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The Prehistory of Fair Use

Matthew Sag[†]

INTRODUCTION

The fair use doctrine is a central part of modern copyright law: academics, critics, journalists, teachers, film makers, fan-fiction writers, and technology companies all rely on the fair use doctrine to give them a certain amount of freedom in dealing with other people's copyrights. The fair use doctrine recognizes that very few works are created without some recognizable borrowing from antecedent works. Fair use allows copyrighted material to be used without permission; in so doing, it sets limits on the otherwise expansive rights of copyright owners to control the reproduction and performance of their works.¹ As part of copyright law's overall balance between authorial incentives and public freedom, the fair use doctrine "permits and requires courts to avoid rigid application of the copyright statute, when, on occasion, it would stifle the very creativity that law is designed to foster."² For all its acknowledged importance, however, the fair use doctrine is difficult—some say impossible—to define.³ This article proposes that a full understanding of fair use cannot be achieved without appreciating both its origins in English copyright law and its development as a legal transplant in the United States.

Two recent cases illustrate the salience and difficulty of fair use. In 2005, Google, Inc. began its massive unauthorized digitization of library books to create an unashamedly

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¹ Technically, the fair use doctrine renders certain otherwise infringing actions relating to copyrighted works noninfringing. 17 U.S.C. § 107 (2006) ("[T]he fair use of a copyrighted work . . . is not an infringement of copyright.").

² *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (2005) (internal quotation omitted).

³ Paul Goldstein, *Fair Use in Context*, 31 COLUM. J.L. & ARTS 433 (2008).

commercial book-search engine, Google Books.⁴ In response to criticism and litigation from copyright owners, Google argued that its conduct was protected by the fair use doctrine.⁵ In 2007, famed children's book author J.K. Rowling sued to prevent the publication of *The Harry Potter Lexicon*, an encyclopedia of fictional facts and observations distilled from the seven-volume *Harry Potter* series.⁶ The Google Books and Harry Potter cases both raise basic questions about the extent and duration of copyright-owner control. These questions are fundamentally ones of public policy: What is a fair return for authors? And when does control over subsequent use harm creativity, technological progress, or freedom of expression?

Copyright owners and defendants alike make claims about the history and essential nature of copyright and of fair use. The plaintiffs in the Google Books litigation argued that a hundred-million-dollar commercial enterprise has never been justified—and can never be justified—by a narrow exception like fair use.⁷ The defendants in the Harry Potter Lexicon case argued that copyright ownership does not convey—and has never conveyed—unlimited rights of control.⁸

Claims and inferences about copyright history often play a significant role in modern debates about copyright law.⁹ Unfortunately, historical discussion of the fair use doctrine in the United States tends to proceed from the wrong baseline. Specifically, it falls short by over 100 years—treating the first American fair use case, *Folsom v. Marsh*¹⁰ (1841), as the

⁴ Author's Guild v. Google, Inc., Civil Action No. 05-CV-8136-JES (S.D.N.Y. filed Sept. 20, 2005) (class-action suit); McGraw-Hill, Inc. v. Google, Inc., Civil Action No. 05-CV-8881-JES (S.D.N.Y. filed June 9, 2006) (a suit on behalf of the Association of American University Publishers, the McGraw-Hill Companies, Pearson Education, Penguin Group (USA), Simon & Schuster, and John Wiley & Sons). The dispute looks set to continue. See Author's Guild v. Google, Inc., No. 05 Civ. 8136(DC), 2011 WL 986049 (S.D.N.Y. Mar. 22, 2011) (rejecting proposed class-action settlement).

⁵ Answer and Affirmative Defenses of Defendant Google, Inc. to the First Amended Complaint, Authors Guild v. Google, Inc., 2005 U.S. Dist. Ct. Pleadings 8136A, at 9 (S.D.N.Y. July 26, 2006); see also Matthew Sag, *The Google Book Settlement and the Fair Use Counterfactual*, 55 N.Y.L. SCH. L. REV. 19 (2010).

⁶ Warner Bros. Entm't, Inc. v. RDR Books, 575 F. Supp. 2d 513 (S.D.N.Y. 2008).

⁷ See Tresa Baldas, *Copyright Law Put to Test in Google Case*, NAT'L L.J., Oct. 3, 2005, available at <http://www.law.com/jsp/article.jsp?id=1128416712706>.

⁸ Defendant RDR Books' Memorandum of Law in Opposition to Plaintiffs' Motion for a Preliminary Injunction, Warner Bros. Entm't v. RDR Books, No. 07-9667 (S.D.N.Y. Feb. 8, 2008).

⁹ See generally Justin Hughes, *Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson*, 79 S. CAL. L. REV. 993 (2006) (summarizing and challenging historical claims that copyright has become increasingly "propertized").

¹⁰ 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

beginning of the American fair use doctrine.¹¹ As this article shows, the fair use doctrine is better understood as the continuation of a long line of English fair abridgment cases, dating back to the beginning of statutory copyright law in 1710.¹² In evaluating the history of the fair use doctrine, it is a mistake to start with *Folsom v. Marsh*; the complete history begins with over a century of copyright litigation in the English courts. This is the “prehistory” of the American fair use doctrine.¹³

This prehistory consists largely of fair abridgment cases litigated in English courts of law and equity between 1710 (the year the first copyright act was enacted) and 1841. Abridgment—the process of making a shortened version or abstract of a longer text—was common in this era, but its lawful scope was contested. A review of early English copyright cases and other aspects of the historical record leads to two significant conclusions. The first is that statutory copyright, virtually from its inception, went well beyond merely mechanical acts of reproduction. Indeed, by the mid-eighteenth century, courts had begun to limit the permissibility of abridgments. The second insight is that there is in fact substantial continuity between fair abridgment in the premodern era and fair use in the United States today.

This article proceeds as follows: Part I begins with a brief summary of the fêted case *Folsom v. Marsh* and its place in the development of American copyright law. *Folsom v. Marsh* has been criticized for expanding copyright protection beyond acts of mere mechanical reproduction to include an abstract concept of the work’s value. Of course, this critique is premised on the belief that the scope of copyright prior to *Folsom v. Marsh*’s intervention was so narrow that it tolerated almost all secondary works. Part II exposes the frailty of this premise.

Specifically, Part II explores the foundation for the mechanical conception of premodern copyright and argues that

¹¹ See *infra* Part I.

¹² Statute of Anne, 8 Ann., c. 19 (1710) (Eng.).

¹³ The prehistory of fair use coincides with premodern copyright, as the expression is used by Sherman and Bently. Sherman and Bently draw the distinction between modern and premodern copyright, using 1850 as a rough dividing line. For ease of reference, this article refers to the period between 1710 and 1841 as the premodern era of copyright. The premodern-modern distinction is useful in this context, as the categories of intellectual-property law were quite fluid up until the mid-nineteenth century. And only after the mid-1800s did the drive to internationalize copyright (a movement that culminated in the Berne Convention) significantly influence copyright law. See BRAD SHERMAN & LIONEL BENTLY, *THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW: THE BRITISH EXPERIENCE, 1760-1911*, at 3 (1999).

it is incomplete. A rather narrow vision of literary property can be gleaned from several sources: the apparently narrow grant of rights in the Statute of Anne (the first copyright statute, which went into effect in 1710),¹⁴ some of the earliest cases interpreting the statute, and a number of contemporary writings. As Part II also explains, however, a close reading of the earliest copyright cases and treatises shows that premodern copyright was not consistently limited to mere mechanical acts of reproduction. From 1741 to 1841, courts distinguished between abridgments of copyrighted works that were deemed fair or bona fide, and those that were not. The very existence of this distinction expands on the first copyright statute's narrow language.¹⁵ This crucial development in copyright law predates *Folsom v. Marsh* by at least 100 years.¹⁶

As Part III establishes in detail, the criteria used to evaluate claims of bona fide abridgment in the premodern cases are surprisingly similar to the modern fair use doctrine in the United States. Like their modern counterparts, judges in premodern abridgment cases relied on case-by-case analysis and evaluated the amount taken by the defendant in a highly contextual fashion. Even more striking is the extent to which early cases parallel the modern focus on market effect—namely, the market effect of the defendant's conduct—and on the extent to which the defendant's use is transformative. Although not always expressed in these terms, questions of substitution effects and the degree of labor and authorial skill injected by the defendant permeated the premodern copyright cases.

Part IV concludes with a reassessment of *Folsom v. Marsh* and its contribution to American copyright law. Understanding the prehistory of fair use is useful for understanding fair use in the present. The coevolution of copyright and fair use demonstrates that fair use need not be a narrow and occasional exception to the rights of copyright owners.

I. *FOLSOM V. MARSH* AND ITS QUESTIONABLE SIGNIFICANCE

Folsom v. Marsh concerned two different literary treatments of the life of George Washington.¹⁷ The plaintiffs in this seminal copyright dispute were Folsom, Wells & Thurston,

¹⁴ Statute of Anne, 1710, 8 Ann., c. 19, § 1 (Eng.).

¹⁵ See *infra* notes 115-16 and accompanying text.

¹⁶ See *infra* note 125 and accompanying text.

¹⁷ *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

a partnership of publishers that held the rights to Jared Sparks' multivolume collection of *The Writings of George Washington*.¹⁸ The accused work was Reverend Charles Upham's *The Life of Washington*, which was mainly comprised of extracts from Washington's own writings.¹⁹ Upham's abbreviated and simplified *Life of Washington*, intended for local school libraries, weighed in at a mere 866 pages—light in comparison to Sparks' massive 6763-page compilation.²⁰ About a third of Upham's work consisted of previously unpublished presidential writings, presumably copied from Sparks' compilation.²¹

Upham's publisher, the firm Marsh, Capen & Lyon,²² argued that even if Folsom held the copyright in Sparks' twelve-volume collection of Washington's writings, the good Reverend's work was nonetheless a fair abridgment that did not infringe.²³ Once Washington's papers and correspondence were published, the publisher contended, anyone had the right to selectively use those materials to prepare a new and original work.²⁴

This defense was entirely plausible given the state of the legal authorities at the time. As discussed in more detail in the next part, similar abridgments had been allowed by numerous English authorities.²⁵ In the 1741 case *Gyles v. Wilcox*, Lord Chancellor Hardwicke explained that a fair abridgment should be regarded as a new book and not as a trespass on the original that it was derived from.²⁶ Thirty-four

¹⁸ WILLIAM W. STORY, REPORTS OF CASES ARGUED AND DETERMINED IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE FIRST CIRCUIT: 1812-1875, at 100-19 (1853). The Story Reports of the decision in *Folsom v. Marsh* contain a summary of the master's report. It is here that we learn that Charles Folsom was the principle plaintiff.

¹⁹ *Id.*; see also R. Anthony Reese, *The Story of Folsom v. Marsh: Distinguishing Between Infringing and Legitimate Uses*, in INTELLECTUAL PROPERTY STORIES 259, 269 (Jane C. Ginsburg & Rochelle Cooper Dreyfuss eds., 2006).

²⁰ STORY, *supra* note 18, at 100-19.

²¹ The special master appointed to review the facts concluded that 319 pages had been copied, but note that sixty-four of those pages were official documents that should not have been subject to any copyright claim. See L. Ray Patterson, *Folsom v. Marsh and Its Legacy*, 5 J. INTELL. PROP. L. 431, 433 (1998). Note also that the defendant's work did not reproduce any original writing by Sparks. *Id.* Justice Story's conclusion that Folsom somehow held the copyright to the words of President Washington after their publication was probably erroneous at the time and would certainly be wrong now. *Id.* at 436. We must suspend disbelief on this point in order to comprehend the remainder of Justice Story's decision.

²² Bela Marsh was the main defendant. See *supra* note 18.

²³ *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

²⁴ Reese, *supra* note 19, at 280.

²⁵ See *infra* Part II.

²⁶ *Gyles v. Wilcox*, (1740) 26 Eng. Rep. 489 (Ch.). See *infra* notes 102-14 and accompanying text.

years later, in *Strahan v. Newbery*, Lord Chancellor Apsley found that Newbery's abridgment of Dr. Hawkesworth's *Voyages* did not infringe the original. Rather, the lord chancellor reasoned, Newberry had created "an allowable and meritorious work" by employing his own understanding to "retrench[] unnecessary and uninteresting circumstances [that] rather deaden the narration."²⁷ Indeed, Newbery's revised edition preserved the substance of the original but reduced its volume by as much as three-quarters.²⁸ Likewise, in the 1761 case *Dodsley v. Kinnersley*, an abridgment of a popular novel in the modestly titled *Grand Magazine of Magazines* was also found to be noninfringing, principally because the copyright owners had already published their own abstract of the book in their own periodical.²⁹

Nonetheless, Justice Story, who decided the case, had little sympathy for such arguments. Although he acknowledged the English authorities' holding that "a fair and bona fide abridgment of an original work" did not amount to copyright piracy, he also relied on those same authorities for a series of limiting principles. It was "clear," in Justice Story's view, "that a mere selection, or different arrangement of parts of the original work, so as to bring the work into a smaller compass," did not constitute a fair and bona fide abridgment.³⁰ On the contrary, he contended, to qualify as a fair and bona fide abridgment, "[t]here must be real, substantial condensation of the materials, and intellectual labor and judgment bestowed thereon; and not merely the facile use of the scissors; or

²⁷ *Strahan v. Newbery*, (1774) 98 Eng. Rep. 913 (K.B.) 913-14. The work in question, generally referred to as Hawkesworth's *Voyages*, was the first authorized account of Captain Cook's circumnavigation of the globe. The longer title was *An Account of the Voyages Undertaken by the Order of His Present Majesty, for Making Discoveries in the Southern Hemisphere, and Successively Performed by Commodore Byron, Captain Wallis, Captain Carteret, and Captain Cook, in the Dolphin, the Swallow, and the Endeavour . . .* by John Hawkesworth, printed for W. Strahan and T. Cadell, 1773. The defendant's work, *Journal of the Resolution's Voyage on Discovery to the Southern Hemisphere, &c. Also a Journal of the Adventure's Voyage, &c. with an Account of the Separation of the Two Ships, and the Most Remarkable Incidents that Befel Each*, although extolled by the court, was reviewed as "hastily written, and hastily printed." 45 GENTLEMAN'S MAG. 591 (1775); see also Mark Leeming, *Hawkesworth's Voyages: The First 'Australian' Copyright Litigation*, 9 AUSTL. J. LEGAL HIST. 159 (2004) (an excellent history of the copyright litigation in relation to Hawkesworth's *Voyages*).

²⁸ *Strahan v. Newbery*, (1774) 98 Eng. Rep. 913 (K.B.) 913-14.

²⁹ *Dodsley v. Kinnersley*, (1761) 27 Eng. Rep. 270 (Ch.). For further discussion of *Dodsley*, see *infra* Part III.

³⁰ *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4901).

extracts of the essential parts, constituting the chief value of the original work.”³¹

Deciding in favor of the plaintiff Folsom, Justice Story drew a distinction between easy cases of copyright infringement, where the defendant’s work is almost exactly the same as the plaintiff’s (i.e., cases where “the whole substance of one work has been copied from another, with slight omissions and formal differences only, which can be treated in no other way than as studied evasions”) and hard cases requiring a balance of “the comparative use made in one of the materials of the other; the nature, extent, and value of the materials thus used.”³² Illustrating this second category, Justice Story noted that, for “the purposes of fair and reasonable criticism,” a review that cites “largely from the original work” should be regarded as fair.³³ By contrast, a review that “cites the most important parts of the work, with a view, not to criticise, but to supersede the use of the original work, and substitute the review for it” should be deemed a “piracy” as a matter of law.³⁴ The distinction here is predominantly one of effect: in Story’s view, a new work that “supersedes” the original and “substitutes” for it infringed on the rights of the copyright owner.³⁵

What is the significance of *Folsom v. Marsh*? Justice Story’s decision is often celebrated as the origin of the fair use doctrine in the United States.³⁶ Indeed, many elements of the decision are discernible in the current statutory formulation of the doctrine.³⁷ However, *Folsom v. Marsh* has also come to be viewed as a significant expansion of the rights of copyright owners.

In a recent *Yale Law Journal* article, Professor Oren Bracha argues that *Folsom v. Marsh* was a pivotal component of American copyright law’s transformation in the nineteenth

³¹ *Id.* (citing *Gyles v. Wilcox*, (1740) 26 Eng. Rep. 489).

³² *Id.* at 344.

³³ *Id.*

³⁴ *Id.* at 344-45.

³⁵ *Id.* Justice Story’s view can be rationalized as follows: if a new work incorporates the most important parts of the original, then the risks of such impermissible substitution increase.

³⁶ Cases crediting the origin of the fair use doctrine to Justice Story include: *Integra Lifesciences I, Ltd. v. Merck KGaA*, 331 F.3d 860, 876 (Fed. Cir. 2003) (comparing the experimental use exemption in patent law to fair use); *Rubin v. Boston Magazine Co.*, 645 F.2d 80, 83 (1st Cir. 1981); and *Encyclopedia Britannica Education Corp. v. Crooks*, 542 F. Supp. 1156, 1167 (W.D.N.Y. 1982). As Kaplan notes, the earliest American report that actually uses the expression “fair use” is *Lawrence v. Dana*, 15 F. Cas. 26, 60 (C.C.D. Mass. 1869) (No. 8136). BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 67 (1966).

³⁷ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576 (1993).

century.³⁸ Over the course of the nineteenth century, Bracha contends, copyright changed from an exclusive right to make verbatim copies of particular texts to an abstract right of general control in which the only boundaries of a work were identified vis-à-vis its market value.³⁹

Significantly, Bracha sees Justice Story as a central actor in this transformation. Bracha argues that the concept of fair use announced in *Folsom v. Marsh* was a fundamental change in copyright's baseline. In the past, he reasons, "infringement was limited to near-verbatim reproduction and all other subsequent uses were considered legitimate; in the new fair use environment, all subsequent uses became presumptively infringing unless found to be fair use."⁴⁰ Thus, in Bracha's view, *Folsom v. Marsh* is both transformative and ironic: "[A]lthough the fair use doctrine is commonly celebrated today as one of the major safeguards against overexpansion of copyright protection[,] at the time it was introduced by Justice Story[,] . . . it was a vehicle for a radical enlargement of the scope of copyright."⁴¹

Without doubt, there is something to be said for the general story of transformation and expansion that Bracha relates. An examination of the early English copyright cases, however, casts this transformation in a different light. Notably, the disjunctive view of *Folsom v. Marsh* presumes that the scope of copyright prior to Justice Story's intervention was so limited that it tolerated almost all secondary works. But as Part II explores, English case law predating *Folsom v. Marsh* undercuts this mechanical conception of premodern copyright. Similarly, the substantial continuity between premodern fair abridgment cases and the modern fair use doctrine contradicts the notion that the fair use doctrine originates with *Folsom v. Marsh*.

³⁸ Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186 (2008).

³⁹ *Id.*; see also BRAD SHERMAN & LIONEL BENTLY, *THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW: THE BRITISH EXPERIENCE 1760-1911* (1999) (describing the same transition in England).

⁴⁰ Bracha, *supra* note 38; see also Patterson, *supra* note 21, at 432 (arguing that Justice Story redefined the concept of copyright infringement in *Folsom v. Marsh*: "[I]n his hands became any copying, duplicative or imitative, in whole or in part of the copyrighted work. This redefinition of infringement enlarged the copyright monopoly and became the basis for what was to become fair use.").

⁴¹ Bracha, *supra* note 38, at 229-30; see also Matthew Sag, *God in the Machine: A New Structural Analysis of Copyright's Fair Use Doctrine*, 11 MICH. TELECOMM. & TECH. L. REV. 381, 414 (2005) (arguing that the existence of the fair use doctrine allows the rights of copyright owners to be phrased more expansively than would otherwise be possible).

II. ABRIDGMENTS, COMPILATIONS, AND OTHER FAIR USES IN THE PREMODERN ERA OF COPYRIGHT

English copyright law in the premodern era offers significant insights into the nineteenth-century transition of American copyright law. The notion that *Folsom v. Marsh* constituted a radical departure from precedent can be properly evaluated only by considering the state of the law before that case. With a handful of exceptions, most copyright case law predating *Folsom v. Marsh* was English. In fact, prior to *Folsom v. Marsh*, there were only eleven reported copyright decisions in the United States. A review of those decisions confirms that the far more developed body of English case law was treated as persuasive in mid-nineteenth-century American courts. For example, in the Supreme Court's first copyright case in 1834, *Wheaton v. Peters*, the majority cited eight English cases and no American authorities; the dissent cited three additional English cases and two American cases.⁴² Likewise, in *Folsom v. Marsh*, Justice Story cited sixteen English authorities and not a single U.S. case.⁴³ The use of English authority clearly outweighs the nascent American case law in almost all reported U.S. cases up to 1841.⁴⁴ Thus, an evaluation of *Folsom v. Marsh*'s significance in the development of American copyright law requires an understanding of the development of premodern English copyright law.

The scope of premodern copyright is usually depicted as narrow, limited, and mechanical.⁴⁵ As surveyed in more detail

⁴² *Wheaton v. Peters*, 33 U.S. 591 (1834).

⁴³ *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

⁴⁴ In addition to *Wheaton* and *Folsom*, see *Gray v. Russell*, 10 F. Cas. 1035 (C.C.D. Mass. 1839) (No. 5728); *Wheaton v. Peters*, 29 F. Cas. 862 (C.C.E.D. Pa. 1832) (No. 17,486); *Clayton v. Stone*, 5 F. Cas. 999 (C.C.S.D.N.Y. 1829) (No. 2872); *Blunt v. Patten*, 3 F. Cas. 763 (C.C.S.D.N.Y. 1828) (No. 1580); *Ewer v. Cox*, 8 F. Cas. 917 (C.C.E.D. Pa. 1824) (No. 4584); *Binns v. Woodruff*, 3 F. Cas. 421 (C.C.D. Pa. 1821) (No. 1424). For the English copyright cases most frequently cited by U.S. courts at this time, see *Beckford v. Hood*, (1798) 101 Eng. Rep. 1164 (K.B.); *Blackwell v. Harper*, (1740) 26 Eng. Rep. 458 (Ch.); *Donaldson v. Beckett*, (1774) 1 Eng. Rep. 837 (H.L.); *Bramwell v. Halcomb*, (1836) 40 Eng. Rep. 1110 (Ch.); *Millar v. Taylor*, (1769) 98 Eng. Rep. 201 (K.B.) 226; *Pope v. Curl*, (1741) 26 Eng. Rep. 608 (Ch.); and *Tonson v. Collins*, (1761) 96 Eng. Rep. 169 (K.B.).

⁴⁵ See, e.g., LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 19 (2004) (stating that the historical "distinction between republishing someone's work on the one hand and building upon or transforming that work on the other" has been lost); Craig Joyce & L. Ray Patterson, *Copyright in 1791: An Essay Concerning the Founders' View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the*

below, this view finds support in several factors—the text of the Statute of Anne itself, the arguments of perpetual copyright supporters, the comments of literary luminaries (such as Dr. Samuel Johnson), and the outcomes of certain prominent early copyright cases—all of which suggest a narrow scope of copyright. In particular, the social importance and legality of abridgment was frequently asserted.⁴⁶ Based on this narrow vision, *Folsom v. Marsh*, the first American fair use case, looks like a radical departure from both the spirit and letter of the law.

Part II.A begins by exploring the foundations of the mechanical view of premodern copyright. As Part II.B demonstrates, however, the actual scope of premodern copyright was not as narrow as it is often depicted. Indeed, the legitimacy of abridgment and other textual borrowing was contested both inside and outside the courtroom throughout the premodern era.

A. *The Mechanical Conception of Premodern Copyright*

The first place to look for a narrow conception of premodern copyright is the text of the Statute of Anne, also known as the Copyright Act. The Act begins with the following rationale:

Whereas printers, booksellers, and other persons have of late frequently taken the liberty of printing, reprinting, and publishing, or causing to be printed, reprinted, and published, books and other writings, without the consent of the authors or proprietors of such books and writings, to their very great detriment, and too often to the ruin of them and their families⁴⁷

As this preamble indicates, the Act was drafted to address the paradigm of rivalrous reprinting of entire works. No thought appears to have been given to abridgments, translations, compilations, or derivative works. Historians have debated whether the Statute of Anne should be seen as displacing, regulating, or merely entrenching the cozy monopoly of London booksellers in the seventeenth century.⁴⁸ Regardless of that

U.S. Constitution, 52 EMORY L.J. 909, 915 (2003) (concluding that the copyright holder's rights under the Statute of Anne were limited to printing and vending copies of the work).

⁴⁶ See *infra* note 74 and accompanying text.

⁴⁷ Statute of Anne, 1710, 8 Ann., c. 19, § 1 (Eng.).

⁴⁸ While some authors regard the passage of the Statute of Anne as marking a shift from a regime of censorship and trade regulation to one of property rights, others see the act primarily in terms of trade regulation. Compare MARK ROSE,

debate, there can be little doubt that the Act's drafters had one particular problem in mind: rivalrous republication of identical books.⁴⁹ By omission or design, the Statute of Anne did not address fractional copying or the similarity threshold for works based on original works with minor textual differences. Under the statute, "the author of any book or books already printed," or his assignees, was entitled to "the sole right and liberty of printing such book and books for the term of one and twenty years."⁵⁰ Construed literally, the Act regulated only exact and entire reprinting.⁵¹

Subsequent legislative history might also indicate a narrow construction of the Statute of Anne. Although the Act was enacted in response to sustained lobbying by the London bookselling trade, that same group ultimately regarded it as unsatisfactory.⁵² Consequently, a number of London booksellers began to lobby for significant changes to the 1710 Act a mere twenty years after its enactment.⁵³ In particular, a bill was introduced in the House of Commons on March 3, 1737,⁵⁴ that would have made it unlawful to "print, publish, import, or sell any *abridgement* of [a copyrighted work], or any translation thereof . . . without the consent of the author or proprietor first obtained in writing" within the first three years of the work's publication.⁵⁵ The fact that booksellers found it necessary to make their monopoly over abridgments and translations explicit suggests that this right was not perceived as part of the

AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 48 (1993), with L. RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS* 27-29 (1991). There is also disagreement as to whether the act was primarily drafted in service of the London booksellers, or whether it embodied a new social bargain between authors, booksellers, and the reading public. Compare JOHN FEATHER, *A HISTORY OF BRITISH PUBLISHING* 75 (Routledge 1988), with RONAN DEAZLEY, *ON THE ORIGIN OF THE RIGHT TO COPY: CHARTING THE MOVEMENT OF COPYRIGHT LAW IN EIGHTEENTH-CENTURY BRITAIN (1695-1775)* 46 (2004).

⁴⁹ ISABELLA ALEXANDER, *COPYRIGHT LAW AND THE PUBLIC INTEREST IN THE NINETEENTH CENTURY* 29 (2010).

⁵⁰ Statute of Anne, 1710, 8 Ann., c. 19, § 1 (Eng.).

⁵¹ Richard Godson, the author of an early treatise on patent and copyright law, notes that consistent with its Saxon origins, the word *book* may be applied to any writing, whether bound or unbound, or consisting of one sheet or many. RICHARD GODSON, *A PRACTICAL TREATISE ON THE LAW OF PATENTS FOR INVENTIONS AND OF COPYRIGHT: WITH AN INTRODUCTORY BOOK ON MONOPOLIES* 219-20 (1823).

⁵² See DEAZLEY, *supra* note 48, at 94-96.

⁵³ *Id.*

⁵⁴ *Journal of the House of Commons*, vol. 22, Mar. 3, 1737, at 769.

⁵⁵ An Act for the Encouragement of Learning, 1737, BL 357, c.7., § 41, cl. 22, reprinted in *PRIMARY SOURCES ON COPYRIGHT (1450-1900)* (L. Bently & M. Kretschmer eds., 2008), available at www.copyrighthistory.org (emphasis added). This article uses the modern spelling of *abridgment* except when quoting directly from original sources.

original grant contained in the Statute of Anne. This suggestion becomes even stronger when considering that this “new” right was only granted for a period of three years.⁵⁶

The first reported case to test the scope of copyright under the newly enacted Statute of Anne was *Burnett v. Chetwood* in 1721.⁵⁷ The plaintiff in this equity proceeding was the executor of a deceased author who had written two books in Latin.⁵⁸ The executor sought to enjoin the publication of English translations of both books—the unpublished *De Statu Mortuorum* and the published work *Archaeologia Philosophica*.⁵⁹

The defendants denied that translations fell within the intended scope of the Statute of Anne.⁶⁰ Translations, they argued, went beyond the merely mechanical art of printing and required the investment of the translator’s own skill, style, and expression.⁶¹ Chancellor Parker leaned toward the view that “a translation might not be the same with the reprinting the original, on account that the translator has bestowed his care and pains upon it, and so not within the prohibition of the act.”⁶² Nonetheless, the court granted an injunction on the more

⁵⁶ While some have argued that the terms of royal printing patents before and after the Statute of Anne’s enactment bear on its construction, the evidence here is inconclusive. Ronan Deazley has recently reviewed a large number of printing patents granted in the seventeenth and eighteenth centuries. He notes that although some prominent royal licenses specifically included an exclusive right with respect to printing abridgments and/or translations, the majority did not. DEAZLEY, *supra* note 48, at 94-96 (citing Shef Rogers, *The Use of Royal Licences for Printing in England, 1695-1760*, in 1 THE LIBRARY 133, 133-92 (2000)).

⁵⁷ (1721) 35 Eng. Rep. 1008 (Ch.). Thanks to Tomás Gómez-Arostegui for alerting me to the fact that, despite common citation to the contrary, this case occurred in 1721, not 1720.

⁵⁸ For a detailed discussion of *Burnett v. Chetwood*, see Stephen A. Siegel, *Injunctions for Defamation, Juries, and the Clarifying Lens of 1868*, 56 BUFF. L. REV. 655, 684 (2008).

⁵⁹ *Id.* Although decided in 1721, *Burnett v. Chetwood* was only reported sometime between 1817 and 1819 as a note to Chancellor Eldon’s decision in *Southey v. Sherwood*, (1817) 35 Eng. Rep. 1006 (Ch.) (citing *Burnett v. Chetwood*, (1817) 35 Eng. Rep. 1008 (Ch.)). We know, however, that the outcome of *Burnett v. Chetwood* was known to many in the eighteenth century because it is mentioned in the 1752 case of *Tonson v. Walker*, (1752) 36 Eng. Rep. 1017, 1020 (Ch.) (discussing earlier cases). As Siegel notes, reference to unreported cases in the Register’s Book was commonplace in the era before official court reporting. Siegel, *supra* note 58, at 687. But that record would not have contained the rationale for enjoining the translating or printing of the *Archaeologia Philosophica*. *Id.*

⁶⁰ *Burnett v. Chetwood*, (1817) 35 Eng. Rep. 1008 (Ch.).

⁶¹ *Id.*

⁶² *Id.* at 1009. Although this part of the decision is dicta, Robert Maugham, the author of what is arguably the first copyright treatise, reports this passage of *Burnett v. Chetwood* as though it were the holding. ROBERT MAUGHAM, TREATISE ON THE LAWS OF LITERARY PROPERTY 89 (Longman, Rees, Orme, Brown, & Green, 1828).

idiosyncratic basis that the “strange notions” contained in the original Latin work should not be exposed to the less educated who could read them in English.⁶³ The *Burnett* Court’s suggestion that a translation should be regarded as a new work—rather than a mere reprinting of the original—indicates a fairly narrow view of copyright owners’ rights under the Statute of Anne.

The pronouncements of perpetual-copyright supporters also lend credence to the notion that premodern copyright was envisaged as a limited right regulating the wholesale reproduction of books. Advocates of perpetual common-law copyright were naturally drawn to stress the narrow scope of the right, if only to defend it against their critics. Blackstone, for example, was a staunch supporter of an author’s enduring right, based on a Lockean conception of natural rights.⁶⁴ In his *Commentaries*, Blackstone described literary property in terms of identity. He argued that

the identity of a literary composition consists intirely [sic] in the sentiment and the language; the same conceptions, clothed in the same words, must necessarily be the same composition: and whatever method be taken of exhibiting that composition to the ear or the eye of another, by recital, by writing, or by printing, in any number of copies or at any period of time, it is always the identical work of the author which is so exhibited.⁶⁵

In Blackstone’s view, the infringement of literary property required a level of similarity verging on identity: the “same conceptions” in the “same words.”⁶⁶ Blackstone’s view was endorsed by all three of the early copyright treatise authors, Robert Maugham, Richard Godson, and Isaac Espinasse.⁶⁷ This narrow conception of copyright would seem to allow ample space for partial appropriation and abridgment; indeed,

⁶³ *Burnett v. Chetwood*, (1817) 35 Eng. Rep. 1008 (Ch.) 1009.

⁶⁴ 2 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 405-06 (1766).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ MAUGHAM, *supra* note 62, at 126; GODSON, *supra* note 51, at 215; ISAAC ESPINASSE, *A TREATISE ON THE LAW OF ACTIONS ON STATUTES, REMEDIAL AS WELL AS PENAL, IN GENERAL* (1824). Although Godson adopts Blackstone’s language and agrees that the transcription “of nearly all the sentiments and language of a book” would amount to “a glaring piracy,” he also adds that “[t]o copy part of a work, either by taking a few pages *verbatim*, where the sentiments are not new, or by imitation of the principle ideas, although the treatises are in other respects different, is also to be illegal.” GODSON, *supra* note 51, at 215. This statement is actually quite a broad formulation of copyright’s reach into partial similarity.

evidence indicates that Blackstone himself was amenable to this result.⁶⁸

The 1769 case *Millar v. Taylor* provides another example of perpetual-copyright advocates' reliance on a narrow construction.⁶⁹ In that case, a majority of the King's Bench upheld the existence of a common-law copyright (a right that the House of Lords eventually overturned in the 1774 case *Donaldson v. Beckett*).⁷⁰ As part of the *Millar* majority, Justice Aston insisted that

[although] the right of the copy still remains in the author [the public obtains] an unlimited use of every advantage that the purchaser can reap from the doctrine and sentiments which the work contains. He may improve upon it, imitate it, translate it; oppose its sentiments: but he buys no right to publish the identical work.⁷¹

Arguably the best evidence of the conventional premodern understanding of copyright scope is the then-prevailing attitude toward abridgments. Passages by famous authors, judges, and legal commentators extolling the importance and legality of abridgment in the premodern era are not difficult to locate. Subsequent authors' liberty to abridge existing works was seen as part of the sphere of public use that authors admitted upon a work's publication. The beginning of Godson's commentary on abridgments reflects this understanding:

Nearly upon the same principles by which it is shewn that there cannot be a monopoly of a general subject, it appears that *books themselves* for certain purposes, besides the mere act of reading them, may be used by the public They may be taken as the ground work of other literary labours.⁷²

Abridgment, compilation, and reprinting played an important role in the dissemination of scientific, technical, and cultural knowledge in the premodern era of copyright. As Ronan Deazley summarizes, "periodical publication throughout the

⁶⁸ See *supra* note 27 (discussing *Strahan v. Newbery*). Blackstone assisted Lord Chancellor Apsley in his decision in *Strahan v. Newbery*, (1774) 98 Eng. Rep. 913 (K.B.). According to the case report, the two men spent some hours discussing the matter, and they agreed that an abridgment such as Newbery's was an allowable and meritorious new work and not an infringement. *Id.*

⁶⁹ *Millar v. Taylor*, (1769) 98 Eng. Rep. 201 (K.B.) 226.

⁷⁰ *Id.* at 257 (discussing *Donaldson v. Beckett*, (1774) 1 Eng. Rep. 837 (H.L.)).

⁷¹ *Id.* at 226.

⁷² GODSON, *supra* note 51, at 238.

eighteenth century was an appropriative affair in both substance and method.”⁷³

One of the most famous and forceful advocates of the right of abridgment was the author, essayist, and commentator Dr. Samuel Johnson. In an article titled *Considerations on the Case of Dr. Trapp’s Sermons, Abridged by Mr. Cave*, Johnson emphatically defended the practice of abridgment based on three principal grounds.⁷⁴ Johnson’s first argument addressed fairness. Johnson argued that the abridgment was so widely practiced and well understood that neither authors nor publishers had cause to complain when their works were abridged. While Johnson acknowledged that an abridgment may do some harm to authors and publishers, he noted that this result, even if unstated, was a recognized part of the copyright bargain. He thus concluded that “[t]o abridge a book, therefore, is no violation of the right of the proprietor, because to be subject to the hazard of an abridgement was an original condition of the property.”⁷⁵

Second, Johnson contended that abridging larger works into smaller extracts was vital to educational advancement—a theme that resonated with the Statute of Anne’s avowed purpose of encouraging learning.⁷⁶ He reasoned that abridgments facilitate the transmission of knowledge “by contracting arguments, relations, or descriptions, into a narrow compass; to convey instruction in the easiest method, without fatiguing the attention, burdening the memory, or impairing the health of the student.”⁷⁷ As an illustration, he noted that

⁷³ Ronan Deazley, *Commentary on Gyles v. Wilcox* (1741), in PRIMARY SOURCES ON COPYRIGHT (1450-1900) (L. Bently & M. Kretschmer eds., 2008), available at http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabecom/%22uk_1741%22.

⁷⁴ Dr. Samuel Johnson, *Considerations on the Case of Dr T[rapp]’s Sermons, Abridged by Mr. Cave*, 1739, 57 GENTLEMAN’S MAG. (1787), reprinted in ARTHUR MURPHY, THE WORKS OF SAMUEL JOHNSON 547 (1st ed. 1837). It can hardly be overlooked that Samuel Johnson was employed by the very same magazine that had abridged Dr. Trapp’s sermons.

⁷⁵ *Id.* at 548.

⁷⁶ Statute of Anne, 1710, 8 Ann., c. 19 (Eng.). The long title of the Statute of Anne is *An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies, During the Times Therein Mentioned*. *Id.*

⁷⁷ JOHNSON, *supra* note 74; see also GODSON, *supra* note 51, at 238 (noting that “[m]any valuable works are so voluminous that abridgments of them are extremely useful”).

the *Transactions of the Royal Society* were generally read as abridgments, to the great improvement of science.⁷⁸

Third, Johnson maintained that established conventions in the printing industry confirmed the legality of abridgment. Without citing any case law, Johnson confidently declared that the practice of abridgment was “an act, in itself legal, and justifiable by an uninterrupted series of precedents, from the first establishment of printing among us, down to the present time.”⁷⁹ Johnson observed that “numberless abridgements that are to be found of all kinds of writing, afford sufficient evidence that they were always thought legal, they are printed with the names of the abbreviators and publishers without the least appearance of clandestine transaction.”⁸⁰ In Johnson’s view, the abridgment of well-known works, such as Clarendon’s *History of the Rebellion and Civil Wars in England*, with the apparent forbearance of their proprietors was abundant evidence of the practice’s legality.⁸¹

Johnson’s defense of abridgment as lawful and socially productive is echoed in Robert Maugham’s comments on the topic in his *Pirating of the Copyright in Printed Books*.⁸² As Maugham explains, “An abridgment of a voluminous work, executed with skill and labor, in a bona fide manner, is not only lawful in itself . . . and exempt from the charge of piracy[,] but is protected from invasion by subsequent writers.”⁸³

The law not only treated abridgments as noninfringing, but accorded copyright to abridgments themselves and protected them against “invasion by subsequent writers.”⁸⁴ In other words, abridgments were lawfully created new works and, in view of their utility and merit, ought to be encouraged.⁸⁵

⁷⁸ For a history of the evolution of the *Transactions of the Royal Society*, see Adrian Johns, *Miscellaneous Methods: Authors, Societies and Journals in Early Modern England*, 33 BRIT. J. HIST. SCI. 159, 159-86 (2000).

⁷⁹ Johnson, *supra* note 74.

⁸⁰ *Id.* Later in the same article, Johnson also stated that “there are few books of late that are not abridged.” *Id.*

⁸¹ *Id.*

⁸² MAUGHAM, *supra* note 62, at 126.

⁸³ *Id.* Godson illustrates the import of the law with an example: “[O]ne man may compose a work, for instance in the Latin language, another abridge it, a third translate it, a fourth write annotations upon it; and every one of them will acquire a copyright in the product of his own ingenuity and labour.” GODSON, *supra* note 51, at 344; see also ESPINASSE, *supra* note 67, at 78.

⁸⁴ *Id.*; see also ESPINASSE, *supra* note 67, at 77-78.

⁸⁵ GODSON, *supra* note 51, at 238.

Consistent with the case law he reports, Maugham's view of abridgment was grounded in a recognition of the skill and labor displayed by the abridger.⁸⁶ He quotes Lord Hardwicke in the 1741 case *Gyles v. Wilcox*: "A real and fair abridgment, . . . may with great propriety be called a new book, because the invention, learning, and judgment of the author are shewn in it, and in many cases abridgments are extremely useful."⁸⁷ Of course, treatise writers had a strong interest, on one hand, in proclaiming their freedom to make abridgments and, on the other hand, in protesting their property interest in notes and annotations made to preexisting works. It is unsurprising, then, that Maugham boldly proclaims the legality of both legal and literary compilations, by which he means "a collection from various authors into one work."⁸⁸ In Maugham's eyes, abridgments had such high social utility that they must be given "considerable latitude."⁸⁹ He argued that "[i]t seems a necessary consequence of the legality of a compilation, that the law must also sanction its being done in a complete manner, and to effect this object, the quotations must generally be both full and numerous."⁹⁰

In sum, several sources—the text of the Statute of Anne, the results of early cases (such as *Burnett v. Chetwood* and *Strahan v. Newbery*), and the writings of Blackstone and Johnson—suggest a rather narrow vision of literary property under the first copyright act. Support for this view can also be found in the early copyright treatises of Maugham, Godson, and Espinasse.

B. *A Broader Conception of Premodern Copyright*

Having made the case for a narrow view of premodern copyright, it is now time to unmake it. As the remainder of this section makes clear, the narrow characterization of premodern copyright—as limited to near-verbatim reproduction and permissive use of all other subsequent uses of a work—is misplaced. Although the scope of copyright in the premodern era was undoubtedly narrower than it is today, it did not leave abridgment entirely unconstrained. The legality of abridgment

⁸⁶ *Id.* at 129.

⁸⁷ *Id.* (citing *Gyles v. Wilcox*, (1741) 26 Eng. Rep. 489 (Ch.)).

⁸⁸ MAUGHAM, *supra* note 62, at 132.

⁸⁹ *Id.*

⁹⁰ *Id.*

in the premodern period was in fact heavily qualified. Furthermore, not all authors agreed with Samuel Johnson on its virtues. For example, Daniel Defoe, writing in 1704, decried abridgment without the author's consent as "a certain sort of Thieving which is now in full practice in *England*."⁹¹

Abridgment was a staple feature of the emerging magazine business of the mid-1700s.⁹² Monthly digests, such as Edward Cave's *Gentleman's Magazine*, featured original composition as well as extensive extracts from other periodicals and books. Cave's liberal use of abridgment was tested in *Austen v. Cave*. The plaintiffs in *Austen*—a trio of London booksellers named Austen, Gilliver, and Clark—brought an action against Cave in the Court of Chancery on August 7, 1739.⁹³ Cave defended that he was free to publish "short extracts, parts of books, pamphlets or other writings newly published on various subjects" and that this practice was beneficial to the proprietors of such books.⁹⁴ According to Johnson's account, Cave had copied from only thirty-seven individual pages of Dr. Trapp's original sixty-nine-page book, *The Nature, Folly, Sin and Danger of Being Righteous Over-Much*.⁹⁵ Furthermore, those thirty-seven pages had been reproduced only in part—amounting to a mere thirteen pages of the same print in *Gentleman's Magazine*.⁹⁶

Lord Hardwicke issued a temporary injunction to prohibit Cave from printing the book or any part of it until he answered the plaintiff's complaint.⁹⁷ When the answer came, however, the court found it insufficient.⁹⁸ Although Cave was given additional time to resubmit his pleadings, no such pleadings were ever entered, and the injunction remained in

⁹¹ DANIEL DEFOE, AN ESSAY ON THE REGULATION OF THE PRESS 25 (Blackwell 1958) (1704); see also JOHN DUNTON, THE LIFE AND ERRORS OF JOHN DUNTON, CITIZEN OF LONDON 52 (1818) (complaining of the prevalence of abridgment by "a whole army of Hackney Authors that keep their grinders moving by the travail of their pens").

⁹² See generally ROBERT D. MAYO, THE ENGLISH NOVEL IN THE MAGAZINES 1740-1815 (1962) (concluding that epitomes and abridgments were widely employed as alternatives to wholesale piracy).

⁹³ *Austen v. Cave*, C33/371, f. 493' (Ch. 1739).

⁹⁴ Deazley, *supra* note 73.

⁹⁵ Compare JOSEPH TRAPP, THE NATURE, FOLLY, SIN, AND DANGER OF BEING RIGHTEOUS OVER-MUCH (Austen 1739), available at <http://books.google.com/books?id=LGU3AAAAMAAJ>, with *The Nature, Folly, Sin and Danger of Being Righteous Over-Much*, 9 GENTLEMAN'S MAG., June 1739, at 288-92 (on file with author).

⁹⁶ Johnson, *supra* note 74.

⁹⁷ *Austen v. Cave*, C33/371, f. 493' (Ch. 1739).

⁹⁸ See ALEXANDER, *supra* note 49.

force.⁹⁹ Thus, despite Johnson's insistence that the legality of abridgment was justified "by an uninterrupted series of precedent," one of the earliest abridgement cases seems to have found that a reproduction of thirteen pages out of an original sixty-nine was excessive.¹⁰⁰

Lord Hardwicke's decision in favor of the plaintiff in *Austen v. Cave*—unreported and unmentioned in early copyright treatises—has been understandably overshadowed by the lord chancellor's proabridgment statements in *Gyles v. Wilcox*, decided a mere two years later.¹⁰¹

Like many early copyright cases, the controversy in *Gyles* centered on an important book of learning, Sir Matthew Hale's *Historia Placitorum Coronæ* (The History of the Pleas of the Crown).¹⁰² Although Hale died on Christmas Day 1676, his *Historia Placitorum Coronæ* was not published in an authorized form until 1736.¹⁰³ The defendant, John Wilcox, had commissioned an abridgment of the *Historia*, to be entitled *Modern Crown Law*.¹⁰⁴ The plaintiffs alleged that the defendant's work "borrowed *verbatim* from Sir Matthew Hale's *Pleas of the Crown*"—omitting only statutes that had been

⁹⁹ See *id.*

¹⁰⁰ But note that four years later, the same publisher successfully answered a similar claim of copyright infringement in relation to an abridgment of *Memoirs of an Unfortunate Young Nobleman* that appeared in his magazine. See *Cogan v. Cave*, (1743) Eng. Rep. (Ch.); 13 GENTLEMAN'S MAG., Feb. 1743, at 93-94; *id.* at 204-05; 13 GENTLEMAN'S MAG., June 1743, at 305-06.

¹⁰¹ Lord Hardwicke's statements in *Gyles* are not surprising, as the lord chancellor himself dismissed the significance of decisions made on motion where he ruled "without much consideration." See *Gyles v. Wilcox*, (1741) 26 Eng. Rep. 489 (discussing *Read v. Hodges*, a 1740 case involving the abridgment of John Motley's *The History of the Life of Peter the First Emperor of Russia*). Note that the litigation in *Gyles* actually commenced in November 1737, before *Austen v. Cave*. See Ronan Deazley, *The Statute of Anne and the Great Abridgement Swindle* (working paper 2010) (on file with the author).

¹⁰² *Gyles v. Wilcox*, (1741) 26 Eng. Rep. 489; see also Barnardiston, *Report of Gyles v. Wilcox* (London 1741), available at http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabe/%22uk_1741b%22. As reported, the decision is inconsistent as to whether the work in question is the more abbreviated *Pleas of the Crown* or the more expansive *Historia Placitorum Coronæ*, first published in 1736. The court may have regarded these two works as merely different versions of the same work. Maugham appears to regard it as the latter, but again without differentiation. SIR M. HALE, *HISTORIA PLACITORUM CORONÆ: THE HISTORY OF THE PLEAS OF THE CROWN* (1736).

¹⁰³ P. R. Glazebrook, *Introduction*, in 1 SIR MATTHEW HALE, *PLEAS OF THE CROWN: A METHODOICAL SUMMARY* 1678, at iii (1971).

¹⁰⁴ *Gyles*, 26 Eng. Rep. at 490. The defendant's work was also referred to in the original bill of complaint to the Court of Chancery as *A Treatise of Modern Crown Law*. See Deazley, *supra* note 101.

repealed—and translated “all the Latin and French quotations” in Hale’s book into English.¹⁰⁵

The first indication of the *Gyles* decision’s dual nature is revealed by Lord Hardwicke’s approach to interpreting the Statute of Anne. As already noted, the 1710 statute was expressed in terms easily reconciled with the view that copyright was merely “the sole liberty of printing and reprinting” works in their entirety.¹⁰⁶ The defendant publisher urged the court to adopt a similarly narrow reading—arguing that the Statute of Anne, as an act of monopoly, should be strictly construed.¹⁰⁷ The lord chancellor rejected this interpretation, saying,

I am quite of a different opinion, and that it ought to receive a liberal construction, for it is very far from being a monopoly, as it is intended to secure the property of books in the authors themselves, or the purchasers of the copy, as some recompence for their pains and labour in such works as may be of use to the learned world.¹⁰⁸

Lord Hardwicke’s purposive reading of the statute led him to an equivocal position on the legality of abridgment. Distinguishing reprints with minor alterations from “true abridgments,” Hardwicke held that, “where books are colorably shortened only, they are undoubtedly within the meaning of the [Statute of Anne], and are a mere evasion of the statute, and cannot be called an abridgment.”¹⁰⁹ But the lord chancellor also noted that

this [proposition] must not be carried so far as to restrain persons from making a *real and fair abridgment*, for abridgments may with great propriety be called a new book, because not only the paper and print, but the invention, learning, and judgment of the author is shewn in them, and in many cases are extremely useful, though in some instances prejudicial, by mistaking and curtailing the sense of an author.¹¹⁰

Echoing Samuel Johnson—whose commentary Lord Hardwicke had almost undoubtedly read—he cautioned that a rule restraining all abridgments would have “mischievous consequences, for the books of the learned, *Les Journals des*

¹⁰⁵ *Gyles*, 26 Eng. Rep. at 489.

¹⁰⁶ Statute of Anne, 8 Ann., c. 19 (1710) (Eng.).

¹⁰⁷ *Gyles*, 26 Eng. Rep. at 489.

¹⁰⁸ *Id.* at 490.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* (emphasis added).

Scavans, and several others that might be mentioned, would be brought within the meaning of this Act of Parliament.”¹¹¹

Lord Hardwicke continued the injunction, pending a master of the court’s report (assisted by “two persons of learning and abilities in the profession of the law”) on the similarities between the two works.¹¹² The result of this court-assisted arbitration proceeding was an agreement that the defendant’s work was a fair abridgment outside the Statute of Anne’s scope.¹¹³ Accordingly, the injunction was dissolved.¹¹⁴

Although *Gyles* is often cited as the origin of the fair use doctrine in England and has generally been received as a proabridgment decision, Lord Hardwicke’s reasoning gave as much to copyright owners as it took away. On the one hand, *Gyles* confirmed the legality of some abridgments (those described as fair).¹¹⁵ Yet it also entrenched a broad purposive reading of the Statute of Anne and condemned another set of abridgments (those deemed unfair) as infringing copyright.¹¹⁶ Lord Hardwicke’s purposive reading of the copyright statute was also an expansive one.

Another abridgment case suggests that the eventual vindication of the *Gyles* defendant was far from preordained. In the 1801 case *Butterworth v. Robinson*, Butterworth alleged that the defendant’s *Abridgment of Cases Argued and Determined in the Courts of Law* was an impermissible copy of the plaintiff’s *Term Reports* (reports of cases in the courts of law).¹¹⁷ The defendant had extracted the same cases as Butterworth with certain omissions, such as the arguments of counsel.¹¹⁸ The defendant had also restructured the reports—presenting the material in alphabetical, as opposed to

¹¹¹ *Les Journals des Scavans* was the French equivalent of the *Transactions of the Royal Society*. What is curious about Hardwicke’s comment is that the French journal, in any event, would not have been subject to copyright protection in England at the time. The Statute of Anne did not “prohibit the importation, vending, or selling of any books in Greek, Latin, or any other foreign language printed beyond the seas . . .” Statute of Anne, 8 Ann., c. 19, § 7 (1710) (Eng.).

¹¹² *Gyles*, 26 Eng. Rep. at 491.

¹¹³ This is made clear in the discussion of *Gyles v. Wilcox* in *Tonson v. Walker*, (1752) 36 Eng. Rep. 1017 (Ch.).

¹¹⁴ *Id.*

¹¹⁵ See ROBERT BURRELL & ALLISON COLEMAN, COPYRIGHT EXCEPTIONS: THE DIGITAL IMPACT 255-56 (2005) (arguing that the Statute of Anne was subject to broad purposive reading almost from its inception).

¹¹⁶ See *id.*

¹¹⁷ *Butterworth v. Robinson*, (1801) 31 Eng. Rep. 817 (Ch.).

¹¹⁸ *Id.*

chronological, order.¹¹⁹ At trial, the plaintiff characterized these alterations as an *artful* arrangement designed to give the appearance of a new work.¹²⁰ Finding the defendant's publication to be "extremely illiberal," Lord Chancellor Loughborough issued an injunction on the plaintiff's motion, with leave for the defendant to answer.¹²¹ As far as can be determined, the matter was not brought before the court again.

Austen v. Cave, *Butterworth v. Robinson*, and even *Gyles v. Wilcox* illustrate that the scope of copyright was not consistently limited to merely mechanical acts of reproduction in the premodern era. There were in fact numerous instances where defendants were enjoined from partial copying and even nonliteral copying.¹²² While the scope of permissible abridgment and reuse was broad by modern standards, courts in the premodern era did not regard all abridgments as the same; rather, they drew a distinction between those that were fair or bona fide, and those that were not. Elaborating on the threshold of copying that amounts to piracy, Godson notes,

a variance in *form and manner* is a variance in *substance*, and that nay material *melioration* cannot be considered as a piracy; yet a piracy is committed whether the author attempt an original work, or call his book an abridgment; if the *principal parts* of a book are servilely copied, or unfairly varied.¹²³

In other words, neither the honest intention to create an original work nor merely labeling a work as an abridgment was sufficient to elude the author's copyright in every case. Godson continues,

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* In his treatise, Maugham takes issue with this decision: "Yet a selection of what is material from a large body of Reports, commodiously arranged, whether alphabetical or systematic, seems an original work. Indeed the right is undisputed of selecting passages from books and reports (including entire judgments) in treatises on particular subjects." MAUGHAM, *supra* note 62, at 132.

¹²² For example, the defendant was enjoined in *Austen v. Cave*, C33/371, f. 493' (Ch. 1739), in *Butterworth v. Robinson*, (1801) 31 Eng. Rep. 817, and in *Wilkins v. Aikin*, (1810) 34 Eng. Rep. 163. In addition, recent historical research by Tomás Gómez-Arostegui shows that, although unreported, *Tonson v. Baker*, C9/371/41 (Ch. 1710), was the first lawsuit filed under the Statute of Anne. See H. Tomás Gómez-Arostegui, *The Untold Story of the First Copyright Suit Under the Statute of Anne in 1710*, 25 BERKELEY TECH. L.J. 1247 (2010). In that case, Tonson was able to secure an ex parte temporary restraining order despite his acknowledgment that the defendant's book was not identical to his own; he merely argued that it was the "Same in Substance & Effect." *Id.*

¹²³ GODSON, *supra* note 51, at 215-16.

A man may fairly adopt part of the work of another; he may so make use of another's labours for the promotion of science, and the benefit of the public: but having done so, the question will be—Was the matter so taken fairly with that view, and without what may be termed the *animus furandi* [intention to steal]?¹²⁴

The requirement that abridgments be “real and fair” as opposed to merely “colorably shortened” distinguished between abridgments in general and a narrower subset of bona fide abridgment. The very existence of this distinction expands upon the narrow statutory language of the first copyright act. This crucial development in copyright law predates *Folsom v. Marsh* by at least 100 years.¹²⁵

III. FOUR CONSTANTS OF FAIR USE

Abridgment was neither categorically allowed nor prohibited in the premodern era of copyright. Instead, the legality of (or bona fide) abridgment was usually determined by a process not unlike the modern fair use enquiry. Although not as systemized, the premodern abridgment cases demonstrate a surprising continuity with modern fair use. Like their modern counterparts, early abridgment cases treated the question of whether a use was bona fide as a complex factual question that resists bright-line rules and requires case-by-case analysis.¹²⁶ Likewise, the early cases regarded the amount of the defendant's copying as a key, but not decisive, issue.¹²⁷ Neither of these observations is particularly unexpected. What is surprising is the extent to which the modern fair use factors of market effect and transformative use are present in these eighteenth-century and early nineteenth-century decisions.¹²⁸ As the remainder of this article demonstrates, questions of substitution effects and the degree of labor and authorial skill injected by the defendant were central in premodern copyright cases.

A. Case-by-Case Analysis

The modern law of fair use is often assailed for its fact-intensive, case-by-case, and consequently unpredictable

¹²⁴ *Id.*

¹²⁵ Compare *Gyles v. Wilcox*, (1741) 26 Eng. Rep. 489 (Ch.), with *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4901).

¹²⁶ See *infra* Part III.A.

¹²⁷ See *infra* Part III.B.

¹²⁸ See *infra* Parts III.C-D.

nature.¹²⁹ The U.S. Supreme Court's admonition in *Campbell v. Acuff-Rose* that application of fair use cannot "be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis" appears to cement this aspect of the doctrine.¹³⁰ For good or ill, in this respect at least, not much appears to have changed between 1828 and the present. As Robert Maugham concedes,

It would, perhaps, be unreasonable to expect, that any full and precise definition should have been made of the extent to which a writer may lawfully quote or extract from the works of his predecessors. The courts have generally confined themselves to the decision of the mere point in litigation.¹³¹

Similarly, concerning the use of quotations, Maugham observes that "[i]t is difficult to define the exact limits to which a compiler is confined in his extracts or quotations from original authors, or from abridgments or previous compilations. In each case the peculiar circumstances attending it must be ascertained and considered."¹³² Like modern commentators, Maugham was quick to point out that this case-by-case development gave rise to incomplete, inconsistent, and confusing legal doctrines. The dominance of case-by-case analysis was not simply a product of the nascent stage of doctrinal development. Even in cases where the judges regarded the issues as fairly settled, they understood those issues as highly fact-specific and resistant to rules of general application.¹³³ Premodern abridgment cases and early copyright

¹²⁹ Even copyright *minimalist* Lawrence Lessig disparages fair use on this ground, arguing that fair use is so uncertain that it is merely "the right to hire a lawyer." LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 187 (2004); see also Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1090 (2007).

¹³⁰ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994). Still, as Pamela Samuelson argues, despite the necessity of case-by-case analysis, fair use law is probably "more coherent and more predictable than many commentators have perceived once one recognizes that fair use cases tend to fall into common patterns." Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2542 (2009).

¹³¹ MAUGHAM, *supra* note 62, at 126; see also *Dodsley v. Kinnorsley*, (1761) 27 Eng. Rep. 270 (Ch.) 271 ("No certain line can be drawn, to distinguish a fair abridgment; but every case must depend on its own circumstances."); *Wilkins v. Aikin*, (1810) 34 Eng. Rep. 163 (Ch.) (Fair quotation is "in all cases very difficult to define."). The same sentiment is expressed by the U.S. Supreme Court in *Campbell*, 510 U.S. at 577, and in *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985).

¹³² MAUGHAM, *supra* note 62, at 132.

¹³³ In the 1761 case *Dodsley v. Kinnorsley*, Sir Thomas Clarke, the master of the rolls, noted that "the subject matter of this suit has been so often before the Court upon other occasions, that when a case of this kind comes to be litigated, little more is

treatises evince the importance of case-by-case analysis in determining the bona fides of the defendant.

B. Amount Copied

A key element of the modern fair use doctrine is “the amount and substantiality of the portion used [by the defendant] in relation to the copyrighted work as a whole.”¹³⁴ Not surprisingly, this factor also played a central role in fair use decisions from almost the very beginning of modern copyright. Consistent with modern doctrine, however, although the extent of the defendant’s appropriation was evidently pertinent to the ultimate infringement question, courts resisted a precise statement on how much copying was too much. The cases *Dodsley v. Kinnersley* in 1761, *Roworth v. Wilkes* in 1807, and *Wilkins v. Aikin* in 1810 are illustrative.

Dodsley v. Kinnersley revisited the question of fair abridgment in relation to magazines.¹³⁵ London bookseller Robert Dodsley, together with William Strahan and William Johnston, had paid Samuel Johnson £75 for the first edition of the two-volume *Rasselas, The Prince of Abyssinia: A Tale*.¹³⁶ Relying on the customs of the day, the defendant had reproduced parts of the narrative in his *Grand Magazine of Magazines*. According to the case report, the defendant produced evidence that it was usual to print extracts of new books in magazines without the author’s permission.¹³⁷ The report also notes that this printing was “often done at the request of the author, as being a means to help the sale of the book.”¹³⁸

Arguing for the opposite conclusion, the plaintiffs noted that the defendant had abstracted an excessive amount of the

necessary than to see whether it is adapted to the rules and principles before laid down.” 27 Eng. Rep. at 271.

¹³⁴ 17 U.S.C. § 107(3) (2006). This inquiry can be traced to Justice Story’s original formulation of the fair use doctrine in *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901). In that case, Justice Story was concerned with protecting the “chief value of the original work” against the extraction of its “essential parts” through the mere “facile use of scissors” or its intellectual equivalent. *Id.* at 345.

¹³⁵ (1761) 27 Eng. Rep. 270 (Ch.) 271. Ironically, the author of the work allegedly copied in *Dodsley* was none other than Samuel Johnson—the same Samuel Johnson whose resounding defense of abridgment is noted *supra* Part II.A. See *supra* note 74 and accompanying text.

¹³⁶ Nancy A. Mace, *What Was Johnson Paid for Rasselas?*, 91 MODERN PHILOLOGY 455, 458 (1994) (clarifying a discrepancy between Boswell’s account and the evidence that the booksellers presented at trial to establish their ownership of the copyright).

¹³⁷ *Dodsley*, 27 Eng. Rep. at 270.

¹³⁸ *Id.*

original work and had “print[ed] only the narrative, . . . leaving out all the moral and useful reflections.”¹³⁹ The defendant’s reproduction of the *Rasselas* narrative, the plaintiffs argued, “was done in such a way” that it did not “recommend the book, but quite the contrary.”¹⁴⁰ The plaintiffs relied on depositions from three other influential London booksellers, Jacob Tonson, Andrew Millar, and John Rivington.¹⁴¹ Unsurprisingly, these witnesses unanimously agreed that *Grand Magazine* had extracted such large portions of *Rasselas* that readers would no longer be interested in purchasing the actual book.¹⁴² But Ambler’s report of the decision notes some ambiguity about exactly how much of Johnson’s book had been reprinted.¹⁴³ The report describes the plaintiffs’ witnesses as “conjectur[ing], that about two-thirds of the book was printed in the Magazine.”¹⁴⁴ As the report also notes, however, although this estimate may have been true by the time the case was heard, only a small amount—“not above one-tenth”—had actually made its way into the magazine when the plaintiffs commenced the action.¹⁴⁵ The master of the rolls had little to say on the amount copied by the defendant, other than to crisply note that “[i]t does not appear that one-tenth part of the first volume has been abstracted.”¹⁴⁶ The court considered this amount patently insufficient to sustain an infringement claim.¹⁴⁷

The 1807 case *Roworth v. Wilkes* concerned the abridgment of a fencing treatise titled *The Art of Defence on Foot with the Broadsword*, a multivolume compendium that styled itself as a “universal dictionary of arts and sciences and literature.”¹⁴⁸ The *Encyclopedia Londinensis* had quite brazenly copied seventy-five pages of the 118-page fencing text in its

¹³⁹ *Id.* at 271.

¹⁴⁰ *Id.*

¹⁴¹ See Mace, *supra* note 136, at 457.

¹⁴² *Id.*

¹⁴³ *Dodsley*, 27 Eng. Rep. 270.

¹⁴⁴ *Id.*

¹⁴⁵ The original bill of complaint was filed on May 21, 1759, and the defendant’s answer is dated September 12, 1759. It was not until June 15, 1761, however, that the case was finally heard. See Mace, *supra* note 136, at 457. The plaintiffs’ witness was a fellow London bookseller, Jacob Tonson, who was also the plaintiff in *Tonson v. Walker*, (1752) 36 Eng. Rep. 1017 (Ch.).

¹⁴⁶ *Dodsley*, 27 Eng. Rep. 270.

¹⁴⁷ *Id.* Similarly, in *Gyles v. Wilcox*, the abridgment in question contained thirty-five sheets, whereas the original was 275 sheets. This was ultimately held to be a fair abridgment. See *Tonson*, 36 Eng. Rep. 1017 (Ch.) 1020 (discussing *Gyles v. Wilcox*, (1741) 26 Eng. Rep. 489 (Ch.)).

¹⁴⁸ (1807) 170 Eng. Rep. 889 (K.B.).

own volume on the same topic—a practice that was apparently not unusual.¹⁴⁹ Lord Ellenborough's brief opinion reduces the question of infringement to whether the defendant's publication would serve as a substitute for the original.¹⁵⁰ According to the lord chancellor, the determinative factor in the substitution inquiry was whether the later work communicates the same knowledge as the original.¹⁵¹ Lord Ellenborough did not accept the defendant's argument that "in a dictionary of all arts and sciences the compiler was justified in taking larger extracts than in another work of the same description."¹⁵² On the contrary, he reasoned, although a compilation such as the *Encyclopedia Londinensis* might differ from a specific treatise published by itself, "[T]here must be certain limits fixed to its transcripts; it must not be allowed to sweep up all modern works . . . or an Encyclopoedia would be a recipe for completely breaking down literary property."¹⁵³ Lord Ellenborough held in favor of the plaintiff on both the text and the drawings.¹⁵⁴

Whereas *Dodsley* tends to illustrate that copying a mere one-tenth of a work was considered too insignificant to sustain a charge of copyright piracy, *Roworth* gives an example of an amount of copying—just under two-thirds—considered too much. In contrast, the next case considered, *Wilkins v. Aikin*, illustrates a more context-dependent quantitative investigation. Wilkins was the author of a single volume entitled *The Antiquities of Magna Græcia*, which he had written based on his travels to Sicily and Greece in 1807.¹⁵⁵ The defendant freely acknowledged quoting sections of Wilkins's book in his own twenty-three-page *Essay on the Doric Order of Architecture*.¹⁵⁶ He argued, however, that he had done so in accordance with the norms of the Society of Professors of Architecture (of which he was a member) and without any

¹⁴⁹ *Id.* In his discussion of compilations in general, Godson notes that the authors of encyclopedias "have generally taken from the works of others with unsparing hands." GODSON, *supra* note 51, at 233.

¹⁵⁰ *Roworth*, 170 Eng. Rep. at 890.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* He also noted that "[h]ere 75 pages have been transcribed out of 118, and that which the plaintiff sold for half-a-guinea may be bought of the defendant for eightpence." *Id.* at 889-90.

¹⁵⁴ *Id.* at 891. The jury found separate damages for the letterpress and the prints—£70 for the former and £30 for the latter. *Id.* at 891.

¹⁵⁵ *Wilkins v. Aikin*, (1810) 34 Eng. Rep. 163 (Ch.).

¹⁵⁶ *Id.*

intention of injuring the plaintiff's work.¹⁵⁷ In Lord Chancellor Eldon's decision, he recognized that the copyright owner's rights extended to both partial and complete reproduction but noted that fair quotation must still be allowed. The lord chancellor accordingly declared, "There is no doubt, that a man cannot under the pretence of quotation, publish either the whole or part of another's work; though he may use, what it is in all cases very difficult to define, fair quotation."¹⁵⁸ Differentiating between fair quotation and its pretense required first-hand observation of both the plaintiff's and the defendant's works. After what appears to have been a fairly close review of the two works, the lord chancellor noted that the defendant had acknowledged a considerable proportion taken from the plaintiff's work but had also failed to acknowledge some.¹⁵⁹ Determining whether the defendant had crossed the line between fairness and pretense was not a strictly arithmetical exercise for the court.

Analogizing to an earlier case involving a road atlas,¹⁶⁰ the lord chancellor reasoned that publishing an individual map to illustrate the history of the maps of a particular region would be fair "if it was a fair history of maps of the county," but he cautioned that "if a jury could perceive the object to make a profit by publishing the map of another man, that would require a different consideration. The slightest circumstances therefore in these cases make the most important distinction."¹⁶¹ It seems, then, that the court would have countenanced the wholesale replication of a copyrighted map if it were merely an illustration of a broader history of map making and did not substitute for the original publication of the map. Time has somewhat obscured the facts of *Wilkins*. Counsel for the defendant argued that he had, "by no means," extracted "the most valuable or material" aspects of the plaintiff's work and that, in any event, any such abridgment and quotation did not exceed three pages.¹⁶²

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ The cases referred to are *Carnan v. Bowles*, (1786) 29 Eng. Rep. 45 (Ch.); *Cary v. Faden*, (1799) 31 Eng. Rep. 453 (Ch.); and *Cary v. Longman*, (1801) 102 Eng. Rep. 138 (K.B.).

¹⁶¹ *Wilkins*, 34 Eng. Rep. 163.

¹⁶² *Id.* But rather than enjoining the defendant's publication, the court issued an injunction permitting the work to be sold subject to the defendant undertaking to account according to the result of the action.

There is an interesting parallel between this nineteenth-century thought experiment and recent controversial cases, such as *Bill Graham Archives v. Dorling Kindersley Ltd.*¹⁶³ In *Bill Graham Archives*, the Court of Appeals for the Second Circuit held that the use of historic concert promotional posters for the *Grateful Dead* in a rock biography was “a purpose separate and distinct from the original artistic and promotional purpose for which the images were created”; thus, even total copying did not necessarily weigh against fair use.¹⁶⁴ Likewise, in two contemporary cases involving visual search engines, *Perfect 10, Inc. v. Amazon.com, Inc.*¹⁶⁵ and *Kelly v. Arriba Soft Corp.*,¹⁶⁶ the Court of Appeals for the Ninth Circuit held that reproducing images on a smaller scale as part of a visual search engine was fair use.¹⁶⁷ In reaching this decision, the court reasoned that using these works as pointing devices did not substitute for the expressive value of the authors’ original expression.¹⁶⁸

Godson’s treatise indicates another way that the amount of the defendant’s copying was understood contextually. Godson notes that if

the work complained of is *in substance* a copy, then it is not necessary to shew the *intention* to pirate; for the greater part of the matter of the book having been purloined, the intention is apparent, and other proof is superfluous. A piracy has *undoubtedly* been committed. But if only a small portion of the work is quoted, then it becomes necessary to prove that it was done *animo furandi* [intention to steal]; with the intention of depriving the author of his just reward, by giving his work to the public in cheaper form.¹⁶⁹

Godson suggests here that intent to pirate can be presumed from a significant amount of copying and that, where less is copied, the defendant’s intent must be investigated more thoroughly. It is also noteworthy that the *animo furandi* (or intention to steal) Godson identifies is not an intention to free

¹⁶³ *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609-10 (2d Cir. 2006).

¹⁶⁴ *Id.* at 613.

¹⁶⁵ 487 F.3d 701, 721 (9th Cir. 2007), *aff’d in part on reh’g*, 508 F.3d 1146 (9th Cir. 2007).

¹⁶⁶ 336 F.3d 811 (9th Cir. 2003).

¹⁶⁷ *Perfect 10*, 487 F.3d at 721; *Kelly*, 336 F.3d at 822. For a detailed discussion of *Perfect 10, Inc. v. Amazon.com, Inc.*, and *Kelly v. Arriba Soft Corp.* as illustrations of the interaction between copyright law and copy-reliant technology, see Matthew Sag, *Copyright and Copy-Reliant Technology*, 103 NW. U. L. REV. 1607 (2009).

¹⁶⁸ See *supra* note 167.

¹⁶⁹ GODSON, *supra* note 51, at 216-17.

ride—which Godson does not condemn—but rather the intention to interfere with the author’s market-based rewards.

On first impression, we could infer from *Dodsley* and *Roworth* that an abstraction of a mere one-tenth of a larger work was considered too little to amount to infringement¹⁷⁰ and that an appropriation of two-thirds was too much to escape the charge of piracy.¹⁷¹ But like their modern counterparts, these cases should not be read as setting any immutable numerical thresholds. While it is clear that the extent of the defendant’s appropriation was an important consideration in copyright cases of this era, it is also apparent from *Wilkins v. Aikin* that the amount of tolerable copying varied according to both the purpose of the defendant’s use and that use’s effect on the copyright owner.¹⁷² This observation leads naturally into the next consideration: market effect.

C. Market Effect

Courts in the United States are required by statute to consider “the effect of the use upon the potential market for or value of the copyrighted work” in any fair use determination.¹⁷³ Judges and commentators enlightened by the law-and-economics movement are naturally drawn to describe the fair use doctrine in the language of economics.¹⁷⁴ As Judge Posner explains in *Ty, Inc. v. Publications International*,¹⁷⁵ the difference between fair use and infringement can often be reduced to the difference between complementary and

¹⁷⁰ *Dodsley v. Kinnersley*, (1761) 27 Eng. Rep. 270 (Ch.).

¹⁷¹ *Roworth v. Wilkes*, (1807) 170 Eng. Rep. 889 (K.B.). For another case of excessive copying, see *Macklin v. Richardson*, (1770) 27 Eng. Rep. 451 (Ch.).

¹⁷² As Lord Chancellor Cottenham noted in *Bramwell v. Halcomb*,

When it comes to a question of quantity, it must be very vague. One writer might take all the vital part of another’s book, though it might be but a small proportion of the book in quantity. It is not only quantity but value that is always looked to. It is useless to refer to any particular cases as to quantity.

Bramwell v. Halcomb, (1836) 40 Eng. Rep. 1110 (Ch.) 1112. For a summary of the modern fair use doctrine on this point, see Sag, *supra* note 167.

¹⁷³ 17 U.S.C. § 107(41) (2006).

¹⁷⁴ See, e.g., Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600 (1982); William M. Landes, *Copyright, Borrowed Images, and Appropriation Art: An Economic Approach*, 9 GEO. MASON L. REV. 1 (2000). Judge Posner notes that “economic terminology . . . has become orthodox in fair-use case law.” *Ty, Inc. v. Publ’ns Int’l, Ltd.*, 292 F.3d 512, 517 (7th Cir. 2002).

¹⁷⁵ 292 F.3d 512 (7th Cir. 2002).

substitutive use.¹⁷⁶ For example, a parody does not substitute for its target;¹⁷⁷ a political attack advertisement does not substitute for a televised debate;¹⁷⁸ and a search engine is no substitute for the websites it indexes.¹⁷⁹ While this focus on market substitution is unremarkable in the modern context, it is more surprising to find it so pervasively ingrained in the discourse of late eighteenth- and early nineteenth-century copyright cases. Writing in 1828, Maugham commented, “According to some authorities, . . . [bona fide extracts] must not be so extensive as to injure the sale of the original work, even though made with no intention to invade the previous author. . . .”¹⁸⁰ In another passage, Maugham explains,

Yet reasonable bounds must be set to the extent of transcripts. If an article in a general compilation of literature and science copies so much of a book, the copyright of which is vested in another person, as to serve as a *substitute* for it, though there may have been no intention to pirate it, or injure its sale,—this is a violation of literary property for which an action will lie to recover damages.¹⁸¹

Understanding exactly what Maugham meant by “substitute” and the term’s broader significance in differentiating bona fide abridgments from infringing ones requires some unpacking. Both passages stress that the absence of intention to invade the copyright owner’s rights was not considered dispositive; the key concern was apparently substitution as determined through market displacement. Although Godson adopts more intention-based language, he also describes an unfair abridgment as “depriving the author of his just [market-based] reward, by giving his work to the public in a cheaper form.”¹⁸²

¹⁷⁶ *Id.* at 517.

¹⁷⁷ *See, e.g.,* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

¹⁷⁸ *See, e.g.,* Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1529 (discussing a television network’s demands that two presidential candidates remove copyrighted footage of a presidential debate from their campaign videos and the prospects of a fair use defense); *see also* MasterCard Int’l, Inc. v. Nader 2000 Primary Comm., Inc., No. 00 Civ. 6068 (GBD), 2004 WL 434404 (S.D.N.Y. Mar. 8, 2004).

¹⁷⁹ *See, e.g.,* Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701 (9th Cir. 2007).

¹⁸⁰ MAUGHAM, *supra* note 62.

¹⁸¹ *Id.* at 132-33 (emphasis added); *see also* GODSON, *supra* note 51, at 247 (noting that “no one is allowed, under the pretence of quoting, to publish either the whole or the principle part of another man’s composition; and therefore a review must not serve as a substitute for the book reviewed”) (citations omitted).

¹⁸² GODSON, *supra* note 51, at 216-17.

Maugham's treatise contains a revealing section on the relevance of injury to the copyright owner.¹⁸³ He begins by observing the existence of some confusion:

The grounds of the decisions on this important subject, as reported in the law books, are not altogether consistent in principle. In some of them, it appears that the piracy occasioning, or obviously tending to, a *depreciation in the value* of the original work, is a fact on which much reliance has been placed in determining the question. In others, this circumstance has been altogether disregarded.¹⁸⁴

Other passages in Maugham's treatise make it clear that what he means by "depreciation in value" is an injury to the sales of the original work. Making the point differently, Maugham notes that, in some cases, a bona fide abridgment is considered a new work and thus allowed even if it injures sales of the original: "On the one hand it has been held, that a fair and bona fide *abridgment* of any book, is considered a new work; and however it may injure the sale of the original, yet it is not deemed a piracy or violation of the author's copyright."¹⁸⁵ Maugham cites *Gyles v. Wilcox* for this proposition.¹⁸⁶ In the relevant paragraph of *Gyles*, Lord Hardwicke made his famous statement that a "real and fair abridgment" should not be restrained by copyright.¹⁸⁷ In the same passage, Hardwicke equated a fair abridgment with new works of authorship because "the invention, learning, and judgment of the author is shewn in them."¹⁸⁸ Notably, Hardwicke acknowledged that even a fair abridgment may injure the textual integrity of the original author's work: it may be "prejudicial" to the author "by mistaking and curtailing the sense of the author."¹⁸⁹

Wilkins v. Aikin also held that a fair and bona fide abridgment was noninfringing, despite prejudice to the copyright holder.¹⁹⁰ As discussed previously, this case concerned a claim of infringement by William Wilkins in his book *The Antiquities of Magna Græcia* against Aikin's *An Essay on the Doric Order of Architecture*.¹⁹¹ While the facts of *Wilkins* have

¹⁸³ MAUGHAM, *supra* note 62, at 126.

¹⁸⁴ *Id.* at 130.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Gyles v. Wilcox*, (1741) 26 Eng. Rep. 489 (Ch); *see also supra* note 87 and accompanying text.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Wilkins v. Aikin*, (1810) 34 Eng. Rep. 163 (Ch.).

¹⁹¹ *See supra* text accompanying notes 155-62.

already been related, it is interesting to reflect on Lord Chancellor Eldon's chain of reasoning in this case. His lordship began with the legitimacy of the defendant's use of the plaintiff's publication: "The question upon the whole is, whether this is a legitimate use of the Plaintiff's publication in the fair exercise of a mental operation, deserving the character of an original work." The lord chancellor saw the question of legitimacy and "the fair exercise of mental operation" as equivalent; if the use is deemed legitimate—presumably because of the intellectual labor added by the defendant—the work is regarded as a new work, not an infringing one. The exculpatory effect of the "fair exercise of mental operation" was not contingent on a lack of harm to the original copyright holder. Quite the contrary, Lord Chancellor Eldon explained: "The effect, I have no doubt, is prejudicial[;] it does not follow, that therefore there is a breach of the legal right."¹⁹²

In contrast to *Gyles v. Wilcox*, Maugham notes that, in *Roworth v. Wilkes* (the case of the *Encyclopedia Londinensis*), the court held for the plaintiff precisely because of the risk that the encyclopedia entry on fencing would displace the plaintiff's more expensive treatise on the subject.¹⁹³ The key determinant of infringement, according to Lord Ellenborough, was whether the defendant's publication was "in substance a copy" and would thus serve as a substitute for the plaintiff's.¹⁹⁴ In this sense, Lord Ellenborough appears to have assessed substitution at a functional level: his lordship was concerned with whether "so much be extracted that it communicates the same knowledge with the original work."¹⁹⁵ As noted above, Lord Ellenborough held in favor of the plaintiff on both the text and the drawings.¹⁹⁶

Maugham resolves the apparent tension between cases that take account of injury to the plaintiff and those that do not by observing "a clear distinction in the nature of these two

¹⁹² *Wilkins*, 34 Eng. Rep. at 165. Lord Chancellor Eldon continued the interim injunction and directed that an action be brought immediately. *Wilkins*, 34 Eng. Rep. 163. But no action appears to have been brought. See ALEXANDER, *supra* note 49, at 184.

¹⁹³ *Roworth v. Wilkes*, (1807) 170 Eng. Rep. 889 (K.B.). See MAUGHAM, *supra* note 62, at 130 ("On the other hand, in the case of the *Encyclopedia Londinensis*, in which a large part of a treatise on fencing was transcribed, though there might have been no intention to injure its sale, yet as it might serve as a substitute for the original work, and was sold at a much lower price, it was held actionable, and damages were recovered.").

¹⁹⁴ *Roworth v. Wilkes*, (1807) 170 Eng. Rep. 889 (K.B.).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

cases, although the fact of *depreciation* might be in each the same.¹⁹⁷ In Maugham's view, cases strongly influenced by the prejudice to the copyright owner were distinguishable from those that were not because the latter involved the defendant's application of labor and judgment, whereas the former were merely instances of "wholesale compilation."¹⁹⁸ Maugham sees *Roworth*, for example, as a case "in which seventy-five pages were successively transcribed, without addition or alteration, and on which consequently no *skill or learning* had been bestowed."¹⁹⁹ He concludes that "the exercise of [skill or learning] may be considered . . . the true criterion by which to determine the bona fide character of the abridgment or compilation."²⁰⁰ Modern fair use case law makes a similar distinction between different kinds of market effect.²⁰¹

Despite the continuity and congruity between the premodern and contemporary understanding of market effect, the parallels should not be overstated. The premodern abridgment cases clearly part company with their modern counterparts in their narrow conception of derivative rights. Under modern copyright law, the author's exclusive rights include the right "to prepare derivative works based upon the copyrighted work."²⁰² The modern copyright statute defines derivatives broadly as "a work based upon one or more preexisting works," and the statutory definition also expressly includes abridgments and translations.²⁰³ But case law indicates that a work is not derivative unless it has *substantially* copied from a prior work.²⁰⁴

¹⁹⁷ MAUGHAM, *supra* note 62, at 130.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ For example, in *Campbell*, the Supreme Court explained that

when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act. Because parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically, the role of the courts is to distinguish between biting criticism that merely suppresses demand and copyright infringement, which usurps it.

Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 591-92 (1994) (quoting *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986)); KAPLAN, *supra* note 36, at 69) (internal quotation marks and alterations omitted).

²⁰² 17 U.S.C. § 106(2) (2006).

²⁰³ *Id.* § 101 (defining "derivative work").

²⁰⁴ *Caffey v. Cook*, 409 F. Supp. 2d 484, 496 (S.D.N.Y. 2006); 1-3 DAVID NIMMER, NIMMER ON COPYRIGHT § 3.01 (2010). See generally Naomi Abe Voegtli,

Dodsley v. Kinnersley illustrates the narrow conception of the copyright owner's rights regarding derivative works—the prevailing view in the premodern era. In *Dodsley*, the plaintiffs argued that *Grand Magazine's* publication of Samuel Johnson's novel *Rasselas* was particularly harmful because "it was done in such a way, as not to recommend the book, but quite the contrary; by printing only the narrative, and leaving out all the moral and useful reflections."²⁰⁵ In this plea to protect both their literary and commercial interests, the plaintiffs portrayed the abridgment in *Grand Magazine* as an inferior version of the original work, bleached of intellectualism and literary merit.²⁰⁶ But the master of the rolls, Sir Thomas Clarke, was not sympathetic to arguments based on either literary or commercial integrity. He dismissed the notion that the abridgment could harm the work's reputation, stating that "it tends to the advantage of the author, if the composition is good; if it is not, it cannot be libeled."²⁰⁷

The *Dodsley* Court also appeared to accept the defendant's argument that the abridgment of books in magazines actually inured to the benefit of copyright owners as a form of free advertising.²⁰⁸ The master of the rolls noted that "[t]he nature of annual registers, magazines, [etc.], is to give an abstract or analysis of authors" and that the plaintiffs themselves had benefited from this freedom in the past in relation to their own periodicals.²⁰⁹

The master warned that to find a subsequent abridgment infringing would require holding—at great prejudice to the plaintiffs—that every abridgment was an infringement.²¹⁰ The *Dodsley* decision in favor of the defendant

Rethinking Derivative Rights, 63 BROOK. L. REV. 1213 (1997) (reviewing the history of the derivative right in the United States).

²⁰⁵ *Dodsley v. Kinnersley*, (1761) 27 Eng. Rep. 270 (Ch.).

²⁰⁶ On the defendant's side, it could be argued that they had merely "retrenched the unnecessary and uninteresting" parts of the text "which rather deaden the narration." This was Apsley's conclusion in *Strahan v. Newbery*, (1775) 98 Eng. Rep. 913 (Ch.).

²⁰⁷ *Dodsley*, 27 Eng. Rep. 270; see also GODSON, *supra* note 51, at 238 ("In general, an abridgment tends to the advantage of the author, if the composition be good; and may serve the end of an *advertisement*. The inquiry whether the work is prejudiced by the *manner* of making the abridgment cannot be entertained.").

²⁰⁸ *Dodsley*, 27 Eng. Rep. 270.

²⁰⁹ The court did not regard these trade customs as binding, but it noted that it ought to "take notice of the springs flowing from trade" and consider their consequences. *Id.*

²¹⁰ *Id.* The exact words of the master of the rolls were

was not, however, based on a broadly construed right of abridgment and reuse. Instead, the primary ground for the decision was the lack of market prejudice. According to the master, the plaintiffs suffered no prejudice because they had already published an abstract of the book in their own periodical, the *London Chronicle*.²¹¹ Accordingly, the plaintiffs' bill was dismissed.²¹² Implicit in the master's conclusion is an understanding that unauthorized abridgments are only impermissible to the extent that they substitute for the copyright owner's original work. What is missing here, from a modern perspective, is any consideration of how an unlicensed abridgment may substitute for the plaintiffs' own derivative work. Unauthorized derivative works were enjoined from time to time in the premodern era, but seemingly only when they directly competed with the copyright owner's original work. There is no evidence in these early cases that courts considered prohibiting unlicensed derivatives on the theory that they would compete with the plaintiff's own derivative.

The premodern copyright cases touching on market effect are thus both familiar and strange. The essential factor—the effect of the defendant's copying on the plaintiff's market—is familiar to the modern copyright scholar, but the decidedly narrow conception of that market is less so.²¹³

D. *Transformative Use*

In modern fair use jurisprudence, a use may be considered transformative if it incorporates an existing work in a way that adds something new—by casting a critical eye on the original, by incorporating the original into an entirely different sort of work, or by processing the original as an intermediate step in the production of a noninfringing end product (such as the automated copying of websites to

[w]hat I materially rely upon is, that it could not tend to prejudice the plaintiffs, when they had before published an abstract of the work in the *London Chronicle*. If I was to determine this to be elusory, I must hold every abridgment to be so; and that, from its extensive consequence, would prejudice the plaintiffs.

Id.

²¹¹ *Id.*

²¹² *Id.*

²¹³ A similar shift on market conception is evident in trademark law. See generally Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839 (2007).

construct a search-engine index).²¹⁴ If the early copyright cases and treatises reviewed in this article are any guide, these transformative uses would have also been regarded as noninfringing in the premodern era—but perhaps for slightly different reasons.

The essence of the premodern cases is synthesized by Maugham's assessment that the application of skill or labor should "be considered as the true criterion by which to determine the bona fide character of the abridgment or compilation."²¹⁵ There is an essential difference between fair use in the premodern cases and the approach that has emerged in the United States since the Supreme Court's *Campbell* decision. The latter focuses on the legitimacy of appropriative uses that result in transformative output, whereas the early copyright cases focus more on inputs. Nonetheless, the distance between the modern approach and the views of the early English copyright courts may be narrower than an input-output dichotomy suggests.

There are other passages in Maugham's treatise that can be read as equivalent to the modern parsing of the transformative-use concept. For example, Maugham says,

Where labor, judgment, and learning, however, have been applied in adapting existing works into a new method, and the composition has been evidently made with a fair and honest intention to produce a new and improved work, it seems that the law will justify the publication, although the abridgment or compilation should injure the sale of the former works.²¹⁶

It seems unlikely that a composition "evidently made with a fair and honest intention to produce a new and improved work" could fail to satisfy the Supreme Court's standard of adding "something new, with a further purpose or different character, altering the first with new expression, meaning, or message."²¹⁷

The early copyright cases stressed the importance of the defendant's labor and the link between the newness of an abridgment and its social utility. As already noted, in *Gyles v. Wilcox*, Lord Hardwicke explained that a "real and fair abridgment . . . may with great propriety be called a new book, because . . . the invention, learning, and judgment of the author

²¹⁴ This is not intended as an exhaustive statement of the boundaries of transformative use.

²¹⁵ MAUGHAM, *supra* note 62, at 130.

²¹⁶ *Id.* at 126.

²¹⁷ *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 579 (1994).

[are] shewn in it, and in many cases abridgments are *extremely useful*.²¹⁸ In addition, there are indications that the exculpatory labor the courts were seeking in order to find fair abridgment was authorial in nature and not merely industrious. Godson, for example, argued that a “real and fair abridgment” must not be merely colorably shortened (i.e., by omitting some parts and merely transposing others) and that “[t]here must, at least, be invention, learning, and judgment shewn by the author of [the abridgment].”²¹⁹ The application of invention, learning, and judgment sounds more like authorship than mere industry and mechanical application. This point is illustrated in the 1775 case *Strahan v. Newbery*, which explicitly recognized abridgment as an act of “understanding.”²²⁰ We cannot dismiss the possibility that the court’s primary impetus for allowing the abridgment was the desire to see an account of Dr. Hawkesworth’s *Voyages* made more broadly available. But it is significant nonetheless that the court at least claimed to have considered the defendant’s editorial contribution and that it chose to frame its decision in those terms. According to the report, both Lord Chancellor Apsley and Justice Blackstone agreed that “an abridgment, where the understanding is employed . . . is not an act of plagiarism upon the original work, nor against any property of the author in it, but an allowable and meritorious work.”²²¹

In 1810, *Wilkins v. Aikin* framed the issues similarly. In determining whether the defendant’s *Essay on the Doric Order of Architecture* had impermissibly copied the plaintiff’s *Antiquities of Magna Græcia*, the court delineated the question in terms of the defendant’s mental and authorial contribution: “[W]hether this is a legitimate use of the plaintiff’s publication in the fair exercise of a mental operation, deserving the character of an original work.”²²² Admittedly, in both of these cases, it is hard to be sure whether the identification of mental labor producing a “new” work should be treated as an instrumental finding or merely as a restatement of the court’s conclusion.²²³

²¹⁸ Gyles v. Wilcox, (1741) 26 Eng. Rep. 489 (Ch.) 490 (emphasis added); see also MAUGHAM, *supra* note 62, at 129.

²¹⁹ GODSON, *supra* note 51, at 230.

²²⁰ Strahan v. Newbery, (1775) 98 Eng. Rep. 913 (Ch.).

²²¹ *Id.*

²²² Wilkins v. Aikin, (1810) 34 Eng. Rep. 163 (Ch.) 165.

²²³ This problem applies with equal force to modern fair use cases. See Sag, *supra* note 41.

The importance of the defendant's addition of authorial value is perhaps most apparent in *Burnett v. Chetwood*.²²⁴ In this 1721 case, counsel for the defendant argued that

the translator may be said to be the author, in as much as some skill in language is requisite thereto, and not barely a mechanic art, as in the case of reprinting in the same language; that the translator dresses it up and clothes the sense in his own style and expressions . . . and therefore should rather seem to be within the encouragement than the prohibition of the act.²²⁵

The defendant in *Burnett* clearly rested his noninfringement claim on a claim to equal status as an author. The lord chancellor agreed, noting that "a translation might not be the same with the reprinting the original, on account that the translator has bestowed his care and pains upon it, and so not within the prohibition of the act."²²⁶

IV. CONCLUSION

Some periods of copyright history are better known than others. The dismantling of the Stationer Guild's printing monopoly at the end of the seventeenth century, the beginning of statutory copyright with the Statute of Anne in 1710, and the death knell of perpetual common-law copyright in 1774 after *Donaldson v. Beckett* are each deservedly well studied.²²⁷ The latter two events are particularly well rehearsed in American copyright lore. But most American scholarship, after having addressed the topics that the Founders may have contemplated in the late 1770s as they drafted the U.S. Constitution and the new nation's first copyright act, proceeds directly to twentieth-century technological and social developments.²²⁸ Even those U.S. scholars who do take a backward glance at the nineteenth century tend to do so from a strictly American point of view.²²⁹ Consequently, the

²²⁴ (1721) 35 Eng. Rep. 1008 (Ch.).

²²⁵ *Id.* at 1009.

²²⁶ *Id.*

²²⁷ Classic works encompassing these events include KAPLAN, *supra* note 36; L. RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE (1968); HARRY H. RANSOM, THE FIRST COPYRIGHT STATUTE (1956); and ROSE, *supra* note 48.

²²⁸ See, e.g., Joyce & Patterson, *supra* note 45.

²²⁹ An important exception is WILLIAM F. PATRY, PATRY ON FAIR USE (2009). For a rare comparative survey, see Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991 (1990).

development of English copyright law from 1774 to the mid-nineteenth century has been largely neglected in this country.

By examining the prehistory of fair use, this article sheds light on the origins of the fair use doctrine in the United States. The complete history of the fair use doctrine begins with over a century of copyright litigation in the English courts. This broader view of copyright history shows that Justice Story's 1841 decision in *Folsom v. Marsh* was not the origin of the fair use doctrine. As Part II explains, a review of the prehistory of fair use also shows that contemporary copyright skeptics may have overstated the narrowness of premodern copyright.

More significantly, the study of this prehistory demonstrates the gradual coevolution of copyright and fair use. Plaintiffs in copyright lawsuits are quick to characterize the fair use doctrine as a narrow exception that should be cautiously applied.²³⁰ In *Sony Corp. v. Universal City Studios*, Justice Blackmun characterized the fair use doctrine as "a form of subsidy" at the expense of authors that permits limited use of a work "for the public good."²³¹ A number of scholars have embraced this conception. Jane Ginsburg, for example, has emphasized the function of fair use as the "redistribution" of value from copyright owners to preferred classes of users.²³² This view of fair use sees copyright as the presumptive right of authors and the exceptions to that right as things to be either confined to the truly deserving or eliminated altogether. But the suggestion that fair use should be seen as the exception to the norm of total copyright owner control is historically unfounded. As the prehistory of fair use makes plain, copyright owners' rights have been subject to and defined by the public's fair use rights since the beginnings of statutory copyright.

²³⁰ See, e.g., Notice of Motion for a Preliminary Injunction, *Warner Bros. Entm't v. RDR Books*, 575 F. Supp. 2d 513 (S.D.N.Y. 2008) (No. 07 Civ. 9667 (RPP)), 2007 U.S. Dist. Ct. Motions 79667.

²³¹ *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 477-78 (1984) (Blackmun, J., dissenting).

²³² Jane C. Ginsburg, *Authors and Users in Copyright*, 45 J. COPYRIGHT SOC'Y U.S.A. 1, 15 (1997) (emphasizing the "redistribution" of value from copyright owners to preferred classes of users); Jane C. Ginsburg, *Copyright, Common Law, and Sui Generis Protection of Databases in the United States and Abroad*, 66 U. CIN. L. REV. 151, 169 (1997) (viewing fair use as a subsidy from copyright owner in favor of uses with public benefits); see also Robert P. Merges, *The End of Friction? Property Rights and Contract in the "Newtonian" World of On-Line Commerce*, 12 BERKELEY TECH. L.J. 115, 134-35 (1997).

Cumulatively, the cases reviewed in this article demonstrate the gradual, if haphazard, development of the body of law we have come to understand as fair use. Part III of this article explored the substantial continuity between the fair abridgment decisions of the premodern era and the fair use doctrine in the United States today. Just as it does now, the problem of fair use presented difficult line-drawing questions in copyright's premodern era. What is illuminating for the modern copyright scholar is not so much where these lines were drawn in specific cases, but rather the analytical tools used to draw them. As Part III establishes, the criteria used to evaluate claims of fair use in the premodern cases demonstrates a surprising level of continuity with the modern fair use doctrine. The key inquiries in fair abridgment cases in the premodern era are quite similar to the fair use factors enshrined in the Copyright Act of 1976. Nevertheless, although the general questions that courts ask in fair use cases have remained largely constant over the years, the *answers* have changed markedly. No court today would entertain the notion that an abridgment that includes no critical commentary and merely retells the original work's story is anything other than an infringement.

Focusing on the continuity between fair use in the premodern era and the doctrine today assists in reframing the true significance of *Folsom v. Marsh*. As discussed in Part III, analysis of substitution and market effects was a staple feature of abridgment cases in the premodern era. Yet premodern courts' understanding of the relevant market's constitution was quite narrow by modern standards, even if they were sensitive to market effects. As the contrast between *Roworth v. Wilkes* and *Dodsley v. Kinnersley* illustrates, a copyright owner's petition to enjoin an unauthorized abridgment was likely to be well received if the abridgment in question threatened to substitute directly for the copyright owner's original work.²³³ Still, courts did not accept that a copyright owner was harmed by an abridgment that merely competed with his own derivative work.

The premodern cases illustrate a half-formed notion of the derivative right: unauthorized derivatives could be enjoined to defend the market of the original work, but they did not constitute a separate market unto themselves. This observation

²³³ See *supra* Part III.B.

brings the contribution of Justice Story's 1841 decision in *Folsom v. Marsh* into sharper focus. *Folsom* departs from the earlier English cases in that it recognizes derivatives as inherently valuable—not just something to be enjoined to defend the original work against substitution.²³⁴ This subtle shift is important because while the boundaries of a defensive derivative right can be ascertained vis-à-vis the defendant's work on the plaintiff's original market, the boundaries of an offensive derivative right can only be determined in the context of some other limiting principle.

This extension of the derivative right from defensive to offensive may well have been inevitable. It seems likely that as more and more derivatives were enjoined defensively, courts and copyright owners began to see these derivatives as part of the authors' inherent rights in their creations. In other words, once copyright owners were allowed to preclude derivatives to prevent competition with their original works, they quickly grew bold enough to assert an exclusive right in derivative works for their own sake—a development that, for good or ill, bridges the gap between premodern and modern copyright.

²³⁴ Just how far the pendulum had swung by the time of *Folsom v. Marsh* can be seen in the staunch criticism that George Ticknor Curtis leveled at the jurisprudence of the English courts in his 1847 treatise. Curtis' rather extreme, almost hyperbolic, position was that the copyright owner's rights covered "the whole book and every part of it . . . the style, or language, and expression; the learning, the facts, or the narrative; the sentiment and ideas, as far as their identity can be traced; and the form, arrangement and combination which the author has given to his materials." GEORGE TICKNOR CURTIS, A TREATISE ON THE LAW OF COPYRIGHT 273 (1847).