, an informal arrangement among publishers to recognize each other’s wholly synthetic exclusive rights in otherwise unprotected writings and to pay foreign authors legally un compelled remuneration for the resulting American editions. Courtesy was, in effect, a makeshift copyright regime grounded on unashamed trade collusion and community-based norms.

This Article examines a particular feature of this informal system: the courtesy paratext. Typically appearing in the form of letters or statements by foreign authors, courtesy paratexts prefaced numerous American editions of foreign works published from the 1850s to the 1890s. These paratexts—supplements to the text proper—played a prohibitory role (not unlike the standard copyright notice) and also extolled the regulating and remunerating virtues of the courtesy system. Authorial paratexts continued to accompany texts well into the twentieth century—including, notably, American editions of James Joyce’s and J.R.R. Tolkien’s works—and enable us to observe the principles of courtesy as they operated less overtly to govern American publishers’ treatment of unprotected foreign works. A little-examined source for understanding the history of copyright law

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and informal publishing norms, courtesy paratexts offer insight into a form of private ordering that rendered the American public domain a paying commons.

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Introduction

The French literary theorist Gérard Genette famously described paratexts—book titles, prefaces, epilogues, and the like—as verbal productions that “surround . . . and extend [the text proper], precisely in order to *present* it, . . . to *make [it] present*, to ensure the text’s presence in the world, its ‘reception’ and consumption in the form (nowadays, at least) of a book.”¹ Genette likened the paratext to a “threshold” or “vestibule” that “offers the world at large the possibility of either stepping inside or turning back.”² It operates as a zone of both “transition” and “transaction,” a “privileged place . . . at the service of a better reception for the text and a more pertinent reading of it.”³ So conceived, the paratext is a space that promotes informed consumption, that beckons without force or fraud, preparing the reader’s experience of the text or, sometimes, reshaping the reading experience once completed. Paratexts of this sort propose a transaction supported by consideration on both sides: a promise of textual pleasure in exchange for full readerly performance. They are a kind of prospectus or invitation. They hang a shingle or put out a welcome mat.

But there is another kind of paratext that seeks to discourage certain transactions with the text. It sets strict conditions for the reader’s textual tenancy. Many contemporary works of fiction carry in their front matter something like the following: “This is a work of fiction. Any resemblance to actual persons living or dead, events, or locales is entirely coincidental.”⁴ This disabusing paratext appeals to the reasonableness of readers in the vestibule, asking them to respect the difference between imagination and reality and to

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1. GÉRARD GENETTE, PARATEXTS: THRESHOLDS OF INTERPRETATION 1 (Jane E. Lewin trans., 1997).
 2. *Id.* at 2 (emphasis omitted).
 3. *Id.* (emphasis omitted).
 4. CORMAC MCCARTHY, THE ROAD (ninth unnumbered page) (2006). “All characters are fictitious” disclaimers have also been used by Hollywood filmmakers since at least 1934. Natalie Zemon Davis, “Any Resemblance to Persons Living or Dead”: Film and the Challenge of Authenticity, Fifth Annual Patricia Wise Lecture of the American Film Institute (Apr. 12, 1987), in 76 YALE REV. 457, 457 (1987). Even lawyers employ versions of this paratext. See, e.g., DOUGLAS J. FARMER, CALIFORNIA EMPLOYMENT LAW: THE COMPLETE SURVIVAL GUIDE TO DOING BUSINESS IN CALIFORNIA, at iv (2013) (“All characters appearing in this work are fictitious. Any resemblance to real persons, living or dead, is purely coincidental.”). Farmer’s paratext, referring to his use of fictitious examples to illustrate legal issues, accompanies another familiar paratextual disclaimer used by book-writing lawyers: “Legal information is not legal advice.” *Id.* Like the “all characters are fictitious” warning, this is a litigation-discouraging paratext that urges the reader to consume the text in the proper spirit.

avoid crude attempts to convert fictional characters into real persons.⁵ It urges the deluded, the literal-minded, and the thin-skinned to put aside their instinct to sue for libel or privacy invasion and instead play the author's game of fictiveness in a sporting spirit.

Another common threshold paratext is the copyright notice (©),⁶ usually found on the back of the title page (in the United States and other Anglophone countries, at least) and often followed by a formulaic parade of prohibited acts of reproduction, adaptation, distribution, and the like.⁷ Whereas the "all characters are fictitious" paratext discourages a faulty reading practice, the barking dog of "all rights reserved" warns against trespasses on authorial property. The copyright notice does not concern itself with the reader's experience of the text so much as with discouraging the reader from

5. Authors and publishers have often been the targets of outraged people who believe they have discovered themselves in fictional works. For example, threatened with a libel action, the English publisher of D.H. Lawrence's *Women in Love* settled the claims of two former friends of Lawrence and insisted that Lawrence revise the text to obscure the offending likenesses. D.H. LAWRENCE, *WOMEN IN LOVE*, at xlix-l (David Farmer et al. eds., Cambridge Univ. Press 1987) (1920). For an account of the roman à clef (a subgenre of the novel that portrays real persons in fictional guise) and the litigiousness it has aroused, see SEAN LATHAM, *THE ART OF SCANDAL: MODERNISM, LIBEL LAW, AND THE ROMAN À CLEF* 3-42 (2009).

6. Genette mentions copyright notices only in passing, GENETTE, *supra* note 1, at 32, and does not discuss any of the other paratexts with which this Article is concerned. The term "paratext" has been used in legal scholarship, without apparent derivation from Genette, to mean "the electronic recording produced by currently known video technology in American law and unknown technological inventions that will be the functional analogues of video in the future." Ronald K.L. Collins & David M. Skover, *Paratexts*, 44 STAN. L. REV. 509, 510 (1992). This is not the meaning I assign to the term. Some legal scholars use "paratext" to refer to textual or situational contexts. See, e.g., Jon M. Garon, *Wiki Authorship, Social Media, and the Curatorial Audience*, 1 HARV. J. SPORTS & ENT. L. 95, 110-11 (2010) ("The paratext, or grounding contextual materials, that contextualize a wiki are provided by the wiki community rules and the statements of goals and purposes provided by the publisher."). This is also not the sense in which I use the term.

7. Sometimes, paratextual copyright warnings can be verbose and didactic, even threatening or wheedling:

The scanning, uploading, and distribution of this book via the Internet or via any other means without the permission of the publisher is illegal and punishable by law. Please purchase only authorized electronic editions and do not participate in or encourage electronic piracy of copyrighted materials. Your support of the author's rights is appreciated.

RON CHERNOW, ALEXANDER HAMILTON (eighth unnumbered page) (2004). In other cases, a more nuanced, less author-centric vision of copyright law appears on the back of the title page: "This book may not be reproduced, in whole or in part, including illustrations, in any form (beyond that copying permitted by Sections 107 and 108 of the U.S. Copyright Law and except by reviewers for the public press), without written permission from the publishers." AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION*, at iv (1998).

consuming the text in unauthorized and potentially unlawful ways. Although traditional copyright law has emphasized the role of the copyright notice in establishing the year of publication (formerly a critical legal fact in the United States⁸) and protecting members of the public from becoming unwitting infringers,⁹ it seems safe to say that from the author and the publisher's point of view, the copyright notice and the accompanying prolix recitation of prohibited acts simply serve as a "no trespass" sign. Both the copyright notice and the "all characters are fictitious" paratext are negative injunctions in this respect. They place boundaries around the text's presence in the world and seek to educate readers in the proper use of the work and its contents, so that readerly misprision does not convert a desired transaction into unwanted legal conflict. These paratexts play no role in enhancing the reader's textual pleasure or guiding her interpretive activity; they merely urge or command the reader to avoid certain disapproved uses of the work.

A close cousin of the ubiquitous copyright notice is the familiar declaration, also a fixture of the title page's verso, "Manufactured in the United States of America"¹⁰ or "Printed in the United States of America."¹¹ These avowals do not attest to the national pride of bookmakers but rather derive from a period in American publishing when U.S. copyright protection turned on strict compliance with the statutory requirement that books be physically manufactured on U.S. soil. Beginning with the International Copyright Act of 1891 (Chace Act), authors, foreign and domestic, could obtain a U.S. copyright only by having their books manufactured from type set within the United States or from plates made from such type.¹² While the 1909 Act—the first significant revision of U.S. copyright law since 1891—exempted foreign language books of foreign origin from the manufacturing requirements, the

8. Under the 1909 Copyright Act, copyright terms were measured from the year of publication, Act of Mar. 4, 1909, Pub. L. No. 60-349, ch. 320, § 23, 35 Stat. 1075, 1080 (repealed 1976), not from the author's death, as they currently are, 17 U.S.C. § 302(a) (2015). The year of publication is still the measuring stick for works made for hire, anonymous works, and pseudonymous works. *Id.* § 302(c).

9. *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 161 F.2d 406, 409 (2d Cir. 1946).

10. *See, e.g.*, TAMARA R. PIETY, *BRANDISHING THE FIRST AMENDMENT: COMMERCIAL EXPRESSION IN AMERICA*, at iv (2012).

11. *See, e.g.*, WILLIAM PATRY, *HOW TO FIX COPYRIGHT*, at iv (2011). Patry's volume conspicuously lacks the usual copyright notice. The absence of a common legal paratext may sometimes be as suggestive as its presence.

12. Act of Mar. 3, 1891, ch. 565, sec. 3, § 4956, 26 Stat. 1106, 1107-08. As a practical matter, these requirements mandated not only U.S. typesetting but also first or simultaneous printing and publication on U.S. soil. CARROLL D. WRIGHT, *COMM'R OF LABOR, A REPORT ON THE EFFECT OF THE INTERNATIONAL COPYRIGHT LAW IN THE UNITED STATES*, S. DOC. NO. 56-87, at 5-6 (2d Sess. 1901) [hereinafter *INTERNATIONAL COPYRIGHT LAW REPORT*].

Act retained those requirements for most other works, including foreign books and periodicals written in English.¹³ For those works, the relevant clause was even more stringent than its 1891 predecessor. Whereas the Chace Act had specifically mandated domestic typesetting, the 1909 Act increased the burden by requiring that printing and binding also be performed within the United States.¹⁴ The clear legislative purpose in both cases was to protect American book manufacturers from the competitive effects of foreign bookmaking and imported books.¹⁵

Today, U.S. copyright protection arises automatically with the creation of a work, or, to use the jargon of the 1976 Copyright Act, when the work is fixed with sufficient permanence in a “tangible medium of expression . . . under the authority of the author.”¹⁶ Enjoyment of U.S. copyright protection by domestic and foreign authors no longer depends on American manufacture or other formalities but rather extends in the case of published works to every national and domiciliary of the United States and its treaty nations, as well as to certain other authors.¹⁷ Until the 1950s,¹⁸ however, the recitations “Manufactured in

13. HERBERT A. HOWELL, *THE COPYRIGHT LAW: AN ANALYSIS OF THE LAW OF THE UNITED STATES GOVERNING REGISTRATION AND PROTECTION OF COPYRIGHT WORKS, INCLUDING PRINTS AND LABELS* 85-86 (2d ed. 1948).

14. Act of Mar. 4, 1909, Pub. L. No. 60-349, ch. 320, § 15, 35 Stat. 1075, 1078-79 (repealed 1976).

15. See ROBERT SPOO, *WITHOUT COPYRIGHTS: PIRACY, PUBLISHING, AND THE PUBLIC DOMAIN* 60-64, 67-75 (2013) [hereinafter SPOO, *WITHOUT COPYRIGHTS*] (discussing the protectionist purpose of the 1891 and 1909 manufacturing clauses); Robert Spoo, Note, *Copyright Protectionism and Its Discontents: The Case of James Joyce's Ulysses in America*, 108 *YALE L.J.* 633, 644-53 (1998) [hereinafter Spoo, *Copyright Protectionism*] (discussing the same).

16. 17 U.S.C. § 101 (2015) (defining “created” and “fixed”). The 1976 Act significantly revised the 1909 Act, notably by replacing the rule that copyright protection begins when copies of a work are published with proper copyright notices, § 23, 35 Stat. at 1080, with the rule that copyright protection begins from the moment the author creates the work, 17 U.S.C. § 302(a) (“Copyright in a work created on or after January 1, 1978, subsists from its creation . . .”); see also H.R. REP. NO. 94-1476, at 137-38 (2d Sess. 1976) (discussing the concept of creation under the 1976 Act).

17. For a complete list of published works that are currently protected in the United States as a matter of national origin, see 17 U.S.C. § 104(b). Unpublished works are protected “without regard to the nationality or domicile of the author.” *Id.* § 104(a).

18. Foreign works qualifying for protection in the United States under the UNESCO Universal Copyright Convention (effective September 16, 1955) were exempted from the U.S. manufacturing requirements if they complied with copyright notice requirements. 17 U.S.C. § 9(c) (1954) (amending 17 U.S.C. § 9 (1947)). Repeal of the manufacturing clause was originally set for July 1, 1982, as provided by the 1976 Act. Act of Oct. 19, 1976, Pub. L. No. 94-553, § 601(a), 90 Stat. 2541, 2588. However, it was postponed until July 1, 1986 by congressional amendment. Act of July 13, 1982, Pub. L. No. 97-215, 96 Stat. 178, 178 (formerly codified at 17 U.S.C. § 601(a)).

the United States” and “Printed in the United States” were true legal paratexts,¹⁹ informing governmental authorities and potential unauthorized reprinters that the manufacturing requirements had been satisfied by tribute paid to American book artisans. Unlike copyright notices, these paratextual avowals did not warn readers to avoid certain ways of consuming the text; they were not addressed to ordinary readers at all. Instead, they announced the lawfulness of the text itself. Today, these phrases are vestigial, a kind of small talk or phatic communion that conveys no legally relevant message.²⁰ They are fossil paratexts.²¹

In their day, these manufacturing declarations, like the copyright notice²² and the “all characters are fictitious” recitation, could properly be called legal paratexts. Legal paratexts have enjoyed a rich and varied history in publishing. As early as 1851, in his preface to *The House of the Seven Gables*, Nathaniel Hawthorne wittily combined a form of the “all characters are fictitious” paratext with an important rumination on the genre of narrative romance, announcing that the “personages of the tale . . . are really of the author’s own

19. I use the phrase “legal paratext” to denote a paratext that conveys a legal or law-related meaning or warning or that seeks to persuade readers that the text or the act of publishing it is lawful or legitimate in some way.

20. “Phatic communion” is a term coined by the anthropologist Bronislaw Malinowski. See Bronislaw Malinowski, *The Problem of Meaning in Primitive Languages*, in C.K. OGDEN & I.A. RICHARDS, *THE MEANING OF MEANING: A STUDY OF THE INFLUENCE OF LANGUAGE UPON THOUGHT AND OF THE SCIENCE OF SYMBOLISM* 296, 315 (4th ed. 1936). Malinowski described phatic communion as “free, aimless, social intercourse” that includes “[i]nquiries about health, comments on weather, . . . a flow of language, purposeless expressions of preference or aversion, accounts of irrelevant happenings, [and] comments on what is perfectly obvious” that do not “serve any purpose of communicating ideas.” *Id.* at 313-16. Although the manufacturing paratext communicates a fact, that fact has lost its legal significance.

21. “A line such as ‘Made [or Printed] in the United States of America [Hong Kong, Italy, etc.]’ is no longer legally required but is often included.” *Copyright Page*, MERRIAM-WEBSTER’S MANUAL FOR WRITERS & EDITORS 316-17 (rev. ed. 1998) (brackets in original). This same volume includes on its own copyright page a vestigial nod to the defunct manufacturing clause of the 1909 Act: “Printed and bound in the United States of America.” *Id.* at vi. Inertia rather than conscious purpose is likely responsible for the repetition of this archaic formula, just as some contemporary lawyers continue to draft contracts that recite the empty, outmoded term “witnesseth.” Kenneth A. Adams, *The New New Rules of Drafting (Part Two)*, MICH. B.J., Aug. 2002, at 40, 40.

22. The copyright notice, a formality that at one time could make or break legal protection in the United States, is now largely a fossil paratext. Formerly mandatory, copyright notices became permissive after the United States joined the Berne Convention for the Protection of Literary and Artistic Works. See Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 7(a), 102 Stat. 2853, 2857 (codified as amended at 17 U.S.C. § 401 (2015)). Nevertheless, a copyright notice continues to afford certain advantages. For example, it can negate a litigation defense of innocent infringement. 17 U.S.C. § 401(d).

making, or, at all events, of his own mixing” and that it would be “an inflexible and exceedingly dangerous species of criticism [to bring the author’s] fancy-pictures almost into positive contact with the realities of the moment.”²³ Hawthorne’s dual purpose was to discourage claims of libel and to assert the primacy of the nonrealistic and the imaginary in his aesthetic craft—to make literary autonomy double as a shield against legal harassment.²⁴ His threshold paratext served both to prepare the aesthetic experience of readers and to steer them away from the courthouse doors.²⁵

Though we are often unaware or only barely aware of it, legal or law-related paratexts crowd the vestibules of the books we read; in many cases, they are invisible paratexts, easily skipped, thought of—if at all—as part of the text’s standard throat-clearing. The “all characters are fictitious” paratext and the other paratextual forms mentioned above deserve a full and lengthy treatment, but this Article focuses on one particular form of legal or legitimizing paratext that gained currency in American publishing during the nineteenth century. This paratext, the courtesy paratext, was a direct response to the failure of American copyright law to protect the writings of non-U.S. authors. From its inception in 1790 and for a century afterward, U.S. copyright law, by legislative design, offered virtually no protection for the works of foreign authors.²⁶ Even after passage of the Chace Act in 1891, the Act’s strict manufacturing clause, which effectively required foreign works to be typeset,

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23. NATHANIEL HAWTHORNE, *THE HOUSE OF THE SEVEN GABLES, A ROMANCE*, at v (Boston, Ticknor, Reed & Fields 1851). In his preface to *The Blithedale Romance*, Hawthorne again asserted that his characters were “entirely fictitious” despite any resemblance between the utopian community depicted in the novel and the actual Brook Farm in Massachusetts. NATHANIEL HAWTHORNE, *THE BLITHEDALE ROMANCE*, at iii-vi (Boston, Ticknor, Reed & Fields 1852).
24. See LAWRENCE BUELL, *THE DREAM OF THE GREAT AMERICAN NOVEL* 74-75 (2014); see also J.A. BARNES, *A PACK OF LIES: TOWARDS A SOCIOLOGY OF LYING* 130-32 (1994) (discussing Hawthorne’s “disclaimer” in the context of fictiveness and lying).
25. Genette distinguishes between paratexts written by authors and those created by publishers or other nonauthorial parties. GENETTE, *supra* note 1, at 8-9.
26. The text of the 1790 copyright statute expressly excluded foreign authors from protection. Act of May 31, 1790, ch. 15, § 5, 1 Stat. 124, 125. Later copyright acts perpetuated this disability. See Act of July 8, 1870, ch. 230, § 103, 16 Stat. 198, 215; Act of Feb. 3, 1831, ch. 16, § 8, 4 Stat. 436, 438. In rare cases, however, foreign authors succeeded in getting around the statute’s exclusionary purpose by certain stratagems. See Peter Jaszi & Martha Woodmansee, *Copyright in Transition*, in 4 *A HISTORY OF THE BOOK IN AMERICA: PRINT IN MOTION; THE EXPANSION OF PUBLISHING AND READING IN THE UNITED STATES, 1880-1940*, at 90, 94 (Carl F. Kaestle & Janice A. Radway eds., 2009). B. Zorina Khan offers examples of these stratagems, including Harriet Beecher Stowe’s idea of partnering with the English novelist Elizabeth Gaskell. B. ZORINA KHAN, *THE DEMOCRATIZATION OF INVENTION: PATENTS AND COPYRIGHTS IN AMERICAN ECONOMIC DEVELOPMENT, 1790-1920*, at 276-77 (2005).

printed, and published on American soil before or at the same time as publication abroad, prevented many foreign authors from obtaining U.S. copyrights.²⁷

Because of the enormous popularity of British fiction and poetry among American readers during the nineteenth century, American publishers faced a public goods problem: the availability of free literary resources from abroad appealed to publishers, but the lack of U.S. copyright protection for those resources invited lawful free riding.²⁸ To prevent market failure for foreign titles, the major publishing houses in New York, Philadelphia, and Boston entered into “a kind of tacit understanding”²⁹ to divide this literary commons among themselves. Each publisher claimed informal exclusive rights to certain works or authors, while the other participating publishers recognized these rights by “courtesy” and forbore to reprint courtesy-protected titles.³⁰ This practice, which by midcentury had generated elaborate rules as well as sanctions for violating them,³¹ came to be called the “courtesy of the trade,” “trade courtesy,” or “trade usage.”³² In addition to horizontally colluding with each other, norm-abiding publishers often paid legally un compelled honoraria

27. See *supra* note 12 and accompanying text; see also SPOO, WITHOUT COPYRIGHTS, *supra* note 15, at 60-63 (discussing the difficulties the Chace Act posed for foreign authors).

28. See *infra* notes 52-58 and accompanying text. Authors’ writings can be thought of as public goods that are nonexcludable and nonrivalrous. Mark A. Lemley, *IP in a World Without Scarcity*, 90 N.Y.U. L. REV. 460, 466-67 (2015). That is, by their nature, they cannot be fenced off, and their consumption by one person does not prevent others from consuming them equally. For that reason, they are especially vulnerable to free riding by unauthorized users. Copyright laws seek to prevent such free riding and the market failure that might result. See Wendy J. Gordon, *Authors, Publishers, and Public Goods: Trading Gold for Dross*, 36 LOY. L.A. L. REV. 159, 164 & n.13 (2002).

29. ROYAL COMMISSION ON COPYRIGHT, MINUTES OF THE EVIDENCE TAKEN BEFORE THE ROYAL COMMISSION ON COPYRIGHT, 1878, [C. (2d series)] 2036, at 316 (UK) (testimony of John Tyndall).

30. See *infra* notes 59-77 and accompanying text.

31. See *infra* Part I.A-B (discussing trade courtesy’s detailed rules and punishments).

32. There were several contemporaneous names for courtesy. See J. HENRY HARPER, THE HOUSE OF HARPER: A CENTURY OF PUBLISHING IN FRANKLIN SQUARE 358 (1912) (using “law of courtesy”); Charles Scribner’s Sons, *Charles Scribner’s Sons Publish the Authorized Edition of Reminiscences, by Thomas Carlyle*, PUBLISHERS’ WKLY., Mar. 26, 1881, at 322, 322 (using “the courtesy of the trade”); Harper & Bros., *Note Respecting Harper & Brothers’ Edition of Reminiscences by Thomas Carlyle*, PUBLISHERS’ WKLY., Mar. 19, 1881, at 316, 316 (using “trade usage”). Trade courtesy was sometimes called the “Harper Rule” because of the role the publisher Harper and Brothers played in establishing courtesy rules. ADRIAN JOHNS, PIRACY: THE INTELLECTUAL PROPERTY WARS FROM GUTENBERG TO GATES 300-01 (2009); see also CHARLES A. MADISON, BOOK PUBLISHING IN AMERICA 63-64 (1966).

or royalties to foreign authors or their publishers, in effect adding a vertical dimension to courtesy.³³

By the 1850s, once trade courtesy had taken firm root, participating publishers often made a point of including courtesy paratexts in their editions of foreign works.³⁴ In these paratexts, which typically appeared in the opening pages of books, publishers took the opportunity to acknowledge or extol the norm of courtesy. Often, more pointedly and vividly, they reproduced a testimonial letter or statement by the work's foreign author exclusively "authorizing" the edition and urging other publishing houses to respect the publisher's approved courtesy claim.³⁵ By binding into their books prefatory matter of a legitimizing and normative nature, courtesy publishers signaled the probity of their business dealings to readers and to fellow publishers. Courtesy paratexts played a role somewhat analogous to the "no trespass" exhortation of the copyright notice, but they went beyond this purely hortatory function to remind the world that the cohesive community of respectable publishers could, by voluntary collective action, be fairer than their country's ungenerous law.

Courtesy paratexts tell us a great deal about the informal norms that prevailed in the close-knit community of major American publishers prior to 1891. They are likewise a valuable source for legal and literary historians who seek to explore the impact of America's isolationist and protectionist copyright laws on nineteenth-century authors and publishers. These authorizing paratexts offer a window into a cohesive set of publishing norms that, with remarkable though inevitably imperfect success, sought to fill the copyright vacuum for foreign works in the United States for much of the nineteenth century and, in more attenuated forms, as late as the 1970s.³⁶ Trade courtesy was a norms-based system similar in complexity to those used by recent communities that have informally regulated the use of public goods such as stand-up comedy routines,³⁷ chefs' recipes,³⁸ roller derby pseudonyms,³⁹ and

33. See *infra* notes 89-109 and accompanying text. For further discussion of courtesy's horizontal and vertical axes, see notes 62-64 and accompanying text below.

34. See *infra* notes 202-79 and accompanying text; see also Henry Holt, *The Recoil of Piracy*, FORUM, Mar. 1888, at 27, 28 (stating that trade courtesy "grew up" roughly between 1850 and 1876).

35. See *infra* notes 227-79 and accompanying text.

36. See *infra* notes 365-95 and accompanying text.

37. Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787, 1809-31 (2008).

38. Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 ORG. SCI. 187, 191-96 (2008).

39. David Fagundes, *Talk Derby to Me: Intellectual Property Norms Governing Roller Derby Pseudonyms*, 90 TEX. L. REV. 1093, 1108-31 (2012).

tattoos.⁴⁰ Although it has received little attention from scholars of copyright law or informal norms,⁴¹ trade courtesy was a historically significant example of informal private ordering, or what the American publisher and courtesy

40. Aaron Perzanowski, *Tattoos & IP Norms*, 98 MINN. L. REV. 511, 525-67 (2013).

41. For the most sustained treatment of courtesy by a legal scholar, see SPOO, WITHOUT COPYRIGHTS, *supra* note 15, at 30-64, 107-15. See also Spoo, *Copyright Protectionism*, *supra* note 15, at 656-59 (discussing courtesy in the context of James Joyce's *Ulysses*). For brief mentions of courtesy, see Thomas Bender & David Sampliner, *Poets, Pirates, and the Creation of American Literature*, 29 N.Y.U. J. INT'L L. & POL. 255, 266-67 (1996-1997); Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 282-83, 299-300, 300 n.79, 302 (1970); Jessica Bulman, *Publishing Privacy: Intellectual Property, Self-Expression, and the Victorian Novel*, 26 HASTINGS COMM. & ENT. L.J. 73, 85 n.40 (2003); Catherine Seville, *Authors as Copyright Campaigners: Mark Twain's Legacy*, 55 J. COPYRIGHT SOC'Y U.S.A. 283, 327 (2008); Robert Spoo, *Ezra Pound's Copyright Statute: Perpetual Rights and the Problem of Heirs*, 56 UCLA L. REV. 1775, 1783-84, 1784 n.42, 1796-98 (2009); and Steven Wilf, *Copyright and Social Movements in Late Nineteenth-Century America*, 12 THEORETICAL INQUIRIES L. 179, 192-93, 198 (2011). For the most systematic discussion of the subject by a nonlegal scholar, see Jeffrey D. Groves, *Courtesy of the Trade*, in 3 A HISTORY OF THE BOOK IN AMERICA: THE INDUSTRIAL BOOK, 1840-1880, at 139, 139-48 (Scott E. Casper et al. eds., 2007). For less extensive though still useful discussions of courtesy and courtesy principles, see MICHAEL J. EVERTON, THE GRAND CHORUS OF COMPLAINT: AUTHORS AND THE BUSINESS ETHICS OF AMERICAN PUBLISHING 44-47, 125-27 (2011); EUGENE EXMAN, THE BROTHERS HARPER: A UNIQUE PUBLISHING PARTNERSHIP AND ITS IMPACT UPON THE CULTURAL LIFE OF AMERICA FROM 1817 TO 1853, at 52-55, 58-59, 116, 118, 264-65 (1965); ELLEN D. GILBERT, THE HOUSE OF HOLT, 1866-1946: AN EDITORIAL HISTORY 3, 18, 31-33, 36-39, 164-67, 210 (1993); HARPER, *supra* note 32, at 110-14, 340-45, 347-48, 355-56, 358, 393, 428, 447, 615-17; MELISSA J. HOMESTEAD, AMERICAN WOMEN AUTHORS AND LITERARY PROPERTY, 1822-1869, at 154-63 (2005); JOHNS, *supra* note 32, at 295-302; KHAN, *supra* note 26, at 277-83; HELLMUT LEHMANN-HAUPT, THE BOOK IN AMERICA: A HISTORY OF THE MAKING, THE SELLING, AND THE COLLECTING OF BOOKS IN THE UNITED STATES 166-67 (1939); MADISON, *supra* note 32, at 10, 16-17, 26, 50, 53-55, 63-69, 98-100, 148-49, 225-26; DONALD SHEEHAN, THIS WAS PUBLISHING: A CHRONICLE OF THE BOOK TRADE IN THE GILDED AGE 39, 57-69, 71, 73, 217, 225-26 (1952); JOHN TEBBEL, BETWEEN COVERS: THE RISE AND TRANSFORMATION OF BOOK PUBLISHING IN AMERICA 39-40, 87, 89-90, 130-31 (1987); SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 52-55 (2001); MICHAEL WINSHIP, AMERICAN LITERARY PUBLISHING IN THE MID-NINETEENTH CENTURY: THE BUSINESS OF TICKNOR AND FIELDS 136-40 (1995); John Feather, *The Significance of Copyright History for Publishing History and Historians*, in PRIVILEGE AND PROPERTY: ESSAYS ON THE HISTORY OF COPYRIGHT 359, 364-65 (Ronan Deazley et al. eds., 2010); Arnold Plant, *The Economic Aspects of Copyright in Books*, 1 ECONOMICA 167, 172-73 (1934); and Stan J. Liebowitz, *Paradise Lost or Fantasy Island?: The Payment of British Authors in 19th Century America* (Aug. 8, 2016) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2676048. For descriptions of courtesy by a contemporaneous practitioner, see Henry Holt, *Competition*, ATLANTIC MONTHLY, Oct. 1908, at 516, 522-24 [hereinafter Holt, *Competition*]; and Holt, *supra* note 34, at 27-32.

practitioner Henry Holt called a “brief realization of the ideals of philosophical anarchism—self-regulation without law.”⁴²

Part I of this Article provides historical context for analyzing courtesy paratexts. That Part sketches the broad outlines of lawful piracy in nineteenth-century America; the public goods problem that U.S. copyright law posed for American publishers of foreign authors; and the cohesive, informal practice of trade courtesy that arose to meet that problem by preventing or reducing destructive competition for unprotected foreign works. That Part goes on to offer a succinct taxonomy of trade courtesy’s rules for acquiring and retaining informal title to foreign works and the sanctions for violating established courtesy rights. Finally, that Part shows courtesy and its sanctions operating in controversies that broke out over American publishers’ claims to works by Thomas Carlyle and Charles Dickens.

Part II examines numerous courtesy paratexts found in nineteenth-century American editions of foreign authors’ works, including works by Charles Dickens, Robert Browning, Elizabeth Barrett Browning, Alfred Lord Tennyson, Thomas De Quincey, and Rudyard Kipling. These authorial paratexts served both as negative injunctions against unauthorized reprinting of courtesy texts (the courtesy equivalent of copyright notices) and as testimonials to the business virtue and morality of the informal norms-based publishing practice. They reveal the contours of the courtesy system and enrich our understanding of the ways in which this complex system of private ordering operated from the 1850s to the 1890s.

Part III offers a close reading of a remarkably elaborate courtesy paratext that appeared in the vocal scores of Gilbert and Sullivan’s comic operas published in the United States in the 1880s. In addition to the usual testimonial and prohibitory functions, this paratext offered reasons and justifications for courtesy practices and sought to assure purchasers that trade courtesy did not operate in the manner of other public goods monopolies to elevate prices, lower quality, and restrict supply.

Part IV goes on to show that the defensive note in Gilbert and Sullivan’s paratext was a response to forces that would soon cause trade courtesy to decline as an overt practice: rampant unauthorized reprinting by discourteous houses, the rise of antitrust laws, and the enactment of the 1891 Chace Act, which offered conditional copyright protection to foreign authors. These developments accompanied and helped fuel suspicion that trade courtesy was more an unjustified monopolistic practice than a defensible solution to market failure or an honor code observed by better businessmen.

42. Holt, *Competition*, *supra* note 41, at 522-23.

Part V shows that although trade courtesy declined as a highly visible, frequently extolled system of publishing norms, the principles of courtesy—mutual forbearance to reprint claimed works and legally un compelled payment to foreign authors—continued to govern the behavior of some American publishers. The “ghost of courtesy,” as it has been called,⁴³ inhabited paratexts in American editions of two iconic works of the twentieth century: James Joyce’s *Ulysses*⁴⁴ and J.R.R. Tolkien’s *The Lord of the Rings*.⁴⁵ These paratexts testify to the survival of courtesy principles as a resource for American publishers who sought to protect their investments in works lacking incontestable copyright protection in the United States.

I. American Piracy, Public Goods, and Trade Courtesy

During the nineteenth century, protests against “Yankee pirates” issued regularly from Britain.⁴⁶ Yet American literary piracy was a complex activity closely bound up with legitimate publishing and copyright law. As one commentator put it in 1882, piracy was “the product of law.”⁴⁷ A decentralized reprint industry in the antebellum years reflected the republican ideals of cultural diffusion and widespread learning, fostering a depersonalized print culture at the expense of individual authors’ rights.⁴⁸ Legislators built piracy into the copyright law as a way of accommodating the democratic values of “ready access to literature, information, education, and other conduits for achieving equality of opportunity.”⁴⁹ For much of the century, the United States was a net importer of fiction,⁵⁰ and British books were voraciously consumed by an increasingly literate populace.⁵¹

43. Groves, *supra* note 41, at 147.

44. JAMES JOYCE, *ULYSSES* (Random House 1st authorized American ed. 1934) (1922).

45. J.R.R. TOLKIEN, *THE FELLOWSHIP OF THE RING* (Ballantine Books 1965) (1954); J.R.R. TOLKIEN, *THE TWO TOWERS* (Ballantine Books 1965) (1954); J.R.R. TOLKIEN, *THE RETURN OF THE KING* (Ballantine Books 1965) (1955). These volumes are parts one, two, and three, respectively, of the trilogy known as *The Lord of the Rings*.

46. S.S. Conant, *International Copyright: An American View*, *MACMILLAN’S MAG.*, June 1879, at 151, 159; see also *Culture and Progress Abroad*, *SCRIBNER’S MONTHLY*, Jan. 1872, at 375, 375 (quoting unnamed Englishman).

47. See *The Author’s Best Friend*, *N.Y. EVENING POST*, Sept. 1, 1882, reprinted in *PUBLISHERS’ WKLY.*, Sept. 23, 1882, at 430, 430.

48. See MEREDITH L. MCGILL, *AMERICAN LITERATURE AND THE CULTURE OF REPRINTING, 1834-1853*, at 49-51, 63-73 (2003).

49. KHAN, *supra* note 26, at 286.

50. *Id.* at 16-17, 258.

51. See PAUL GOLDSTEIN, *COPYRIGHT’S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 149 (rev. ed. 2003). The 1850 U.S. Census reported a literacy rate of 90% among
footnote continued on next page

To the extent nineteenth-century authors can be said to have created public goods, unauthorized reprinting of their works in the United States represented a vast free rider phenomenon.⁵² Intellectual property laws seek to prevent market failure for public goods by artificially restricting their distribution and making them subject to simulated scarcity.⁵³ U.S. copyright laws in the nineteenth century offered no mechanism for contriving scarcity in foreign works. Yet despite the aggressive free riding of American reprinters, foreign authors continued to create. In part, this was because copyright protection in their own countries solved free rider problems for their publishing markets, allowing them to capture at least the domestic benefits of their labors. American piracies did not seriously undermine foreign authors' incentives to create so long as they could look to their own markets for remuneration.⁵⁴ The divergence of international laws—protection in the country of creation and lack of protection in the countries of production and distribution—brought about a variant of the disaggregation that commercialization theory examines today.⁵⁵ The American public domain was parasitic; it annexed a vast free resource of foreign innovation without running the risk of losing that resource through failure to incentivize it. With respect to the creation of foreign works, the American public domain was not haunted by a public goods problem.

But publishers, too, produce—not typically by creating works but rather by reproducing and disseminating works created by others. Like creators, they

white men and women. CANDY GUNTHER BROWN, *THE WORD IN THE WORLD: EVANGELICAL WRITING, PUBLISHING, AND READING IN AMERICA, 1789-1880*, at 10 (2004).

52. See Gordon, *supra* note 28, at 164 (discussing authors' works and free riding).

53. Lemley, *supra* note 28, at 462.

54. See INTERNATIONAL COPYRIGHT LAW REPORT, *supra* note 12, at 80-81 (statement of the Historical Publishing Company) ("In no possible event can an author . . . be seriously wronged by the republication of his works in a foreign country. If he is appreciated at home, his reward should be reasonably satisfactory."); *The International Copyright Question*, 12 U.S. MAG. & DEMOCRATIC REV. 115, 120 (1843) ("The English author . . . has written his book for the large and liberal reading public of his own country, under the rights, for his compensation and protection, conferred upon him by its institutions and laws; how is he injured by the reproduction and diffusion of the same in another country, three thousand miles across an ocean, a distinct political body?"); see also Breyer, *supra* note 41, at 313 ("[I]t may have been British [copyright] protection that guaranteed [the British] author and publisher sufficient income to make them relatively indifferent to American [reprint] prices.").

55. It is commonly observed that the Internet, with its capacity for rapid dissemination of copies, tends to disaggregate creation and distribution. See, e.g., Lemley, *supra* note 28, at 461. Commercialization theory contends that intellectual property is necessary not so much to incentivize the creation of works as to encourage production, distribution, and marketing of works. Jonathan M. Barnett, *Copyright Without Creators*, 9 REV. L. & ECON. 389, 404-14 (2013); Lemley, *supra* note 28, at 463, 494.

require economic incentives to go on producing. Why would a New York publishing firm in, say, 1855 invest in advance sheets of a new English novel when a firm in Philadelphia could free ride by quickly bringing out a competing edition that would benefit from advertising paid for by the New York house?⁵⁶ First-mover strategies offered some advantages, but being first to market with a new foreign title sometimes secured a head start of only days or hours before competitors began issuing their own reprints.⁵⁷ Why, then, did the threat of uncontrolled reprinting not result in widespread market failure and early abandonment of foreign literature as a profitable good? One important solution, carefully evolved over the nineteenth century, was the courtesy of the trade.⁵⁸

Contemporaries variously defined the courtesy of the trade as a duty “[n]ot to jump another publisher’s claim”⁵⁹ and an agreement among publishers “not . . . to cut each other’s throats.”⁶⁰ “[T]here . . . grew up,” wrote Henry Holt, “between, say, 1850 and 1876, the unwritten law . . . of ‘trade courtesy.’ It not only prevented ruinous competition between American publishers, but also secured to foreign authors most of their rights.”⁶¹ Trade courtesy, in its fully developed form, thus had a horizontal axis and a vertical axis. By requiring participating publishers to respect the claim of the first publisher to announce its intention to reprint a foreign title,⁶² courtesy horizontally regulated what might otherwise have disintegrated into destructive competition for the work.⁶³ Vertically, the system ordered relations between American publishers and foreign authors by encouraging voluntary payments to the authors or their publishers.⁶⁴ Again, self-interest was at work. Payments helped cement

56. See INTERNATIONAL COPYRIGHT LAW REPORT, *supra* note 12, at 48 (statement of G.P. Putnam’s Sons) (describing the tendency of publishing rivals to free ride on “the advertising done for the authorized edition”).

57. EXMAN, *supra* note 41, at 7-8.

58. Many American publishers testified to the threat of market failure by unrestrained reprinting prior to 1891. See, e.g., INTERNATIONAL COPYRIGHT LAW REPORT, *supra* note 12, at 56 (statement of Charles Scribner’s Sons) (“[R]eprint[ing] recent English books in America and mak[ing] a profit on them . . . had become almost impossible when there was no protection.”); *id.* at 69 (statement of J.B. Lippincott Company) (discussing “the demoralizing and ruinous competition” caused by pre-1891 “reckless reprinting”); see also *infra* notes 111-13, 144-61, 271-76 and accompanying text (discussing the financial hardship inflicted on publishers by the reprinting of foreign works).

59. “*The Evening Post’s* Libel Suit, PUBLISHERS’ WKLY., Feb. 25, 1893, at 359, 360 (1893) (quoting testimony of Henry Holt).

60. ROYAL COMMISSION ON COPYRIGHT, *supra* note 29, at 43 (testimony of John Blackwood).

61. Holt, *supra* note 34, at 28.

62. See *infra* notes 78-81 and accompanying text.

63. See MADISON, *supra* note 32, at 50.

64. *Id.*

relationships with foreign authors and signaled to other publishers that the paying firm was a responsible member of the trade.⁶⁵

What is most striking about trade courtesy is that it was an “unwritten law,”⁶⁶ an entirely voluntary system of informal norms that imitated the basic features and purposes of copyright law.⁶⁷ Courtesy evolved a complex set of exclusive rights, rules for securing those rights, and sanctions for violating them.⁶⁸ These extralegal entitlements helped stabilize the book market during much of the nineteenth century.⁶⁹

The community of participating courtesy publishers was a small cohesive one. Although estimates vary, the extant correspondence of Charles Scribner’s Sons reveals that at least nine major publishing firms, in addition to Scribner’s, observed the principles of courtesy during the 1870s: J.B. Lippincott and Co., J.R. Osgood and Co., D. Appleton and Co., Roberts Brothers, G.P. Putnam’s Sons, Harper and Brothers, Macmillan and Co., E.P. Dutton and Co., and Henry Holt and Co.⁷⁰ Not all publishing houses recognized courtesy. Novice publishers and small firms, for example, had strong incentives to resist the informal code and to reprint freely as a way of establishing book lists and amassing capital that could help build a foundation for success,⁷¹ and courtesy failed to gain a foothold in the aggressive paper-book trade of the 1870s and

65. Cf. ERIC A. POSNER, *LAW AND SOCIAL NORMS* 18-19 (2000) (discussing actors who signal willingness or unwillingness to cooperate within informal ordering systems).

66. Holt, *supra* note 34, at 28.

67. Holt praised courtesy as possessing “the essential features of an International Copyright Law” despite the “gaps and defects” typical of “all usages, and, for that matter[,] . . . all laws.” *Id.* at 30.

68. See *infra* Part I.A-B.

69. American courts refused to treat courtesy claims as actual property entitlements. See, e.g., *Sheldon v. Houghton*, 21 F. Cas. 1239, 1241-42 (C.C.S.D.N.Y. 1865) (No. 12,748) (“If [courtesy] has any foundation at all, it stands on the mere will, or . . . the ‘courtesy’ of the trade. . . . It can, therefore, hardly be called property at all—certainly not in any sense known to the law.”).

70. SHEEHAN, *supra* note 41, at 65; see also ROYAL COMMISSION ON COPYRIGHT, *supra* note 29, at 181 (testimony of Charles Edward Appleton) (describing “courtesy copyright” as “an understanding which theoretically exists between all firms in America, but practically only amongst the five or six largest firms”). A form of courtesy also underlay the system of exchange newspapers in the 1850s, where uncopyrighted (and sometimes copyrighted) material from American periodicals could be reprinted freely by other American periodicals, as long as they credited the author and the original publishing source. HOMESTEAD, *supra* note 41, at 154-63.

71. See GEORGE T. DUNLAP, *THE FLEETING YEARS* (1937), quoted in PUBLISHERS ON PUBLISHING 269, 271-72 (Gerald Gross ed., 1961) (discussing the publishing company Grosset and Dunlap’s use of unauthorized reprinting to achieve financial viability); MADISON, *supra* note 32 at 7-8 (“[F]ledgling publishers . . . made up most of their lists with reprinted [and unremunerated] importations.”).

1880s when publishing norms were often cast aside in favor of quick profits on cheaply printed books.⁷² Moreover, new entrants into the publishing field increasingly accused veteran firms of monopolistic practices and supracompetitive pricing.⁷³

The publishing world in the nineteenth century, though cohesive enough to evolve an extralegal code of conduct, was more heterogeneous and volatile than the close-knit rural community of Robert Ellickson's classic study of informal norms.⁷⁴ Unlike Ellickson's resourceful cattlemen who employ flexible social mores as an alternative to unwieldy or unfamiliar legal remedies, American publishers did not have the luxury of choosing between informal norms and legal entitlements because the foreign authors whom they reprinted enjoyed no legal entitlements at all in the United States.⁷⁵ These publishers were confronted instead with a starker choice between informal self-regulation and virtually no legal regulation at all. The choice was not one between order with law and order without law but, more fundamentally, between fragile order and commercial chaos. Operating beyond the shadow of the law—indeed, in a kind of legal vacuum—publishers sought to avert destructive competition by cooperating to manage a free, unprotected resource. With striking though intermittent success over the decades,⁷⁶ the elaborate

72. See *infra* notes 100, 108, 158-61, 271-76 and accompanying text. On the “piracy wars” in nineteenth-century American publishing, see Robert L. McLaughlin, *Oppositional Aesthetics/Oppositional Ideologies: A Brief Cultural History of Alternative Publishing in the United States*, 37 CRITIQUE 171, 173-74 (1996).

73. See *infra* notes 314, 318-25 and accompanying text. Courtesy publishers often entered into contracts with each other and their foreign authors. See Groves, *supra* note 41, at 141; see also ROYAL COMMISSION ON COPYRIGHT, *supra* note 29, at 94-95 (testimony of George Haven Putnam) (referring to American publishers’ “contracts” with foreign authors). But there was no comprehensive system of horizontal contracting, except in the sense that courtesy publishers tacitly operated as a cartel. See *id.* at 287 (testimony of Herbert Spencer) (noting that trade courtesy conferred “a [publishing] priority, such as is tacitly regarded as a monopoly”).

74. See generally ROBERT C. ELICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 40-64 (1991) (describing the system of informal norms that cattlemen and landowners employ in Shasta County, California to resolve cattle-trespass disputes in preference to formal tort remedies).

75. See *supra* notes 26-27 and accompanying text.

76. See SHEEHAN, *supra* note 41, at 62-63 (describing courtesy around 1860 as a “clearly defined, even if occasionally ignored, principle of self-regulation”); see also INTERNATIONAL COPYRIGHT LAW REPORT, *supra* note 12, at 50 (statement of G.P. Putnam’s Sons) (noting that prior to the 1891 Chace Act, “foreign authors secured at haphazard an uncertain remuneration from their American readers”); ROYAL COMMISSION ON COPYRIGHT, *supra* note 29, at 43 (testimony of John Blackwood) (“I have known [courtesy] broken, and I have known it kept.”).

rules of courtesy staved off or at least mitigated “the old scramble of pirated editions.”⁷⁷

A. Trade Courtesy: Entitlements

In its simplest outlines, the courtesy of the trade granted an informal exclusive right of publication to the first American publisher to announce plans to issue an uncopyrighted foreign book.⁷⁸ Participating houses recognized this right and refrained from “printing on” the announcing firm.⁷⁹ Later, in part to avoid confusion over the priority of announcements, the rule emerged that the announcing firm, to secure its rights, must actually have purchased advance sheets of the foreign edition for use as setting copy or entered into an agreement with the author for permission to reprint. “If a publisher had the advance sheets in his possession, such right or claim overrode a simple announcement.”⁸⁰ By supplementing its announcement with the purchase of advance sheets or with an author’s contract, the publisher perfected its otherwise bare title to the foreign work.⁸¹

Trade courtesy also developed a kind of option system based on what the trade referred to as the “rule of association.”⁸² Once an American publisher reprinted a foreign title and paid its author, it was generally understood that the author was associated with that house, which could then expect to have the first refusal of the author’s next effort.⁸³ For example, after William D.

77. INTERNATIONAL COPYRIGHT LAW REPORT, *supra* note 12, at 30 (statement of the American Copyright League). Whether market failure for foreign works was a real threat to American publishers or served as rhetorical cover for monopolistic practices or moral preferences—or both—is beyond the scope of this Article. Certainly, publishers routinely voiced concern about ruinous competition. *E.g.*, Holt, *supra* note 34, at 28.

78. EXMAN, *supra* note 41, at 52-55; JOHNS, *supra* note 32, at 300-01; SHEEHAN, *supra* note 41, at 71.

79. The phrase “printing on” meant “printing a book for which another publisher claimed priority.” EXMAN, *supra* note 41, at 7.

80. HARPER, *supra* note 32, at 111; *see also* ROYAL COMMISSION ON COPYRIGHT, *supra* note 29, at 66 (testimony of George Washburn Smalley) (stating that arrangements for “early sheets” were “common”).

81. The Harper firm noted that “[i]n many cases when the English authors send us early sheets of their books, and for some reason we fail to use them, we endeavor to sell them on the author’s account to other American houses.” Letter from Harper & Bros. to M.O.W. Oliphant (Feb. 11, 1873), *quoted in* HARPER, *supra* note 32, at 357, 358. This suggests that publishers enjoyed the power to transfer courtesy rights. *See infra* notes 129-30, 171 and accompanying text.

82. Groves, *supra* note 41, at 140.

83. MADISON, *supra* note 32, at 26; Groves, *supra* note 41, at 140-41.

Ticknor established courtesy title to Tennyson's *Poems* in 1842,⁸⁴ other publishers acknowledged the Boston firm's associational rights to Tennyson's later works.⁸⁵ There were additional refinements, as well. For example, if a publisher reprinted the work of a new or untried author as an experiment, the publisher would have the first refusal of the author's later books only if it made satisfactory payment to the author for the first publication.⁸⁶ With variations, the foregoing rules crystallized over time into a coherent and consensual system of imbricated rules and subrules.⁸⁷

Publishers sometimes paid very substantial sums for advance sheets.⁸⁸ As early as the 1820s and 1830s, the Carey & Lea firm of Philadelphia was making payments to Sir Walter Scott or his publisher.⁸⁹ Scott received £75 for advance sheets of each of the Waverley novels⁹⁰ and £300 for his *Life of Napoleon Buonaparte*.⁹¹ In 1849, Harper and Brothers brought out Thomas Babington Macaulay's celebrated *History of England from the Accession of James II*⁹² after announcing the book and paying his English publisher £200 for first proofs.⁹³

84. 1 ALFRED TENNYSON, *POEMS* (Boston, William D. Ticknor 1842).

85. Groves, *supra* note 41, at 141.

86. For details of this courtesy practice and those mentioned in the foregoing paragraphs, see Holt, *supra* note 34, at 29-31.

87. Cf. Richard A. Posner & Eric B. Rasmusen, *Creating and Enforcing Norms, with Special Reference to Sanctions*, 19 INT'L REV. L. & ECON. 369, 369-70 (1999) (discussing group consensus and the "crystalliz[ing]" of norms).

88. Scholars have disagreed about the amounts paid to foreign authors as well as the number of authors who received payments. Compare Breyer, *supra* note 41, at 282, 300 (stating that nineteenth-century "American publishers sold countless copies of British works and paid their authors royalties" and that "many English writers earned more from the sale of advance proofs to American publishers . . . than from the copyright royalties on their English sales"), with Liebowitz, *supra* note 41, at 20 ("[E]ven with trade courtesy, British authors were either not paid at all or paid less than what they would have been expected to receive had they been protected by copyright.").

89. Groves, *supra* note 41, at 141.

90. *E.g.*, 1 SIR WALTER SCOTT, *KENILWORTH* (Philadelphia, M. Carey & Son 1821) (1821).

91. 1 SIR WALTER SCOTT, *THE LIFE OF NAPOLEON BUONAPARTE, EMPEROR OF THE FRENCH: WITH A PRELIMINARY VIEW OF THE FRENCH REVOLUTION* (Philadelphia, Carey, Lea & Carey 1827) (1827). For the sums paid by the Carey firm for Scott's works, see SHEEHAN, *supra* note 42, at 62. According to a calculation employing the consumer price index and the retail price index, the average value in 2014 of £300 from 1827 was \$32,600. *Computing 'Real Value' over Time with a Conversion Between U.K. Pounds and U.S. Dollars, 1774 to Present*, MEASURINGWORTH, <https://www.measuringworth.com/exchange> (to locate, enter "1827" into the "Initial year" text box; enter "£" and "300" into the "Initial value" text boxes; enter "2014" into the "Desired year" text box; and then follow the "Calculate" hyperlink).

92. 1 THOMAS BABINGTON MACAULAY, *THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES II* (New York, Harper & Bros. 1849) (1849).

93. EXMAN, *supra* note 41, at 264-65.

The Harpers paid Charles Dickens £360 for magazine rights to *Bleak House*,⁹⁴ £250 for *Little Dorrit*,⁹⁵ £1000 each for *A Tale of Two Cities*⁹⁶ and *Our Mutual Friend*,⁹⁷ £1250 for *Great Expectations*,⁹⁸ and £2000 for the never-finished *Mystery of Edwin Drood*.⁹⁹ Until fierce competition from cheap reprints made it difficult to offer remuneration in the 1880s, the Appleton firm paid the Welsh author Rhoda Broughton \$1000 for each of her novels.¹⁰⁰ One publisher in 1876 estimated that payments for advance sheets averaged between £25 and £100,¹⁰¹ and payments were sometimes made to a deceased author's estate.¹⁰²

Methods of payment varied. Instead of offering upfront sums for advance sheets, publishing houses sometimes paid post hoc honoraria as a “voluntary

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94. CHARLES DICKENS, *BLEAK HOUSE* (London, Bradbury & Evans 1853). In the United States, *Bleak House* appeared serially in twenty parts in 1852-1853 in *Harper's Magazine*. THE CHARLES DICKENS ENCYCLOPEDIA 19 (comp. Michael Hardwick & Mollie Hardwick 1973).
95. CHARLES DICKENS, *LITTLE DORRIT* (London, Bradbury & Evans 1857). The novel appeared serially in *Harper's Magazine* in 1855-1857. THE CHARLES DICKENS ENCYCLOPEDIA, *supra* note 94, at 21.
96. CHARLES DICKENS, *A TALE OF TWO CITIES* (London, Chapman & Hall 1859). The novel appeared serially in *Harper's Weekly* in 1859. THE CHARLES DICKENS ENCYCLOPEDIA, *supra* note 94, at 23.
97. 1 CHARLES DICKENS, *OUR MUTUAL FRIEND* (London, Chapman & Hall 1865). The novel appeared serially in *Harper's Magazine* in 1864-1865. THE CHARLES DICKENS ENCYCLOPEDIA, *supra* note 94, at 27.
98. 1 CHARLES DICKENS, *GREAT EXPECTATIONS* (London, Chapman & Hall 3d ed. 1861). The novel appeared serially in *Harper's Weekly* in 1861. THE CHARLES DICKENS ENCYCLOPEDIA, *supra* note 94, at 26.
99. CHARLES DICKENS, *THE MYSTERY OF EDWIN DROOD* (London, Chapman & Hall 1870). The novel appeared serially in a supplement to *Harper's Weekly* in 1870. THE CHARLES DICKENS ENCYCLOPEDIA, *supra* note 94, at 29. For the sums paid by the Harpers to serialize the above-mentioned Dickens novels, see MADISON, *supra* note 32, at 26. A contemporary source confirms these sums, with the exception that it figures the amount paid for *Bleak House* at £400. *The Dickens' Controversy*, AM. LITERARY GAZETTE & PUBLISHERS' CIRCULAR, June 1, 1867, at 68, 68-69. This source does not include the then-unpublished *Mystery of Edwin Drood*.
100. Raymond Howard Shove, *Cheap Book Production in the United States, 1870 to 1891*, at 119 (1936) (unpublished M.A. thesis, University of Illinois) (on file with the University of Illinois Library).
101. ROYAL COMMISSION ON COPYRIGHT, *supra* note 29, at 91 (testimony of George Haven Putnam).
102. *Id.* at 63 (testimony of John Murray) (stating that £1000 had been obtained from an American publisher for the family of the deceased author and explorer David Livingstone). Livingstone died in 1873. Christopher K. Schuele, *Healing the Congo's Colonial Scars: Advocating for a Hybrid Approach to Conflict Minerals Reporting Regulations in the European Union*, 33 WIS. INT'L L.J. 755, 755 n.1 (2015).

recognition” of authors whose books had reaped profits.¹⁰³ In 1836, for example, the Carey firm reprinted 1500 copies of the initial parts of Dickens’s *Pickwick Papers*,¹⁰⁴ sold at 45 cents per volume.¹⁰⁵ Two years later, the firm sent Dickens £50 in acknowledgment of the book’s success.¹⁰⁶ As courtesy practices took hold, publishers began to offer foreign authors royalties on copies sold, either instead of or as a supplement to simple honoraria for successful sales or initial payments for advance sheets.¹⁰⁷ Henry Holt paid a 10% royalty on numerous editions of Thomas Hardy’s works in the 1870s and 1880s until widespread piracies made reprinting Hardy unprofitable.¹⁰⁸ Courtesy thus imitated a practice inspired by formal copyright law: royalties were becoming the usual form of payment to authors who controlled the exclusive rights conferred by copyright.¹⁰⁹

The artificial property system fashioned by trade courtesy even had its own public domain, a commons of foreign works to which no American publisher was exclusively entitled. Courtesy could not be used, for example, to claim an association with a long-dead or classic author or for collected editions of standard foreign writers.¹¹⁰ These materials remained available to all publishers. Moreover, if a courtesy title became subject to reprinting by multiple publishers, it might lose its informal protection and return to trade courtesy’s commons.¹¹¹ Thus, American publishing came to recognize a two-tiered public domain: First, there was the familiar legal public domain, the

103. ROYAL COMMISSION ON COPYRIGHT, *supra* note 29, at 136 (testimony of the Reverend Canon Farrar).

104. THE POSTHUMOUS PAPERS OF THE PICKWICK CLUB: CONTAINING A FAITHFUL RECORD OF THE PERAMBULATIONS, PERILS, ADVENTURES AND SPORTING TRANSACTIONS OF THE CORRESPONDING MEMBERS (“Boz” ed., Philadelphia, Carey, Lea & Blanchard 1836). “Boz” was Dickens’s pseudonym early in his career. ROBERT MCPARLAND, CHARLES DICKENS’S AMERICAN AUDIENCE 50 (2010).

105. EXMAN, *supra* note 41, at 58-59.

106. *Id.* Previously, the Carey firm had offered a gratuity of £25, but Dickens politely declined it. Letter from Charles Dickens to Carey, Lea & Blanchard (Oct. 26, 1837), in 1 THE LETTERS OF CHARLES DICKENS 322, 322 & n.1 (Madeline House & Graham Storey eds., Pilgrim ed. 1965).

107. Groves, *supra* note 41, at 146; *see also* ROYAL COMMISSION ON COPYRIGHT, *supra* note 29, at 314 (testimony of John Tyndall) (noting that the Appleton firm gave annual accounts of an English author’s American sales and “a certain percentage on the retail price of [his] books”); WINSHIP, *supra* note 41, at 138-39 (discussing the publisher Ticknor and Fields’s use of royalties and payments for advance sheets in the 1850s).

108. GILBERT, *supra* note 41, at 164, 166.

109. SHEEHAN, *supra* note 41, at 69, 73; *see also* TEBBEL, *supra* note 41, at 90 (discussing royalty payments made to Thomas Hardy after the Chace Act went into effect).

110. Groves, *supra* note 41, at 144.

111. *Id.* at 145.

result of nonexistent or expired copyright protection. Second, there was the ethical public domain, where a work already lacking copyright also lost the protection of trade courtesy because it had been so frequently reprinted that no publisher would attempt to claim the text as exclusive moral property.

It might strike modern legal sensibilities as bizarre for an uncopyrighted work to be described as having become “public property,”¹¹² but it is a redundancy explained by the institution of trade courtesy. Courtesy raised a work out of the public domain, gave it the status of private property, and caused the market to treat it as a public good clothed with the privileges of legal monopoly. The magic of this informal system would sometimes continue undisturbed for years, until one day a discourteous reprinter decided to seize upon some courtesy-protected work and to issue it in a cheap, flimsy edition. The spell broken, other reprint houses would leap in and try their luck with the same title.¹¹³ Suddenly, the artificial order of courtesy was temporarily wrecked by the anarchy of an unregulated commons. The trade now regarded the foreign work as having returned to its original condition among the heterogeneous mass of materials in the commons. For courtesy adherents, this loss of recognized exclusivity was a lapse into a renewed public domain, a second death of protection.

B. Trade Courtesy: Punishments

Henry Holt described nineteenth-century American publishing as

perhaps the greatest paradox in human experience At one end, its principal material was not protected by law, and the business lived to a large extent on what was morally, if not legally, thievery; while at the other end, there was honor among thieves, in the respect they paid each other’s property.¹¹⁴

Holt may have believed that trade courtesy was an embodiment of business virtue, but the courtesy system itself did not share the assumption that publishers, left to their own devices, would be good. Instead, along with rules for acquiring and maintaining exclusive rights, trade courtesy evolved a series

112. The common perception has been that the American public domain is unitary and unchanging. For much of its history, U.S. intellectual property law recognized that “matter once in the public domain must remain in the public domain.” *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 484 (1974) (discussing patents and trade secrets). This policy has been in doubt at least since *Golan v. Holder*, 132 S. Ct. 873 (2012), which upheld the constitutionality of a federal statute restoring U.S. copyright protection to foreign works that had lost or failed to obtain protection as a result of noncompliance with U.S. copyright formalities, *id.* at 894.

113. *See Groves*, *supra* note 41, at 145.

114. GILBERT, *supra* note 41, at 31 (quoting HENRY HOLT, GARRULITIES OF AN OCTOGENARIAN EDITOR 97 (1923)).

of carefully calibrated penalties for transgressors. If informal exclusive rights to foreign titles were the carrots of the system, escalating sanctions were the sticks. These sanctions included, in order of increasing severity, mild remonstrance, angry protest, public shaming, refusal to deal, predatory pricing, and outright retaliation.

A gentlemanly rebuke, often expressed as a simple, urbane inquiry, was usually the first step in enforcing exclusive courtesy rights.¹¹⁵ When the Harpers announced plans to reprint the French critic Hippolyte Taine's *On Intelligence* in 1870,¹¹⁶ Henry Holt wrote the firm, "Doesn't the fact that we have published several of his books entitle us to that if we want it?"¹¹⁷ The Harpers agreed to withdraw, acknowledging the rule of association whereby a publisher that had issued an author's earlier work was entitled to his or her later books.¹¹⁸ Several years later, Holt calmly objected when the Harpers planned to publish *The Return of the Native*,¹¹⁹ reminding Joseph Harper that Holt had been Thomas Hardy's authorized publisher in America.¹²⁰ The Harpers again relented, and Holt later remarked that the Harpers had done "what the notions of honor then prevalent among publishers of standing required."¹²¹

Mild remonstrance sometimes became angry protest when a threat to courtesy persisted. A heated dispute arose between the Harper and Scribner firms in 1881 over James Anthony Froude's edition of Thomas Carlyle's *Reminiscences*.¹²² The Harpers claimed an arrangement with the late Carlyle himself;¹²³ Scribner's, which claimed an association with Froude, insisted that Froude was the work's chief author and that in any case, as Carlyle's executor, he had authorized Scribner's to publish the work.¹²⁴ After bitter exchanges, the

115. See EVERTON, *supra* note 41, at 126-27 (describing a dispute in 1851 over the works of Swedish novelist Fredrika Bremer in which the Harper and Putnam publishing firms initially exchanged private protests and then took their complaints to a trade journal).

116. H. TAINE, *ON INTELLIGENCE* (T.D. Haye trans., New York, Holt & Williams 1872) (1870).

117. MADISON, *supra* note 32, at 98.

118. *Id.*

119. THOMAS HARDY, *THE RETURN OF THE NATIVE* (New York, Henry Holt & Co. 1878) (1878), *advertised in* PUBLISHERS' WKLY., Dec. 14, 1878, at 811, 811.

120. TEBBEL, *supra* note 41, at 90.

121. *Id.*

122. THOMAS CARLYLE, *REMINISCENCES* (James Anthony Froude ed., New York, Charles Scribner's Sons 1881) (1881).

123. Harper & Bros., *supra* note 32, at 316.

124. Charles Scribner's Sons, *supra* note 32, at 322.

two houses issued their respective editions¹²⁵ and then took to the trade journals.¹²⁶ The Harpers placed a full-page notice in the *Publishers' Weekly*, listing the works by Carlyle that they published and detailing the history of their dealings with Carlyle for *Reminiscences*.¹²⁷ The Harpers reminded readers of the courtesy of the trade:

The trade usage is familiar, and accepted by all the leading publishers of the country. It concedes to the house which has issued the works of an English author, either by agreement with him or with his English publishers, the option of republishing, upon mutually satisfactory terms, the subsequent works of the same author as they appear.¹²⁸

Essentially, the Harpers claimed, by virtue of the principle of association, first courtesy rights to works by Carlyle that the firm had acquired “by purchase and transfer from former publishers, and by purchase and direct authorization from Mr. Carlyle.”¹²⁹ The implication was that an association with a foreign author could be established both by direct dealings with the author and by transfer from other publishers who had presumably held associational rights in the past. The “usage” thus permitted transfer of courtesy rights between publishers.¹³⁰ Moreover, the Harpers claimed that their association with Carlyle survived his death and should have been recognized by his executor as posthumously binding on Carlyle’s estate, as if this courtesy “arrangement,” as the Harpers called it, was like any other claim that a creditor might assert against a decedent’s estate.¹³¹ The Harper firm was arguing, in essence, that its claim to Carlyle’s work had a dual character as a contractual right that bound the author and his estate (the vertical axis) and an informal, norms-based right that should be respected by other publishers (the horizontal axis).

Scribner’s responded the following week with its own full-page notice in the *Publishers' Weekly*, pointing to arrangements both with Froude and with Carlyle’s niece and noting that the firm had received advance sheets from

125. *Id.*; see also CARLYLE, *supra* note 122; THOMAS CARLYLE, REMINISCENCES (James Anthony Froude ed., New York, Harper & Bros. 1881) (1881). The Scribner edition contained the courtesy paratext “Authorized Edition.” CARLYLE, *supra* note 122, at iv.

126. MADISON, *supra* note 32, at 67-68.

127. Harper & Bros., *supra* note 32, at 316.

128. *Id.*

129. *Id.*

130. See *supra* note 81 (discussing the power to transfer courtesy rights); see also Sheldon v. Houghton, 21 F. Cas. 1239, 1239 (C.C.S.D.N.Y. 1865) (No. 12,748) (quoting the plaintiffs’ bill as averring that the “good will” generated by courtesy practices “is often very valuable, and is often made the subject of contracts, sales, and transfers, among booksellers and publishers”).

131. Harper & Bros., *supra* note 32, at 316.

Froude and had duly announced that the volume was “in press.”¹³² The Scribner firm’s claim was based primarily on its earlier negotiations with Froude as executor of Carlyle’s estate and editor of *Reminiscences*, as well as on its prior announcement of the book, reinforced by acquisition of advance sheets from Froude.¹³³ Scribner’s denied that the Harper firm was the exclusive associated publisher of Carlyle in the United States and asserted that Carlyle had authorized Froude to make any disposition of *Reminiscences* he pleased.¹³⁴ In effect, Scribner’s was claiming that its understanding and relationship with Froude (the vertical axis) trumped any courtesy claims that the Harpers might assert (the horizontal axis). Invoking “the courtesy of the trade” by name, Scribner’s concluded that “[t]he public will choose between this edition, put forth by the clearly expressed authority of Mr. Carlyle’s executor, and a reprint from our sheets under a claim to which he has distinctly refused his acknowledgment.”¹³⁵ Although they disputed the facts and relevant rules concerning *Reminiscences*, the Harper and Scribner firms plainly acknowledged several important features of trade courtesy: the use of announcement fortified by advance sheets to acquire courtesy title; the claim of prior associational (option) rights when properly obtained; the need to seek a contract-like “arrangement” with the author, his publisher, or his executor; and the propriety of paying a royalty (or “copyright”) to the author or his posthumous representatives.¹³⁶

The noisy skirmishing of the Harper and Scribner firms over Carlyle’s *Reminiscences* is an example of a further courtesy sanction. Because private remonstrance had failed, the two houses resorted to the more severe punishment of public shaming, trading charges that their courtesy claims had been violated. The Boston firm of Roberts Brothers had used the same tactic a year earlier when John W. Lovell of New York brought out an edition of the poems of Jean Ingelow,¹³⁷ an English writer who had been associated with Roberts Brothers for years.¹³⁸ The Boston firm promptly took out

132. Charles Scribner’s Sons, *supra* note 32, at 322.

133. *Id.*

134. *Id.*

135. *Id.*

136. What the Harpers called “a royalty” paid to Carlyle’s niece, Harper & Bros., *supra* note 32, at 316, Scribner’s referred to as “a full copyright,” which it paid to Carlyle’s representatives, Charles Scribner’s Sons, *supra* note 32, at 322. The terms “royalty” and “copyright” were interchangeable in this period, whether referring to copyrighted works or courtesy-protected works. See KHAN, *supra* note 26, at 280.

137. JEAN INGELOW, *THE POETICAL WORKS OF JEAN INGELOW* (New York, John Wurtele Lovell 1880). For the Roberts Brothers’ first edition, see JEAN INGELOW, *POEMS* (Boston, Roberts Bros. 1863).

138. Roberts Bros., *Jean Ingelow’s Poems*, PUBLISHERS’ WKLY., Aug. 21, 1880, at 216, 216.

advertisements “[t]o Booksellers throughout the United States,” reminding them that Roberts Brothers had been publishing Ingelow’s poems ever since announcing the volume as “[i]n [p]ress” in 1863 and that she had “received from us her copyright [that is, her royalty payment] semi-annually, precisely the same as though she were legally entitled to it.”¹³⁹ Not until now had anyone in “the entire fraternity of American Book Publishers” tried “to interfere.”¹⁴⁰ Roberts Brothers implored booksellers not to “sanction a moral wrong by vending this unauthorized edition” but rather “to show their admiration for this beloved authoress by favoring only the Author’s Editions, issued by her own publishers.”¹⁴¹ By broadcasting its disgust, Roberts Brothers was subjecting the transgressor Lovell to public shaming.¹⁴² If such shaming did not cause offenders to mend their ways, then it might at least have the effect of persuading others—publishers, booksellers, and purchasers—to engage in a further type of sanction: refusal to deal.¹⁴³ Multilateral refusal to carry on business with the transgressing firm would force it to conform or to take its chances as a pariah outside the publishing comity.

Disputes between courtesy publishers sometimes became more aggressive. Harsher than private protest or public shaming was the sanction of predatory pricing. If a firm “printed on” a publisher with a claim to priority, the latter

139. *Id.*

140. *Id.*

141. *Id.*; see also Groves, *supra* note 41, at 147 (noting Roberts Brothers’ shaming of Lovell over his reprinting of Ingelow’s poems). Roberts Brothers also employed the courtesy sanction of price-slashing, see *infra* notes 144-53 and accompanying text, announcing that it was reducing prices on its editions of Ingelow’s poems by as much as 50%, Roberts Bros., *Reduced Prices for the Author’s Editions of Jean Ingelow’s Poems*, AM. BOOKSELLER, Aug. 16, 1880, at 146, 146. Roberts Brothers aimed this sanction directly at Lovell’s “pirated edition.” *Correspondence*, AM. BOOKSELLER, Aug. 16, 1880, at 95, 96. Ten years later, Lovell published Ingelow’s fictional work *Quite Another Story* with the courtesy paratext “Authorized Edition.” JEAN INGELOW, *QUITE ANOTHER STORY* 3 (New York, John W. Lovell Co. 1890) (1890). In the supplementary materials to a different novel, Lovell claimed to have issued the work “by special arrangement” with Ingelow. RICHARD DOWLING, *A BAFFLING QUEST* 377 (New York, U.S. Book Co. 1891) (1891).

142. Scholars of social norms refer to communal reprimand as “coordinated punishment,” Barak D. Richman, *How Community Institutions Create Economic Advantage: Jewish Diamond Merchants in New York*, 31 LAW & SOC. INQUIRY 383, 402-03 (2006), or “[m]ultilateral costly sanctions,” Posner & Rasmusen, *supra* note 87, at 372. Robert Ellickson calls it “negative gossip.” Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 677 (1986).

143. See *supra* notes 139-42 and accompanying text (discussing Roberts Brothers’ call for booksellers to refuse to deal with a discourteous publisher); cf. Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1745 (2001) (describing refusal to deal in the cotton industry); Oliar & Sprigman, *supra* note 37, at 1815-16 (describing refusal to deal among stand-up comics).

would sometimes reissue the disputed title at a reduced price in an effort to undersell the pirate.¹⁴⁴ For example, when the New York publisher T.L. McElrath issued an unauthorized edition of *Hard Times* in 1854,¹⁴⁵ the Harpers protected their courtesy investment in Dickens by putting out an edition of the novel at half McElrath's price, purportedly causing McElrath's firm to fail.¹⁴⁶ In 1855, the Boston firm of Ticknor and Fields explained that attempts to interfere with another publisher's courtesy claim would cause that publisher to "print at any rate, and at a cheaper rate, and perhaps set on our other books full chase, & try to injure us in every way."¹⁴⁷ If a publishing house was powerful, it "could afford to undersell a rival."¹⁴⁸ When the English novelist Anthony Trollope angered Harper and Brothers, his established publisher, by giving advance sheets of his book *North America* to a rival house,¹⁴⁹ the Harpers rushed out a cheap edition¹⁵⁰ that destroyed the book's American market.¹⁵¹ The Harpers and other houses would sometimes price their books so low that they could not recover their own costs, believing that "any pecuniary sacrifice"¹⁵² was worth teaching pirates that their behavior had created a climate in which no one could profit.¹⁵³

The severest punishment of all was reserved for the worst outrages against courtesy. This was the sanction of retaliation, occasionally employed even by publishers of the first rank when their rights were threatened by another

144. See SHEEHAN, *supra* note 41, at 217.

145. CHARLES DICKENS, *HARD TIMES* (New York, T.L. McElrath & Co. 1854) (1854).

146. MCPARLAND, *supra* note 104, at 58.

147. Letter from James T. Fields to Robert Browning (Sept. 25, 1855), *quoted in* Groves, *supra* note 41, at 143, 143.

148. ROYAL COMMISSION ON COPYRIGHT, *supra* note 29, at 316 (testimony of John Tyndall).

149. 1 ANTHONY TROLLOPE, *NORTH AMERICA* (Philadelphia, J.B. Lippincott & Co. 1862) (1862). Proclaiming itself the "Author's Edition," the Lippincott volume contained a forceful courtesy paratext: "This Edition of Trollope's 'North America' is published by special arrangement with the Author, Anthony Trollope, Esq., at whose urgent request it was undertaken, and to whom we pay the regular copyright [courtesy payment]." *Id.* at ii.

150. ANTHONY TROLLOPE, *NORTH AMERICA* (New York, Harper & Bros. 1862) (1862). The Harper edition contained no courtesy paratext but instead included a list of other Trollope books published by the Harpers, *id.* at ii, implying that *North America* belonged to the firm by virtue of the courtesy principle of association.

151. CATHERINE SEVILLE, *THE INTERNATIONALISATION OF COPYRIGHT LAW: BOOKS, BUCCANEERS AND THE BLACK FLAG IN THE NINETEENTH CENTURY* 195 (2006).

152. ROYAL COMMISSION ON COPYRIGHT, *supra* note 29, at 308 (testimony of Thomas Henry Huxley).

153. See LEHMANN-HAUPT, *supra* note 42, at 167; MADISON, *supra* note 32, at 53-54; SHEEHAN, *supra* note 41, at 62, 217.

house.¹⁵⁴ Retaliation meant “printing on” a transgressor by issuing one or more of its foreign titles at a competitive price. “If a publisher declined to comply with the requirements of trade courtesy,” wrote Joseph Harper, “some method would be adopted to discipline the offender—generally by the printing of lower-priced editions of his foreign reprints by his aggrieved competitor.”¹⁵⁵ Reprisal was sometimes devastating. In 1870, Harper and Brothers responded to what it considered a breach of courtesy on the part of Fields, Osgood & Co. by issuing an illustrated edition of Tennyson’s works.¹⁵⁶ Other publishers piled on with rival editions, further eroding a thirty-year relationship between Tennyson and the Fields firm.¹⁵⁷ The Harpers’ reprisal triggered the very behavior that trade courtesy had been created to avoid.

When a publisher proved to be a hopeless deviant from courtesy, utterly indifferent to the gentlemanly code, sanctions like negative gossip, predatory pricing, and even retaliation had no effect. During the feverish cheap book competition of the 1870s and 1880s, such renegades became increasingly common; they were less interested in acquiring respectability and maintaining author associations than free riding on the successful experiments of other firms.¹⁵⁸ They rarely offered royalties or honoraria to authors, frequently printed in cheap formats, and exploited the publicity for which the first publisher had paid.¹⁵⁹ These “upstart publishers” were often new entrants that had nothing immediately to gain by adhering to courtesy and little to lose by flouting it.¹⁶⁰ The close-knit publishing community unraveled at the edges when new or opportunistic firms saw a chance to build a list quickly at little cost to themselves. Trade courtesy “was broken up by the cheap piracies” of independent houses.¹⁶¹

154. See EXMAN, *supra* note 41, at 53 (discussing the Harper and Carey firms’ “reprisal against trespassers”); LEHMANN-HAUPT, *supra* note 41, at 166-67 (discussing publishers’ retaliations); MADISON, *supra* note 32, at 26 (discussing the Harpers’ use of reprisal).

155. HARPER, *supra* note 32, at 111-12.

156. ALFRED TENNYSON, *THE POETICAL WORKS OF ALFRED TENNYSON, POET LAUREATE* (New York, Harper & Bros. 1870). Predecessors in interest of the Fields publishing house had been issuing Tennyson’s collected poems since the 1840s. *E.g.*, TENNYSON, *supra* note 84.

157. Groves, *supra* note 41, at 145.

158. *See id.* at 147.

159. LEHMANN-HAUPT, *supra* note 41, at 166-67.

160. McLaughlin, *supra* note 72, at 174; *see also infra* notes 318-25 (discussing the new cheap reprinters of the 1870s and 1880s who defied trade courtesy and considered it detrimental to their interests and the public).

161. Ouida, *International Copyright*, PUBLISHERS’ WKLY., Aug. 11, 1883, at 165, 165. “Ouida” was the pseudonym of the English author Maria Louise Ramé.

C. The Dickens Controversy

The salient features of trade courtesy can be seen in action in a controversy that broke out in 1867 over Charles Dickens's alleged disloyalty to his associated American publishers. The controversy shows that in some cases, American publishers had come to expect courtesy from their remunerated foreign authors (on the vertical axis) no less than from their fellow publishers (on the horizontal axis). The dispute also reveals that a foreign author's massive popularity could disrupt the courtesy system and tempt publishers to cast aside their vows of forbearance.

Dickens had long been a fiercely contested prize among American reprinters. Hundreds of thousands of pirated copies of his works had circulated in the United States beginning in the 1830s.¹⁶² In the frenzied competition for new English fiction among the weekly and daily periodicals of the 1830s and 1840s, firms like the Harpers'¹⁶³ that regarded themselves as Dickens's authorized publishers retaliated against rival reprinters by issuing his novels in unbound parts at 12.5 cents and 6 cents.¹⁶⁴ The Philadelphia publisher Lea and Blanchard sought to stabilize the market for Dickens's books by claiming courtesy in his early works and paying him sums for advance sheets.¹⁶⁵ Unappeased, Dickens raged against the "scoundrel-booksellers" who "grow rich [in the United States] from publishing books, the authors of which do not reap one farthing from their issue."¹⁶⁶

In 1867, two prominent American publishing houses boasted courtesy associations with Dickens. Harper and Brothers of New York claimed exclusive magazine rights in his novels.¹⁶⁷ T.B. Peterson and Brothers of

162. DIANA C. ARCHIBALD, DOMESTICITY, IMPERIALISM, AND EMIGRATION IN THE VICTORIAN NOVEL 140 (2002); MCPARLAND, *supra* note 104, at 44, 49.

163. The Harper firm, which came to dominate American publishing, was known for its early piratical aggressions. MADISON, *supra* note 32, at 22. The Harpers pirated at least two of Charles Dickens's early works, *American Notes* (1842) and *The Life and Adventures of Martin Chuzzlewit* (1844). TEBBEL, *supra* note 41, at 89.

164. MADISON, *supra* note 32, at 25.

165. MCPARLAND, *supra* note 104, at 49-50. The firm paid Dickens £60 for the last part of *Oliver Twist*, £112.10 for *The Old Curiosity Shop, and Other Tales*, and £107.10 for *Barnaby Rudge*. 1 THE LETTERS OF CHARLES DICKENS, *supra* note 106, at 322 n.2; *see also* BARNABY RUDGE (Philadelphia, Lea & Blanchard 1842) (1841); THE OLD CURIOSITY SHOP, AND OTHER TALES (Philadelphia, Lea & Blanchard 1841) (1841); OLIVER TWIST (Philadelphia, Lea & Blanchard 1839) (1838).

166. Letter from Charles Dickens to Henry Austin (May 1, 1842), in 3 THE LETTERS OF CHARLES DICKENS 228, 230 (Madeline House et al. eds., 1974). On Dickens's efforts to influence American opinion on international copyright, *see* MCGILL, *supra* note 48, at 109-40; and SEVILLE, *supra* note 151, at 165-69.

167. *See The Dickens' Controversy*, *supra* note 99, at 68. The Harpers also published Dickens in book form. *E.g.*, CHARLES DICKENS, BLEAK HOUSE (New York, Harper & Bros. 1853)
footnote continued on next page

Philadelphia asserted the exclusive right to issue his novels in book form.¹⁶⁸ These concurrent claims were based on payments that the two firms had made to Dickens or his English publisher. The Harpers had given substantial sums, sometimes more than £1000, for advance proof sheets of each of Dickens's novels;¹⁶⁹ the Petersons had contributed to the Harpers' purchase money and bought the printing plates and illustrations that the Harpers had previously used in serializing the novels.¹⁷⁰ The Petersons had also purchased plates and illustrations from other American houses that had issued Dickens's earlier novels.¹⁷¹ In treating their respective courtesy entitlements as applying to different publishing media—serial rights and book rights—the Harper and Peterson firms in effect constituted themselves beneficiaries of a sublicensing arrangement. But in many bargaining scenarios in this period, the copyright

(1853); *see also* MCPARLAND, *supra* note 104, at 50, 57 (discussing the Harpers' reprinting of Dickens in book form).

168. Letter from T.B. Peterson & Bros. to George W. Childs, Publisher, Am. Literary Gazette & Publishers' Circular (May 25, 1867), in *The Dickens' Controversy*, *supra* note 99, at 69, 69; *see also* MCPARLAND, *supra* note 104, at 57-60 (discussing the rights claimed in Dickens's works by the Harper and Peterson publishing firms).
169. *See supra* note 99 and accompanying text.
170. Letter from T.B. Peterson & Bros. to George W. Childs, *supra* note 168, at 69. According to a calculation employing the consumer price index and the retail price index, the average value in 2014 of £1000 from 1860 was \$113,000. *Computing Real Value over Time with a Conversion Between U.K. Pounds and U.S. Dollars, 1774 to Present*, *supra* note 91 (to locate, enter "1860" into the "Initial year" text box; enter "£" and "1000" into the "Initial value" text boxes; enter "2014" into the "Desired year" text box; and then follow the "Calculate" hyperlink).
171. Letter from T.B. Peterson & Bros. to George W. Childs, *supra* note 168, at 69; *see also* MCPARLAND, *supra* note 104, at 58 ("[The Petersons] had assumed the rights to publish Dickens and were known as Dickens's publishers, . . . although they had no contractual agreement with him."). The Petersons acted on a common belief that courtesy rights were acquired when a firm purchased the plates or other printing materials used by a former courtesy house to publish a foreign author. This was a courtesy counterpart to transferring exclusive rights under a copyright. Whereas many assignments of copyright in this period required a signed writing, *see* EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES: EMBRACING COPYRIGHT IN WORKS OF LITERATURE AND ART, AND PLAYRIGHT IN DRAMATIC AND MUSICAL COMPOSITIONS 318-21 (Boston, Little, Brown & Co. 1879), courtesy transfers could be evidenced by the transfer of tangible printing assets. For example, the Boston publisher Houghton, Mifflin and Company indicated that it had obtained courtesy rights in the English essayist Thomas De Quincey's works through its parent company's transfer of "stereotype plates." THOMAS DE QUINCEY, BIOGRAPHICAL AND HISTORICAL ESSAYS, at iv (Boston, Houghton, Mifflin & Co. 1877). In other cases, the selling of advance sheets to another firm evidenced a transfer of courtesy rights—again the sale of tangible property standing in for the transfer of intangible rights. *See supra* notes 81, 129-30 and accompanying text.

owner played a role in determining his or her publisher-licensees.¹⁷² By contrast, under the courtesy system, when rival publishers agreed to split a lucrative piece of the public domain, the publishers often arrived at sublicensing solutions on their own, without the active participation of the foreign author. The dividing up of Dickens in America was accomplished largely through his publishers' mutual understandings and adjustments.

The controversy of 1867 resulted when Dickens appeared to turn his back on the Harper and Peterson firms by actively negotiating a deal that made the Boston house of Ticknor and Fields the exclusively authorized American publisher of his collected works.¹⁷³ Ticknor's offer had been an attractive one: a £200 advance and a 10% royalty on sales of Dickens's books, coupled with an arranged speaking tour of America for the celebrated author.¹⁷⁴ In a letter that was widely reproduced in the trade press, Dickens rubbed salt in the wounds of his established courtesy publishers by stating that "[i]n America the occupation of my life for thirty years is, unless it bears [the Ticknor and Fields] imprint, utterly worthless and profitless to me."¹⁷⁵ Though Dickens acknowledged that the Harpers had paid him for advance sheets of serialized novels, he denied deriving or expecting to derive "pecuniary advantage" from any "republications of [his] collected works in the United States not issued by [Ticknor and Fields]."¹⁷⁶

The Harper and Peterson firms felt the double snub keenly. Certain American trade journals rushed to their defense. The *American Literary Gazette and Publishers' Circular* called Dickens "ungenerous, illiberal, and ungentleman-like" in his failure to acknowledge the "voluntary liberality" of the courtesy arrangements from which he had benefited in the past.¹⁷⁷ The same journal accused him of ignoring the rules of "courtesy" or the "usage of the trade," as his goal was to "injure or drive out of the market long-established editions . . .

172. See DRONE, *supra* note 171, at 343-82 (discussing numerous lawsuits involving copyright-owning authors who had bargained with publisher-licensees).

173. *The Dickens' Controversy*, *supra* note 99, at 68-69; see also MCPARLAND, *supra* note 104, at 57-59.

174. TEBBEL, *supra* note 41, at 89. Ticknor and Fields claimed in a trade advertisement that Dickens was to receive "a copyright [that is, a royalty] on every volume of his works bearing the imprint of Messrs. Ticknor and Fields." *Important Announcement from Charles Dickens*, AM. LITERARY GAZETTE & PUBLISHERS' CIRCULAR, June 1, 1867, at 84, 84. The ad quoted Dickens as saying that he would be "retrospectively as well as prospectively . . . a sharer in the profits of [Ticknor and Fields's] Diamond Edition of [his] books." *Id.* (quoting Letter from Charles Dickens to Ticknor & Fields (Apr. 8, 1867)).

175. Letter from Charles Dickens to Ticknor & Fields (Apr. 16, 1867), in *The Dickens' Controversy*, *supra* note 99, at 68, 68.

176. *Id.*

177. *The Dickens' Controversy*, *supra* note 99, at 69.

which have been for years before the public, and which represent a heavy amount of capital.”¹⁷⁸ Dickens, the *American Literary Gazette* claimed, 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!”¹⁷⁹

Here, the publishing trade seemed to be turning the tables on Dickens, who years earlier had vociferously assailed lawful piracy in the United States.¹⁸⁰ Now Dickens himself had become a pirate, the *American Literary Gazette* seemed to charge; he had deviated from established courtesy norms and deserved the sanction of public shaming. In an unusual public quarrel over courtesy’s vertical axis, a famous foreign author was being accused of violating norms ordinarily confined to the horizontal relations of genteel publishers. As a prominent English author of the period put it, “a publisher who has published one or two of your books in the United States would think himself very hardly used if you allowed any other publisher to publish for you.”¹⁸¹

Dickens had plainly 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 Harper firm’s payments as a thing of the past, mere remuneration for serial rights that imposed no further obligation after he had transmitted the advance sheets. He scarcely acknowledged the Petersons’ claim that they enjoyed a courtesy relationship by virtue of having assisted the Harpers with their courtesy payments. These dealings among publishers, Dickens seemed to say, were their own affair; 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 inherent paternalism toward its authors and rejected a collusive practice that excluded him from the bargaining table.

We also see the use of royalties—payments on copies sold—as an increasingly favored mechanism for remunerating successful authors, preferable to the older system of paying lump sums either *ex gratia* or as consideration for

178. *Id.*

179. *Id.*

180. See *supra* note 166 and accompanying text.

181. ROYAL COMMISSION ON COPYRIGHT, *supra* note 29, at 308 (testimony of Thomas Henry Huxley); cf. Elsevir, *International Copyright: The Anthony Trollope Charge*, BOST. HERALD, Oct. 8, 1883, reprinted in PUBLISHERS’ WKLY., Nov. 24, 1883, at 809, 809 (criticizing English novelist Anthony Trollope for not acknowledging substantial courtesy payments made to his English publishers).

advance sheets.¹⁸² For a novelist as popular as Dickens, the idea of receiving a percentage from sales of his collected works in a market the size of the United States was irresistible, and Ticknor and Fields was eager to make such a deal for the courtesy right to claim Dickens as its exclusive author.¹⁸³ In essence, Dickens regarded his relationship with the Harpers as having terminated with the completed serialization of his novels; he simply ignored the Petersons' derivative courtesy claim.¹⁸⁴ He was receiving no continuing payments from those firms, and they had no reasonable expectation of a continued exclusive association with him. He had transferred his fealty to Ticknor, a firm that would earn an ongoing association by making ongoing payments. What seemed dishonest and discourteous to some traditional courtesy adherents was just good financial sense to Dickens. Moreover, he apparently viewed Ticknor's collected edition of his works as a third form of publication—different from serializations and single editions—which justified a new courtesy relationship.¹⁸⁵ He now enjoyed the celebrity clout to choose his own forms of sublicensing, rather than have sublicensing imposed on him.

An editorial in the *Nation* seemed to see the matter through Dickens's eyes. The Harpers had paid for advance sheets of serialized novels, the *Nation* observed.¹⁸⁶ It was reasonable for Dickens to contend that “buying advance-sheets is a very different thing from buying manuscripts [of books], and while [the former] gives the purchaser the possibility of early publication, [it] cannot be held to give him any property in the novel as a book.”¹⁸⁷ The Petersons' claim, the *Nation* pointed out, simply derived from their alleged participation in the purchase of advance sheets.¹⁸⁸ Like Dickens, the *Nation* made sharp, unsentimental distinctions between serializations and collected editions and between one-time payments and ongoing royalties.¹⁸⁹ The courtesy mystique of association, if it was based solely on payments for advance sheets made a decade or more ago, could not command Dickens's permanent loyalty. The

182. See Groves, *supra* note 41, at 146 (noting that by the 1870s, the courtesy practice of purchasing advance sheets with single payments had been largely replaced, at least for popular works, by a voluntary royalty system).

183. See *supra* note 174 and accompanying text.

184. While Dickens felt that his courtesy ties to the Harpers had ended with the serialization of his novels, some American courtesy adherents believed that the Harpers' original payments for magazine rights created an ongoing relationship that Dickens was now flouting. *The Dickens' Controversy*, *supra* note 99, at 68-69.

185. Letter from Charles Dickens to Ticknor & Fields, *supra* note 175, at 68.

186. Literary Note, *NATION*, May 23, 1867, at 408, 408.

187. *Id.*

188. *Id.*

189. See *id.*

Nation was not denying the existence of trade courtesy or its associational principles, but there was plainly a difference of opinion in the publishing world as to how much courtesy could be claimed on the basis of old associations and former one-time payments, at least with respect to an author of Dickens's stature.

The Harper and Peterson firms resorted to the courtesy punishment of public shaming and negative gossip, as their rebukes in the *American Literary Gazette and Publishers' Circular* show.¹⁹⁰ These chastisements seemed to be aimed more at Dickens than at Ticknor and Fields: Dickens was the grossly faithless and ungrateful one, even if the Boston firm had worked to alienate his affections. Meanwhile, the Petersons, who planned to continue to issue "uniform editions," took out full-page advertisements with banner headings in the trade journals: "GREAT REDUCTION ON DICKENS' WORKS."¹⁹¹ The Petersons' handsomely printed Illustrated Duodecimo Edition now sold for \$3 per cloth volume, the Illustrated Octavo Edition for \$2, the People's Duodecimo Edition for \$1.50, and most of the Cheap Editions on buff paper for \$0.75.¹⁹² The Petersons were employing price-slashing to attempt to match the various editions of Dickens's collected works offered by Ticknor and Fields at prices ranging from \$1.25 to \$2 per volume.¹⁹³

The Dickens controversy shows that the carefully evolved practices 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, noncourtesy firms, and even Dickens himself. In 1864, prior to the triangular courtesy quarrel, at least twelve American firms had been printing Dickens without regard for courtesy principles.¹⁹⁴ Other houses in this period were directly importing British editions of Dickens and marketing them in the United States.¹⁹⁵ The Harpers' courtesy expectations, based on direct dealings with Dickens, were vulnerable to the Dickens craze, as were the Petersons' expectations, based on their

190. *The Dickens' Controversy*, *supra* note 99, at 68-69.

191. *E.g.*, T.B. Peterson & Bros., *Great Reduction on Dickens' Works: T.B. Peterson & Brothers' Uniform Editions*, AM. LITERARY GAZETTE & PUBLISHERS' CIRCULAR, June 1, 1867, at 86, 86.

192. *Id.* Two years earlier, in 1865, the Petersons were selling the Illustrated Duodecimo Edition for \$4 per copy, the Illustrated Octavo Edition for \$2.50, the People's Duodecimo Edition for \$2.50, and most of the Cheap Editions at the same price of \$0.75 per copy. C.W. DENISON, ILLUSTRATED LIFE, CAMPAIGNS AND PUBLIC SERVICES OF PHILIP H. SHERIDAN app. at 1-2 (Philadelphia, T.B. Peterson & Bros. 1865).

193. *Important Announcement from Charles Dickens*, *supra* note 174, at 84-85.

194. MCPARLAND, *supra* note 104, at 59.

195. *Id.* at 59-62.

dealings with the Harpers. Although Ticknor and the Harpers later adjusted their dispute by splitting future Dickens titles along the familiar divide of serial and book printings,¹⁹⁶ the Petersons were left out of this compromise.¹⁹⁷ Even so, the Petersons continued to sell Dickens for years to come in their “Cheap Edition for the Million.”¹⁹⁸ The Dickens controversy, with its indignant public shaming, reveals many aspects of the courtesy system and shows that courtesy could be a fragile contrivance when it came to massive sales and authorial celebrity.

II. Courtesy Paratexts: Binding Norms in Authorized American Editions

The detailed rules, subrules, and sanctions of trade courtesy, examined in Part I above, constituted what might be called the grammar, or basic structure, of that system of private ordering.¹⁹⁹ Developed over decades, courtesy’s intricate grammar spelled out everything from the acquisition of exclusive publishing rights to the punishment for violators.²⁰⁰ But grammatical rules were not enough to guarantee the full operation of trade courtesy’s norms. Courtesy also had a rhetorical dimension in which participating publishers praised the virtues of the informal code and exhorted rival reprinters and the purchasing public to respect their claims to exclusivity.²⁰¹ This Part examines a particular rhetorical device by which publishers signaled to each other and the public their adherence to these fragile norms: the courtesy paratext.

Evidence of the existence of informal norms within close-knit communities, Robert Ellickson has noted, sometimes includes “aspirational statements” testifying to the virtues of the ordering system.²⁰² Practitioners and admirers

196. See TEBBEL, *supra* note 41, at 90 (noting that Ticknor agreed to issue Dickens’s *The Mystery of Edwin Drood* in book form while the Harpers brought it out serially).

197. See MCPARLAND, *supra* note 104, at 59.

198. See GEORGE LIPPARD, *WASHINGTON AND HIS MEN* 193 (Philadelphia, T.B. Peterson & Bros. 1876).

199. I use “grammar” here in the sense suggested by Kenneth Burke: “a concern with the terms [of a system] alone, without reference to the [rhetorical] ways in which their potentialities have been or can be utilized in actual statements about motives.” KENNETH BURKE, *A GRAMMAR OF MOTIVES*, at xvi (Univ. of Cal. Press 1969) (1945).

200. See *supra* Part IA-B.

201. See KENNETH BURKE, *A RHETORIC OF MOTIVES* 41 (Univ. of Cal. Press 1969) (1950) (defining the “basic function of rhetoric” as “the use of words by human agents to form attitudes or to induce actions in other human agents”).

202. ELLICKSON, *supra* note 74, at 129-30. That aspirational statements existed alongside courtesy punishments, *supra* Part I.B, is further proof that courtesy operated as a distinct normative system, see ELLICKSON, *supra* note 74, at 129-30.

of trade courtesy often praised the practice as a sign of business morality and a spur to fair dealing.²⁰³ For example, the English editor Hepworth Dixon stated that from “a sense of natural fairness,” American publishers “act as though they were restrained by law. This generosity is seen on every side. No law compels [them] It is their voluntary act.”²⁰⁴ The Irish author and physicist John Tyndall, who had received substantial courtesy payments, regarded himself as “in the hands of a most high-minded [American] publisher.”²⁰⁵ Even in the midst of their squabble over Carlyle’s *Reminiscences*,²⁰⁶ the Harper and Scribner firms took the opportunity to pay homage to courtesy’s virtues.²⁰⁷ Whether such encomia were the self-serving utterances of *homo economicus* or evidence of punctilious honor, or both, is a question with which scholars have struggled.²⁰⁸ But many such aspirational statements in this period reveal the contours of the norms-based courtesy code.²⁰⁹

Aspirational statements often took an unusual paratextual form. Courtesy publishers frequently printed testimonial statements by their foreign authors as prefatory matter in their volumes.²¹⁰ These statements, sometimes in the form of a letter addressed to the author’s American publisher,²¹¹ described the special courtesy association between author and publisher and appealed, openly or by implication, to other American publishers to respect that association by not reprinting the volume. The literary text thus came to embody a normative, legitimizing paratext—the courtesy counterpart, in a sense, of the copyright notice²¹²—as well as an acknowledgment of remuneration received from the publisher and a testimonial extolling the virtues of the courtesy system in general. By binding such authorizing statements into their books, publishers hoped to fortify their informal claims to exclusivity and enhance the legitimacy of their editions, signaling the morality of their own business

203. See *supra* text accompanying note 114.

204. HARPER, *supra* note 32, at 355; see also INTERNATIONAL COPYRIGHT LAW REPORT, *supra* note 12, at 59 (statement of the D. Van Nostrand Company) (“The moral tendencies of the better class of American publishers before the existence of the [Chace Act] induced them to pay foreign authors for their works . . .”).

205. ROYAL COMMISSION ON COPYRIGHT, *supra* note 29, at 315 (testimony of John Tyndall).

206. CARLYLE, *supra* note 122.

207. See *supra* notes 128-36 and accompanying text.

208. See, e.g., EVERTON, *supra* note 41, at 44-47, 125-27.

209. For praise of courtesy by a practitioner, see Holt, *Competition*, *supra* note 41, at 522-24; and Holt, *supra* note 34, at 27-32.

210. See *infra* notes 227-65 and accompanying text.

211. See *infra* notes 232-65 and accompanying text.

212. See *supra* notes 6-9 and accompanying text.

dealings and distinguishing themselves from lawful though unethical “pirates” operating outside the courtesy pale.

One of the prized benefits of association was that a firm could boast of being the “authorized” publisher of a foreign author. Such a relationship conferred respectability on the firm, lifting it up out of the mass of mere reprinters and indicating to other publishers and to the purchasing public at large that the firm enjoyed the prestige of honorable dealings.²¹³ Often a courtesy association was signaled in a book’s opening pages or on its cover by the simple phrase “Author’s Edition.”²¹⁴ Editions of the English poet Robert Browning published by Ticknor and Fields carried that paratextual boast on the verso of the title page, where the copyright notice would ordinarily have appeared.²¹⁵ In its editions of the poems of Elizabeth Barrett Browning (Robert Browning’s spouse), the New York publisher C.S. Francis and Company placed the “Author’s Edition” paratext on the title page’s verso or on the following page, sometimes at the head of an authorizing statement by Barrett Browning herself.²¹⁶ In some cases, this succinct paratext was expanded slightly to indicate a contractual or other basis for the courtesy relationship: “Author’s Edition, From Advance Sheets.”²¹⁷ The purchase of advance proof sheets from

213. See WINSHIP, *supra* note 41, at 138 (discussing courtesy publishers’ direct appeal to the public to buy only their “authorized” editions of foreign authors’ works); Breyer, *supra* note 41, at 301 (noting the advantage of proclaiming an “authorized” edition); Henry Holt, *The Publishing Reminiscences of Mr. Henry Holt*, PUBLISHERS’ WKLY., Feb. 12, 1910, at 928, 930-31 (contrasting “reputable” courtesy publishers with the producers of “cheap reprints”); Holt, *supra* note 34, at 27-31 (distinguishing between honest courtesy publishers and pirate “adventurers”).

214. The “author’s” and “authorized” editions discussed in this Article are all genuine examples of courtesy publications. However, some reprints in this period may have contained spurious authorizing paratexts. See JESSICA DESPAIN, NINETEENTH-CENTURY TRANSATLANTIC REPRINTING AND THE EMBODIED BOOK 1 (2014).

215. E.g., ROBERT BROWNING, DRAMATIS PERSONAE 8 (Boston, Ticknor & Fields 1864) (1864) [hereinafter BROWNING, DRAMATIS PERSONAE]; ROBERT BROWNING, MEN AND WOMEN, at ii (Boston, Ticknor & Fields 1863) (1855); 1 ROBERT BROWNING, POEMS (eighth unnumbered page) (Boston, Ticknor & Fields 1856) (1849) [hereinafter 1 BROWNING, POEMS]. For a complete list of “Author’s Editions” of Browning’s works issued by Ticknor and its successors in interest, see LOUISE GREER, BROWNING AND AMERICA app. F at 231-43 (1952).

216. E.g., ELIZABETH BARRETT BROWNING, AURORA LEIGH (seventh unnumbered page) (New York, C.S. Francis & Co. 1857) (1856) [hereinafter BARRETT BROWNING, AURORA LEIGH]; ELIZABETH BARRETT BROWNING, NAPOLEON III IN ITALY AND OTHER POEMS 2 (New York, C.S. Francis & Co. 1860) (1860).

217. E.g., ROBERT BROWNING, BALAUCTION’S ADVENTURE: INCLUDING A TRANSCRIPT FROM EURIPIDES 4 (Boston, James R. Osgood & Co. 1871) (1871); 1 ROBERT BROWNING, THE RING AND THE BOOK 3 (Boston, Fields, Osgood & Co. 1869) (1869).

foreign authors or their publishers was a recognized method of perfecting a courtesy claim.²¹⁸

Figure 1

Author's Edition Paratext in Robert Browning, *The Ring and the Book* (Boston, Fields, Osgood & Co. 1869)

AUTHOR'S EDITION,

From Advance Sheets.

UNIVERSITY PRESS: WELCH, BIGELOW, & Co.
CAMBRIDGE

Another typical abbreviated courtesy paratext was “Authorized Edition,” which one early commentator called “a guarantee for the accuracy of the reproduction, and . . . an excellent advertisement.”²¹⁹ This legitimizing phrase appeared, for example, on the title pages of Rudyard Kipling’s works reprinted by the John W. Lovell Company of New York and its successors in the 1890s.²²⁰ To reflect the fact that some American editions of foreign authors’

218. See *supra* notes 80-81 and accompanying text. Louise Greer states that in Ticknor’s editions of Robert Browning, the paratexts “Author’s Edition” and “From Advance Sheets” “indicate that some financial arrangement was made with the poet.” GREER, *supra* note 215, app. F at 231.

219. WILLIAM BRIGGS, *THE LAW OF INTERNATIONAL COPYRIGHT: WITH SPECIAL SECTIONS ON THE COLONIES AND THE UNITED STATES OF AMERICA* 113 (1906).

220. E.g., RUDYARD KIPLING, *MINE OWN PEOPLE* (title page) (New York, U.S. Book Co. 1891) (1891) [hereinafter KIPLING, *MINE OWN PEOPLE*]; RUDYARD KIPLING, *SOLDIERS THREE: A COLLECTION OF STORIES SETTING FORTH CERTAIN PASSAGES IN THE LIVES AND ADVENTURES OF PRIVATES TERENCE MULVANEY, STANLEY ORTHERIS, AND JOHN LEAROYD* (title page) (New York, John W. Lovell Co. 1890) (1888) [hereinafter KIPLING, *SOLDIERS THREE*]; RUDYARD KIPLING, *THE STORY OF THE GADSBYS AND UNDER THE*
footnote continued on next page

works contained both copyrighted and public domain material, the seeming oxymoron “Authorized Copyright Edition” came into vogue. This paratext appeared, for example, in the vocal scores of Gilbert and Sullivan’s comic operas *Iolanthe* and *The Pirates of Penzance*, published by J.M. Stoddart and Company of Philadelphia in the 1880s.²²¹ While the vocal scores themselves lacked copyright protection in the United States,²²² publishers like Stoddart included certain variants not found in the English versions, such as additional lyrics or scenes, as a basis for claiming some copyright protection.²²³ Publishers used the paratextual signals “Authorized Edition,” “Authorized Copyright Edition,” and “American Copyright Edition” for the spectrum of protection available in the period, from public domain texts shielded by courtesy, to blends of public domain and copyrighted matter, to texts entitled to full statutory copyright.²²⁴ These distinctions were common after 1891, when foreign authors’ works became eligible for full copyright protection in the United States if manufacturing requirements were met.²²⁵ With pre- and post-1891 foreign titles circulating freely in the trade,²²⁶ these works might variously claim protection under courtesy principles, copyright law, or both.

American publishers took special pride in printing courtesy-attesting letters or statements by their foreign authors. These celebrity paratexts were badges of exclusivity and respectability. A notable example is the statement of Charles Dickens printed in the opening pages of his novels issued by Ticknor

DEODARS (title page) (New York, Lovell, Coryell & Co. 1891) [hereinafter KIPLING, *THE STORY OF THE GADSBYS*].

221. W.S. GILBERT & ARTHUR SULLIVAN, *IOLANTHE OR THE PEER AND THE PERI* 1 (Philadelphia, J.M. Stoddart & Co. 1882); W.S. GILBERT & ARTHUR SULLIVAN, *THE PIRATES OF PENZANCE OR, THE SLAVE OF DUTY* 1 (Philadelphia, J.M. Stoddart & Co. 1880) [hereinafter GILBERT & SULLIVAN, *THE PIRATES OF PENZANCE*].

222. *Cf. supra* notes 26-27 and accompanying text.

223. See Hal Kanthor, *Collecting American Librettos* 1, 6, 8-9 (2007), http://www.gilbertandsullivanarchive.org/articles/american_librettos/librettos.pdf; see also JOHNS, *supra* note 32, at 296-97 (discussing publishers’ strategy of making changes to a foreign text in an effort to obtain U.S. copyright protection).

224. For example, in 1889, C.W. Bardeen, a New York publisher, used the phrases “Authorized Edition” and “Authorized Copyright Edition” to describe different foreign-origin offerings in an advertisement. C.W. Bardeen, *New Books on Education, Now Ready*, AM. TEACHER, Feb. 1889, at 240, 240. In 1894, the Boston publisher Roberts Brothers used the phrase “American copyright edition” to indicate foreign authors’ works for which the firm had secured U.S. copyrights. Roberts Bros., *Roberts’ New Books: Out To-Day*, CRITIC, Dec. 15, 1894, at viii, viii.

225. See *supra* notes 12-15 and accompanying text.

226. For a discussion of the blend of copyrighted and uncopyrighted foreign titles issued by publishers after 1891, see INTERNATIONAL COPYRIGHT LAW REPORT, *supra* note 12, at 36 (statement of R.F. Fenno & Co.); *id.* at 42 (statement of Harper Brothers); and *id.* at 85 (statement of Street & Smith).

and Fields beginning in 1867: “By a special arrangement made with me and my English Publishers, (partners with me in the copyright of my works,) Messrs. Ticknor and Fields, of Boston, have become the only authorized representatives in America of the whole series of my books.”²²⁷ Dickens’s language was almost legalistic in its careful rationalizing of the norms-based courtesy title claimed by Ticknor. The phrase “the copyright of my works” referred to Dickens’s British copyright, which, he suggested, formed the initial property basis for a contractual understanding (“a special arrangement”) between his American and English publishers and himself. This special understanding extended the courtesy association with Ticknor beyond any particular volume—in this case, *Our Mutual Friend*—to his collected works (“the whole series of my books”). While Dickens’s paratext stressed the vertical dimension of courtesy—the arrangement between publisher and author—the phrase “the only authorized representatives in America” pointed to the horizontal exclusivity that courtesy publishers were eager to establish. Dickens here became a witness to an exclusive publishing association and a celebrated spokesperson for Ticknor’s courtesy claim against the rest of the publishing world. The confident brevity of Dickens’s statement gave no sign of the controversy his relationship with Ticknor would soon stir up among other American courtesy claimants to Dickens’s writings.²²⁸

227. *E.g.*, 1 CHARLES DICKENS, *OUR MUTUAL FRIEND*, at ii (Boston, Ticknor & Fields 1867) (1865). The statement was signed by Dickens and dated “London, April, 1867.” *Id.* (italics omitted). This paratext was printed in all volumes in Ticknor’s “Library Edition” of Dickens’s works. *E.g.*, CHARLES DICKENS, *A TALE OF TWO CITIES*, at iii (Boston, Ticknor & Fields 1867) (1859).

228. *See supra* Part I.C. Ticknor and Fields occasionally included variant authorial paratexts in their Dickens editions. For example, *Child-Pictures from Dickens*, which contained selections from Dickens’s works, included his paratextual assurance that “this compilation is made for American children with my free consent.” CHARLES DICKENS, *CHILD-PICTURES FROM DICKENS* (ninth unnumbered page) (Boston, Ticknor & Fields 1868) (1867). The volume bore a copyright notice in Ticknor’s name, *id.* (eighth unnumbered page), perhaps referring to the selection of passages and to illustrations by Solomon Eytinge, Jr., an American artist who illustrated many of Ticknor’s Dickens editions. The presence of both a copyright notice and a courtesy paratext was common in volumes containing unprotected foreign matter and potentially protectable content introduced by American authors, illustrators, or publishers themselves. *See supra* notes 221-26 and accompanying text. A copyright notice and Dickens’s courtesy paratext appeared together on the same page of Ticknor’s edition of *The Uncommercial Traveller, and Additional Christmas Stories*, which contained a selection of Dickens’s works and illustrations by Eytinge. CHARLES DICKENS, *THE UNCOMMERCIAL TRAVELLER, AND ADDITIONAL CHRISTMAS STORIES* (thirteenth unnumbered page) (Boston, Ticknor & Fields 1868). A copyright notice and a courtesy paratext also appeared on the same page of *The Readings of Mr. Charles Dickens, as Condensed by Himself*, where Dickens’s paratext read: “The edition bearing the imprint of Messrs. Ticknor and Fields is the only correct and authorized edition of my Readings.” CHARLES DICKENS, *THE READINGS OF MR. CHARLES DICKENS, AS CONDENSED BY HIMSELF 2* (Boston, Ticknor & Fields 1868). The
footnote continued on next page

Figure 2

Courtesy Paratext in Charles Dickens, *Our Mutual Friend* (Boston, Ticknor & Fields
1867)

**By a special arrangement made with me and my English
Publishers, (partners with me in the copyright of my works,)
Messrs. TICKNOR and FIELDS, of Boston, have become the only
authorized representatives in America of the whole series of my
books.**

CHARLES DICKENS.

LONDON, April, 1867.

Robert Browning was also one of Ticknor and Fields's prized authors. In 1849, the firm (then Ticknor, Reed, and Fields) issued an unauthorized reprinting of Browning's *Poems*,²²⁹ but in 1855 the firm offered Browning £60 for advance sheets of his volume of poems, *Men and Women*.²³⁰ From that point on, Browning treated Ticknor as his exclusive courtesy publisher in America.²³¹ The firm's 1856 reprint of his *Poems* reproduced the text of a letter he wrote to Ticknor, dated November 29, 1855:

I take advantage of the opportunity of the publication in the United States of my "Men and Women," for printing which you have liberally remunerated me, to express my earnest desire that the power of publishing in America this and every subsequent work of mine may rest exclusively with your house.²³²

Browning's grateful letter came to serve as an authorizing paratext printed in several of Ticknor's editions of his writings.²³³ In a single sentence, this letter assured readers that Browning had been "liberally" paid by Ticknor and that he favored that house as the one with which he wished to be exclusively

volume also contained illustrations by Eytinge. *Id.* (seventh unnumbered page). For a discussion of Ticknor's experiments in obtaining U.S. copyrights for its Dickens editions in this period, see SEVILLE, *supra* note 151, at 194-95.

229. GREER, *supra* note 215, at 34. American publishers often extended courtesy only after a foreign author had achieved popularity or success. See ROYAL COMMISSION ON COPYRIGHT, *supra* note 29, at 203 (testimony of Thomas Henry Farrer) ("[H]owever well the author of reputation may . . . be paid, the American publisher would not be likely, without copyright, to give anything to an unknown English author.").

230. KHAN, *supra* note 26, at 280; Groves, *supra* note 41, at 142-43.

231. See Groves, *supra* note 41, at 142-43; see also *supra* note 215 (citing Ticknor editions of Browning's works beginning in 1856).

232. 1 BROWNING, POEMS, *supra* note 215 (ninth unnumbered page).

233. E.g., ROBERT BROWNING, SORDELLO, STRAFFORD, CHRISTMAS-EVE AND EASTER-DAY (tenth unnumbered page) (Boston, Ticknor & Fields 1864).

associated in the United States.²³⁴ In exchange for remuneration, Browning expressed his “earnest desire” that courtesy rights—“the power of publishing in America”—“may rest exclusively” with Ticknor.²³⁵ The paratext was thus a blend of formal and informal norms, an acknowledgment, on the vertical axis, of a contract-like transaction with Ticknor and, on the horizontal axis, a mere precatory hope that other American publishers “may” respect Ticknor’s informal courtesy entitlements.

Figure 3

Courtesy Paratext in Robert Browning, *Men and Women* (Boston, Ticknor & Fields 1863)

From the Author to the Publishers.

TO MESSRS. TICKNOR AND FIELDS:

I take advantage of the opportunity of the publication in the United States of my “Men and Women,” for printing which you have liberally remunerated me, to express my earnest desire that the power of publishing in America this and every subsequent work of mine may rest exclusively with your house.

I am, my dear Sirs,
with high esteem,
Yours faithfully,

PARIS, Nov. 29, 1855.

ROBERT BROWNING.

By the early 1850s, Ticknor and Fields was actively publishing the writings of the English essayist Thomas De Quincey, apparently at first without any arrangement with the author,²³⁶ as was initially the case with Browning.²³⁷ De Quincey’s works, especially his autobiographical *Confessions of an English*

234. 1 BROWNING, POEMS, *supra* note 215 (ninth unnumbered page).

235. *Id.*

236. See ROBERT MORRISON, THE ENGLISH OPIUM EATER: A BIOGRAPHY OF THOMAS DE QUINCEY 363-64 (2010).

237. See GREER, *supra* note 215, at 34.

Opium-Eater,²³⁸ were popular with Americans, and by 1853 Ticknor had sold more than 45,000 copies of his various books.²³⁹ In that same year, grateful for the substantial sums that Ticknor had paid him from profits on these editions,²⁴⁰ De Quincey wrote Ticknor a letter that the firm printed at the start of many of its editions of his writings for years to come. The letter, written in De Quincey's ornate confessional style,²⁴¹ authorized Ticknor "exclusively" as his American publisher and acknowledged that Ticknor had "made [him] a participator in the pecuniary profits of the American edition, without solicitation or the shadow of any expectation on [his] part, without any legal claim that [he] could plead, or equitable warrant in established usage, solely and merely upon [Ticknor's] own spontaneous motion."²⁴²

De Quincey was confessing here, almost abjectly, that he had neither the copyright law nor even the usual rules of courtesy ("established usage") to thank for Ticknor's payments;²⁴³ with no prior courtesy association or arrangement with Ticknor, he felt that he was completely dependent on the firm's sheer generosity for the post hoc honoraria that he had received. In a melancholy paradox typical of his literary style,²⁴⁴ De Quincey cast himself as a recipient of courtesy who was somehow outside the church of courtesy, a chief sinner who could only hope for supervenient grace.

238. THOMAS DE QUINCEY, *CONFESSIONS OF AN ENGLISH OPIUM-EATER, AND SUSPIRIA DE PROFUNDIS* (Boston, Ticknor, Reed & Fields 1850) (1821).

239. MORRISON, *supra* note 236, at 364.

240. *Id.*

241. George Saintsbury, *De Quincey*, *MACMILLAN'S MAG.*, June 1890, at 101, 110-12 (noting De Quincey's "ornate" style).

242. *E.g.*, 1 THOMAS DE QUINCEY, *HISTORICAL AND CRITICAL ESSAYS*, at vi-vii (Boston, Ticknor & Fields 1864); 1 THOMAS DE QUINCEY, *MEMORIALS, AND OTHER PAPERS*, at v (Boston, Ticknor & Fields 1856).

243. For a discussion of Ticknor's courtesy payments to De Quincey, see GREVEL LINDOP, *THE OPIUM-EATER: A LIFE OF THOMAS DE QUINCEY* 371-72, 374 (1981).

244. See Lawrence D. Needham, *De Quincey's Rhetoric of Display and Confessions of an English Opium-Eater*, in *RHETORICAL TRADITIONS AND BRITISH ROMANTIC LITERATURE*, at 48, 48-50 (Don H. Bialostosky & Lawrence D. Needham eds., 1995) (discussing De Quincey's rhetorical taste for paradox).

Figure 4

Courtesy Paratext in Thomas De Quincey, *Memorials, and Other Papers* (Boston, Ticknor & Fields 1856)

FROM THE AUTHOR, TO THE AMERICAN EDITOR OF HIS WORKS.

THESE papers I am anxious to put into the hands of your house, and, so far as regards the U. S., of *your* house exclusively; not with any view to further emolument, but as an acknowledgment of the services which you have already rendered me; namely, first, in having brought together so widely scattered a collection—a difficulty which in my own hands by too painful an experience I had found from nervous depression to be absolutely insurmountable; secondly, in having made me a participator in the pecuniary profits of the American edition, without solicitation or the shadow of any expectation on my part, without any legal claim that I could plead, or equitable warrant in established usage, solely and merely upon your own spontaneous motion. Some of these new papers, I hope, will not be without their value in the eyes of those who have taken an interest in the original series. But at all events, good or bad, they are now tendered to the appropriation of your individual house, the Messrs. TICKNOR & FIELDS, according to the amplest extent of any power to make such a transfer that I may be found to possess by law or custom in America.

I wish this transfer were likely to be of more value. But the veriest trifle, interpreted by the spirit in which I offer it, may express my sense of the liberality manifested throughout this transaction by your honorable house.

Ever believe me, my dear sir,
Your faithful and obliged,
THOMAS DE QUINCEY.

The almost humble mood with which Robert Browning expressed his desire for courteous treatment of Ticknor's editions was not an isolated instance. The same publisher's 1861 edition of *The Poetical Works of Alfred Tennyson* carried that author's personal "wish that with Messrs. Ticknor and Fields alone the right of publishing [his] books in America should rest."²⁴⁵

245. ALFRED TENNYSON, *THE POETICAL WORKS OF ALFRED TENNYSON*, at iv (Boston, Ticknor & Fields 1861).

Ticknor's other editions of Tennyson contained the same authorizing paratext.²⁴⁶ Again, a foreign author benefitting from legally un-compelled payments articulated a "wish" that Ticknor would remain the exclusive publisher of his works in the United States. And just as Browning had expressed the hope that the "power of publishing [his works] in America . . . may rest exclusively with [Ticknor's] house,"²⁴⁷ Tennyson desired that the "right of publishing [his] books in America" might "rest" solely with Ticknor.²⁴⁸ The rhetorical similarities between Browning and Tennyson suggest that these courtesy paratexts had attained a formulaic status in American publishing, or perhaps that Ticknor was encouraging its foreign authors to write to a formula, or both. In any case, Tennyson and Browning urged forbearance from piracy in the most courteous, even modest terms, as if the shared norm of courtesy required only the gentlest reminder by a grateful foreign author.

Figure 5

Courtesy Paratext in Alfred Tennyson, *Idyls of the King* (Boston, Ticknor & Fields 1866)

It is my wish that with MESSRS. TICKNOR AND FIELDS alone the right of publishing my books in America should rest.

ALFRED TENNYSON.

Elizabeth Barrett Browning echoed this style in her own authorizing paratexts. The New York firm of C.S. Francis and Company had begun reprinting her poems, apparently without authorization, in 1850.²⁴⁹ A few years later, it paid her £100 for her long poem *Aurora Leigh*,²⁵⁰ which it published in 1857.²⁵¹ Francis included in the opening pages of its edition a

246. E.g., ALFRED TENNYSON, *IDYLS OF THE KING*, at ii (Boston, Ticknor & Fields 1866) (1859). Ticknor's courtesy claim on Tennyson began in 1842 when the firm remunerated him for an edition of his work. Jeffrey D. Groves, *Judging Literary Books by Their Covers: House Styles, Ticknor and Fields, and Literary Promotion*, in *READING BOOKS: ESSAYS ON THE MATERIAL TEXT AND LITERATURE IN AMERICA* 75, 98 n.33 (Michele Moylan & Lane Stiles eds., 1996); see also JUNE STEFFENSEN HAGEN, *TENNYSON AND HIS PUBLISHERS* 180-82 (1979) (discussing payments Tennyson received from American sales of his works).

247. BROWNING, *DRAMATIS PERSONAE*, *supra* note 215, at 11.

248. TENNYSON, *supra* note 245, at iv.

249. See GARDNER B. TAPLIN, *THE LIFE OF ELIZABETH BARRETT BROWNING* 236 (1957). The Francis firm's edition of *The Poems of Elizabeth Barrett Browning* appeared in two volumes in 1850. ELIZABETH BARRETT BROWNING, *THE POEMS OF ELIZABETH BARRETT BROWNING*, IN TWO VOLUMES (New York, C.S. Francis & Co. 1850).

250. BARRETT BROWNING, *AURORA LEIGH*, *supra* note 216.

251. TAPLIN, *supra* note 249, at 304-05; Samantha Matthews, *Marketplaces*, in *THE OXFORD HANDBOOK OF VICTORIAN POETRY* 655, 660 (Matthew Bevis ed., 2013). C.S. Francis and

footnote continued on next page

letter by Barrett Browning, dated October 21, 1856: “Having received what I consider to be sufficient remuneration for my poem of ‘Aurora Leigh,’ from Mr. Francis, of New York, it is my earnest desire that his right in this and future editions of the same, may not be interfered with.”²⁵² Barrett Browning here acknowledged receiving “sufficient remuneration” from Francis (her husband had thanked Ticknor for “liberally remunerat[ing]” him²⁵³), in exchange for which she provided her authorizing letter with its precatory wording. Again, as with Robert Browning, Barrett Browning recorded her “earnest desire” that trade courtesy be observed, but she avoided the more common indirection of merely noting her publisher’s exclusive “right” or “power” to reprint in America.²⁵⁴ Pointedly alluding to the possibility that pirates might “interfere[]”²⁵⁵ with Francis’s courtesy claim, her letter discouraged any such acts of norm-flouting deviancy.²⁵⁶

Company published several earlier volumes of Barrett Browning’s poems without any indication of a courtesy arrangement. *E.g.*, ELIZABETH BARRETT BROWNING, PROMETHEUS BOUND, AND OTHER POEMS (New York, C.S. Francis & Co. 1851); *see also* TAPLIN, *supra* note 249, at 240 (noting that Francis “pirated” the poems in *Prometheus Bound*). Francis’s edition of *The Poems of Elizabeth Barrett Browning* contained a preface in which she declared her “love and admiration” for “the great American people,” 2 ELIZABETH BARRETT BROWNING, THE POEMS OF ELIZABETH BARRETT BROWNING, at ix (New York, C.S. Francis & Co. 1st American ed. 1850), but gave no indication of a courtesy relationship with the firm. Ticknor and Fields, the authorized American publisher of Robert Browning, hoped to add Barrett Browning to its list but recognized the superior courtesy claim of Francis. *See* GREER, *supra* note 215, at 75. Reluctant to meddle with prior associational rights, Fields remarked to Robert Browning, “We are a funny set of christians over the waves.” Groves, *supra* note 41, at 143 (quoting Letter from James T. Fields to Robert Browning (Sept. 25, 1855)).

252. BARRETT BROWNING, AURORA LEIGH, *supra* note 216 (sixth unnumbered page).

253. BROWNING, DRAMATIS PERSONAE, *supra* note 215, at 11.

254. *See, e.g., id.*; TENNYSON, *supra* note 245, at iv.

255. BARRETT BROWNING, AURORA LEIGH, *supra* note 216 (sixth unnumbered page).

256. For Barrett Browning’s posthumously published volume *Last Poems*, Robert Browning provided a paratextual statement that drew on elements from both his and her previous courtesy paratexts: “The right of publishing this Book in the United States having been liberally purchased by Mr. James Miller, it is hoped that there will be no interference with the same.” ELIZABETH BARRETT BROWNING, LAST POEMS 8 (New York, James Miller 1862) (1862). James Miller was successor to C.S. Francis and Company. *Id.* at 5.

Figure 6

Courtesy Paratext in Elizabeth Barrett Browning, *Aurora Leigh* (New York, C.S. Francis & Co. 1857)

AUTHOR'S EDITION.

—

HAVING received what I consider to be sufficient remuneration for my poem of "AURORA LEIGH," from Mr. FRANCIS, of New York, it is my earnest desire that his right in this and future editions of the same, may not be interfered with.

ELIZABETH BARRETT BROWNING.

London, Oct 31, 1856.

The intimate "wish" or "earnest wish" of Tennyson and the Brownings personalized the courtesy claims of publishers, reminding rivals and readers alike that piracy had a human impact apart from any horizontal damage it might inflict on business interests. In contrast to the stern command of the familiar copyright notice, these privately endorsed paratexts practically whispered their exhortations, urging the moral earnestness that scholars have argued was a feature of Victorian culture.²⁵⁷ The ideal of moral earnestness stressed serious work habits and an industrious spirit; it shunned frivolity and selfish pleasures and deprecated love of money and materialism.²⁵⁸ Barrett Browning's "earnest wish" that courtesy claims not be piratically interfered with was a kind of quasi-religious plea for the righteous use of the American public domain. To conduct oneself morally in the tempting commons was to behave as an earnest publisher should or, to invoke another concept of the period, to justify oneself as an unstained American Adam.²⁵⁹

Not all courtesy paratexts invoked earnestness. The "Authorized Edition" of Rudyard Kipling's *The Story of the Gadsbys and Under the Deodars*, published by Lovell, Coryell and Company of New York in 1891, contained the brief,

257. See, e.g., WALTER E. HOUGHTON, *THE VICTORIAN FRAME OF MIND, 1830-1870*, at 220-22 (1957) (discussing earnestness as a defining characteristic of nineteenth-century British thought).

258. Houghton describes Victorian earnestness and related qualities as pervasive, secularized products of the various strands of evangelical reform that marked the era. *Id.* at 222, 242, 251-59.

259. See R.W.B. LEWIS, *THE AMERICAN ADAM: INNOCENCE, TRAGEDY, AND TRADITION IN THE NINETEENTH CENTURY 1-12* (1955) (describing the nineteenth-century myth of American culture as innocent liberation from Europe's tainted history and characterizing the idealized American self as adventurous and self-reliant).

blunt message: “This edition of my collected writings is issued in America with my cordial sanction.”²⁶⁰ Kipling had been openly indignant about American piracies of his books,²⁶¹ and he made peace with one of the culprits, the Lovell firm, only after Lovell arranged to pay him a small lump sum along with a royalty on reprints of his books.²⁶² In its 1891 edition of Kipling’s *Mine Own People*, the United States Book Company (a large “book trust” of cheap reprinters that Lovell had organized²⁶³) included a facsimile letter in which Kipling affirmed that the edition “ha[d] [his] authority” and that he owed “to the courtesy of [his] American publishers that [he] ha[d] had the opportunity of [him]self preparing the present book.”²⁶⁴

Kipling’s courtesy paratexts did not always conceal his seething contempt for U.S. copyright laws. In an 1890 edition of his story collection *Soldiers Three*, Lovell reproduced another facsimile letter by Kipling:

Gentlemen[,] [y]our country takes the books of other countries without paying for them. Your firm has taken some books of mine and has paid me a certain price for them though it might have taken them for nothing. I object to the system altogether but since I am helpless, authorize you to state that all editions of my property now in your hands have been overlooked by me.²⁶⁵

Lovell might not have been pleased by the implication that, in a country whose laws permitted the uncompensated taking of foreign authors’ works,

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260. KIPLING, *THE STORY OF THE GADSBYS*, *supra* note 220, at 1. The edition also contained a U.S. copyright notice in the publisher’s name, *id.* (eighth unnumbered page), probably referring to the publisher’s selection of stories rather than to the stories themselves, which had been published in England prior to the Chace Act and therefore individually enjoyed no U.S. copyright, *see supra* notes 26-27 and accompanying text.
261. Kipling had been outraged by Harper and Brothers’ unauthorized use of his stories. Letter from Rudyard Kipling to the Editor of the Athenaeum (Nov. 8, 1890), in 2 *THE LETTERS OF RUDYARD KIPLING* 25, 25-26 (Thomas Pinney ed., 1990).
262. *See generally* David Alan Richards, *Kipling and the Pirates*, 96 *PAPERS BIBLIOGRAPHIC SOC’Y AM.* 59, 65-77 (2002) (discussing Lovell’s authorized and unauthorized editions of Kipling’s works).
263. *See* MADISON, *supra* note 32, at 55; Shove, *supra* note 100, at 43-45; *see also* TEBBEL, *supra* note 41, at 148.
264. E.W. MARTINDELL, *A BIBLIOGRAPHY OF THE WORKS OF RUDYARD KIPLING (1881-1921)*, at 33 (1922) (quoting facsimile letter in KIPLING, *MINE OWN PEOPLE*, *supra* note 220). For a discussion of Kipling’s dealings with his American publishers, *see* SEVILLE, *supra* note 151, at 297-99.
265. KIPLING, *SOLDIERS THREE*, *supra* note 220 (second unnumbered page). This volume also bore a regular copyright notice: “Copyright, 1890, By John W. Lovell Company.” *Id.* (fourth unnumbered page). Such notices usually did not refer to the uncopyrighted foreign work but rather to the publisher’s selection or arrangement of texts, new illustrations, or additional notes or other features. *See supra* notes 221-26 and accompanying text; *see also supra* note 228. For a reprint (with annotations) of Kipling’s 1890 letter to the John W. Lovell Company, *see* 2 *THE LETTERS OF RUDYARD KIPLING*, *supra* note 261, at 31.

Lovell had distinguished himself merely by paying “a certain price” after “tak[ing]” Kipling’s books, as if the publisher were only a cut above a categorically thieving nation. Kipling portrayed himself here as the grudging recipient of a bit of quasi-piratical booty, paradoxically authorizing the use of “property” that he was “helpless” to protect and consoling himself that at least he had “overlooked” Lovell’s editions (in the sense of “supervising” them, but also with a faint quibble, perhaps, on “ignoring” them).

Far from the groveling tone of De Quincey’s letter or Tennyson’s earnest wishing,²⁶⁶ Kipling’s discourteous paratext suggests that not all foreign authors viewed normative courtesy as the antithesis of lawful piracy. Some, like Kipling, saw courtesy as a qualified form of piracy, an institution that offered a kind of insulting consolation or hush money to outraged authors.²⁶⁷ After all, for passive foreign authors, courtesy resembled more a compulsory license than a robust property rule typical of exclusive copyright ownership.²⁶⁸ Kipling understood his status under American copyright law deontologically, not pragmatically, as if no amount of trade courtesy could redeem the law’s original sin of depriving him of his natural rights as an author.²⁶⁹ A tainted public domain could not be cleansed by businessmen’s self-interested gratuities.

266. See *supra* notes 242-48 and accompanying text.

267. See SPOO, WITHOUT COPYRIGHTS, *supra* note 15, at 14-16 (discussing the Scottish author Andrew Lang’s outrage over the American publisher Thomas Bird Mosher’s unauthorized reprinting of one of his uncopyrighted books in 1895 and his rejection of Mosher’s post hoc offer of payment).

268. See Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742, 1775-76, 1811-12 (2007) (discussing compulsory licenses as liability rules that permit unauthorized uses and merely require compensation, as opposed to property rules that empower intellectual property owners to forbid uses).

269. See Eli M. Salzberger, *Economic Analysis of the Public Domain*, in THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW 27, 31 (Lucie Guibault & P. Bernt Hugenholtz eds., 2006) (contrasting the deontological natural law paradigm of intellectual property with the positivist incentive paradigm).

Figure 7

Facsimile Letter Paratext in Rudyard Kipling, *Soldiers Three* (New York, John W. Lovell Co. 1890)

John W. Lovell, Co.
150 North Street,

Gentlemen

Your country takes the books of
other countries without paying for them
Your firm has taken some books of
mine and has paid me a certain
price for them though it might have
taken them for nothing

I object to the system altogether but
since I am helpless authorize you to state
that all editions of my property now
in your hands have been overbilled by me.

Yours

Rudyard Kipling

Kipling's discourteous courtesy, so different from the earnest wishing of English authors thirty years earlier,²⁷⁰ was in part a reaction to the chaotic, price-slashing competition that American publishers had practiced during the 1880s, when horizontal and vertical courtesy was often thrown aside in the interest of quick returns on inexpensive reprints.²⁷¹ In this fierce competition for foreign titles, which led to the overproduction of cheap paper-covered books and a glutting of the market, Robert Louis Stevenson's uncopyrighted works were widely reproduced, as were Mrs. Humphry Ward's *Robert Elsmere*²⁷² and H. Rider Haggard's *Cleopatra*,²⁷³ the latter appearing in ten

270. See *supra* notes 232, 252, 254, 257-59 and accompanying text.

271. See *supra* notes 100, 108, 158-66 and accompanying text.

272. MRS. HUMPHRY WARD, *ROBERT ELSMERE* (London, MacMillan & Co. 1888).

273. H. RIDER HAGGARD, *CLEOPATRA: BEING AN ACCOUNT OF THE FALL AND VENGEANCE OF HARMACHIS, THE ROYAL EGYPTIAN, AS SET FORTH BY HIS OWN HAND* (London, Longmans, Green & Co. 1889).

different editions.²⁷⁴ When Holt published an authorized edition of *The Mayor of Casterbridge* in 1886,²⁷⁵ he assured Thomas Hardy that although the market was overrun with pirates, “[h]e [would] do the best [h]e [could] with it in th[o]se distressing times when it seem[ed] next to impossible to do anything with anything.”²⁷⁶ Later, in the 1890s, Alexander Grosset brought out a string of Kipling’s unprotected works, including his popular poems done up as booklets selling for ten cents a copy.²⁷⁷ The profits from reprinting Kipling helped lay the financial foundation of the noted publishing house Grosset and Dunlap.²⁷⁸ Kipling, like the immensely popular Dickens fifty years before,²⁷⁹ denounced a volatile industry that lurched between open piracy and sporadic courtesy and that rendered foreign authors the helpless victims of lawful lawlessness or the passive recipients of unpredictable largesse.

III. Gilbert and Sullivan’s Paratext: Courtesy Rationalized

In the 1880s, W.S. Gilbert and Arthur Sullivan, the celebrated English creators of comic operas, attempted to overcome the defects of U.S. copyright law by devising a plan for obtaining an American copyright in *The Mikado*²⁸⁰ so as to prevent piratical performances of the work in the United States. To this end, they hired George Lowell Tracy, an American citizen, to come to London and prepare a piano arrangement of the full operatic score.²⁸¹ Tracy then registered the copyright in this arrangement with the Library of Congress and assigned the rights to Richard D’Oyly Carte, the theatrical impresario and partner of Gilbert and Sullivan.²⁸² With an American copyright apparently secured, the team felt it was safe to publish the libretto, the vocal score, and the piano arrangement in England.²⁸³

But the enormous popularity of Gilbert and Sullivan inspired audacity in American entrepreneurs. When an unauthorized production of the opera was

274. MADISON, *supra* note 32, at 54.

275. THOMAS HARDY, *THE MAYOR OF CASTERBRIDGE* (New York, Henry Holt & Co. 1886) (1886).

276. MADISON, *supra* note 32, at 99-100.

277. DUNLAP, *supra* note 71, at 272.

278. *Id.*

279. *See supra* note 166 and accompanying text.

280. W.S. GILBERT & ARTHUR SULLIVAN, *THE MIKADO; OR THE TOWN OF TITIPU* (New York, Wm. A. Pond & Co. 1885).

281. *Carte v. Duff*, 25 F. 183, 183-84 (C.C.S.D.N.Y. 1885).

282. *Id.*; MICHAEL KENNEDY & JOYCE BOURNE KENNEDY, *D’Oyly Carte, Richard*, in *THE OXFORD DICTIONARY OF MUSIC* 242 (Tim Rutherford-Johnson ed., 6th ed. 2012).

283. *See Carte*, 25 F. at 183-84.

announced in New York, Carte sued for an injunction, claiming that the rival orchestration, which had been craftily recreated from the piano arrangement, would infringe the American copyright in the latter work.²⁸⁴ A federal court rejected Carte's claim, however, holding that U.S. copyright law did not grant an exclusive right of public performance for musical compositions and that Gilbert and Sullivan had forfeited American rights in the libretto and the vocal score by publishing those works initially abroad.²⁸⁵ The defendant was free to stage his version of *The Mikado*, "however unfair commercially or reprehensible in ethics his conduct may be."²⁸⁶ The celebrated team's efforts to enjoy protection for the whole opera by copyrighting a part of it had run aground on the technical distinctions and protectionist policies of U.S. copyright law.

Gilbert and Sullivan also looked to trade courtesy for protection of their operas in America. One of the century's most elaborate courtesy paratexts appeared in editions of their comic operas published by J.M. Stoddart and Company of Philadelphia in the 1880s. Stoddart called these reprints "Authorized Copyright Editions," possibly because the firm had introduced potentially copyrightable variants into otherwise public domain librettos.²⁸⁷ The lengthy authorizing paratext, surrounded by a box on the cover and signed by Gilbert and Sullivan, began in the usual way by stating that Stoddart,

by special and satisfactory arrangements with our English publishers and ourselves, ha[s] secured the exclusive authority to publish our Opera "*The Pirates of Penzance; or, The Slave of Duty*," in the United States of America. We hereby express the earnest wish that [it] may suffer no invasion of the rights derived from us, as the sole publishers of our work, through any attempt to put upon the market unauthorized editions.²⁸⁸

Here were the familiar elements of the courtesy paratext: an acknowledgment, on the vertical axis, of an exclusive authorization derived from special arrangements and, on the horizontal axis, an earnest wish that courtesy rights would not be invaded by unauthorized versions. The operatic team was both pointing to contractual rights and acting as celebrity sponsors of American publishing norms.

But the courtesy paratext did not end there. Gilbert and Sullivan went on to articulate three "reasons" for making their request for courtesy treatment. "First," they wrote, "we are satisfied there exists a general desire on the part of the people of both continents to come to an agreement upon the question of an

284. *Id.* at 184.

285. *Id.* at 185-87.

286. *Id.* at 186.

287. See *supra* notes 221-25 and accompanying text.

288. GILBERT & SULLIVAN, *THE PIRATES OF PENZANCE*, *supra* note 221, at 1.

international copyright, affording compensation to authors in their literary and artistic productions.”²⁸⁹ They were partly right. There had been multiple efforts to establish a reciprocal Anglo-American copyright law in previous years, but these efforts had repeatedly met with obstacles.²⁹⁰ For example, in response to a petition presented by British authors, Senator Henry Clay introduced a bill in Congress in 1837 that would have recognized British copyrights in the United States.²⁹¹ The bill encountered strong opposition from the American book trade, however, and never became law.²⁹² In 1854, President Franklin Pierce signed an Anglo-American copyright treaty providing for reciprocal recognition of the rights of authors and publishers in the two countries.²⁹³ Once again, stubborn resistance from publishers and booksellers caused the treaty to fall short of ratification by the Senate.²⁹⁴ Writing in 1880, the year of Gilbert and Sullivan’s courtesy paratext, British poet and essayist Matthew Arnold remarked that the United States had repeatedly “refused to entertain the question of international copyright.”²⁹⁵ Numerous Anglo-American copyright bills failed in Congress prior to 1890.²⁹⁶

Gilbert and Sullivan quietly alluded to these legislative dead ends when they referred in their paratext to a “general desire on the part of the people of both continents”²⁹⁷ to establish an international copyright law. The particular desire of Congress, they implied, had yet to assemble the votes needed for

289. *Id.*

290. See SEVILLE, *supra* note 151, at 160-64, 173-74, 180-84, 199-236.

291. *Id.* at 160-61.

292. *Id.* at 161-62.

293. JOHN FEATHER, PUBLISHING, PIRACY AND POLITICS: AN HISTORICAL STUDY OF COPYRIGHT IN BRITAIN 167 (1994).

294. *Id.*

295. Matthew Arnold, *Copyright*, FORTNIGHTLY REV., Mar. 1, 1800, at 319, 331. By contrast, for much of the nineteenth century, a non-British author could obtain copyright protection in Britain if she published her work in the United Kingdom, there was no previous publication, and she was within the British dominions at the time of publication. DRONE, *supra* note 171, at 230; SIMON NOWELL-SMITH, INTERNATIONAL COPYRIGHT LAW AND THE PUBLISHER IN THE REIGN OF QUEEN VICTORIA 39-40 (1968). Matthew Arnold observed that American authors could satisfy the third requirement by simply visiting England or Canada at the time their book was published in Britain. Arnold, *supra*, at 331. Some English publishers attempted a kind of trade courtesy with respect to unprotected American books, but the system was not as cohesive or successful as its American counterpart. George Haven Putnam, *Property, Literary*, in 3 CYCLOPÆDIA OF POLITICAL SCIENCE, POLITICAL ECONOMY, AND OF THE POLITICAL HISTORY OF THE UNITED STATES 392, 410 (John J. Lalor ed., Chicago, Melbert B. Cary & Co. 1884).

296. Wilf, *supra* note 41, at 186, 205.

297. GILBERT & SULLIVAN, THE PIRATES OF PENZANCE, *supra* note 221, at 1.

legislative action. The paratext seemed to justify courtesy as both an informal property norm and a precursor to real lawmaking, a contrivance of respectable publishers that not only protected business interests but also served as an expression of the popular will to ensure compensation for all authors, foreign and domestic. Stoddart's courtesy claim should be respected, the paratext suggested, because authors' rights were already supported by the people, however dilatory their elected representatives might be. So conceived, courtesy was a harbinger of and a moral incitement to a genuine law protecting foreign authors.

Gilbert and Sullivan's second reason for requesting courteous treatment was that "[they were] by this arrangement enabled to secure the publication of [their] work under [their] own personal supervision, greatly to the benefit of the public and [themselves]."²⁹⁸ Here was another justification for courtesy: the ability of creators to control the aesthetic integrity of their creations. The informal courtesy monopoly, this paratext implied, did more than safeguard economic interests; it also generated informal moral rights that guaranteed the accuracy of works, enhancing the reputation of authors and minimizing the harm to consumers from the unfair competition of cheap, unauthorized knockoffs.²⁹⁹ In the chaotic publishing scene of these years, textual accuracy could be ensured only if authors had the ability to "supervise" texts that enjoyed exclusive norms-based protection.³⁰⁰ It was this ability to oversee aesthetic quality that Kipling was referring to when he stated in his own paratexts that his editions had been "overlooked by [him]."³⁰¹ Moral rights, historically a byproduct of copyright protections and other laws rather than a distinctly recognized area of American law,³⁰² were also the byproduct of copyright-like courtesy.

298. *Id.*

299. *Cf.* BRIGGS, *supra* note 219, at 113 (noting that courtesy paratexts served as "a guarantee for the accuracy of the reproduction"). Nineteenth-century American publishers often complained that noncourtesy books were "cheap and slovenly printed reprints," INTERNATIONAL COPYRIGHT LAW REPORT, *supra* note 12, at 20 (statement of Small, Maynard & Co.), "imperfect and inaccurate," *id.* at 26-27 (statement of the Burrows Brothers Company), or marred by "the cutting out of many pages," *id.* at 28 (statement of the Helman Taylor Company).

300. *See* LEHMANN-HAUPT, *supra* note 41, at 167-68 (discussing cheap, shoddy reprints in this period).

301. *See supra* note 265 and accompanying text.

302. *See* PETER BALDWIN, THE COPYRIGHT WARS: THREE CENTURIES OF TRANS-ATLANTIC BATTLE 225-26, 235-40 (2014) (discussing the attenuated protection for moral rights in the United States and Britain, in contrast to the robust protection in continental Europe).

Gilbert and Sullivan's third reason for claiming courtesy was that "by the present contract [their] publications w[ould] be wholly manufactured in the United States."³⁰³ This portion of the paratext guaranteed that Stoddart's vocal scores would be manufactured solely by American typesetters, printers, and bookbinders, an assurance that related to another aspect of the movement for international copyright. Many legislators and lobbyists had insisted that any copyright protection for foreign works must be conditioned on American manufacture of protected editions. The bill that Henry Clay proposed in 1837 would have granted copyright to British and French authors on the basis of American manufacture of their books within a month of publication abroad.³⁰⁴ In 1884, the Harper firm argued for manufacturing provisions that would require protected foreign books to be printed in the United States, "chiefly in order that they may not be made inconvenient and unobtainable, which would be the case if the base of supplies were as remote as London."³⁰⁵ Like the Harpers, Gilbert and Sullivan were assuring the public that American workers would be rewarded and that books would remain plentifully available, without risk of shortages that might result if printing took place abroad. These arguments, along with others, eventually prevailed with legislators who approved the Chace Act of 1891 with its strict manufacturing provisions.³⁰⁶

Gilbert and Sullivan's paratext also promised that Stoddart's courtesy editions would sell at "as low a price, with . . . as wide a circulation, as if they were issued by a number of rival and unauthorized persons."³⁰⁷ In essence, this was a promise that any artificial scarcity created by courtesy collusion would not, in contrast to the effects of classic public goods monopolies like copyrights,³⁰⁸ result in an elevation of prices and a reduced supply of copies. The one thing that unrestricted piracy guaranteed, at least while "rival and unauthorized" reprinters competed to sell the same title, was that supply would remain abundant and cost would stay low.³⁰⁹ The public often benefited from

303. GILBERT & SULLIVAN, *THE PIRATES OF PENZANCE*, *supra* note 221, at 1.

304. SEVILLE, *supra* note 151, at 29.

305. Letter from Harper & Bros. to Henry C. Lea (Mar. 13, 1884), *quoted in* HARPER, *supra* note 32, at 431, 431-32.

306. *See supra* notes 12-15 and accompanying text. Trade courtesy anticipated the Chace Act by effectively confining book manufacturing to the United States.

307. GILBERT & SULLIVAN, *THE PIRATES OF PENZANCE*, *supra* note 221, at 1.

308. *See* Lemley, *supra* note 28, at 468 (discussing how intellectual property rights create artificial scarcity in public goods).

309. *See* INTERNATIONAL COPYRIGHT LAW REPORT, *supra* note 12, at 22, 36, 43, 54, 77, 79-81, 84-87 (presenting statements of various American publishers concerning the benefits of pre-1891 "piracy" to purchasers and book manufacturers).

aggressive competition for cheap, popular books.³¹⁰ The Harpers acknowledged in 1877 that during occasional breakdowns of the courtesy system “the people are benefited . . . by a free fight, in the course of which, while rival publishers are fighting over some tempting morsel, the reading public devours it.”³¹¹ Gilbert and Sullivan were addressing the fear Thomas Macaulay articulated in his classic 1841 critique of copyright—that “the effect of monopoly generally is to make articles scarce, to make them dear, and to make them bad”³¹²—and reassuring purchasers that Stoddart’s courtesy editions would not suffer from the evils of contrived scarcity. They had already guaranteed that the vocal scores would not be of inferior quality by noting that the scores would be under their “own personal supervision.”³¹³

310. *Id.* at 11-13, 22, 25-26, 36, 43, 45, 47, 50, 54, 66-67, 71-73, 76, 78-79, 82-83, 85-87 (presenting statements of various American publishers concerning increases in the price of foreign works printed in the United States after enactment of the 1891 Chace Act).

311. Letter from Harper & Bros. to Wilkie Collins (Feb. 1877), *quoted in* HARPER, *supra* note 32, at 392, 393.

312. T.B. Macaulay, A Speech Delivered in the House of Commons on the 5th of February, 1841, *in* 1 SPEECHES OF THE RIGHT HONORABLE T.B. MACAULAY, M.P. 273, 279 (Leipzig, Bernhard Tauchnitz copy. ed. 1853).

313. GILBERT & SULLIVAN, THE PIRATES OF PENZANCE, *supra* note 221, at 1.

Figure 8

Full-Page Courtesy Paratext in Gilbert and Sullivan, *The Pirates of Penzance*
(Philadelphia, J.M. Stoddart & Co. 1880)

(AUTHORIZED COPYRIGHT EDITION.)

THE
PIRATES
OF
PENZANCE

OR
The Slave of Duty.

AN ENTIRELY ORIGINAL COMIC OPERA
IN TWO ACTS.

WRITTEN BY
W. S. GILBERT.

COMPOSED BY
ARTHUR SULLIVAN.

ONLY AUTHORIZED AND COMPLETE EDITIONS.

LONDON.

Messrs. J. M. STODDART & Co., by special and satisfactory arrangements with our English publishers and ourselves, have secured the exclusive authority to publish our Opera "The Pirates of Penzance; or, The Slave of Duty," in the United States of America. We hereby express the earnest wish that they may suffer no invasion of the rights derived from us, as the sole publishers of our work, through any attempt to put upon the market unauthorised editions.

We make this request for the following reasons: First, because we are satisfied there exists a general desire on the part of the people of both continents to come to an agreement upon the question of an international copyright, affording compensation to authors in their literary and artistic productions; Secondly, because we are by this arrangement enabled to secure the publication of our work under our own personal supervision, greatly to the benefit of the public and ourselves; and Thirdly, because by the present contract our publications will be wholly manufactured in the United States, and will be sold at as low a price, with the certainty of as wide a circulation, as if they were issued by a number of rival and unauthorised persons.

W. S. GILBERT,
ARTHUR S. SULLIVAN.

Copyright, 1880, by J. M. STODDART & CO.

IV. Monopolistic Practices and the Decline of Trade Courtesy

The defensive note in Gilbert and Sullivan's paratext, examined in Part III above, was a response to critiques that the practice of trade courtesy was a bullying "trust" in which privileged publishers colluded to keep the price of books high and to prevent price-reducing competition.³¹⁴ Courtesy, when horizontally successful, mirrored copyright law in its creation of publishers' monopolies in public goods. Some of the familiar costs of monopoly—increased prices and artificially induced scarcity of goods³¹⁵—were likely experienced under trade courtesy just as in markets controlled by formal laws.³¹⁶ However, the unusual position of courtesy publishers, under pressure from the competing activities of lawful pirates, may have helped mitigate the effects of monopoly pricing to some extent.³¹⁷ This Part discusses the perceived monopolistic tendencies of courtesy and the forces—notably antitrust law and the enactment of conditional U.S. copyright protection for foreign authors—that caused courtesy to decline as a highly visible, openly cartelized trade practice.

314. See Groves, *supra* note 41, at 140, 146 (discussing the charge that courtesy was a price-inflating trust); see also MADISON, *supra* note 32, at 52 (discussing the same).

315. See Lemley, *supra* note 28, at 466–67.

316. It is difficult to say whether and to what extent trade courtesy resulted in monopolistic pricing of foreign authors' works absent an extensive empirical study of book prices in the nineteenth century—a task beyond the scope of this Article. There is anecdotal evidence that the 1891 Chace Act had little or no impact on the price of most books in the United States—a fact that, if true, might suggest that courtesy and copyright had similar effects on book pricing. See INTERNATIONAL COPYRIGHT LAW REPORT, *supra* note 12, at 23 (statement of A.C. McClurg & Co.); *id.* at 45 (statement of the S.S. McClure Company); *id.* at 58 (statement of the Frederick A. Stokes Company); see also *id.* at 20 (statement of Small, Maynard & Co.) ("The price for a well-made standard book would probably be about the same [in 1900 as before the Chace Act], since scrupulous [courtesy] publishers have been quite generally in the habit of making some compensation to a foreign author, even in the absence of copyright."). But the same report offers anecdotal evidence that the Chace Act caused book prices to rise—a fact that, if true, might suggest that courtesy pricing was not significantly monopolistic. See *id.* at 22 (statement of the Blakely Printing Company); *id.* at 36 (statement of R.F. Fenno & Co.); *id.* at 63 (statement of Drexel Biddle); see also *id.* at 47 (statement of the Publishers' Printing Company) ("The book-purchasing public has not been at all benefited by the [Chace Act], as they are certainly obliged to pay a larger price for copyrighted books than they paid formerly when pirate [courtesy?] publishers were able to produce books at a much lower rate than that at which they are now sold."). The report provides rather ambiguous data on book pricing because it formulated its questions in terms of the difference between "copyright law" and "piracy" without clearly controlling for courtesy. See *id.* at 8–9. It is therefore unclear whether the respondents were measuring the effects of the Chace Act against courtesy practices or unqualified piracies, or some blend of the two.

317. See *infra* notes 342–47 and accompanying text.

Trade courtesy's anticompetitive practices did not go unnoticed, and the system had its detractors. Notably, certain cheap, noncourtesy reprinters, denying the accusation that they were pirates, portrayed themselves as reformers seeking to abolish the privileges enjoyed by the genteel firms that had selfishly adopted the courtesy code.³¹⁸ For example, in 1884, George P. Munro, founder of the Seaside Library of inexpensive books, argued that the cheap libraries had broken down "the Chinese or rather American wall of trade courtesy and privilege" that had been erected solely for the "monopoly of publishers in this country."³¹⁹ These arrogant book barons, Munro asserted, "dictated terms, and precious low ones too, to the [foreign] authors, on the basis of non-interference among themselves."³²⁰ Munro was claiming, in essence, that courtesy operated horizontally to benefit participating publishers but did not work vertically to help foreign authors or to make books more affordable for the masses.

Courtesy publishers responded by portraying themselves as honorable and decent. Henry Holt denied that the large publishing houses were a bullying cartel held together by promises of reciprocity. There was "no close corporation about it," he averred. "[A]nybody is welcome who will behave himself."³²¹ But cheap reprint firms and new startups disagreed. They spurned a welcome mat that required them to recognize the courtesy claims of the veteran houses, even as it withheld the prestige and leverage necessary to enjoy the benefits such a system conferred.³²² These so-called pirates justified their methods by invoking the strict letter of the law. Foreign works were lawfully in the American public domain and were freely available to all; any attempt to claim such works and call it "courtesy" was simply a game played by the haves to the detriment of the have-nots.³²³ Unrestrained competition would break down courtesy and benefit the book-reading public by placing "good cheap" editions of important works "within the reach of students, schoolteachers, and others of moderate means."³²⁴ The American publisher Isaac K. Funk attacked

318. TEBBEL, *supra* note 41, at 148-49; Groves, *supra* note 41, at 146-47.

319. Groves, *supra* note 41, at 146 (quoting MADISON, *supra* note 32, at 53).

320. MADISON, *supra* note 32, at 53.

321. "The Evening Post's" *Libel Suit*, *supra* note 59, at 360 (quoting testimony of Henry Holt).

322. See John W. Lovell, Letter to the Editor, *The Canadian Incursion*, PUBLISHERS' WKLY., Apr. 19, 1879, at 470, 471 (criticizing courtesy as disadvantaging newer, smaller publishers and sometimes the public).

323. See *id.*

324. *Id.* at 470.

courtesy as a “law” that had not been “framed in the interest of authors or of the public.”³²⁵

Congress enacted the Sherman Antitrust Act in 1890,³²⁶ one year before passage of the Chace Act. The Sherman Act prohibited “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce,” and it criminalized the acts of “[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce.”³²⁷ The law was aimed at monopolies, combinations, and cartels that harmed competition in the marketplace. Horizontal restraints on trade have been thought especially pernicious and have often been deemed violations of the Sherman Act.³²⁸ For example, in 1898, six manufacturers of cast-iron pipe that had conspired to allocate among themselves the right to serve particular customers in certain regions were held to have violated the Sherman Act.³²⁹ The U.S. Court of Appeals for the Sixth Circuit arrived at this conclusion even though the conspiracy was only a partial restraint on trade and other cast-iron manufacturers had remained outside the cartel.³³⁰ The participating manufacturers had divided up the market and insulated themselves from competition in ways that tended toward monopoly and potentially deprived the public of the advantages flowing from free competition.³³¹

The courtesy houses were plainly combining in a horizontal restraint on trade that ensured that they would “not bid against one other.”³³² Instead of splitting the market into exclusive territories and customers, as the cast-iron cartel did, publishers divided the free cultural commons into exclusively assigned books and authors, each publisher tacitly honoring every other publisher’s courtesy title to a public domain work. This agreement to refrain from poaching on other houses potentially injured foreign authors because it limited other offers that might have bettered the proposal of the first publisher to claim courtesy. “When two publishers are seeking an author,” wrote publisher George Haven Putnam, “the proportion of the proceeds offered to the

325. I.K. Funk & Co., Letter to the Editor, *Foreign Authors and “the Standard Series,”* PUBLISHERS’ WKLY., May 15, 1880, at 499, 499.

326. Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (2015)).

327. 15 U.S.C. §§ 1-2.

328. Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 IOWA L. REV. 1207, 1219-20 (2008).

329. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 272, 291 (6th Cir. 1898).

330. *Id.* at 292-93.

331. *Id.* at 292-94.

332. ROYAL COMMISSION ON COPYRIGHT, *supra* note 29, at 273 (testimony of Thomas Henry Farrer) (quoting a letter received from an American publisher).

author[] goes up.”³³³ The concerted alignment of publishers against authors’ mobility, and the many attested refusals of publishers to negotiate with any author belonging to another house,³³⁴ suggest that some authors may have been harmed financially by the courtesy cartel.

There was also a form of oligopoly—control of the market by a few sellers—here. Publishers adhering to courtesy allowed fellow publishers to fix the price of public domain works at levels artificially heightened by courteous treatment of authors and to control the supply of copies. While above-marginal-cost pricing and reduced supply occur as a result of ordinary copyright protection,³³⁵ copyrights are legal monopolies granted by Congress under the authority of the U.S. Constitution.³³⁶ Trade courtesy, in contrast, created extralegal monopoly effects, fabricated through publishers’ mutual forbearance to compete for free public goods.

In many respects, courtesy resembled the Fashion Originators’ Guild, an American fashion design cartel that in the 1930s acted to limit “design piracy” within the ranks of American garment and textile manufacturers.³³⁷ Like foreign authors’ works in the nineteenth century, fashion designs were not protected by copyright.³³⁸ The Guild, determined to stamp out piracy, refused to sell garments to retailers who sold pirated fashions and compelled retailers to sign agreements pledging to forswear the sale of such copies.³³⁹ In 1941, the U.S. Supreme Court held that the Guild’s program violated the Sherman Act because it narrowed the outlets for buying and selling textiles and garments, took away the freedom of members, and suppressed competition in the sale of

333. SHEEHAN, *supra* note 41, at 59 (quoting G.H.P. & J.B.P., *AUTHORS AND PUBLISHERS: A MANUAL OF SUGGESTIONS FOR BEGINNERS IN LITERATURE* 72 (New York, G.P. Putnam’s Sons 7th ed. 1897)).

334. *See, e.g.*, GREER, *supra* note 215, at 75 (noting that when Robert Browning in 1854 suggested that his American publisher, Ticknor and Fields, publish a poem by his wife, Elizabeth Barrett Browning, Ticknor refused because C.S. Francis and Company had already been publishing Barrett Browning). The publisher Henry Holt urged his editors not to pursue authors associated with other houses; such practices, he remarked, were “utterly opposed to my habits and old-fashioned sense of dignity of the business.” MADISON, *supra* note 32, at 225-26.

335. Lemley, *supra* note 28, at 467-68.

336. U.S. CONST. art I, § 8, cl. 8.

337. For a discussion of the Fashion Originators’ Guild, see Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1697-98 (2006).

338. *See* Fashion Originators’ Guild of Am., Inc. v. FTC, 312 U.S. 457, 461 (1941).

339. *Id.* at 461-62.

unregistered textiles and copied designs—all tending to deprive the public of the benefits of free competition.³⁴⁰

There are obvious differences between courtesy and the fashion design cartel, not least that there is no evidence that American publishers regularly organized boycotts of booksellers that handled pirated stock or forced booksellers to sign pledges to carry only courtesy-protected books. Yet the horizontal agreement to control competition in uncopyrighted garments, which the Supreme Court deemed illegal under the Sherman Act,³⁴¹ shares broad features with the tacit agreement of powerful publishers to eliminate competition among themselves for a foreign author's book and allow one of their number to dictate the price and supply of copies. Had courtesy remained a conspicuous practice after 1890, the U.S. government or an injured private party would likely have challenged its apparent tendency to deprive authors and book buyers of the benefits of real competition.

Despite the anticourtesy rhetoric of Munro, Lovell, and other mass-market publishers, it is possible that trade courtesy did not always result in supracompetitive pricing of foreign titles. Nineteenth-century publishers often pointed to a special vulnerability of the courtesy cartel as the main reason for this phenomenon: courtesy-abiding firms lived with the ever-present threat of competition from noncourtesy publishers who were legally free to disregard all norms of self-regulation and forbearance.³⁴² As an informal system operating in the shadow of deviant though lawful reprinting, trade courtesy was a monopoly that could not consistently maintain monopoly pricing.³⁴³ Courtesy was a menaced monopoly that was unable to enforce its claims in court³⁴⁴ and inspired no allegiance in unaffiliated pirates who defied the courtesy "trust" and flew the flag of statutory privilege.³⁴⁵ As a menaced monopoly, trade courtesy often kept the cost of foreign works at reasonable,

340. *Id.* at 465.

341. *Id.*

342. *E.g.*, Letter from Harper & Bros. to M.O.W. Oliphant, *supra* note 81, at 358 ("It must be remembered . . . that in view of possible competition [from lawful pirates], [American publishers'] prices for English reprints must be low . . ."); *see also* HARPER, *supra* note 32, at 113 ("[I]t was necessary to keep the prices of foreign books as low as possible so as not to invite competition."); LEHMANN-HAUPT, *supra* note 41, at 165 (describing "bitter price-cutting battles" and "ridiculous prices, sometimes as low as twenty or even ten cents for an entire novel").

343. For courtesy publishers' practice of reducing book prices as a sanction for unauthorized reprinting of their titles, see notes 144-53, 311 and accompanying text above. For the general price-reducing effects of lawful piracy in the book trade, see notes 309-10 and accompanying text above.

344. *See* Sheldon v. Houghton, 21 F. Cas. 1239, 1241-42 (C.C.S.D.N.Y. 1865) (No. 12,748).

345. *See supra* notes 318-25 and accompanying text.

resilient levels, so that participating firms could respond to the competitive assaults of reprinters outside the norm-abiding community.³⁴⁶ Because the threat of free competition helped control book prices, consumers sometimes benefited financially from the courtesy cartel.³⁴⁷

Although trade courtesy did not always burden consumers' pocketbooks and was never challenged as anticompetitive in the courts, the legal climate at the turn of the century disfavored the kind of horizontal restraint on trade that the major publishing houses pursued as a matter of honor and self-interest.³⁴⁸ The openly anticompetitive nature of their arrangements likely contributed to the decline and seeming disappearance of courtesy in the early years of the twentieth century. The cheap reprint houses had mercilessly assailed the genteel publishers as a trust or monopoly,³⁴⁹ and the antitrust laws condemned horizontal restraints as illegal.³⁵⁰ Trade courtesy withered in this inhospitable climate.

In addition to the pressures of fierce competition and antitrust law, dramatic changes in American copyright law had a direct impact on courtesy. As noted above, the Chace Act at last granted formal legal protection to foreign authors on the condition that their editions were typeset on American soil.³⁵¹ The Chace Act was a compromise between advocates of international copyright and defenders of the manufacturing trades who feared loss of work if foreign authors were allowed to secure American copyrights unconditionally.³⁵² If foreign books suddenly received statutory protection, these industries would be forced to compete against copyrighted imports and editions printed from type set overseas and thus lose the benefits they had enjoyed when foreign works lacked copyright protection altogether. The Chace Act, like courtesy, protected foreign authors while resisting the transatlantic control

346. See INTERNATIONAL COPYRIGHT LAW REPORT, *supra* note 12, at 41 (statement of Harper Brothers) ("In the absence of international copyright, the works of foreign authors were printed at low prices, with a view to discouraging competition."); Plant, *supra* note 41, at 173 (noting that "the low-price policy which the American publishers adopted" served as a check on rival reprinting of books); *cf.* Breyer, *supra* note 41, at 306 n.96 ("Without copyright protection, the threat of competition should force down the price of subsequent printing of popular texts.").

347. *Cf.* Letter from Harper & Bros. to Wilkie Collins, *supra* note 311, at 393 (noting that "the people are benefited occasionally" when multiple publishers reprint the same book).

348. See *supra* notes 314-40 and accompanying text.

349. See *supra* notes 314-25 and accompanying text.

350. See *supra* notes 326-40 and accompanying text.

351. See *supra* notes 12-15 and accompanying text.

352. See MADISON, *supra* note 32, at 59-60; see also Jaszi & Woodmansee, *supra* note 26, at 95.

and heightened prices that might have resulted from the much-feared “English publisher’s monopoly.”³⁵³

Some historians have suggested that the Chace Act essentially put an end to trade courtesy because actual copyright protection for foreign works rendered the system of informal norms unnecessary.³⁵⁴ But the conditional and technical nature of protection under the Chace Act ensured that many foreign authors would still fail to obtain U.S. copyrights.³⁵⁵ Although some foreign authors or their domestic publishers were able to satisfy the onerous requirements, many others were not.³⁵⁶ Under the 1909 U.S. Copyright Act, which in some ways increased the burden of the manufacturing requirements,³⁵⁷ the American public domain remained an aggressive acquirer of new foreign works.³⁵⁸ Yet vulnerable authors were not always exploited, because a sense of honor and propriety still underlay the practices of American publishers. The former spirit of trade courtesy continued to influence the practices of conscientious publishers, less overtly and rigorously than in the previous century but often with as keen a sensitivity for foreign authors’ rights.³⁵⁹ The “ghost of courtesy”³⁶⁰ persisted well into the twentieth century.

353. ROYAL COMMISSION ON COPYRIGHT, *supra* note 29, at 210 (testimony of Thomas Henry Farrer).

354. *See, e.g.*, LEHMANN-HAUPT, *supra* note 41, at 210 (“The American publisher of an English book [after the Chace Act] was not dependent any more upon the good will of his colleagues, but he could rely on the government’s legal protection.”); SHEEHAN, *supra* note 41, at 73 (“After 1891, payment for advance sheets substantially disappeared, and pirates vanished with them.”).

355. For remarks by various American publishers suggesting that foreign authors effectively lacked U.S. copyright protection even after passage of the Chace Act, see INTERNATIONAL COPYRIGHT LAW REPORT, *supra* note 12, at 17, 58, 74. *See also id.* at 19, 29, 55, 64 (presenting statements by various American publishers that the Act’s manufacturing requirements made it difficult for foreign authors to obtain U.S. copyrights); BRIGGS, *supra* note 219, at 114 (noting that the Chace Act was “taken advantage of only in particular cases” because of the manufacturing costs it imposed on foreign authors).

356. *See* INTERNATIONAL COPYRIGHT LAW REPORT, *supra* note 12, at 17 (statement of L.C. Page & Co.) (noting, with respect to the Chace Act’s manufacturing requirements, that “American publishers will not make arrangements for buying the American market [for publishing a foreign work] unless they are very certain of the success of the book in question”); *see also id.* at 63 (statement of Drexel Biddle) (“[I]t sometimes happens that under the present requirements of the American copyright law American publishers lose copyrights for themselves and for their authors, American as well as foreign.”).

357. *See supra* notes 12-15 and accompanying text.

358. *See* SPOO, WITHOUT COPYRIGHTS, *supra* note 15, at 79-80, 108.

359. *Id.* at 108; *see also id.* at 107-15.

360. Groves, *supra* note 41, at 147.

V. Paratextual Ghosts of Courtesy: James Joyce and J.R.R. Tolkien

The authorizing paratext had a long life (and afterlife). By the dawn of the twentieth century, trade courtesy was no longer practiced openly and extrovertly. The climate of trust-busting, the advent of the literary agent,³⁶¹ and the passage of the Chace Act combined to render the proud collusiveness of the genteel publishers a suspect and antiquated chivalry. Yet the Chace Act and its successor, the 1909 Act, did not make copyright effortlessly available to foreign authors. As noted in Part IV above, the manufacturing requirements in those statutes perpetuated, to some degree, the commons problem that international copyright had been enacted to solve.³⁶² For foreign authors and publishers who could not satisfy its rigors, the manufacturing clause raised barriers similar to those created by the affirmative withholding of copyrights in earlier statutes.³⁶³ Improvised solutions, including recourse to the equitable principles of courtesy, were still necessary for preventing widespread unauthorized reprinting of foreign authors' writings.³⁶⁴ This Part explores the survival of courtesy and its paratexts in American publishers' treatment of two iconic twentieth-century authors: James Joyce and J.R.R. Tolkien.

The courtesy paratext proved its value again in the 1930s in the aftermath of a federal customs litigation in which James Joyce's *Ulysses*³⁶⁵ was judicially declared to be nonobscene under the Tariff Act.³⁶⁶ Bennett Cerf, cofounder of Random House, had instigated the lawsuit in the hope of becoming the first authorized publisher of a lawful American edition of Joyce's masterpiece, a work that up until then had circulated in unauthorized editions in the American booklegging market.³⁶⁷ When, in late 1933, Judge John M. Woolsey declared that *Ulysses* was not obscene and could be "admitted into the United

361. For a discussion of the role of literary agents in eroding the associational practices of courtesy, see SPOO, WITHOUT COPYRIGHTS, *supra* note 15, at 58-59.

362. See *supra* notes 355-58 and accompanying text.

363. See *supra* notes 26-27 and accompanying text.

364. See SPOO, WITHOUT COPYRIGHTS, *supra* note 15, at 90-107 (describing noncourtesy stratagems employed to obtain U.S. copyright for foreign authors in the early twentieth century).

365. JAMES JOYCE, *ULYSSES* (1922).

366. *United States v. One Book Called "Ulysses,"* 5 F. Supp. 182, 185 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934).

367. JAY A. GERTZMAN, *BOOKLEGGERS AND SMUTHOUNDS: THE TRADE IN EROTICA, 1920-1940*, at 31-32, 228, 235 (1999) (discussing open and underground piracies of *Ulysses*); JOSEPH M. HASSETT, *THE ULYSSES TRIALS: BEAUTY AND TRUTH MEET THE LAW* 125-29 (2016) (noting Cerf's goal of being the authorized American publisher of a lawful edition of *Ulysses*).

States,”³⁶⁸ Random House set to work preparing the book for nationwide release in early 1934.³⁶⁹

The 1934 Random House edition of *Ulysses* contained three legitimizing paratexts: a foreword by Morris L. Ernst—Random House’s lead attorney in the *Ulysses* litigation—celebrating the convergence of the repeal of Prohibition and the lifting of the customs ban on *Ulysses*,³⁷⁰ the full text of Judge Woolsey’s urbane decree sparing Joyce’s book from legal forfeiture,³⁷¹ and a letter from Joyce to Bennett Cerf describing the troubled legal history of *Ulysses* and naming Random House as the exclusively authorized publisher of the book in the United States.³⁷² The first two documents—Ernst’s foreword and Woolsey’s opinion—represented yet another form of legal paratext from this period, one that certified that a work had undergone a legal test of its decency and had been exonerated. These “no obscenity” paratexts sought to discourage further official attempts at censorship and assured readers that a court had deemed the book safe for consumption.³⁷³ They prepared readers in the vestibule for an experience of strong but lawful authorial candor and discouraged the view that the work had been written for the salaciously minded.³⁷⁴ These paratexts often combined interpretive aesthetic guidance for

368. *One Book Called “Ulysses,”* 5 F. Supp. at 185.

369. For the foregoing details, drawn from a longer discussion of the *Ulysses* litigation, see SPOO, WITHOUT COPYRIGHTS, *supra* note 15, at 233-62. For other accounts of the litigation, see JOSEPH KELLY, OUR JOYCE: FROM OUTCAST TO ICON 85-140 (1998); PAUL VANDERHAM, JAMES JOYCE AND CENSORSHIP: THE TRIALS OF ULYSSES 115-49 (1998); and Robert Spoo, *Judging Woolsey Judging Obscenity: Elitism, Aestheticism, and the Reasonable Libido in the Ulysses Customs Case*, 50 JAMES JOYCE Q. 1027, 1027-33 (2013). See generally THE UNITED STATES OF AMERICA V. ONE BOOK ENTITLED ULYSSES BY JAMES JOYCE: DOCUMENTS AND COMMENTARY—A 50-YEAR RETROSPECTIVE (Michael Moscato & Leslie LeBlanc eds., 1984) [hereinafter ULYSSES RETROSPECTIVE] (reproducing the texts of letters, litigation documents, and other materials bearing on the *Ulysses* case).

370. Morris L. Ernst, *Foreword* to JOYCE, *supra* note 44, at vii, vii-viii.

371. *The Monumental Decision of the United States District Court Rendered December 6, 1933, by Hon. John M. Woolsey Lifting the Ban on “Ulysses,”* in JOYCE, *supra* note 44, at ix, ix-xiv [hereinafter *Monumental Decision*].

372. *A Letter from Mr. Joyce to the Publisher, Reprinted in This Edition by Permission of the Author*, in JOYCE, *supra* note 44, at xv, xv-xvii [hereinafter *A Letter from Mr. Joyce*].

373. For other “no obscenity” paratexts, see Havelock Ellis, *Commentary* to RADCLIFFE HALL, THE WELL OF LONELINESS (eleventh unnumbered page) (Covici Friede 1929) (1928); Morris L. Ernst, *Foreword* to THE DECAMERON OF GIOVANNI BOCCACCIO, at xxi, xxi-xxii (John Payne trans., Modern Library 1931) (1353); Morris L. Ernst, *Preface* to MARIE CARMICHAEL STOPES, ENDURING PASSION: FURTHER NEW CONTRIBUTIONS TO THE SOLUTION OF SEX DIFFICULTIES, at xvii, xvii-xxi (Blue Ribbon Books 1931) (1928); and *Publisher’s Note* to HALL, *supra* (first to fourth unnumbered page).

374. See, e.g., Ernst, *supra* note 370, at vii (“Writers need no longer seek refuge in euphemisms. They may now describe basic human functions without fear of the law.”); *Monumental Decision*, *supra* note 371, at xii (“[W]hen such a real artist in words, as Joyce
footnote continued on next page

serious readers with a negative injunction for those who might wish to search the text for a lascivious experience. The “no obscenity” paratext, like the “all characters are fictitious” paratext, was a sorting mechanism that divided genuine readers from lustful opportunists.

Figure 9

“No Obscenity” Paratext in Radclyffe Hall, *The Well of Loneliness* (Covici Friede 1929)

I *HAVE read The Well of Loneliness with great interest because – apart from its fine qualities as a novel by a writer of accomplished art – it possesses a notable psychological and sociological significance. So far as I know, it is the first English novel which presents, in a completely faithful and uncompromising form, one particular aspect of sexual life as it exists among us to-day. The relation of certain people – who while different from their fellow human beings, are sometimes of the highest character and the finest aptitudes – to the often hostile society in which they move, presents difficult and still unsolved problems. The poignant situations which thus arise are here set forth so vividly, and yet with such complete absence of offence, that we must place Radclyffe Hall’s book on a high level of distinction.*

HAVELOCK ELLIS

undoubtedly is, seeks to draw a true picture of the lower middle class in a European city, ought it to be impossible for the American public legally to see that picture?”).

Figure 10

“All Characters Are Fictitious” Paratext in Radclyffe Hall, *The Well of Loneliness* (Covici Friede 1929)

ALL the characters in this book are purely imaginary, and if the author in any instance has used names that may suggest a reference to living persons, she has done so inadvertently.

A motor ambulance unit of British women drivers did very fine service upon the Allied front in France during the later months of the war, but although the unit mentioned in this book, of which Stephen Gordon becomes a member, operates in much the same area, it has never had any existence save in the author's imagination.

After Judge Woolsey's decree opened the harbors to *Ulysses*, Cerf had reason to worry that pirates would quickly go to work with their greatest legal fear much allayed: prosecution for publishing obscenity.³⁷⁵ In banning controversial modern works, obscenity law had come to function as a sort of super-copyright, vesting the government with exclusive power to control publication and making it impossible for anyone else, even authors, to disseminate such works legally.³⁷⁶ American copyright law, in contrast, often failed to protect transgressive foreign works at all. One work that suffered from impaired copyright protection was *Ulysses*, which had entered the

375. Prior to Judge Woolsey's decree, two courts had found *Ulysses* wholly or partially obscene. In 1921, the New York Court of Special Sessions convicted two editors of publishing obscenity in violation of New York law when they issued an excerpt from *Ulysses* in their magazine. David Weir, *What Did He Know, and When Did He Know It: The Little Review, Joyce, and Ulysses*, 37 JAMES JOYCE Q. 389, 394-95, 400 (2000). Several years later, the U.S. Customs Court upheld the seizure, for obscenity, of several copies of *Ulysses* at a port in Minnesota. *Heymoolen v. United States*, 54 Treas. Dec. 119 (Cust. Ct. 1928), in *ULYSSES RETROSPECTIVE*, *supra* note 369, at 142, 142-44. For a discussion of the *Ulysses* cases and the changing obscenity law, see Stephen Gillers, *A Tendency to Deprave and Corrupt: The Transformation of American Obscenity Law from Hicklin to Ulysses II*, 85 WASH. U. L. REV. 215, 250-95 (2007).

376. See generally EDWARD DE GRAZIA, *GIRLS LEAN BACK EVERYWHERE: THE LAW OF OBSCENITY AND THE ASSAULT ON GENIUS*, at xi-xiv, 3-53 (1992) (surveying government censorship of literature in the early twentieth century); CHARLES REMBAR, *THE END OF OBSCENITY: THE TRIALS OF LADY CHATTERLEY, TROPIC OF CANCER AND FANNY HILL* 3-26 (Andre Deutsch 1969) (1968) (surveying the same).

American public domain in 1922, shortly after Joyce published the full, unexpurgated version in France without complying with the manufacturing provisions of the 1909 Copyright Act.³⁷⁷ Cerf reasonably feared that lawful pirates would quickly free ride on his success in liberating *Ulysses* from state censorship.³⁷⁸

Joyce's letter, the third of the *Ulysses* paratexts, invoked the tradition of courtesy. The Random House edition, he wrote, was "the authenticated text of my book," in contrast to any pirated version that might be issued by "some unscrupulous person [with the] purpose of making profit for himself alone out of the work of another to which he can advance no claim of moral ownership."³⁷⁹ Joyce's careful phrase "moral ownership" glanced at the copyright problem that he openly addressed elsewhere in his letter:

I was unable to acquire the copyright in the United States since I could not comply with the requirements of the American copyright law which demands the republication in the United States of any English book published elsewhere within a period of six months after the date of such publication . . .³⁸⁰

Joyce coupled this technically accurate account of the copyright-depriving effects of the manufacturing clause with a traditional courtesy plea:

It is therefore with the greatest sincerity that I wish you all possible success in your courageous venture both as regards the legalisation of *Ulysses* [in the customs litigation] as well as its publication and I willingly certify hereby that not only will your edition be the only authentic one in the United States but also the only one there on which I will be receiving royalties.³⁸¹

Joyce's letter to Cerf plainly hearkened back to the nineteenth-century authorizing paratext and its role in reinforcing the informal claims of courtesy. Joyce's "wish" for Random House's success, offered with "the greatest sincerity," echoed the earnest wishing of the Brownings and other courtesy-protected authors eighty years earlier.³⁸² And like those authors, Joyce certified the exclusivity of the "only authentic" text, citing the remuneration he would receive in the form of royalties.³⁸³ Operating in the ghostly aftermath of

377. For detailed discussions of Joyce's inability to obtain a copyright for *Ulysses* in the United States, see SPOO, WITHOUT COPYRIGHTS, *supra* note 15, at 156-65; and Spoo, *Copyright Protectionism*, *supra* note 15.

378. Cerf expressed these fears in a letter to Robert Kastor, a businessman at the firm Sartorius and Smith, dated March 22, 1932. For the text of this letter, see *ULYSSES RETROSPECTIVE*, *supra* note 369, at 102-04. See also SPOO, WITHOUT COPYRIGHTS, *supra* note 15, at 236-40 (discussing Cerf's fears of lawful piracy of *Ulysses*).

379. *A Letter from Mr. Joyce*, *supra* note 372, at xvii.

380. *Id.* at xvi.

381. *Id.* at xvii.

382. See *supra* notes 232-35, 252-59 and accompanying text.

383. *A Letter from Mr. Joyce*, *supra* note 372, at xvii.

courtesy's heyday, Random House drew upon residual courtesy principles, and the respect Cerf had earned in the publishing world for litigating a watershed obscenity case, for the informal right to be recognized as the exclusive American publisher of *Ulysses*.³⁸⁴ Like the courtesy publishers of the 1850s and 1860s, Random House was able to rely on the tacit forbearance of other publishing firms for decades to come.³⁸⁵

Courtesy principles and the courtesy paratext survived in American publishing into the 1970s.³⁸⁶ In 1965, the publishing house Ace Books decided to exploit the rising popularity of J.R.R. Tolkien's *The Lord of the Rings*,³⁸⁷ which, published initially in Britain, enjoyed questionable copyright protection in the United States.³⁸⁸ Selling at \$0.75 per copy, the unauthorized Ace paperbacks quickly eroded the market for the \$6 authorized Houghton Mifflin hardback.³⁸⁹ Realizing that he must hurry to repair his American sales, Tolkien permitted Ballantine Books to issue "authorized" paperbacks of *The Lord of the Rings* and *The Hobbit*,³⁹⁰ selling at \$0.95 per copy and heavily promoted to college students.³⁹¹

Trade courtesy was the key to Tolkien's recovery of the American market. He spread negative gossip by launching a letter campaign that branded Ace Books as unauthorized and unscrupulous, and the press took up his cause with

384. For a discussion of Cerf's exploitation of the courtesy tradition to obtain informal protection for *Ulysses*, see SPOO, WITHOUT COPYRIGHTS, *supra* note 15, at 245-57.

385. *Id.* at 255-57. It was not until the late 1960s that a pornographic publisher in California issued an unauthorized edition of *Ulysses*, complete with advertisements for racy paperbacks, nude photographs, and sexual devices. *Id.* at 257-59.

386. For example, in the early 1970s, editors at Harper and Row requested courtesy treatment for Sylvia Plath's *The Bell Jar* when they learned that Random House planned to issue the uncopyrighted novel in America. Random House ceded the volume to Harper and Row. Frances McCullough, *Foreword* to SYLVIA PLATH, *THE BELL JAR*, at ix, xii-xiii (Harper Perennial Modern Classics deluxe ed. 2006) (1963).

387. *E.g.*, J.R.R. TOLKIEN, *THE FELLOWSHIP OF THE RING* (Ace Books, Inc. 1965) (1954).

388. One court held that a U.S. copyright in *The Lord of the Rings* had not been invalidated for failure to include copyright notices in copies of the trilogy. Eisen, Durwood & Co. v. Tolkien, 794 F. Supp. 85, 88 (S.D.N.Y. 1992), *aff'd* 990 F.2d 623 (2d Cir. 1993). *But see* Joseph Ripp, Middle America Meets Middle-Earth: American Publication and Discussion of J.R.R. Tolkien's *Lord of the Rings*, 1954-1969, at 25-33 (Nov. 2003) (unpublished M.S. thesis, University of North Carolina at Chapel Hill), <https://ils.unc.edu/MSpapers/2908.pdf> (discussing legal difficulties for U.S. copyright protection of Tolkien's trilogy).

389. J.R.R. TOLKIEN, *THE FELLOWSHIP OF THE RING* (Houghton Mifflin 1954) (1954); *see also* Ripp, *supra* note 388, at 35 (discussing the prices of the Ace and Houghton Mifflin volumes).

390. J.R.R. TOLKIEN, *THE HOBBIT* (Ballantine Books 1965) (1937). For the Ballantine edition of *The Lord of the Rings*, see note 45 above.

391. Ripp, *supra* note 388, at 35-37.

articles on the flaws of American copyright law, the plight of foreign authors, and the ethical implications of Ace's conduct.³⁹² The back cover of the Ballantine edition carried an aspirational paratext bearing Tolkien's stamp of approval and his direct appeal to the morals of the common reader: "This paperback edition, and no other, has been published with my consent and cooperation. Those who approve of courtesy (at least) to living authors will purchase it, and no other."³⁹³ Here, Tolkien's paratextual appeal, in contrast to the "earnest desire" of nineteenth-century British authors,³⁹⁴ reached beyond the American publishing community to readers themselves, as if courtesy principles now occupied the full vertical axis, binding authors and purchasers together by their civilizing power.³⁹⁵ By the 1960s, courtesy was no longer an openly celebrated system of business morality in the publishing trade, but it continued to exist as a residual business ethic, a dimming memory of good behavior in the old copyright vacuum. The ghost of courtesy could still be invoked at need to stamp out sporadic piracies or to shame a deviant pirate.

392. *Id.* at 37-40.

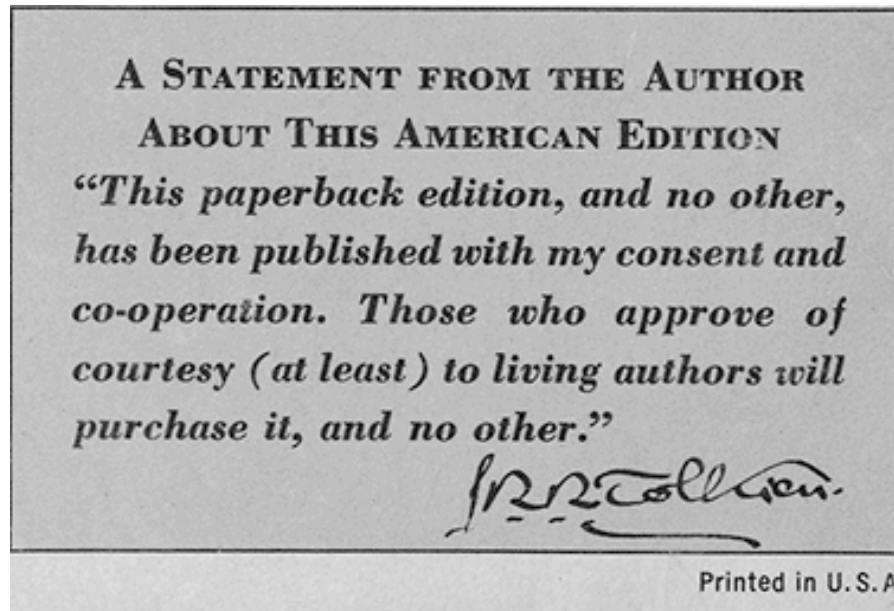
393. TOLKIEN, *THE TWO TOWERS*, *supra* note 45 (back cover). Now-Justice Stephen Breyer noted the lack of U.S. copyright protection for Tolkien's trilogy and observed that Tolkien's approved publisher "reaped some advantage by proclaiming his the 'authorized edition.'" Breyer, *supra* note 41, at 301 n.83.

394. *See supra* notes 232-35, 252-59 and accompanying text.

395. In furtherance of his antipiracy campaign, Tolkien wrote directly and individually to many of his American fans to alert them that Ace Books was an unauthorized reprinter and to urge them to tell their friends. HUMPHREY CARPENTER, *J.R.R. TOLKIEN: A BIOGRAPHY* 229 (1977). American readers began to demand that booksellers refuse to carry the Ace Books editions; the Tolkien Society of America and the Science Fiction Writers of America also took up the cause. *Id.* In the end, Ace Books sent Tolkien a "courteous" letter voluntarily offering to pay him a 4% royalty on sales of its remaining stock of Tolkien books. *See* Letter from J.R.R. Tolkien to W.H. Auden (Feb. 23, 1966), in *LETTERS OF J.R.R. TOLKIEN* 367, 367 (Humphrey Carpenter ed., 1981).

Figure 11

Courtesy Paratext on Back Cover of J.R.R. Tolkien, *The Two Towers* (Ballantine Books
1965)



Conclusion

Trade courtesy arose as an informal surrogate for international copyright protection in America and as a way for American publishers to insulate themselves from injurious competition for free resources. The copyright law that provided a windfall of foreign materials to publishers failed to create artificial scarcity in those materials. Therefore, publishers developed the system of trade courtesy to fill the legal vacuum, salve their consciences, and install a signaling system by which good players could be distinguished from bad players—courtesy publishers from pirates. Courtesy privatized a plentiful commons that, had it not been artificially enclosed, might have been lost or severely eroded as a profitable resource for publishers. Whether a monopolistic practice or an ethical improvisation of conscientious businessmen, or both, trade courtesy bears out the scholarly thesis that nonlegal forms of protection

may sometimes avert, or at least mitigate, a kind of market failure for public goods.³⁹⁶

Courtesy was a necessary fiction told and retold by prominent members of the publishing community. Copyright is itself a kind of fiction, an arbitrary signifier, backed by state sanctions, that treats unfenced public goods as if they could be contained within a legal monopoly and a contrived scarcity economy. Trade courtesy, in this respect, might be viewed as a metafiction which, in the absence of law, reimagined monopoly as authored not by a legislature but rather by the private collusion of businessmen. To be a courtesy publisher was to agree to participate in a communal fiction that the publisher Henry Holt proudly referred to as a form of “philosophical anarchism—self-regulation without law.”³⁹⁷ Those who defied the fiction, who insisted on taking the public domain literally, were viewed as deviant, scurrilous pirates by the courtesy fraternity.

The authorizing paratext lent its policing power to this informal system of ordering by cautioning readers and publishers to remember that these public goods should be consumed only in morally approved ways. While other threshold paratexts taught readers to locate the text’s meanings, courtesy paratexts inculcated a proper respect for the text as equitable property. The earnest wishes of British authors that their American publishers’ informal claims not be interfered with were a kind of personified copyright notice, a negative injunction. Yet they were also aspirational encomia to a norm that, whatever its basis in self-interest, sought to repair a defect of the U.S. copyright law that many saw as both a moral and a practical failing. These paratexts attest to, and serve as historical records of, an informal practice that made publishing order out of copyright chaos for significant periods of the nineteenth century and after.

396. See Oliar & Sprigman, *supra* note 37, at 1860. For other communities that employ informal norms to discourage copying of unprotected public goods, see notes 37-40 and accompanying text above.

397. Holt, *Competition*, *supra* note 41, at 522-23.