WALTER COPINGER

The Law of Copyright

in Works of Literature and Art

With a New Introduction by RONAN DEAZLEY
Professor of Law, University of Glasgow

THE

LAW OF COPYRIGHT,

IN WORKS OF LITERATURE AND ART:

INCLUDING THAT OF THE

DRAMA, MUSIC, ENGRAVING, SCULPTURE, PAINTING, PHOTOGRAPHY AND ORNAMENTAL AND USEFUL DESIGNS;

TOGETHER WITH

INTERNATIONAL AND FOREIGN COPYRIGHT,

WITH THE STATUTES RELATING THERETO,

AND

REFERENCES TO THE ENGLISH AND AMERICAN DECISIONS.

BY

WALTER ARTHUR COPINGER, Esq.,
OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

"Non equidem hoc studeo, bullatis ut mihi nugis
Pagina turgescat, dare pondus idonea fumo."—PERS.

With a New Introduction and Notes by
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INTRODUCTION [1]

I

In Britain, in the last quarter of the nineteenth century the teaching of law as an academic discipline began to find a mainstream place within the University curriculum. This development prompted the publication of numerous landmark texts as a consequence of which the legal treatise began to assume a new significance for the profession.[2] From the late 1860s onwards, Snell, Buckley, Pollock, Stephen, Underhill, Anson, Dicey and Clerk all produced foundational works in their various fields of expertise.[3] The law of copyright was no different in this regard. Prior to 1870 only a handful of works had been published that dealt specifically with the subject.[4] After 1870 however, the number of published works that were dedicated to the law of copyright mushroomed.[5] The most important of these was, without doubt, Walter Arthur Copinger's *Law of*

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1. This commentary is based upon work carried out in relation to an AHRC-funded digital archive project: *Primary Sources on Copyright (1450–1900)*; for further information see www.copyrighthistory.org. The author would like to thank Mark Rose for his comments on an early draft of this work.

2. In general see C.H.S. Fifoot, *Judge and Jurist in the Reign of Victoria* (London; Stevens & Sons, 1859), 24–30; see also N. Duxbury, *Judges and Jurists: An Essay on Influence* (Oxford: Hart Publishing, 2001). On the history of the legal treatise see A.W.B. Simpson, "The Legal Treatise and Legal Theory", in E.W. Ives, and A.H. Manchester, eds, *Law, Litigants and the Legal Profession* (London: Royal Historical Society, 1983), 11-29.

3. Snell published his *Principles of Equity* in 1868, which treatise was followed by *Buckley on the Companies Act* in 1873, and Pollock's *Principles of Contract* in 1876. Stephen published his masterly *Digest of the Criminal Law* in 1877, after which came Underhill's *Law Relating to Trusts and Trustees* (1878), Anson's *Law of Contract* (1879), Dicey's *Law of the Constitution* (1885), and *Clerk on Torts* (1889).

4. Joshua Montefiore (1802), Robert Maugham (1828) and John Lowndes (1840) had all written specifically about the law of copyright, whereas Richard Godson (1823, 1840), Montagu Leverson (1854) and James Fraser (1860) considered the subject in conjunction with the law of patents. Between 1860 and 1870 three copyright texts were published, all of which followed in the wake of the International Exhibition: Frederick Chappell & John Shoard's *Handy-Book of the Law of Copyright* (London: Henry Sweet, 1863); Emanuel Underdown's *Law of Art Copyright* (London: John Crockford, 1863); and Charles Palmer Phillips' *The Law of Copyright in Works of Literature and Art, and in the Application of Designs* (London: 1863).

5. See for example: J. Shortt: *The Law relating to works of literature and art* (London, 1871); J.C. Hotten, *Literary Copyright* (London: Hotten, 1871); C.H. Purday, *Copyright: A Sketch of Its Rise and Progress* (London: 1877); S. Jerrold: *A Handbook of English and Foreign Copyright* (London:

Copyright in Works of Literature and Art, the first edition of which was published in 1870,[6] and the fifteenth edition of which was recently published in 2005 under the editorial control of Kevin Garnett, Gillian Davies, and Gwilym Harbottle.[7]

Copinger published the *Law of Copyright* just one year after he was called to the Bar and in the same year that he settled in Manchester, where he established a practice specializing in conveyancing (a subject about which he also wrote).[8] An avid book collector and bibliophile, he was instrumental in establishing the Bibliographical Society (founded in London in 1892), in which organization he also served as President for its first four years.[9] Three further editions of the work were published during Copinger's lifetime, the second and third of which Copinger revised himself (in 1881 and 1893); by 1904, however, Copinger's son-in-law, James Marshall Easton, had taken over the reins, writing in the Preface to the fourth edition that "[p]ressure of other work unfortunately prevented [Copinger] from writing this edition of his well-known work on copyright".[10] Copinger, by this stage of his life, had stopped writing on legal matters and was devoting his time almost exclusively to matters of family genealogy, heraldry, and local history. In the same year in which Easton produced

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Chatto & Windus, 1881); T.E. Scrutton: *The Laws of Copyright* (London: John Murray, 1883); A.V. Newton, *An Analysis of the Patent and Copyright Laws* (London: Trübner & Co., 1884); J.H. Slater, *The Law relating to Copyright and Trade Marks* (London: Stevens and Sons, 1884); R.R. Bowker, *Copyright: Its Law and its Literature* (London: Sampson Low & Co., 1886); A. Howard, *Copyright: A Manual for Authors and Publishers* (London: Griffiths, Farran & Co., 1887); R. Winslow, *The Law of Artistic Copyright* (London: Clowes & Son, 1889); E. Cutler, *The Law of Musical and Dramatic Copyright* (London: Cassell & Co, 1890); G.H. Putnam, *The Question of Copyright* (London & New York, G.P. Putnam's, 1891); W.A. Bewes, *Copyright, Patents, Designs, Trade Marks* (London: A.&C. Black, 1891); D. Chamier, *Laws Relating to Literary Copyright* (London: Effingham Wilson, 1895); A. Birrell, *Seven Lectures on the Law and History of Copyright in Books* (London: Cassell, 1899).

6. W.A. Copinger, *The Law of Copyright in Works of Literature and Art* (London: Stevens & Haynes, 1870).

7. K. Garnett, G. Davies, Harbottle, eds, *Copinger and Skone James on Copyright*, 15th ed. (London: Sweet & Maxwell, 2005).

8. See: *Index to Precedents in Conveyancing, and to Common and Commercial Forms* (London: Stevens & Haynes, 1872); *On the custody and production of Title Deeds, and other Documentary Evidence at Law, in Equity, and in matters of Conveyancing* (London: Stevens & Haynes, 1875); *Tables of Stamp Duties from 1815 to the Present Time* (London: Stevens & Haynes, 1878); *The Law of Rents, with special reference to the sale of land in consideration of a rent charge or chief rent* (London: William Clowes & Son, 1886).

9. Henry Guppy, "Copinger, Walter Arthur (1847–1910)", rev. Catherine Pease-Watkin, *Oxford Dictionary of National Biography* (Oxford: Oxford University Press, 2004), online edition: www.oxforddnb.com/view/article/32559, accessed 1 April 2008.

10. J.M. Easton, *The Law of Copyright in Literature and Art*, 4th ed. (London: Stevens & Haynes, 1904), "Preface to the Fourth Edition". Easton married Copinger's daughter, Ethel Gertrude Copinger, on 18 December 1901.

the fourth edition of *The Law of Copyright*, for example, Copinger published a five volume history of the *County of Suffolk*,[11] which was followed a year later by a seven volume treatise on *The Manors of Suffolk*.[12]

II

In terms of his general understanding of and approach to the subject of copyright, Copinger falls, broadly speaking, within the same camp as the various natural rights theorists of the eighteenth century, such as Lord Mansfield and William Blackstone, who co-opted the work of John Locke and others in positing the concept of copyright at common law as the natural and inalienable right of the author. On the very first page of *The Law of Copyright*, for example, Copinger explains that "[t]he right of an author to the productions of his mental exertions may be classed among the species of property acquired by occupancy; being founded on labour and invention".[13] Moreover, like the copyright historian John Lowndes,[14] Copinger considered that the historical provenance of the common law right could be readily traced through the incorporation of the Stationers' Company, the various Star Chamber decrees of the sixteenth and early seventeenth century, the ordinances of the Long Parliament, and the *Licensing Act* 1662.[15]

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11. W.A. Copinger, *County of Suffolk. Its history as disclosed by existing records and other documents, being materials for the history of Suffolk* (Henry Sotheran & Co.: London, 1904).
12. W.A. Copinger, *The Manors of Suffolk* (London: Unwin, 1905).
13. Copinger, 1. At this point in the text Copinger references both Locke *On Government* as well as David Hoffman's *Legal Outlines, being the substance of the first title of a course of lectures now delivering in the University of Maryland* (Baltimore: 1836), sect.iii. Interestingly, Hoffman, rejected Locke's general thesis on property as grounded on labour, preferring instead the approach of Grotius who considered occupancy to be a more reliable and appropriate concept upon which to base a theory of property ownership. However, Hoffman continued that "the notions of Mr. Locke may have some degree of justness" when applied to "the fruits of intellectual toil". Hoffman wrote that "[l]iterary property, or the right of an author to the fruits of his mental exertions, has been regarded as an important natural right, and, as such, has often been the object of special legislation, and of grave and learned discussion", at which point in his text, he refers to the following British cases: *Millar* v. *Taylor* (1769) 4 Burr. 2303; *Donaldson* v. *Becket* (1774) 4 Burr. 2408; *Macklin* v. *Richardson* (1770) Amb. 694; *Clementi* v. *Walker* (1824) 2 B&C 861; *Gyles* v. *Wilcox* (1741) 2 Atk. 141; and *Wilkins* v. *Aikin* (1810) 17 Ves. Jun. 422. He continued: "It would be out of place, at this time, to state the enlightened arguments that have taken place in England on this point; but it is manifest from the cases to which we have referred, that the able judges who decided them, were familiar with the doctrines of natural jurisprudence, and sought most of their lights from the great code of natural law". See: Hoffman, 125–129.
14. J.J. Lowndes, *An Historical Sketch of the Law of Copyright* (London: Saunders and Benning, 1840).
15. Copinger, 11–15.

That said, while Copinger can be described as a proponent of the natural rights thesis of copyright entitlement, it should not be thought that he simply slavishly followed the work and wisdom of these earlier judges and jurists. One example of the manner in which he departed from his theoretical forebears concerned his views on the copyright term. The eighteenth century 'battle of the booksellers', which culminated in the landmark decisions of *Millar* v. *Taylor* (1769) and *Donaldson* v. *Becket* (1774), was principally concerned with the duration of literary copyright—that is, whether copyright lasted in perpetuity or was instead limited to the finite periods of time set out within the *Statute of Anne*. Mansfield and Blackstone both advocated that copyright was and should be perpetual in duration; Copinger, by contrast, argued that copyright should not be perpetual, upon the basis that a "perpetuity . . . would have the effect of impeding the progress of literature and science".[16] Of course, Copinger's attitude to the copyright term may well have been informed by an obvious pragmatism in that, when he published the first edition of his work, the debate over perpetual protection had, in effect, been settled nearly one hundred years earlier by the decision of the House of Lords in *Donaldson*; to re-open the debate on perpetual protection would no doubt have been a fruitless exercise. In any event, it was not Copinger's commentary upon the copyright term that would mark his most significant contribution to copyright jurisprudence at this time.[17]

To understand how Copinger's work did meaningfully contribute to the re-shaping of existing copyright norms let us first turn to the work of one of his near-contemporaries. In 1863 when Charles Palmer Phillips attempted to articulate the general principle that informed how best to draw the boundary between lawful use of a work and copyright infringement of the same he did so as follows: "[T]hat any unauthorized use of a copyright book in a later publication is an infringement of the earlier, unless that use involves a fair amount of thought and judgment".[18] In many respects, this premise might be said to encapsulate the basic attitude to the use of copyright protected work that prevailed throughout the eighteenth and into the early to mid-nineteenth century.

When the 1710 *Statute of Anne* was passed it sought to regulate the exclusive right of making and selling verbatim copies of any given work; it did not seek to regulate or prevent the production of imitative or derivative texts. Moreover,

16. Ibid., 57.

17. Copinger wrote that, while he would not "uphold a perpetual copyright, believing that its existence would by no means tend to the spread or encouragement of literature", he would nevertheless support an extension of the current term for literary works beyond that provided for by the *Copyright Law Amendment Act* 1842, 5 & 6 Vict., c.45 (that is, the life of the author plus seven years post mortem, or forty-two years from publication, whichever was longer); ibid., 58. However, Copinger failed to specify exactly what his preferred (extended) term of copyright protection would be for the same.

18. Phillips, 110–111.

throughout the eighteenth century, even the most strident proponents of common law copyright did not consider that copyright should really do anything else. In *Millar* v. *Taylor* (1769), for example, Aston J described that which remained with an author after the publication of his or her work in the following terms:

> [T]he publication of a composition does *not* give away the property in the work; but the right of the copy *still remains* in the author; ... no more passes to the public, from the free will and consent of the author, than 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*.[19]

Defining and understanding the scope of copyright protection in narrow terms, as a means of preventing the unauthorized publication of material that was in essence 'identical' to that first produced by the author, allowed for and facilitated the continued production of all manner of useful (and non-infringing) derivative works such as abridgements, translations, dramatizations, and so on. These could all be accommodated within the literary marketplace without impacting upon the author's so-called 'natural rights'.[20] Robert Maugham, for example, a robust advocate of the natural rights thesis, writing in 1828, felt no evident need to challenge the general principle 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 a violation of the author's copyright".[21] Even Thomas Noon Talfourd, the nineteenth century champion of authors' rights *par excellence*, in the first of the many copyright bills that he brought before parliament in the late 1830s and early 1840s, included provision for "the publication of any extracts fairly and bona fide made from any Book for the purpose of criticism, observation or argument, or to any translation into

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19. *Millar* (1769) 2348.

20. Some litigation concerning derivative works was conducted throughout the eighteenth century, but very little was ever successfully concluded (from the point of view of the plaintiff that is). One of the few cases that was definitively resolved in the plaintiff's favour was *Tonson* v. *Walker* (1752) in which the defendant had only added twenty-eight notes to the 1500 that featured in Tonson's annotated edition of Milton's *Paradise Lost*. This was not so much an abridgement but rather a virtually identical reproduction; in Lord Hardwicke's words, the work was "a mere evasion". On the other hand *Gyles* v. *Wilcox* (1741), *Cogan* v. *Cave* (1743) UK National Archives c.33 383/69, *Dodsley* v. *Kinnersley* (1761) Amb. 403, *Hawkesworth* v. *Newbery* (1774) Lofft 775, were all cases which suggested that the acts of re-presenting, abridging, adapting, and so on, were entirely lawful forms of literary endeavour.

21. R. Maugham, *A Treatise on the Laws of Literary Property* (London: 1828), 130. Maugham did however note that "[t]he 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".

another language, or abridgement fairly made of any book".[22]

The manner in which Copinger conceived of the *raison d'etre* of copyright protection, however, differed somewhat from that of Aston J, Talfourd and Maugham. When discussing the concept of infringement, Copinger argued that:

> Regard must be had to the value of the work, and the value of the extent of the infringements; for while, on the one hand, the policy of the law allows a man to profit by all antecedent literature, yet, on the other, the use made of antecedent literature may not be so extensive as to injure the sale of the original work ... Full acknowledgement of the original, and the absence of any dishonest intention, will not excuse the appropriator when the effect of his appropriation is, of necessity, to injure and supercede the sale of the original work . . .

When Copinger attempted to capture the "fundamental principle on which is based the protection afforded to authors from piracies" he defined it simply in terms of "the injury or damage caused to them by the depreciation in the value of their original works".[23] It was this principle, for example, that Copinger considered should guide the courts on the issue of abridgements: "It seems a very unsatisfactory answer to an original author, who has been injured by an abridgment, to say, that because the wrongful taker has exhibited talent and ingenuity, both in the taking and in the use which he has made of it, the original author has no remedy".[24] For Copinger, copyright should not only concern itself with the straightforward 'piracy' of works, but should also seek to protect the value of the author's work in preventing the unauthorized production of any derivative material that might act as a market substitute for the same; moreover, he maintained that the intentions and efforts of the person producing the derivative work were not relevant considerations in this regard. It was in advocating that the focus of copyright protection be readjusted in this way that Copinger most obviously departed from the existing literature in the field.

As regards the former, he referred to *Roworth* v. *Wilkes* (1807) M&R 94, as a case in point, "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". That case, however, in Maugham's opinion, was not one that touched upon the concept of a "*bona fide abridgment*, in which labour and judgment had been applied", but concerned a situation of "*wholesale compilation*, in which seventy-five pages were successively transcribed, without addition or alteration, and on which no *skill or learning* had been bestowed, the exercise of which may be considered as the true criterion by which to determine the bona fide character of the abridgment or compilation"; Maugham, 130.

22. Bill to consolidate and amend Laws relating to Copyright in Printed Books, Music, Plays and Engravings, 1837, (380) 1: 573, clause 13.

23. Copinger, 102.

24. Ibid.

III

It would be to overstate that case to suggest that Copinger was singularly responsible for inculcating a sea-change in British copyright doctrine and thought. However, it is true to say that, after 1870, the notion that copyright should regulate the production of unauthorized derivative uses so as to protect the full commercial value of the original work does begin to find considerable purchase within contemporary copyright jurisprudence.

In the year after Copinger's work first appeared, John Shortt published *The Law relating to works of literature and art*, in which he, like Copinger, observed that "the leading and distinguishing feature of piracy is that it reproduces the pirated work in such a manner as to interfere with the profit and enjoyment which the proprietor derives from it".[25] Six years later Charles Purday, in his work on the history and development of copyright law, replicated this sentiment verbatim (without attributing the source).[26] John Slater, in 1884, wrote that, when reproducing material from an existing work, "the primary, though not necessarily the exclusive subject of enquiry, is, what effect the extracts are likely to have upon the original work".[27] On the question of derivative works in general he observed that "[t]here would appear to be authority for the statement that a person is entitled as of right to take the copyrighted work of another and republish it, provided he materially improve it, either in corrections, revisions, or annotations, and does not servilely copy it"; about this principle he continued: "[T]hat if a plea of this nature were allowed to prevail, it would be impossible to afford protection to literary property at all".[28] Alfred Howard, three years later still (in 1887), describing the eighteenth century case law on abridgements as "anomalous",[29] continued that "[t]oo much dependence should not be placed upon it, for it has not had universal approval. It may be characterized as a law for the convenience of the public, at the expense of the painstaking author".[30]

Significant also was the fact that the 1878 Report of the Royal Commission on Copyright appeared to advocate that copyright law should seek to protect

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25. Shortt, 168. Shortt did also continue by noting that "everything that does this by no means lays the author of the interference open to the charge of piracy. For example, a *bona fide* abridgment of a book may seriously impair the profit which the proprietor of the larger work derives from it, at the same time that it subjects the author of the abridgment to none of the penalties which the law attaches to piracy. Nevertheless, where the act done is not one of those which are in express terms prohibited by statute, no finer test of piracy has been applied in the various cases on record than that of the degree in which one work interferes, by reproduction, with the benefits derivable from another work in which copyright exists"; ibid., 168–69.

26. Purday, 110.

27. Slater, 35.

28. Ibid., 37.29. Supra n.20.

30. Howard, 8. On infringement in general he wrote: "We do not propose here to go into further

the author by preventing the unauthorized production of any work derived from and economically impacting upon the same. This rationale was evident in the Report's recommendation that an author should have the right to prevent the dramatization of his novel (or other work) for the duration of the copyright term:

> [I]t has been pressed upon us that it is only just that an author should be entitled to the full amount of profit which he can derive from his own creation; —that the product of a man's brain ought to be his own for all purposes; —and that it is unjust, when he has expended his invention and labour in the composition of a story, that another man should be able to reap part of the harvest.[31]

Like Copinger, the Report recommended that the existing law on the 'fair abridgment' of books should be revised. Even a fair abridgement, the Report concluded, "is capable of doing great harm to the author of the original work by interfering with his market; and it is the more likely to interfere with that market and injure the sale of the original work if, as is frequently the case, it bears in its title the name of the original author". As a result, the Report continued, "no abridgments of copyright works should be allowed during the term of copyright".[32]

We must however be careful to acknowledge that the Law Commission's Report was by no means a consensual document. Indeed, of the fifteen Commissioners involved, only five signed the final Report without reservation.[33] Nine others signed the Report, while attaching some form of dissenting opinion or comment thereto.[34] Famously, Sir Louis Mallet refused to sign the Report at

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definition, or to distinguish piracy from plagiarism—for more detailed information on these subjects generally we refer our readers to the text books, such as Drone, Copinger, Slater, Shortt, &c."; ibid., 32.

31. Report of the Royal Commission on Copyright, 1878, xxiv, C.2036, xvi.

32. Ibid., xv.

33. They were: the Earl of Devon; H.T. Holland; Julius Benedict; F. Herschell; and J.A. Froude.

34. One of the many dissenting opinions was submitted by Sir James Stephen who prepared the Digest of the Law of Copyright appended to the Commissioner's Report. Rejecting the Commission's recommendations on abridgements as well as the dramatization of novels, Stephen argued that such proposals: "[A]ppear to me to be founded upon a mistaken view of the principle on which the law of copyright ought to be based. They assume that the author of a work of art ought to be considered to have a right to every advantage which can possibly be derived from that work of art, even indirectly and by the exercise of independent ability. A dramatic author is not to use a novel as material for a drama, a painter is not to copy the painting of another painter, although in the one case the adaptation and in the other the copy may require great labour and skill ... The law of copyright ought, in my opinion, to protect money interests only; and I think that the only money interests which it should protect are those which it creates; that is to say, the money interest of the author of a work of literature or art capable of being reproduced by mechanical means in such a manner

all, but instead prepared his own ten-page report which, as Paul Saint-Amour observes, "all but repudiated the Report's central conclusions".[35] Nevertheless, despite the lack of consensus surrounding the Report and its recommendations, one of its legacies lies in the fact that, for many, the Report was imbued with, what Saint-Amour refers to as, "a *perceived* finality and unanimity" which in turn would shape subsequent copyright jurisprudence and reform.[36]

Indeed, when Copinger and others began to integrate the recommendations of the Report within their own commentaries upon the law of copyright, they did so without any reference to the fact that many of those recommendations did not receive the unanimous support of the Commissioners,[37] and certainly without any attempt to address or even acknowledge the profound ideological discord that characterised the work of the Commission itself.[38] In this regard, we find Copinger's text performing a dual function. With the first edition of his work he was the first British jurist to coherently frame the conceptual landscape that provided the backdrop for the substance of the Commission's final Report. With the second and subsequent editions of his treatise he helped to invest the Report itself with a weight and an authority that it did not necessarily warrant.

IV

As we have seen, various aspects of Copinger's treatise represented a departure from the predominant conception of, and the existing literature about,

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that every copy is as valuable as the original" (Report, lvii). In Stephen's opinion, the protection which the legislation offered to authors should extend no farther than to prevent the mass reproduction of the original work in its original form; derivative works, adaptations, and even direct copies that were not mass-produced, were not to be drawn within the prohibitive parameters of the copyright regime at all.

35. Paul K. Saint-Amour, *The Copywrights: Intellectual Property and the Literary Imagination* (Ithaca and London: Cornell University Press, 2003), 54.

36. Ibid., 55. The Report was certainly influential in shaping Lord Monkswell's (1845-1909) unsuccessful attempt to consolidate and reform the law of copyright in 1891. As Lely notes, in his commentary on Lord Monkswell's Bill, the amendments to the existing copyright regime were "for the most part, but not entirely, those suggested by a Royal Commission which reported in 1878"; J.M. Lely, *Copyright Law Reform: An Exposition of Lord Monkswell's Copyright Bill now before Parliament* (London: Eyre and Spottiswoode, 1891), 10.

37. See for example: W.A. Copinger, *The Law of Copyright*, 2nd ed, (London: Stevens and Haynes, 1881), 62, 80–81, 109, 325, 341–342, 386, 396, 406–408, 491–492, 501–506. One of the few writers to acknowledge the reality of the disagreement amongst the Commissioners was Lely, who, in his treatise on copyright law reform, while suggesting that "[t]he Commissioners may be said to have been practically unanimous" in their recommendations, did nevertheless, acknowledge and reproduce "Sir Louis Mallet's dissentient Report"; Lely, Preface, 20.

38. For more, see: www.copyrighthistory.org (Deazley, *Commentary on the Royal Commission on Copyright*).

copyright law in Britain. What is interesting is the extent to which Copinger was guided in these matters by the jurisprudence of Justice Joseph Story and George Ticknor Curtis.[39] Story wrote about copyright matters in his *Commentaries on Equity Jurisprudence*;[40] more importantly, he was, in the words of one commentator, "probably the most prolific judge in the field of copyright in the first half of the century".[41] Curtis, of course, published the first American legal treatise specifically devoted to the subject of copyright in 1847.[42] The work of both men, in combination, had a substantial influence upon Copinger in relation to the manner in which he approached questions as to the nature and scope of copyright protection, as well as the boundaries of permissible and impermissible use. Copinger's concern with protecting the value of the author's work, and addressing the problem of the derivative work as a market substitute, as well as his thoughts on the irrelevance of the second author's intentions or efforts in relation to the same, were all distinct features of the conception of copyright that Story and Curtis had sought to articulate in the mid-nineteenth century.[43] Curtis, for example, had written that: "to the author belongs the exclusive right to take all the profits of publication which the book can, in any form, produce".[44] The test by which the question of infringement "ought to be determined, in nearly all doubtful and difficult cases" was whether the author was likely to sustain "any injury by the publication of which he complains"; moreover, he continued, "where an injury is caused, an infringement is, in point of strict right, made out".[45]

What is arguably more interesting, however, is that in transposing this emerging jurisprudence from the US to the UK, Copinger was reproducing material from Curtis' earlier treatise without acknowledging the same.[46]

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39. Story and Curtis were also well known to each other. Story had first met Curtis when he taught him at Harvard Law School; he later became Curtis' father-in-law after Curtis married his daughter, Mary Oliver Story. For more, see www.copyrighthistory.org (Bracha, *Commentary on Curtis' Treatise on the Law of Copyright*).

40. J. Story, *Commentaries on Equity Jurisprudence as Administered in England and America*, 2nd ed., (Boston: 1839).

41. O. Bracha, *Owning Ideas: A History of Anglo-American Intellectual Property*, Chapter 3, 304 (available at: www.obracha.net/oi/oi.htm).

42. G.T. Curtis, *A Treatise on the Law of Copyright* (Boston: Little and Brown; London: Maxwell and Son, 1847).

43. For detailed analysis of both Story and Curtis' approach to copyright law at this time, see Bracha, *Owning Ideas*, Chapter 3. See also: www.copyrighthistory.org (Bracha, *Commentary on Curtis' Treatise on the Law of Copyright*).

44. Curtis, 238.

45. Ibid., 240–241; in general, see in ibid., 236–305.

46. Copinger did also reproduce material by Story without acknowledgement. When writing about copyright infringement by imitation, for example, Copinger commented as follows: "There are many

For example, on the state of the book trade during the Interregnum Curtis wrote that:

> In 1640, the star-chamber was abolished, and all regulations of the press and decrees against printing, as well as all the charter powers given to the stationers' company, were abolished. But the licentiousness that ensued led the two houses of parliament to pass a new ordinance, which prohibited printing unless the book had been first *licensed* and entered in the register of the stationers' company; and it also prohibited printing without consent of the owner, or importing (if printed abroad,) upon pain of forfeiting the same *to the owner or owners* of the copies of the said books, &c. . . . [I]t can therefore be of little doubt, that the understanding of the parliament was, that the property existed at common law, in the "owners" whom they chose to protect . . .[47]

Copinger's account of the same period runs as follows:

> In 1640, however, the Star Chamber was abolished; the king's authority was set at nought; all the regulations of the press, and restraints previously imposed against unlicensed printers by proclamations, decrees of the Star Chamber, and charter powers given to the Stationers Company, were deemed and certainly were illegal. The licentiousness of libels induced the Parliament to make an ordinance which prohibited printing unless the book was first licensed. The ordinance prohibited printing without the consent of the owner, or importing (if printed abroad), upon pain of forfeiting the same to the owner or owners of the copies of the said books, &c. This provision necessarily presupposed property to exist; it would have been nugatory if there had been no admitted owner. An owner could not at that time have existed other than by common law.[48]

Consider also Copinger's comments on the duration of the copyright term:

> The claim of authors resulting from the principles of natural right involves the perpetual duration of the property. But in order that such property should

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imitations of Homer in the Æneid; but no one would say that one was a copy of the other. . . . There may be a strong likeness without an identity. The question is, therefore, in many cases a very delicate one: what degree of imitation constitutes an infringement of the copyright of a particular composition? . . . It is very evident that any use of materials, whether they are figures or drawings, or other things which are well known and in common use, is not the subject of a copyright, unless there be some new arrangement thereof. Still, even here, it may not always follow that any person has a right to copy the figures, drawings, or other things, made by another, availing himself solely of his skill and industry, without any resort to such common sense"; Copinger, 98–99. This was taken from Story's judgment in *Emerson* v. *Davies* (1845) 3 Story's R. 768, which quote was also reproduced in Curtis, 258–259.

47. Ibid., 32–33.

48. Copinger, 11.

> be of value, it is necessary that society should interfere actively for its protection. It may either interfere by the enactment of penalties, which, in order to be effectual, must be severe; or it may interfere by prohibition, which is a stern and summary exercise of power. Society will not ordinarily be willing to apply such remedies in favour of an exclusive right, further than it finds such a course beneficial to its own interests, in the broadest sense of the term. . . . A perpetuity in copyright would have the effect of impeding the progress of literature and science, and among other serious inconveniences we will mention one. The text of an author, after two or three generations, if the property be retained so long by his descendants, would belong to so many claimants, that endless disputes would arise as to the right to publish, which in all probability might prevent the publication altogether.[49]

Curtis, twenty-three years earlier, had written that:

> The claim of authors, resulting from the principles of natural right, involves the perpetual duration of the property. But in order that such property should be of any value, it is necessary that society should interfere actively for its protection. It can interfere by the enactment of penalties, which, in order to be effectual, must be severe; or it can interfere by prohibition, which is a stern and summary exercise of power. Society will not ordinarily be willing to apply such remedies in favour of an exclusive right, further than it finds such a course beneficial to its own interests, in the broadest sense of the term. A perpetuity in literary property involves some inconveniences, which may come to be serious; one of which is, that the text of an author, after two or three generations, if the property be retained so long by his descendants, would belong to so many claimants, that disputes must arise as to the right to publish, which are very likely to prevent publication altogether.[50]

The passages by Copinger were unquestionably lifted from Curtis' text; nor are these the only examples.[51] This is not to say that Copinger did not at times

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49. Ibid., 56–57.

50. Curtis, 23–24.

51. For example, compare: Curtis, 33–37 and Copinger, 11–13; Curtis, 46–48 and Copinger, 15-16. When Copinger wrote about copyright infringement, he listed five principle categories of the same: "1st. By reprinting the whole work verbatim. 2nd. By reprinting verbatim a part of it. 3rd. By imitating the whole or a part, or by reproducing the whole of a part with colourable alterations. 4th. By reproducing the whole or a part under an abridged form. 5th By reproducing the whole or a part under the form of a translation"; Copinger 95. This categorization also drew upon Curtis, who detailed the various ways in which someone might infringe as follows: "1. By reprinting the whole work, verbatim; 2. By reprinting, verbatim, a part of it, either with or without acknowledgement of the source from which the extract or passage is taken; 3. By imitating the whole or a part, or by

reference and explicitly quote from Curtis;[52] however, as is apparent, on a number of occasions Copinger did fail to properly cite his predecessor's treatise as the source for his own commentary and analysis.

V

As we understand the phenomenon today there is no doubt that Copinger's actions warrant the tag of 'plagiarism'. It is worth considering, however, whether Copinger would *himself* have recognized that he was plagiarizing Curtis. Naturally, theories as to the necessary conditions for, and acceptable methods of, literary production are not fixed in stone. Robert MacFarlane, in his excellent book on plagiarism and originality in nineteenth-century literature,[53] charts the fluidity of these related concepts within the context of a new discourse that began to appear in British and American periodicals from the late 1860s onwards. Victorian writers, such as George Eliot, Charles Reade, Oscar Wilde, and Lionel Johnson began to reconsider and challenge what MacFarlane refers to as "[t]he representation of literary creativity as origination *ex nihilo*", positing instead a model of creative production that was based upon appropriation and transformation, upon "the selection and recombination of pre-existing words and concepts".[54]

No doubt Copinger would have followed this debate with some interest, carried on, as it was, in popular and well-established Victorian periodicals such as *Blackwood's Magazine*,[55] the *Athenaeum*,[56] the *Gentleman's Magazine*,[57] and the *Contemporary Review*.[58] However, would this literature have influenced

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reproducing the whole of a part with colourable alterations and disguises, intended to give to it the character of a new work; 4. By reproducing the whole or a part under an abridged form"; Curtis, 238. Moreover, although Curtis does not include the issue of infringement by way of translation amongst his list of offending actions, he nevertheless deals within the subject, in his own work, directly after discussing his four categories of infringing behaviour.

52. See for example: Copinger, 13, 32, 47, 60–61, 95, 102, 121.

53. R. MacFarlane, *Original Copy: plagiarism and originality in nineteenth-century literature* (Oxford: Oxford University Press, 2007).

54. MacFarlane, 8. He continues, that: "[O]ver the course of the second half of the Victorian period, indebtedness, borrowedness, textual messiness and overlap became more and more to be perceived not as qualities furtively to be hidden or disguised, but as distinguished features of a literary work, to be emphasized, explored, and in various ways commemorated"; ibid., 9.

55. C. Wibley, "A Plea for Legitimate Plagiarism", *Blackwood's Edinburgh Magazine*, 168 (October 1900): 595–599.

56. J. Skelton, "The Ethics of Plagiarism", *Athenaeum*, 18 February 1893, 221.

57. W. Davenport-Adams, "Imitators and Plagiarists", *Gentleman's Magazine*, 48 (May 1892): 502–516.

58. A. Lang, "Literary Plagiarism", *Contemporary Review*, 51 (June 1887): 831–840.

or informed the manner in which Copinger composed his own treatise? It seems unlikely. For one thing, this general debate is most appropriately situated within the final two decades of the nineteenth century, and so after Copinger had already produced the first two editions of his work. But in any event, the idea that Copinger might have self-consciously used the text of his practitioner-oriented treatise to engage with an emergent discussion concerning the nature of literary production and the redundancy of theories of autogenous origination seems, quite simply, a little far-fetched.

A more appropriate literary and legal landscape within which to situate Copinger's appreciation of his own actions is the Court of Appeal's decision in *Pike* v. *Nicholas* (1869), handed down less than a year before the publication of the first edition of his treatise.[59] The decision in *Pike* provided one of the first examinations of the relationship between copyright infringement and plagiarism (at least, that is, by an appellate court in Britain). The case was brought by the author of *The English and their Origin: a Prologue to Authentic English History*, against Nicholas, who had written a similar work, *The Pedigree of the English People*. Both books were written in response to a 100 guinea prize offered by the National Eisteddfod in Wales as a consequence of which both dealt with the same historical subject—that is, the genealogy of the English peoples. Pike alleged copyright infringement; Nicholas denied any unfair or illegitimate use of the plaintiff's book.

In the High Court James VC commented that "[p]lagiarism does not necessarily amount to a legal invasion of copyright" but nevertheless held that the defendant had, in the circumstances, infringed.[60] The Court of Appeal overturned the decision, Lord Hatherley observing that when considering works dealing with a common subject, which both drew upon common sources, "it would naturally be expected that there would be great similarity in the statements of the facts which were narrated from those common sources".[61] So long as there was evidence that the defendant did "really and *bona fide* look at that common source" then Lord Hatherley considered that the court should find no infringement.[62]

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59. *Pike* v. *Nicholas* (1869) 5 Chancery Appeals 251.

60. He did so commenting as follows: "I have read both books carefully in the parts complained of, and if the matter rested on a comparison of the two works I could have no doubt whatsoever that the Defendant's work was in these parts a palpable crib from the Plaintiff's, transposed, altered, and added to—to use the words of Lord Strangford's award, "essentially, indeed, typically, second-hand, run off easily from the pen by a well-trained writer" —a writer, I would add, skilful in appropriating the labours of another, and in disguising, by literary artifices, the appropriation"; ibid., 257.

61. Ibid., 261.

62. Ibid., 263. Lord Hatherley continued as follows: "He must not simply copy the passage from the Plaintiff's book, but having been put on to the track, and having looked at that particular part of the